

Enzi  
Graham  
Gregg

Inhofe  
Isakson  
Kyl

McCain  
Sessions

NOT VOTING—3

Byrd

Kennedy

Mikulski

The bill (H.R. 2997), as amended, was passed, as follows:

(The bill will be printed in a future edition of the RECORD.)

Mr. BROWNBACk. Mr. President, I move to reconsider the vote and to lay that motion on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. The Senator from Wisconsin.

Mr. KOHL. Mr. President, I want to take a minute to thank Senator BROWNBACk, with whom I have worked extremely well on this bill. He has made great contributions to the bill, and he has a wonderful staff—Fitz Elder, Stacy McBride, and Katie Toskey—who also made great contributions. On my side, Galen Fountain, Jessica Frederick, Dianne Nellor, and Bob Ross made great contributions.

We are all very proud of the product, we are pleased with the vote, and we are happy it is over.

Mr. BROWNBACk. Mr. President, I, too, want to take a moment to thank my colleague Senator KOHL who has worked on this for some period of time. I thought this was one of the smoothest appropriations bill we have had flow through the floor. I congratulate our colleague and particularly his work and that of the staff to make this happen: Galen Fountain, Jessica Frederick on his staff, Bob Ross, Dianne Nellor; on mine, Fitz Elder, Stacy McBride, Katie Toskey, and then Riley Scott and Melanie Benning were also key on it.

There is an item about which I have some consternation at the end where we broke the 302(b) allocation. My hope is in conference we can get that worked back down because clearly we have a huge budget crisis on our hands and we have to hit these numbers. I know it was an important issue to the chairman on dairy funding and that is an important issue; particularly if you are from Wisconsin, that is an important issue. It is my hope we can work that down.

I do think it shows a lot of support and strength when you have a major bipartisan vote on this bill at the end. My hope is that is the way we will operate in the body, in a bipartisan way so we can move things through for the good of the country.

We are in the minority, obviously, but there is no reason we cannot work these issues together as much as we possibly can. Senator KOHL was excellent to work with. I appreciate that chance to do it.

I look forward to us getting this through on a stand-alone basis, not rolled together in an omnibus package if at all possible. I think it is an important package, one we should be able to do that with. I think we have the ability to get that done.

I yield the floor.

Mr. KOHL. Mr. President, I thank Senator BROWNBACk for his kind words. I would also like to not end the proceedings without mentioning an individual on my staff, Phil Karting, who did a tremendous job and was an important part of the product that was finally put forth.

The PRESIDING OFFICER. Under the previous order, the Senate insists on its amendment and requests a conference with the House, and the Chair appoints the following conferees.

The PRESIDING OFFICER appointed Mr. KOHL, Mr. HARKIN, Mr. DORGAN, Mrs. FEINSTEIN, Mr. DURBIN, Mr. JOHNSON, Mr. NELSON of Nebraska, Mr. REED, Mr. PRYOR, Mr. SPECTER, Mr. INOUE, Mr. BROWNBACk, Mr. BENNETT of Utah, Mr. COCHRAN, Mr. BOND, Mr. MCCONNELL, Ms. COLLINS, and Mr. SHELBY conferees on the part of the Senate.

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

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

#### EXECUTIVE SESSION

#### NOMINATION OF SONIA SOTOMAYOR TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to executive session to consider the following nomination which the clerk will report.

The legislative clerk read the nomination of Sonia Sotomayor, of New York, to be an Associate Justice of the Supreme Court of the United States.

The PRESIDING OFFICER. Under the previous order, the first hour will be under the control of the chair and the ranking member of the committee.

Mr. LEAHY. I thank the distinguished Presiding Officer, also himself a member of the Judiciary Committee. He sat through and participated in all of the hearings on Judge Sotomayor.

When the Judiciary Committee began the confirmation hearing on the nomination of Judge Sotomayor to the Supreme Court, in my opening statement I recounted an insight from Dr. Martin Luther King, Jr. I did this because it is often quoted by President Obama, the man who nominated her. The quote is:

Let us realize the arc of the moral universe is long, but it bends towards justice.

Each generation of Americans has sought that arc toward justice. Indeed, that national purpose is inherent in our Constitution. In the Constitution's preamble, the Founders set forth to establish justice as one of the principal reasons that "We the people of the

United States" joined together to "ordain and establish" the Constitution. This is intertwined in the American journey with another purpose for the Constitution that President Obama often speaks about. We all admit it is the unfinished goal of forming "a more perfect Union." Our Union is not yet perfected, but we are making progress with each generation.

That journey began with improvements upon the foundation of our Constitution through the Bill of Rights and then it continued with the Civil War amendments, the 19th amendment's expansion of the right to vote for women, the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the 26th amendment's extension of the vote to young people. These actions have marked progress along the path of inclusion. They recognize the great diversity that is the strength of our Nation.

Judge Sotomayor's journey to this nomination is truly an American story. She was raised by a working mother in the Bronx after her father died when she was a child. She rose to win top honors as part of one of the first classes of women to graduate from Princeton. She excelled at Yale law school. She was one of the few women in the Manhattan District Attorney's Office in the mid-1970s. She became a Federal trial judge and then the first Latina judge on a Federal appeals court when she was confirmed to the second circuit over a decade ago.

I might note on a personal basis, I am a member of the bar of the second circuit, as well as the Federal District Court of Vermont. That is the circuit I belong to as a member of the Vermont bar. I know how excited we were in the second circuit when she became a judge.

She is now poised to become the first Latina Justice and actually only the third woman to serve on the U.S. Supreme Court. She has broken barriers along the way. She has become a role model to many. Her life journey is a reminder to all of the continuing vitality of the American dream.

Judge Sotomayor's selection for the Supreme Court also represents another step toward the establishment of justice. I have spoken over the last several years about urging Presidents—I have done this with Presidents of both political parties—to nominate somebody from outside the judicial monastery to the Supreme Court. I believe that experience, perspective, an understanding of how the world works and how people live—how real people live and the effect decisions will have on the lives of people—these have to be very important qualifications.

One need look no further than the Lilly Ledbetter and the Diana Levine cases to understand the impact each Supreme Court appointment has on the lives and freedoms of countless Americans.

In the Ledbetter case, five Justices on the Supreme Court struck a severe

blow to the rights of working families across our country. In effect, they said we can pay women less than men for the exact same work. Congress acted to protect women and others against discrimination in the workplace more than 40 years ago, yet we still struggle to ensure that all Americans, women and men, receive equal pay for equal work. It took a new Congress and a new President to strike down the immunity the Supreme Court had given to employers who discriminate against their workers and successfully hide their wrongdoing.

The Supreme Court had allowed them to do that. We changed that again. I remember the pride I had when I stood beside President Obama when he signed his first piece of legislation into law, the Lilly Ledbetter law, which says something that every one of us should know instinctively in our heart and soul: that women should be paid the same as men for the same kind of work.

But for all the talk about “judicial modesty” and “judicial restraint” with the nominees of a Republican President at their confirmation hearings, we have seen a Supreme Court these last 4 years that has been anything but modest and restrained.

I understand decrying judicial activism when judges have simply substituted their judgment for that of elected officials. That is what we have seen these last few years from the conservative members of the Supreme Court.

When evaluating Judge Sotomayor's nomination, I believe Senators should consider what kind of Justice she will be. Will she be in the mold of these activists who have gutted legislation designed to protect Americans from discrimination in their jobs and in voting, laws meant to protect the access of Americans to health care and education, and laws meant to protect the privacy of all Americans from an overreaching government? I think not and I hope not.

The reason I think not and hope not is I have been looking at what kind of judge she has been for the last 17 years and that is not the kind of judge she has been for 17 years. Keep in mind, this is a nominee who has had more experience on the Federal court than any nominee to the Supreme Court in decades. What we see is she has applied the law to the facts of the cases she has considered. She has done that while understanding the impact of her decisions on those before the court.

Those who struggle to pin the label of judicial activist on Judge Sotomayor are met by her very solid record of judging based on the law. She is a restrained, experienced, and thoughtful judge who has shown no bias in her rulings.

The charge of some Senate Republican leaders that they fear she will show bias is refuted over and over again in her record of 17 years. In fact, her record as a judge is one of ren-

dering decisions impartially and neutrally. No one has pointed to decisions that evidence bias. No one has shown any pattern of her inserting her own personal preferences into her judicial decisions. No one can because that does not exist. That is not who she is nor is it the type of judge she has been.

As her record demonstrates and her testimony before the Judiciary Committee reinforced, she is a restrained and fair and impartial judge who applies the law to the facts to decide cases—the kind of judge that any one of us who practiced law would want to appear before, whether we were plaintiff or defendant, government or respondent, rich or poor. Ironically, the few decisions for which she has been criticized are cases in which she did not reach out to change the law or to defy judicial precedent; in other words, cases in which she refused to “make law” from the bench.

In her 17 years on the bench there is not one example, let alone a pattern, of her ruling based on bias or prejudice or sympathy. She has been true to her oath. She has faithfully and impartially performed her duties under the Constitution.

As a prosecutor—a distinguished prosecutor—and then as a judge, she has administered justice without favoring one group of persons over another. In fact, she testified directly to this point. She said:

I have now served as an appellate judge for over a decade, deciding a wide range of constitutional, statutory and other legal questions. Throughout my 17 years on the bench, I have witnessed the human consequences of my decisions. Those decisions have not been made to serve the interest of any one litigant, but always to serve the larger interests of impartial justice.

About 12 years ago in a case called *City of Boerne v. Florida*, the Supreme Court struck down the Religious Freedom Restoration Act, a law that Congress had passed to protect religious freedom. Since then, an activist conservative group of Justices has issued a number of rulings that further restricted the power of Congress under section 5 of the 14th amendment.

They have limited other important Federal statutes such as the Violence Against Women Act, and they have done this by using a test created out of whole cloth, without any root in either history or in the text of our Constitution. Scholars across the political spectrum have criticized the Supreme Court's rulings in this line of cases, including Judge Michael McConnell and Judge John Noonan, Jr., both Republican appointees to the Federal bench.

Let's have some history. Hundreds of thousands of Americans lost their lives fighting a civil war to end the enslavement of millions of Americans. After the war, we transformed our founding charter, the Constitution, into one that embraced equal rights and human dignity through the reconstruction amendments by not only abolishing slavery but also by guaranteeing equal protection of the law for all Americans

and prohibiting the infringement of the right to vote on the basis of race.

But these reconstruction amendments to our Constitution are not self-implementing. Both the 14th and 15th amendments to the Constitution contain sections giving Congress the power to enforce the amendments. Congress acts to secure Americans' voting rights when it passes statutes like the Voting Rights Act pursuant to its authority to implement the 14th and 15th amendment's guarantees of equality. Congress acts to ensure the basis for our democratic system of government when we provide for implementation of this principle.

In contrast to the resistance that met the initial enactment of the Voting Rights Act of 1965—something that brought about enormous debate in this country—3 years ago, Republicans and Democrats in the Senate and House of Representatives came together to reauthorize key expiring provisions of the Voting Rights Act. This overwhelmingly bipartisan effort sought to preserve the rights of all Americans to equal access to the democratic process.

I stood with President George W. Bush when he proudly signed that restoration. But earlier this year, I attended the oral argument in a case challenging the constitutionality of the reenacted Voting Rights Act.

It appeared from the questions posed by the conservative Justices that they were ready to apply the troubling line of rulings in which they have second guessed Congress in order to strike down a key provision of the Voting Rights Act, one of this country's most important civil rights laws. Lacking a fifth vote for such a seismic shift, the constitutional ruling was avoided. But I remain concerned that the Supreme Court nonetheless remains poised to overturn other decisions made by Congress in which we decide how best to protect the rights and well-being of all American people.

I believe Judge Sotomayor will be a Justice who will continue to do what she has done as a judge for the last 17 years. I believe she will show appropriate deference to Congress when it passes laws to protect the freedoms of Americans.

I also believe she will have an understanding of the real world impact of the Supreme Court's decisions, which will be a welcome addition. When she was designated by the President, Judge Sotomayor said:

The wealth of experiences, personal and professional, have helped me appreciate the variety of perspectives that present themselves in every case that I hear. It has helped me to understand, respect and respond to the concerns and arguments of all litigants who appear before me, as well as the views of my colleagues on the bench. I strive never to forget the real-world consequences of my decisions on individuals, businesses, and government.

Well, it took a Supreme Court that understood the real world to see that

the seemingly fair-sounding doctrine of “separate but equal” was in reality a straitjacket of inequality and it was offensive to the Constitution.

We had “separate but equal.” For years in this country, we had segregation. We had segregation in our schools. It was a blight on the idea of a colorblind Constitution. And all Americans have come to respect the Supreme Court’s unanimous rejection of racial discrimination and inequality in *Brown v. Board of Education*. That was a case about the real-world impact of a legal doctrine.

But just 2 years ago, in the Seattle school desegregation case, we saw a narrowly divided Supreme Court undercut the heart of the landmark *Brown v. Board* decision, a decision that was unanimous. The Seattle school district valued racial diversity and was voluntarily trying to maintain diversity in its schools. By a five-to-four vote, the conservative activists on the Court said that program was prohibited. That decision broke with more than half a century of equal protection jurisprudence, and I believe it set back the long struggle for equality in this country.

Justice Stevens wrote that the Chief Justice’s opinion twisted *Brown v. Board* in a “cruelly ironic” way.

I think most Americans understand that there is a crucial difference between a community that does its best to ensure that schools include children of all races and one that prevents children of some races from attending certain schools. I mean, real-world experience tells us that. Those of us who are parents, grandparents, we know this.

Justice Breyer’s dissent criticized the Chief Justice’s opinion as applying an “overly theoretical approach to case law, an approach that emphasizes rigid distinctions . . . in a way that serves to mask the radical nature of today’s decision. Law is not an exercise in mathematical logic.”

Actually, I might say, if it were, we could just have computers on our Supreme Court.

Chief Justice Warren, a Justice who came to the Supreme Court with real-world experience as a State attorney general and Governor, recognized the power of a unanimous decision in *Brown v. Board*.

The Roberts Court, in its narrow desegregation decision 2 years ago, ignored the real-world experience of millions of Americans and chose to depart from the most hallowed precedents of the Supreme Court.

I am hopeful and confident that when she serves as a Justice on the Supreme Court of the United States, Sonia Sotomayor, a woman from the South Bronx who has overcome so much, will be mindful of the real-world experiences of Americans.

Those critics who devalue her judicial record and choose to misconstrue a few lines from speeches, ignore the aspiration behind those speeches. In fact, Judge Sotomayor begins the part of the speech so quoted by critics with

the words “I would hope.” She would “hope” that she and other Latina judges would be “wise” in their decision-making and that their experiences would help inform them and help provide that wisdom. I hope so, too. Just as I hope that Justices Thomas’ early life leads him to, as he testified in his confirmation hearing, “stand in the shoes of other people.” And I hope that Justice Alito’s immigrant heritage, as he too discussed in his confirmation hearing, helps him understand the plight of the powerless in our society.

Judge Sotomayor also said in her speeches that she embraced the goal that: “[J]udges must transcend their personal sympathies and prejudices and aspire to achieve a greater degree of fairness and integrity based on the reason of law.” I am going to be saying more about this as we go along, but I would note that her critics missed that Judge Sotomayor was pointing out a path to greater fairness and fidelity to the law by acknowledging that despite the aspirations of impartiality she shares with other judges, judges are human. Her critics seem to ignore her modesty in claiming not to be perfect. I would like to know which one of the 100 U.S. Senators could claim to be perfect. There are some who could; I am not one of them.

By acknowledging that judges come to the bench with experiences and personal viewpoints, they can be on guard against those views influencing judicial outcomes. By striving for a more diverse bench drawn from judges with a wider set of backgrounds and experiences, we can better ensure that the decisions of the Court will be freer of limited viewpoints or narrow biases.

All Supreme Court nominees have talked about the value they will bring to the bench from their backgrounds and experiences. That diversity of experience is a strength, not a weakness, in achieving an impartial judiciary. A more diverse bench with a better understanding of the real world impact of decisions can help avoid the pitfalls of the Supreme Court’s decisions these last years.

Let me point to just one example because judges—just as Senators bring their experience to this body—judges do, too.

Judge Sotomayor sat on a three-judge panel that heard a case involving strip searches of adolescent girls in a juvenile detention center. The parents of two female children challenged Connecticut’s blanket strip search policy for all those admitted to juvenile detention centers as a violation of the fourth amendment’s prohibition against unreasonable searches. Two of the male judges on the Second Circuit upheld the strip searches of the young girl.

In dissent, Judge Sotomayor cited controlling circuit precedent describing what is involved in the strip searches of these girls who had never been charged with a crime—keep in mind that they had never been charged

with a crime—and without any basis for individual suspicion. She said that courts “should be especially wary of strip searches of children, since youth is a time and condition of life when a person may be most susceptible to influence and to psychological damage.” She also emphasized that since many of these girls had been victims of abuse and neglect, they may be more vulnerable mentally and emotionally than other youths their age.

The Supreme Court recently decided a similar case, the *Redding* case. They found that school officials violated the fourth amendment rights of a young girl by conducting an intrusive strip search of her underclothes while looking for the equivalent of a pain reliever many of us have in our medicine cabinet. During oral arguments in that case, one of the male Justices compared the search to simply changing for gym classes. Several of the other Justices answered with laughter—not the reaction I would have if that was my adolescent daughter. And Justice Ginsburg, the lone female Justice on the Supreme Court, described the search as humiliating to young girls. She spoke out. She did not join in that laughter.

Ultimately, the Supreme Court decided that case by a vote of 8 to 1. Justice Souter, the Justice whom Judge Sotomayor is nominated to replace, wrote the opinion for the Court. Of course, that position mirrored that of Judge Sotomayor. I suspect that it was Justice Ginsburg’s understanding of the intrusiveness of the strip search of the young girl that ultimately prevailed. Can we say our life experience bears no weight in what we do?

Among the very first purposes of the Constitution is “to establish justice.” It is a purpose that has animated the improvements we have made over generations to our Constitution. It is a purpose engraved in the words over the entrance of the Supreme Court. These words are in Vermont marble, and they say, “Equal Justice Under Law.” All the dozens and dozens of times I have walked into the Supreme Court, up those steps straight out across from this Chamber, I have always paused to read those words, “Equal Justice Under Law.” Is that not what we should stand for?

I hope and believe Judge Sotomayor understands the critical importance of both fairness and justice. A decade ago, she gave another speech in which she spoke about the meaning of justice. She said, “Almost every person in our society is moved by that one word. It is a word embodied with a spirit that rings in the hearts of people. It is an elegant and beautiful word that moves people to believe that the law is something special.”

I believe Judge Sotomayor will live up to those words when she is confirmed, as she will be confirmed to the U.S. Supreme Court. The senior Senator from Vermont will vote for that confirmation.

I yield the floor and reserve the remainder of my time.

The PRESIDING OFFICER (Mrs. SHAHEEN). The Senator from Alabama is recognized.

Mr. SESSIONS. I appreciate the opportunity to speak. Before I do, I want to say that we had some disagreements as we went along about how to conduct the hearings. But Chairman LEAHY made a commitment that we would have a fair hearing, that every Senator would have an opportunity to question the witnesses and have the time to follow up, and he complied with that. I think we had a good hearing.

Judge Sotomayor was voted out of the committee, and I appreciate her kind words to me and to our colleagues on how she felt she was treated. I think the hearings were fair and effectively discussed the important issues raised by this nomination.

Our confirmation process began with the President indicating that empathy was a standard that he believes should be applied to selecting judges. There is some disagreement about that. I am one of those who do not believe that is a legal standard. It is a kind of standard that is closer to a political standard, and we need to be careful that politics do not infect the judiciary.

I certainly do not profess to be able to say with certainty how Judge Sotomayor will perform if confirmed to the Supreme Court.

History shows that Justices, once confirmed, often surprise. I have previously expressed my evaluation and decision in this matter. I will just say I hope I am wrong. But I have concluded that the nominee has a fully formed judicial philosophy, one that is held by quite a few other lawyers and judges, but it is a philosophy contrary to the classical underpinnings of the American legal system, a system that has blessed us so much. Edmond Burke, in his famous speech "On Conciliation with the Colonies," urged the King to avoid war, noting that the Colonies were simply asserting the rights to which they had become accustomed. He observed that almost as many copies of Blackstone's Commentaries on the Laws were being sold in America as in England.

From the beginning, Americans have honored law because, I suspect, it was the arena in which the poor individual citizen could and often did prevail against the powerful. Even before the Revolution, judges, juries, and English law decided cases. It was a people's power controlled by law that would prevail even over the political wishes of the powerful. Laws, Burke noted, were to be created by the people through their elected representatives, not judges. Law in the new Republic was not an abstract. It was concrete. The laws meant what they said. If by some loophole even an evil act was not covered by criminal law, the prisoner was to go free.

Importantly, our system rested upon a near universally held belief that law

and order were necessary for freedom and progress to occur. It further rested on the firm belief that there was such a thing as objective truth and that if a real effort was put forth, truth could be ascertained. For most, this was an easy concept, since a belief in God, the ultimate truth, was widespread. Thus, the legal system was arranged to best discover truth. Rules of evidence, cross-examination, and the adversarial system were parts of the design to discover truth. Many nations have tried to replicate it without success. It is a national treasure, our legal system.

I believe our Federal courts are the greatest dispensers of justice the world has ever known. For 15 years, I practiced full time as a Federal attorney before Federal judges. I saw the system operate. I have seen State and local judges, Republicans and Democrats, serve faithfully day after day, adhering to the ideal of objectivity, fairness, and law. But many intellectuals in recent decades look upon such an approach as anti-intellectual. They conclude such thinking that judges actually do in an ideal way, they find this is hopelessly naive. They think it is unrealistic. The brilliant jurist and intellectual Jerome Frank, quoted favorably by Judge Sotomayor in a law review article, said as much in the early part of the last century.

Since then, many theorists have gone even further, moral relativists, postmodernists, deconstructionists, critical legal studies adherents, they all come from the same pond. They don't believe—some don't—that there is an ascertainable truth. They believe these ideals actually confuse thinking and mislead. They believe it is results that count.

I don't agree. The American people don't agree. Ideals are important. High standards can be reached. Not every time, I am sure, but most times. If the ideal is not ardently sought, it will be reached less and less. The American people are not cynics who settle for less than the ideal of impartiality and equal justice for the poor and the rich under the Constitution and the laws of this country. Each judge operates under the Constitution and laws of this country. They expect, rightly, that every judge will be fully committed to the heritage of law and the judicial oath they take to follow it.

That is why I have expressed the view since this process has begun, that we are at a fork in the road, perhaps. Will we continue to adhere to the classical ideal of American jurisprudence, or will we follow results-oriented judging, where judges cease to be committed to the law and equal justice because they know it is not possible. Do they believe words are just words? Do they believe the Constitution can be made to say what one wants it to say? In this world, the Constitution cannot bind a judge to what the judge considers an unwise result. Instead, we should see the Constitution as a flexible, living document. Under this view,

judges are not just umpires. Judges are more powerful. Judges can make the Constitution and law say what they would prefer it to say. Judges can ensure that the right team wins. Judges can make policy. That is the seductive siren call of judicial activism, and judicial activism is an impropriety that can be embraced by conservatives as well as liberals.

Our former chairman, Senator HATCH, has often said: Activism is a tendency in a judge to allow their personal and political views and values to override the law and the facts of a case to achieve a result they think is desirable. That is what is not acceptable in our system.

That is why, at the most fundamental level, many have a problem with this nominee. It seems clear from her writings and speeches that she is a devotee of the new philosophy of judging. Her speeches, over the years, are quite clear on this matter, although her hearing testimony backtracked from it in a somewhat confusing manner.

Regrettably, I was not able to support her nomination in committee, nor will I support her nomination before the full Senate. I would like to discuss in greater detail a few of the reasons that lead me to that conclusion. There are more things that will be discussed later as we go along, but let me say a few things now.

Even before the nomination of Judge Sotomayor, I made clear what my criteria would be for assessing a Supreme Court nominee: impartiality, commitment to the rule of law, integrity, legal experience, and judicial temperament. Judge Sotomayor possesses the well-rounded resume I like to see in a Supreme Court Justice. She has a wonderful personal story. She was a prosecutor. She was a private practitioner. She was a trial judge, and she was an appellate judge. Those are good experiences for a judge on the Supreme Court. However, her speeches and cases she has decided are troubling because they reflect the lack of a proper sense of the clearly stated constitutional rights that are guaranteed to American citizens. Her testimony was her opportunity to convince us she would be the type of Justice we could vote for. Instead her answers lacked clarity, the consistency and courage of conviction one looks for in a nominee to the Supreme Court.

In many instances, she raised more questions through her testimony than she answered. Judge Sotomayor's expressed judicial philosophy rejects openly the ideal of impartial and objective justice. Instead, her philosophy embraces and accepts the impact that background, personal experience, gender, sympathies, and prejudices—these are her words—have on judging. A fair and plain reading of these speeches—read in context—calls into question Judge Sotomayor's commitment to impartiality and objectivity. When given an opportunity to explain this philosophy, as was reflected in speech after

speech, year after year, Judge Sotomayor dodged and deflected. In many cases, her answers could not be squared with the facts.

It has been suggested we should disregard those speeches. It has been suggested they are just words, that they are merely meant to inspire. In short, it has been suggested the words of the speeches simply do not matter. But words do matter. Words are important. They must have meaning or the result is chaos. No one should know this more than a judge. Her speeches and academic writings were not offhand comments delivered without the aid of notes. They were carefully crafted to dispute the notion that impartiality is realistic, or even possible. These were not the musings of a second-year law student. They were all delivered after she was a Federal judge. They were delivered to a number of different audiences, a number of different forums, including a bar association.

In her speeches and academic articles, Judge Sotomayor describes other approaches to judging and her approach to the law. She describes the factors judges should consider when reaching decisions. She describes her fully formed judicial philosophy. She challenges the mainstream concept of judging.

Make no mistake, judicial philosophy matters. It guides judges. It tells them what to consider. Importantly, it tells them what not to consider. Judicial philosophy is quite different from a judge's personal, political, moral or social views that a judge is to set aside when they decide a case. That is what blindfolded justice means. When a judge puts on that robe, they are, in effect, saying to everyone in that courtroom that their personal biases and prejudices and so forth will not impact the fairness of the ruling they are called upon to make.

Judges in trial and appellate courts, of course, are constrained by precedent. Even if a trial or appellate judge harbors a radical approach to the law, the threat of reversal restricts that judge's ability to employ that philosophy. But on the Supreme Court, however, these restrictions are removed. On the Supreme Court, there is no additional review. On the Supreme Court, a judicial philosophy that is fully formed is permitted to reach full bloom. As a liberal law dean recently said in the *Los Angeles Times*: "There's a huge difference between being a court of appeals judge who is bound by precedent and a Supreme Court justice who can rewrite those precedents."

That is why judicial philosophy matters. Frankly, after reviewing her consistent speeches in preparation for the confirmation hearing, I expected Judge Sotomayor to defend her views. I expected her to defend her statement that "[t]he law that lawyers practice and judges declare is not a definitive, capital 'L' law that many would like to think exists."

I expected her to defend the notion that the court of appeals is where "policy is made." I expected her to defend her statements in favor of using foreign law to interpret American statutes and her statement that there is "no objective stance, but only a series of perspectives."

However, during her testimony, many of Judge Sotomayor's answers were inconsistent with her record and others were evasive and not adequate. On several occasions, Judge Sotomayor appeared to run away from the philosophy she had so publicly articulated. Other answers, I concluded, were not plausible.

It has been repeatedly suggested that Judge Sotomayor's words and speeches are being taken out of context. I have read the speeches in their entirety. Her words are not taken out of context. In fact, when one reads her speeches in their entirety, in context, the impact is more troubling, not less.

For example, Judge Sotomayor said, on repeated occasions, that she "willingly accept[s] that . . . judge[s] must not deny the differences resulting from experience and heritage but attempt . . . continuously to judge when those opinions, sympathies and prejudices are appropriate."

When I asked whether there was "any circumstance in which a judge should allow prejudices to impact decision-making," she replied: "Never their prejudices."

This is quite the opposite of what her speeches said. In the hearing, she said her speeches discussed "the very important goal of the justice system . . . to ensure that the personal biases and prejudices of a judge do not influence the outcome of a case." Well said. But that is not what her speeches said—in context or line by line. She was not urging that judges guard against their prejudices, as their oath calls on them to do. She was accepting that a judge's prejudices may influence their decisions.

Similarly, Judge Sotomayor repeatedly stated she accepts that who she is will "affect the facts I choose to see" as a judge—the facts she chooses to see as a judge. She accepts this. When I asked her about this statement, she said: "It's not a question of choosing to see some facts or another, Senator. I didn't intend to suggest that."

But that is what she said repeatedly. She accepts the fact that who she is will "affect the facts I choose to see" as a judge. The context of her speech states a clear philosophy. Judge Sotomayor was contrasting her own views with that of Judge Cedarbaum and Justice O'Connor, two women judges of prominence. Of course, Justice O'Connor was a former member of the Supreme Court. The context was her view that "[i]n short . . . the aspiration"—I am quoting her—"the aspiration to impartiality . . . is just that, an aspiration." Such a statement evidences a lack of the kind of firm commitment to fairness and to the judicial

oath of impartiality that is expected, in my opinion.

We have heard again and again that our concerns are based on three words: The "wise Latina woman." That is not the case. We are talking about a judicial philosophy, as reflected in speech after speech, year after year. That is what is causing the problem here.

Senator COBURN, at the hearing, made a point that I think is worthy of emphasizing: that her refusal to effectively defend her own speeches and statements was almost as troubling as the philosophy contained within those speeches.

As the *Washington Post*, in endorsing her, on July 19, in their editorial, said:

Judge Sotomayor's attempts to explain away and distance herself from [the "wise Latina" 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.

In Judge Sotomayor's opening statement, she said that her philosophy is "fidelity to the law." But her record demonstrates that, if true, her view is far different than mine. For example, she has advocated for the use of foreign law by American judges. Once again, we are left with statements made at the hearing, though, that were in direct conflict with statements made before she was nominated.

As Judge Sotomayor noted in her April 2009 speech—April of this year—before the Puerto Rico American Civil Liberties Union, the current debate regarding the use of foreign law in the courts, she noted, pits two distinct views against one another. On one side sit Justices Scalia and Thomas, who believe that foreign law should not be used in interpreting the U.S. Constitution. That is correct, in my view. On the other side is Justice Ginsburg, who believes that courts should be more aggressive in their use of foreign law.

In this speech in April, Judge Sotomayor clearly indicated who she thinks has the better view of the issue, stating that she "share[s] more the ideas of Justice Ginsburg . . . in believing, that unless American courts are more open to discussing the ideas raised by foreign cases, and by international cases, that we are going to lose influence in the world."

Moreover, Judge Sotomayor talked approvingly about two recent Supreme Court cases in which Justices did look to foreign law precisely to interpret our Constitution. That is a very clear position. I think it is incorrect, but it is a clear one. Others adhere to it.

When she came before the Judiciary Committee, however, Judge Sotomayor articulated a very different view of foreign law, stating:

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.



Well, that is quite a different position from the theme and statements in her April speech.

So I agree with my colleagues who lamented Judge Sotomayor's tendency to avoid answering questions, with one colleague noting her "extreme caution" in answering. I do not think many would dispute that she was less forthcoming than Judges Alito and Roberts, our latest confirmations to the Court just a few years ago.

In addition to her stated judicial philosophy, I am also quite concerned regarding how Judge Sotomayor has approached the most important constitutional cases that have come to her court. Most of the cases a court of appeals judge considers are routine, fact dominated, and do not offer novel questions or require substantial legal discussion. Still, a few important cases that present new and critical issues do periodically come before the courts of appeals. These cases can give insight into how the nominee will handle the many such cases that regularly come before the Supreme Court.

Within the last 3 years, Judge Sotomayor has heard three monumentally important cases at the circuit level: the constitutional right to be free of racial discrimination, the right to keep and bear arms, and the fifth amendment right to keep one's own property.

In all three of these cases, Judge Sotomayor joined or authored very brief opinions—very brief opinions, oddly brief opinions—that avoided the kind of careful analysis we would expect of an appellate judge. In all three cases, individuals went to court with the plain text of the Constitution on their side. In each case, Judge Sotomayor reached conclusions that denied individual Americans their rights that they were asserting against governmental power.

When confronted with an appeal based on fundamental notions of equal protection of the laws, Judge Sotomayor, to be charitable, took a pass. By now we are familiar with the basic facts of the New Haven firefighters, the Ricci case. Eighteen firefighters brought suit against the city of New Haven after the city threw out the results of a promotional exam. It was thrown out because not enough of certain minorities did well enough on the exam. Judge Sotomayor's decision in the case is troubling. Her curious one-paragraph summary order, and the Supreme Court's subsequent reversal, are the starting points. But there is more. And there is a reason that so much attention has been focused on this case.

Her initial attempted disposal of the case by summary order was, quite simply, unacceptable and an embarrassment. A summary order is, by circuit rule, only for cases in which there is no legal principle worthy of discussion. In the end, every Supreme Court Justice concluded she applied the wrong legal standard in granting a judgment

against the firefighters and for the city before a trial occurred, and a majority of the Supreme Court found that the firefighters' case was so strong that they were entitled to a verdict for their side on the evidence that already existed without a trial.

The Supreme Court understood the importance of this case—why we care about it as Americans. As they said of Judge Sotomayor's logic:

Allowing employers to violate the disparate-impact liability would encourage race-based action at the slightest hint of disparate impact. . . . That would amount to a de facto quota system. . . .

That is the Supreme Court language.

I was struck by something one firefighter, Lieutenant Vargas, said to us—that his testimony before the Senate was the first opportunity he had to tell his story because the district court threw out the case before he even had a trial. On appeal, Judge Sotomayor initially dismissed the case by summary order, meaning that a hard copy of her order was never even delivered to the other judges on the court. Had one of her colleagues, Judge Cabranes, apparently, independently, not heard about the case and sought a full review—a rehearing en banc is what he sought through the whole Second Circuit—it is likely the Supreme Court would never have even known the case existed or considered the case. It is also likely Lieutenant Vargas would never have had the opportunity to tell his story, to explain to his children his profound hope that, as a result of his efforts, they would be judged on their merit and not on their race or their ethnicity.

In response to my questions, Judge Sotomayor also claimed that her Ricci decision was controlled by "established" Supreme Court precedent, saying "a variety of different judges on the appellate court were looking at the case in light of established Supreme Court and Second Circuit precedent." But the Supreme Court did not see it that way. The Supreme Court noted that "few, if any, precedents in the Court of Appeals" discuss this issue.

As noted commentator Stuart Taylor has recently confirmed, even if Judge Sotomayor had believed her panel was bound by Second Circuit precedent, review and rehearing by the whole Second Circuit would have provided the opportunity to review those previous cases afresh and to overrule them if they were unsound. But Judge Sotomayor cast the deciding vote against rehearing this case by the full circuit. She defended her ruling and defended whatever authority existed at the time in the Second Circuit.

The case is also troubling to me because Judge Sotomayor had pledged to me during her confirmation, in 1997, that she would follow the Supreme Court's decision in *Adarand*—a well-known case—and subject any preference for one race over another race to the Court's established standard of strict judicial scrutiny. When I asked

her about this promise she had made, I, once again, found her answer to be dismaying. She stated that the cases I asked about, the seminal equal protection cases—*Adarand* and so forth—"were not what was at issue in this decision." She was talking about the Ricci case.

But that is not right. There were two very clear claims made by the firefighters in this case—one based on a statutory right and one based on the equal protection clause of the Constitution.

One need only look at—

The PRESIDING OFFICER. The Chair wants to advise the Senator that his initial 30 minutes has been used, and so the Senator would be moving into the next period of debate.

Mr. SESSIONS. Madam President, I ask unanimous consent to have 5 additional minutes.

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

Mr. SESSIONS. Madam President, we will discuss some of the other cases in more detail later. But one need only look at the papers filed in the district court and the court of appeals to see that the *Adarand* issue and the constitutional question were central issues in this case. Look at Judge Cabranes' decision, where one of the first cases he cites is *Adarand*. One does not expect this type of mistake or a lack of accuracy from a Supreme Court nominee in a case of this importance, when she understands she will have to discuss before the Judiciary Committee.

Judge Sotomayor repeatedly stated, including in her opening statement, that litigants deserve explanations; that she looks into the facts, delves into the record, and explains to litigants why she rules for or against them. I have read the one-paragraph Ricci opinion. Judge Sotomayor did not afford the firefighters the respect they deserved.

I have also considered very carefully Judge Sotomayor's views regarding the Second Amendment, and I am troubled by her record and not reassured by the answers she gave during the hearing.

In sum, she effectively held that the Second Amendment—the right to keep and bear arms—does not bind the States, and that means any city or any State in America, if her opinion is upheld, can ban all guns in those jurisdictions. If her opinion is not reversed, that is what will happen in America. I would note the Supreme Court, in ruling on the *Heller* case, held clearly for the first time that the Second Amendment is an individual right that applied to the District of Columbia, which effectively banned firearms in the District of Columbia. They said that was not constitutional, that the citizens of the District of Columbia have a constitutional right to keep and bear arms and it cannot not be eliminated.

So if the Sotomayor opinion is upheld, I can only say the Second Amendment might be viable in the District of Columbia but not in the other

cities and States throughout the country.

With regard to the takings case, one of the most significant takings cases in recent years, she ruled against a private landowner who had his property taken. He intended to build one kind of pharmacy on it. A developer who was working with the city utilized the powers of the city to attempt to extort money from that individual so he could build another private drugstore on that lot. When the owner refused, the city condemned the man's property, gave it to the developer, who then built his own kind of drugstore there. I believe this is in violation of the constitutional protection that private property can only be taken for public use.

So words have meaning. The Constitution and laws of the United States have meaning. People come to courts to assert their rights under the Constitution and laws. In these three cases I have mentioned, the litigants did not have their rights properly listened to nor protected, in my opinion. Is it because she would have preferred different results from the promotional exam for firefighters? Is it because she did not believe in the rights protected by the Second Amendment as set forth in the Constitution? Is it because she favors redevelopment?

We are left to wonder because the cases were certainly not decided based on the plain language of the Constitution, and she did not openly and thoroughly in any one of these cases engage in a serious discussion of issues raised. Each was just a page or two or three.

One of the most important tools of a judge is words. The meaning of words is obviously where the power of our Constitution and laws is found. When a judge feels empowered to redefine the meaning of words in our Constitution, they feel empowered to amend our Constitution. If they don't like the death penalty, maybe they will call it unconstitutional. If they don't like the right to keep and bear arms, maybe they will say the Second Amendment doesn't apply to States and cities.

In a recent speech before this nomination, Professor Allen C. Guelzo, a two-time winner of the Lincoln Prize, wisely noted that a constitutional system resides on a bedrock of shared assumptions. While it may seem to be a collection of laws and statutes, the most important thing is that "those laws and statutes depend first on a reverence for words, for reason, and for orderliness."

He adds that "reverence must grow . . . from the confidence that words, reasons . . . really do protect" the rights of citizens.

Citizens must know their rights, when clearly stated in the Constitution, will be steadfastly protected by the courts. It is here that I have significant qualms. The ease by which the nominee reconciled or attempted to reconcile fundamentally different statements in speeches at our hearing evidences a lack of respect for the

meaning of words. Her explanation of controversial decisions lacked clarity, a very serious shortfall indeed for a Supreme Court Justice.

So I came to this process with an open mind regarding Judge Sotomayor. She has many wonderful qualities, and I truly mean that. And I like her. She was ever graceful in her testimony. But certain aspects of her record troubled me—whether, for example, she has the kind of deep commitment to the ideal of objectivity and impartiality that I believe necessary. I had hoped those concerns would be addressed effectively. Unfortunately, many of the answers did little to ease my concerns but, instead, reinforced them and led to more unanswered questions. Regrettably, I cannot support her nomination to a lifetime appointment to the U.S. Supreme Court.

I thank the Chair and yield the floor. The PRESIDING OFFICER. The Senator from California.

Mrs. FEINSTEIN. Madam President, it should be no surprise that my views are not those of the distinguished ranking member of our Judiciary Committee but somewhat different. I have served on this committee for over 16 years now. I have sat through the confirmation hearings of four Supreme Court Justices. I am very proud to say I believe the President made an excellent choice, and I enthusiastically support this nominee.

Judge Sotomayor is a warm and intelligent woman. More importantly, though, she is a solid, tested, and mainstream Federal judge. Her personal story is one of hard work. She has risen above all kinds of obstacles, and she has perseverance. She is a role model for women in the law, and I cannot help but feel a sense of enormous pride in her achievements, her nomination, and, hopefully, before the end of the week, her confirmation to be a Supreme Court Justice.

As I said at the confirmation hearings, a Supreme Court Justice should possess at least five qualities.

One, broad and relevant experience. So how does she stand? You can't find a nominee with better experience than Judge Sotomayor.

She has 29½ years of relevant legal experience, and she has seen the law from all sides.

For 4½ years she was a prosecutor in New York City. She prosecuted murders, robberies, and child pornography cases as an assistant district attorney. She worked with law enforcement officers and victims of crime, and she sent criminals to jail.

We heard from the distinguished New York City District Attorney, Mr. Morgenthau, who said he looked for bright young people, and he found her and he heard her story and she had been to Princeton. She graduated summa cum laude. She went to Yale Law School. She was editor of the Law Review.

She came to his attention, and he went to recruit her as a prosecutor in New York City. For 8 years after that,

she practiced business law as a litigator in a private firm. She worked on complex civil cases involving real estate law, banking law, contracts, and intellectual property law.

Then, she was appointed by George Herbert Walker Bush—as we might fondly say "Bush 41"—as a U.S. district court judge for 6 years. She heard roughly 450 cases in the district court up close and personal, where litigants come before the judge and the judge gains a sense of what the Federal court means to an individual.

I think that is important to know on the Supreme Court. She saw there firsthand the impact of the law on people before her.

Then she was appointed by President Clinton. For 11 years she has been a Federal appellate court judge on the Second Circuit Court of Appeals. She has been on the panel for more than 3,000 Federal appeals, and she has authored opinions in more than 600 cases. These 11 years were rigorous and appropriate training ground for the Supreme Court.

Judge Sotomayor will be the only sitting Justice with experience on both the Federal trial and appellate courts, and she has more Federal judicial experience than any Supreme Court nominee in the last 100 years. That is a substantial qualification.

Secondly, a Supreme Court Justice should have deep knowledge of the law and the Constitution. I believe her broad experience gives her firsthand knowledge of virtually every area of the law.

As a prosecutor she tried criminal cases—homicides, assaults, pornography cases—those crimes that destroy lives.

As a business lawyer, she examined contracts, represented clients in complex civil litigation, and tried intellectual property disputes.

As a district court judge she presided over criminal and civil jury trials; she sentenced defendants; she resolved complicated business disputes; and she reached decisions in discrimination and civil tort cases where people had been unfairly treated, injured, or harmed.

Finally, as an appellate judge, she has grappled with the difficult and critical questions that arise when people disagree about what our Constitution and our Federal statutes mean today. So she certainly has ample experience.

Third, a Supreme Court Justice should have impeccable judicial temperament and integrity. Anyone who watched Judge Sotomayor at her confirmation hearings has seen her temperament and demeanor firsthand. She is warm, she is patient, and she is extremely intelligent. She sat at that table with a broken ankle up on a box hour after hour and day after day in a hot room listening to members of the Judiciary Committee pepper her with questions. Not at any time did she lose her presence, lose her cool, or show anger. She showed determination and

patience and perseverance. I think that means a great deal.

At times, the hearings became quite heated, but she would remain calm even in the face of provocative questioning.

So I am not surprised the American Bar Association and the New York City Bar Association gave her their highest rating.

As one of her Republican-appointed colleagues on the Second Circuit said: "Sonia Sotomayor is a well-loved colleague on our court. Everybody from every point of view knows she is fair and decent in all her dealings. The fact is, she is truly a superior human being."

What greater compliment could there be for a prospective Supreme Court nominee?

After spending time with her during our one-on-one meeting and participating in her confirmation hearings, I agree. She is a walking, talking example of the very best America can produce. She has overcome adversity. Here is a woman—a child—the product of a poor Puerto Rican family living in a housing project in New York. She is 8 years old, she finds herself with juvenile diabetes. She is 9 years old, her father dies. She goes to school. She struggles with the language. She overcomes it. She graduates from high school. She goes to Princeton. She succeeds in every way, shape, and form, as I said, *summa cum laude*, and then on to Yale and a member of the Yale Law Review. She overcame adversity and she kept going.

She has given back to her country and her community, and she is now on track to become the first Latina Justice of the U.S. Supreme Court and only the third woman ever appointed to that Court.

I not only will vote for her, I will do so with great pride.

Finally, a Supreme Court Justice should exhibit mainstream legal reasoning and a firm commitment to the law. I have heard people say that they don't believe she will follow the law.

I sat in the room during those 4 days of hearings. There was never an instance that I saw where she moved away from legal precedent and the law.

I have said before, and I say today, I am somewhat concerned about the current Supreme Court. As I see it, conservative activists have succeeded in moving our Court to the right of mainstream American thought.

In just the last 2 years, this has been abundantly clear. The Justices have disregarded precedent at an alarming rate, and they have rewritten the law in ways that make clear that they are not just "calling balls and strikes."

In 2007, the Court held that a school district cannot consider race when it assigns students to schools—even to ensure any amount of racial diversity. This is *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701, 2007.

It held that women who were paid less than men had to sue within 180

days—even when they had no way of knowing they were paid less, or they lost their right to back pay. This is *Lily Ledbetter v. Goodyear Tire & Rubber Co. Inc.*, 550 U.S. 618, 2007. The occupant of the chair is new to the Senate. One of the first things we did was pass the Lily Ledbetter law to overcome that Supreme Court decision.

The Court held for the first time since 1911 that manufacturers could fix minimum prices for their products. This is *Leegin Creative Leather Products Inc. v. PSKS, Inc.*, 551 U.S. 877, 2007.

It held that the Endangered Species Act did not apply to certain Federal actions—even though the Court, in 1978, said the Act had "no exception." This is *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 2007.

And it held that Congress could pass a law restricting access to OB/GYN services for women without including an exception for when a woman's health is at risk. This is *Gonzales v. Carhart*, 550 U.S. 124, 2007.

That last decision was not only dangerous to a woman's health, it is also contrary to the Court's opinions in *Roe*, in 1973; in *Ashcroft*, in 1983; in *Casey and Thornburgh*, both in 1992; in *Carhart I* in 2000; and in *Ayotte*, in 2006. So this Court of conservative activists cast aside precedent and "super-precedent" to do essentially what they believe—not to follow the precedent, which was simply thrust aside.

The Supreme Court's shift to the right and discarding of precedent is not just an ivory tower issue either. These decisions have real-life impact.

Last week, *USA Today* reported that older white men, 55 years or older, are losing jobs at the highest rate since the Great Depression. This is *Dennis Cauchon*. In this Recession, Older White Males See Jobs Fade, *USA Today*, July 30, 2009.

This is troubling. We have a law—the Age Discrimination in Employment Act—that is supposed to protect workers from being laid off because of their age. But 2 months ago, the Supreme Court changed the burden of proof under that law, making it harder for older workers to get protection when they are fired, demoted, or not given a job because of their age. This is *Jack Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343, 2009.

Let me be clear, in my view, after 16 years on this committee: The Justices on the Supreme Court are not umpires; they do not just call balls and strikes. And they are not computers. It matters who sits on our Supreme Court, and it matters whether they will respect precedent and follow the law.

Judge Sotomayor is a nominee with a 17-year record of following the law. She has faithfully applied the law to the facts in case after case.

We have a research service called the Congressional Research Service. It is a neutral, respected adjunct to what we do in the Senate and the House. It car-

ries out significant research. They took a look at her record, examined it, and this is what they said:

Her decisions do not fall along any ideological spectrum. The most consistent characteristic of her approach as an appellate judge has been an adherence to the doctrine of *stare decisis*—the upholding of past judicial precedents.

When her record is objectively researched by the number one objective research service we have, she has been found to abide by court precedent. They have essentially said she is not an activist, she follows legal precedent. When her confirmation hearing ended, even one Senator who is now voting against Judge Sotomayor said this:

I actually agree that your judicial record strikes me as pretty much in the mainstream of judicial decisionmaking.

This is Senator JOHN CORNYN, Confirmation Hearings for Judge Sonia Sotomayor, July 16, 2009.

Judge Sotomayor's mainstream record, her respect for precedent, and her commitment to the law have earned her the support of groups that cut across party lines.

She has been endorsed by law enforcement groups, such as the International Association of Chiefs of Police; civil rights groups, such as the Leadership Conference for Civil Rights; business groups, such as the U.S. Chamber of Commerce—yes, they have endorsed her; former officials from both parties, including conservative lawyer Kenneth Starr; and legal groups, such as the American Bar Association.

This is a nominee with a solid record, with more Federal judicial experience than any nominee in a century, and with widespread support.

There are those who oppose her because of a line from a speech she made—one line in 29½ years of legal experience.

Second, there are those who oppose her because of one case. It is the *Ricci* case—the New Haven case involving firefighters. But Judge Sotomayor was squarely in the mainstream in that case. She followed established precedent. That is what the district court said in an almost 50-page opinion. This is *Ricci v. DeStefano*, 2006 U.S. Dist. LEXIS 73277, D. Conn. 2006, unpublished opinion. Her second circuit panel unanimously agreed. This is *Ricci v. DeStefano*, 530 F.3d 87, 2d Cir. 2007.

At about the same time, in the U.S. District Court in Tennessee, a judge held that in a nearly identical situation, the Memphis Police Department could replace a promotional exam that it feared was discriminatory.

Last year, a three-judge circuit court panel on the Sixth Circuit—including one judge appointed by President George W. Bush—agreed. This is *Oakley v. City of Memphis*, No. 07-6274, 6th Cir. 2008, unpublished opinion. So there was agreement on the courts.

It is true that five Justices, in a 5-to-4 opinion on the Supreme Court, disagreed, and their decision is now the



law of the land. This is Ricci v. DeStefano, 129 S. Ct. 2658, 2009. I was a mayor for 9 years of a difficult city going through a number of affirmative action cases. I can tell you that this ruling has placed cities in what Justice Souter called a “damned if you do, damned if you don’t situation.”

I agree with that. If a city has to prove that it would lose in court before replacing a civil service exam it believes is discriminatory, this jeopardizes virtually any exam they might choose.

Finally, and most important, there is the third point of opposition, and that is the National Rifle Association. The NRA actively opposes Judge Sotomayor. They say they are scoring her confirmation vote. They will tell their members that any Senator who votes to confirm Judge Sotomayor has voted against the NRA’s priorities. So let’s look at that for a minute.

The NRA says Judge Sotomayor erred in the case of *United States v. Sanchez-Villar*, a 2004 case. In this case, an illegal immigrant named Jose Sanchez-Villar was caught dealing crack cocaine and carrying a gun in New York City. This is *United States v. Sanchez-Villar*, 99 Fed. Appx. 256, 2d Cir. 2004.

Those are the facts of the case. A jury convicted. On appeal, the defendant argued, among other things, that to prohibit him from carrying a gun in New York City violated the second amendment.

Judge Sotomayor and her colleagues unanimously rejected his argument and upheld the conviction. The NRA is apparently upset that Judge Sotomayor and her colleagues did not agree with Mr. Sanchez-Villar’s second amendment argument.

But in 2004, when this case was decided, the law had been clear for 65 years. The Supreme Court had said in 1939 that the second amendment only related to militia service and judges all across our country had followed that decision for decades. This is *United States v. Miller*, 307 U.S. 174, 1939.

Would the NRA have preferred that Judge Sotomayor rule against 65 years of settled law and hold that an undocumented drug dealer had a constitutional right to carry a gun in New York City? Do you want that, Mr. President? Do I want that in my State? The answer is absolutely no.

The NRA also says Senators should oppose Judge Sotomayor’s nomination because of another case, *Maloney v. Cuomo*. This is *Maloney v. Cuomo*, 554 F.3d 56, 2d Cir., 2009. There, Judge Sotomayor and her colleagues unanimously upheld a New York law banning a particular Japanese martial arts weapon called nunchakus.

The unanimous decision said the second amendment limits only the Federal Government, not the States. Why would Judge Sotomayor and her colleagues say that? Because it was binding Supreme Court law. Look at the decisions:

In 1876, the Supreme Court held that the second amendment only applies to the Federal Government. That was *United States v. Cruikshank*, 92 U.S. 542 (1876). It said it again in 1886, in *Presser v. Illinois*, 116 U.S. 252, 1886, and again, in 1984, in *Miller v. Texas*, 153 U.S. 535, 1984.

The fourth circuit followed that law and said in 1995 that the second amendment only applies to the Federal Government. That case was *Love v. Peppersack*, 47 F.3d 522, 1995. The Sixth Circuit agreed in 1998, in *People’s Rights Organization v. City of Columbus*, 152 F.3d 522, 1998. Judge Sotomayor’s own court, the second circuit, agreed in 2005, in *Bach v. Pataki*, 408 F.3d 75, 2005.

Then last year, Justice Scalia wrote in footnote 23 of the famous *Heller* opinion:

[Our] decisions in *Presser v. Illinois* and *Miller v. Texas* reaffirmed that the Second Amendment only applies to the Federal Government.

That case was *District of Columbia v. Heller*, 128 S.Ct. 2783, 2008. Justice Scalia is not exactly a liberal Supreme Court Justice, and that is his view:

*Presser v. Illinois* and *Miller v. Texas* reaffirm that the second amendment only applies to the Federal Government.

Finally, just 2 months ago, three Republican appointees on the Seventh Circuit agreed that the second amendment only applies to the Federal Government. They said anyone who doubts this need only read Justice Scalia’s opinion. And that case was the *National Rifle Association v. City of Chicago*, 567 F.3d 856, 2009.

So once again Judge Sotomayor’s decision was squarely in agreement with court after court after court.

Some of my colleagues have said that the Ninth Circuit disagreed. It is true that three of its judges did. But last week, the full Ninth Circuit voted to review these three judges’ decision and to rehear it as a full court en banc. And that case is *Nordyke v. King*, No. 07-15763, En Banc Order, Ninth Circuit, July 29, 2009.

The NRA tried its case before the Seventh Circuit and lost. They lost in front of three Republican-appointed judges.

Let me summarize. Judge Sonia Sotomayor has 29½ years of relevant legal experience. She has a 17-year record of following the law. She has experience, temperament, and knowledge. She will be, in my view, a fine Supreme Court Justice.

Supreme Court Justices do not merely call balls and strikes; they make decisions that determine whether acts of Congress will stand or fall. They decide how far the law will go to protect the safety and rights of all of us. They have the power to limit or expand civil rights protections. They have great leeway to interpret the laws protecting or limiting a woman’s right to choose. And they can expand or limit child pornography laws and campaign finance laws and so many more.

I believe Judge Sotomayor is an exceptional person who brings a rich background as a prosecutor, a business lawyer, a trial judge, and appellate court judge. And her 17-year record of judicial temperance shows she will faithfully apply the law. I cannot tell you how proud I will be to vote to confirm her as an Associate Justice on the Supreme Court. I sincerely hope that a dominant majority of my colleagues will do the same.

I yield the floor.

The PRESIDING OFFICER (Mr. UDALL of Colorado). The Senator from New Jersey.

Mr. MENENDEZ. Mr. President, I rise in proud support of the confirmation of Judge Sonia Sotomayor. We are not only about to cast a vote this week that will make history, but we are about to stand witness in some small way to the coming age of America.

The great Founders of this democracy built a nation on an idea and an ideal. They devised the unique experiment in a new form of government built on tolerance, equal rights, justice, and a constitution that protected us from the mighty sword of tyranny. They forged a community from shared values, common principles, yet preserved the freedom of every citizen to pursue happiness and reach for the stars no matter their position, no matter their circumstance at birth.

It was a revolutionary notion that in America one is not bound by his or her social or economic status; that if we work hard, reach further, aim higher, everything—anything—is possible.

Unlike other nations united by common history, common language, and common culture, America prides itself on its motto: *E pluribus unum*—out of many, one. In our blind rush to one side of the political spectrum or the other, we too often forget those words. We too often forget that we are united in our differences in a vast melting pot forged from common values and an ideal of freedom that is the envy of the world.

Today, as we prepare to confirm Judge Sotomayor, the full realization of that ideal is closer than it has ever been. I know it, I feel it, for I have lived it. I stand here, someone who himself came from humble beginnings, raised in a tenement building in a neighborhood in Union City, NJ, a son of immigrants, first in my family to go to college, and now in a nation of 300 million people, 1 of 100 Members of the U.S. Senate.

I never dreamed growing up that one day I would have the distinct honor to come to the floor of the Senate to rise in favor of the confirmation of an eminently qualified Hispanic woman who grew up in the Bronx across the river from the old tenement I lived at in Union City. I never dreamed that as a U.S. Senator of Hispanic heritage, I would have the privilege of standing in the well of this Chamber to cast a historic vote for the first Hispanic woman on the highest Court in the land. So for

me personally, my vote for Judge Sonia Sotomayor will be a proud moment, one I will always remember as a highlight of my time in the Senate.

When Judge Sotomayor takes her seat on the U.S. Supreme Court, America will have come of age. We will need only to look at the portrait of the Justices of the new Supreme Court to see how far we have come as a nation, who we really are as a people, what we stand for, and what our Founders intended us to be. It will be a striking portrait—one of strength, diversity, spirit, and wisdom, the portrait of a nation united by common concerns, yet still too often divided by deeply held individual beliefs.

There are those in this Chamber who, because of those deeply held beliefs, will vote for Judge Sotomayor and those who will not, each for their own reasons, each in part because of who they are, where they grew up, how their perspective has been uniquely shaped by their individual circumstances and experiences. Their vote will be based on their own logic, their own reasoning, how they interpret the facts and the testimony before them. Each of us will analyze and debate those facts from our own perspective. We will hold to our own intellectual positions. We will disagree. Some will find fault with Judge Sotomayor's choice of words. Some will interpret her statements and rulings differently than she may have clearly intended. Some will question her temperament, her judgment, the details of her decisions. But in this debate and, ultimately, in the final analysis, none of us can deny the role our experience will play in our decision. None of us can deny our backgrounds, our upbringing, the seminal events that shaped our life. We cannot deny who we are. All we can ask of ourselves—of any of us—is that wisdom, intelligence, reason, and logic will always prevail in the decisions we make.

Those who would say a U.S. Senator or a Justice of the U.S. Supreme Court does not carry something with them from their experience are simply out of touch with reality. But let us remember that who we are is not a measure of how we judge; it is merely the prism through which we analyze the facts. The real test is how we think and what we do.

Let's be clear. Given the facts, given the evidence before us, Sonia Sotomayor is one of the most qualified and exceptionally experienced nominees to come before the Senate. I am proud to stand in favor of her confirmation, not because of where she came from, not because we share a proud ethnicity, but because of Judge Sotomayor's experience and vast knowledge of the law. I am proud to stand in favor of her nomination not because she is a Hispanic woman but because of her commitment to the rule of law and her respect for the Constitution; not because of the depth of her theoretical knowledge and respect for

precedent but because of her practical experience fighting crime; not because of one statement she may have made years ago outside the courtroom but because of a career-long, proven record of dedication to equal justice under law. Nothing—I repeat nothing—should be more important to any nominee than a dedication to those simple words chiseled above the entrance to the Supreme Court: "Equal Justice Under Law."

These are the reasons I am proud to stand in support of her confirmation, and these are the reasons I believe Judge Sotomayor should be unanimously confirmed by the Senate. But I know that will not be the case. I know there will be few on the other side of the aisle who will cast their vote in support of her. I know some of my colleagues have suggested that Judge Sotomayor may not have the judicial temperament necessary to serve on the Supreme Court. To those Senators who get up and say that, I say watch the hearings again. Watch them closely. Listen to what was asked, watch her responses, take note of the depth, the dignity, and clarity of her answers. Be aware of the deference she showed every Senator on the committee, her tone, the tenor of her responses, her rebuttals, and then tell me she does not have the proper judicial temperament.

I think most Americans who watched her, who listened to her, would respectfully disagree. Most Americans do not care about one specific statement out of hundreds of statements. They care about the person. They care about the experience. They care about honor and decency and dignity and fairness. They care about who she is and what she has accomplished in her long judicial career. Put simply, they care about the record, and the record is clear. It shows she has a deep and abiding respect for the Constitution. It shows that the leaders of prominent legal and law enforcement organizations who know her best, those who have actually seen her work, say she is an exemplary, fair, and highly qualified judge. It shows a crime fighter who as a prosecutor put the "Tarzan murderer" behind bars. It shows a judge who has upheld the convictions of drug dealers, sexual predators, and other violent criminals. And it highlights a deep and abiding respect for the liberties and protections granted by the Constitution, including the first amendment rights of those with whom she strongly disagrees.

Judge Sotomayor's credentials are impeccable. Set aside for a moment the fact that she graduated at the top of her class at Princeton. Set aside her tenure as editor of the Yale Law Review, her work for Robert Morgenthau in the Manhattan District Attorney's Office, her successful prosecution of child abusers, murderers, and white-collar criminals. Set aside her courtroom experience and practical hands-on knowledge of all sides of the legal system. Even set aside her appoint-

ment by George H.W. Bush to the U.S. District Court in New York and her appointment by Bill Clinton to the U.S. Court of Appeals and the fact that she was confirmed by both a Democratic majority Senate and a Republican majority Senate, which alone tells this Senator, if she was qualified then, she must be qualified now. Set all that aside, and you are still left with someone who would bring more judicial experience to the Supreme Court than any Justice in the last 70 years, more Federal judicial experience than anyone nominated to the Court in the last century. Her record clearly shows that someone so experienced, so skilled, so committed, so focused on the details of the law can be an impartial arbiter who follows the law and still has a deep and profound understanding of the effect her decisions will have on the day-to-day lives of everyday people.

With all due respect to my colleagues who plan to vote against this nominee, what speaks volumes about Judge Sotomayor's temperament, what speaks volumes about her experience, what speaks volumes about her record is that the worst—the very worst—her opponents can accuse her of is an accident of geography that gave her the unique ability to see the world from the street view, from the cheap seats. I know that view very well. I grew up in it. I can tell you that certainly it gives you a unique perspective on life. It engenders compassion. It engenders pathos. It focuses a clear lens on the lives of those whose struggles are more profound than ours, and whose problems run far deeper. Yes, I know that view well, and it remains with me today, and it will remain with me all of my life.

I daresay there may be no greater vantage point from which to view the world—to see the whole picture—than a tenement in Union City or a housing project in the Bronx. Thomas Jefferson, in his first inaugural address said:

I shall often go wrong through defect of judgment. When right, I shall often be thought wrong by those whose positions will not command a view of the whole ground.

Judge Sonia Sotomayor surely commands a full, wide expansive view of the whole ground. It is a strength, not a weakness. It is who she is, not what she will do or how she will judge. It is the long view, and it gives her an edge where she may see what others cannot. And that is a gift that will benefit this Nation as a whole.

I ask my colleagues to take the long view and see what this nomination means in the course of this Nation's glorious history. For me, the ideal, the idea of America, the deep and abiding wisdom of our Founders, will have come of age when Judge Sonia Sotomayor raises her right hand, places her hand on the Bible, and takes the solemn oath of office. With it, the portrait of the Justices of the U.S. Supreme Court will more clearly reflect who we are as a nation, what we have become, and what we stand for as a

fair, just, and hopeful people. Let that be our charge. Let that be our legacy. Let someone who is committed to the Constitution, to the rule of law, to precedent—and who has exhibited that over a lifetime of work—be our next Supreme Court Justice.

I am proud and honored to support the confirmation of Judge Sonia Sotomayor as the next Justice of the U.S. Supreme Court.

And finally, numerous civil rights, Latino, and law enforcement organizations join me in supporting Judge Sotomayor's nomination. I ask unanimous consent to have printed in the RECORD letters of support from the following organizations: Mexican American Legal Defense and Education Fund, the National Hispanic Leadership Agenda, the National Puerto Rican Coalition, the National Fraternal Order of Police, the National Organization of Black Law Enforcement Executives, Federal Hispanic Law Enforcement Officers Association, the United States Hispanic Chamber of Commerce, the Arizona Hispanic Chamber of Commerce, and the Fort Worth Hispanic Chamber of Commerce, to name a few.

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

MEXICAN AMERICAN LEGAL DEFENSE  
AND EDUCATIONAL FUND,

Los Angeles, CA, July 7, 2009.

Hon. PATRICK J. LEAHY,  
*Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.*

Hon. JEFF SESSIONS,  
*Ranking Member, Committee on the Judiciary, U.S. Senate, Washington, DC.*

DEAR CHAIRMAN LEAHY AND RANKING MEMBER SESSIONS: On behalf of the Mexican American Legal Defense and Educational Fund (MALDEF), I write to express our support for the confirmation of Judge Sonia Sotomayor to the United States Supreme Court. Judge Sotomayor is an outstanding choice to replace retiring Justice David Souter. She has an impeccable record of accomplishment that is worthy of serving on the highest court in the nation. She possesses all of the credentials and experience that make her highly qualified to sit on the Supreme Court. Significantly, she is one of the most qualified candidates to be considered for Associate Justice in recent history.

The American Bar Association has unanimously rated Judge Sotomayor "well qualified" for the Court, its highest rating. She has broad and bipartisan support. She has been endorsed by eight national law enforcement groups. She has the support of Former President Herbert Walker Bush and former Supreme Court Justice Sandra Day O'Connor.

Judge Sotomayor has extensive experience as a trial attorney having worked in both the public and private sectors. She was an Assistant District Attorney in New York for five years where she tried dozens of criminal cases including murders, robberies, police misconduct, and fraud. Former New York District Attorney Robert Morgenthau described her as a "fearless and effective prosecutor." She was a corporate litigator in private practice for eight years as a partner at the law firm of Pavia & Harcourt where she handled cases in real estate, employment, banking, contracts, and intellectual property law.

She has served as a federal judge for 17 years. She was the youngest judge appointed to the federal bench in the Southern District of New York where she served for six years and heard over 450 cases. She has been on the U.S. Court of Appeals for the Second Circuit—one of the most demanding circuits in the country—for 11 years. As a federal appellate judge she has participated in over 3000 panel decisions and authored approximately 400 published decisions. She has handled complex legal and constitutional matters. Her decisions are faithful to both legal doctrines and factual details.

If confirmed, Judge Sotomayor would bring more federal judicial experience to the Supreme Court than any justice in 100 years and more overall judicial experience than anyone confirmed to the Court in the past 70 years. She also would be the only Justice with experience as a trial judge.

Judge Sotomayor's educational accomplishments demonstrate her strong work ethic and clarity of focus starting from a young age. She graduated summa cum laude from Princeton University and is a graduate of Yale Law School where she was an Editor on the Law Review, a distinction reserved for only the top law students.

Judge Sotomayor has a demonstrated commitment to the community. She has been a lecturer at Columbia Law School and an adjunct professor at NYU Law School. She served on the board of the Development School for Youth whose mission is to develop work skills for inner city young people. She has served on the Boards of Directors of the New York Mortgage Agency, the New York City Campaign Finance Board and the Puerto Rican Legal Defense and Education Fund. The Latino community shares in the pride of the nation at President Obama's nomination of this exceptional jurist. The diversity she will add to the Court is a strength that will enhance respect and dignity for the judicial system. MALDEF respectfully requests the opportunity to testify in support of Judge Sotomayor's confirmation.

Judge Sotomayor is an individual of exceptional talent, experience and commitment to justice. We urge her swift confirmation.

Very truly yours,  
HENRY L. SOLANO,  
*Interim President & General Counsel.*

JUNE 9, 2009.

Hon. PATRICK LEAHY,  
*Chairman, U.S. Senate, Committee on the Judiciary, Dirksen Senate Office Building, Washington, DC.*

DEAR SENATOR LEAHY: The National Hispanic Leadership Agenda (NHLA), comprised of thirty-one of the leading national and regional Hispanic civil rights and public policy organizations, representing a diverse Latino community and millions of members nationwide, would like to request a meeting regarding the nomination of Judge Sonia Sotomayor to become the next United States Supreme Court Justice. As community advocates with a vested interest in serving the public good, members of our coalition would like to meet with you and discuss Judge Sotomayor's nomination. NHLA represents a vast array of constituencies that include veterans, academics, legal experts, labor activists, federal employees, elected officials, medical professionals and members of the media, among many other community leaders who unequivocally support the nomination of Judge Sotomayor based on the merits of her judicial record and overall experience.

The NHLA mission and objectives call for providing a clearinghouse of information to the Hispanic community; providing a unified voice on relevant issues; and providing a much needed voice on legislative issues that have direct implications for our members na-

tionwide. The composition of NHLA includes groups with Mexican, Puerto Rican, Dominican, and Cuban leadership, as well as the membership of countless other Hispanic and Latin-American interests. The common issues of education, civil rights, immigration, economic empowerment, health, and government accountability transcend ethnic origin and racial identity, as evidenced by the breadth of these different groups. The Hispanic community is larger and more diverse than ever, numbering close to 50 million persons and making up over 16% of the combined population of the United States, Puerto Rico, and the United States territories.

We look forward to your response as we would like to schedule meetings for the week of June 15th–19th. Should you have any questions, please contact Alma Morales Riojas, Secretary/Treasurer of the National Hispanic Leadership Agenda and President and CEO of MANA, A National Latina Organization or James Albino, Director, Hispanic Federation.

Sincerely,  
DR. GABRIELA D. LEMUS,  
*Chair, Board of Directors,  
National Hispanic Leadership Agenda.*

NATIONAL PUERTO  
RICAN COALITION, INC.,  
Washington, DC, July 13, 2009.

Hon. PATRICK J. LEAHY,  
*Chairman, Committee on the Judiciary, U. S. Senate, Russell Senate Office Building, Washington, DC.*

Hon. JEFF SESSIONS,  
*Ranking Member, Committee on the Judiciary, U.S. Senate, Russell Senate Office Building, Washington, DC.*

DEAR CHAIRMAN LEAHY AND RANKING MEMBER SESSIONS: On behalf of the National Puerto Rican Coalition Inc. (NPRC), representing the interests of over 8 million U.S. citizens in the states and Puerto Rico, I would like to express our full and enthusiastic support for the confirmation of the Honorable Judge Sonia Sotomayor to the United States Supreme Court. Her personal and professional experiences make her uniquely sensitive and qualified to address the concerns of all Americans in our nation's highest court.

Judge Sotomayor's personal story of growing up as a daughter of Puerto Rican parents in a Bronx housing project, and eventually going on to study in Princeton and Yale, is an authentic reflection of the power for motivated and talented people in our society to overcome hardship and achieve success. This experience allows her a profound sensitivity to the challenging conditions of life which are the reality for a significant portion of the U.S. population and will provide her with a unique perspective on how to justly and equally apply our nation's laws.

In her professional life Judge Sotomayor's legal career has included not only criminal prosecution and commercial litigation, but also academia and appointment to the federal bench. For the past ten years, her intellect, integrity, and consensus-building have made her a highly respected jurist on the Second Circuit. This followed a distinguished career as a federal trial judge, during which Judge Sotomayor's pragmatism and resolve brought the national baseball strike to an end that satisfied all parties. She then taught for over nine years at the New York University School of Law and at Columbia Law School and has been a mentor to hundreds of attorneys and students as well as a member of the Puerto Rican and the Hispanic National Bar Associations. This wealth of experience has impressed upon her both the law's potential, as well as its limits. Since her nomination was announced she has

received endorsements and praise from across the country.

As the Senate holds confirmation hearings, NPRC will be watching carefully to ensure that the Senate treats Judge Sotomayor fairly. Our organization firmly believes that Judge Sotomayor is the best choice for our country's next Supreme Court Justice. Therefore, NPRC will include her confirmation vote as part of our NPRC Community Accountability Rating. I hope and trust that you and your colleagues will enthusiastically support her nomination.

Sincerely,

RAFAEL FANTAUZZI,  
President & CEO.

NATIONAL FRATERNAL ORDER OF POLICE,  
Washington, DC, June 9, 2009.

Hon. PATRICK J. LEAHY,  
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

Hon. JEFFERSON B. SESSIONS III,  
Ranking Member, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN AND SENATOR SESSIONS: I am writing on behalf of the members of the Fraternal Order of Police to advise you of our support for the nomination of Judge Sonia M. Sotomayor to join the Supreme Court of the United States.

Following her graduation from Yale Law School, Judge Sotomayor joined the District Attorney's office in Manhattan, where she tried dozens of cases during her tenure, including winning a conviction of the "Tarzan murderer". She worked closely with rank-and-file law enforcement officers during her time as a prosecutor, and, was described by the legendary Manhattan District Attorney Robert Morgenthau as a "fearless and effective prosecutor."

After spending some time in private practice, Judge Sotomayor returned to public service and was nominated by President George H. W. Bush for a seat on the U.S. District Court for the Southern District of New York. The Committee on the Judiciary unanimously approved her nomination, and she was confirmed in the Senate by unanimous consent. Upon confirmation, Judge Sotomayor became the youngest sitting judge in the Southern District of New York.

Her first high profile case involved a labor issue—*Silverman v. Major League Baseball Player Relations Committee, Inc.* By issuing an injunction preventing the owners from imposing a new collective bargaining agreement, it can be argued that Judge Sotomayor helped save baseball, and certainly baseball fans, from a long, drawn out labor dispute.

In 1998, she was named to the U.S. Court of Appeals for the Second Circuit, one of the most demanding circuits in the country, by President William J. Clinton. As an appellate judge, she has participated in over 3000 panel decisions and authored roughly 400 opinions, handling difficult issues of constitutional law, complex procedural matters, and lawsuits involving complicated business organizations. Over the course of her career, she has demonstrated herself to be a sharp and fact-driven jurist, analyzing each case on its merits and weighing the facts before rendering any decision.

While her ruling in *Ricci v. Destefano* has been getting most of the media attention, we would like to bring another case to your attention, *Pappas v. The City of New York*, et al. New York City Police Officer Thomas Pappas was fired for distributing through the U.S. mail racially offensive material from his home. While the Second Circuit upheld the termination of Officer Pappas, Judge Sotomayor dissented noting that his First Amendment rights took precedence because he did not occupy a high-level supervisory, confidential or policymaking role within the department.

In other cases which came before her, both civil and criminal, Judge Sotomayor has often sided with law enforcement officers acting in good faith by upholding convictions on appeal. It is clear that she weighs the facts in evidence and makes her rulings based on the merits of the case. She is a model jurist—tough, fair-minded, and mindful of the constitutionally protections afforded to all U.S. citizens.

I believe that the President has made an excellent choice in naming Judge Sonia S. Sotomayor to the Supreme Court of the United States and, on behalf of the more than 327,000 members of the Fraternal Order of Police, I am proud to endorse her nomination. If I can be of any additional support on this matter, please do not hesitate to contact me or Executive Director Jim Pasco in my Washington, D.C. office.

Sincerely,

CHUCK CANTERBURY,  
National President.

NATIONAL ORGANIZATION OF  
BLACK LAW ENFORCEMENT EXECUTIVES,  
Alexandria, VA, June 8, 2009.

Hon. PATRICK J. LEAHY,  
U.S. Senate,  
Washington, DC.

Hon. JEFF SESSIONS,  
U.S. Senate,  
Washington, DC.

DEAR SENATORS LEAHY AND SESSIONS: The National Organization of Black Law Enforcement Executives (NOBLE), an organization of approximately 3,000 primarily African American law enforcement CEOs and command level officials writes to express its support for President Barack Obama's nomination of U.S. District Court Judge Sonia Sotomayor as Associate Justice of the U.S. Supreme Court.

It is critically important to NOBLE, that a Supreme Court justice exercises the ability to interpret the Constitution in a manner that respects the fundamental rights of all people, and that is fair. Judge Sotomayor has credible service; her transition from local prosecutor, to U.S. District Court judge, to U.S. Appeals Court jurist has afforded her the opportunity to experience the breadth of criminal, civil and administrative law issues. The critical issues involving the dialectical contradictions of inequities and fairness across the spectrum of employment, education, housing, the status of juvenile offenders and the enforcement of law are of deep concern to us and are issues that we believe she will be sensitive to.

Furthermore, as the cases before the Court become more challenging, and with science and technology related issues advancing at such a rapid pace, we believe that Judge Sotomayor is imminently qualified to look at our 200-year-old Constitution in a manner that is relevant to today's world. It is interesting to note a recent White House Press Office statistic, "If confirmed, Sotomayor would bring more federal judicial experience to the Supreme Court than any justice in 100 years, and more overall judicial experience than anyone confirmed for the Court in the past 70 years".

Law enforcement is a profession that is constantly evolving and we believe that there is a seat among the top of that criminal justice system for this great American. We trust that the Senate will look at her character and act quickly on her confirmation.

Respectfully,

JOSEPH A. McMILLAN,  
National President.

FEDERAL HISPANIC LAW ENFORCEMENT OFFICERS ASSOCIATION,  
Tampa, FL, July 16, 2009.

Hon. PATRICK LEAHY,  
Chairman,  
Hon. JEFF SESSIONS,  
Ranking Member,  
Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR SENATORS LEAHY AND SESSIONS, The Federal Hispanic Law Enforcement Officers Association (FHLEOA) is pleased to join the myriad of other law enforcement groups and associations throughout our nation in support of the president's nomination of Judge Sonia Sotomayor to serve as associate justice of the United States Supreme Court.

Judge Sotomayor's personal story, educational achievements, prosecutorial history, and overall common sense approach and commitment to the law and law enforcement are indeed impressive. But more impressive is the fact that if confirmed, she will bring more federal judicial experience to our highest court than any justice in the last hundred years.

Her record as a public servant is simply outstanding, and her court rulings are indicative of a clear understanding of the law. We believe our nation will be well served with Judge Sotomayor as an Associate Justice of the Supreme Court.

FHLEOA is proud to endorse the nomination of Judge Sotomayor to the U.S. Supreme Court and we look forward to her quick confirmation by the Senate.

Respectfully,

SANDALIO GONZALEZ,  
National President.

UNITED STATES HISPANIC  
CHAMBER OF COMMERCE,  
Washington, DC, June 23, 2009.

Hon. PATRICK LEAHY,  
Russell Senate Office Building,  
Washington, DC.

DEAR SENATOR LEAHY: On behalf of the United States Hispanic Chamber of Commerce (USHCC)—the national representative for almost 3 million Hispanic-owned businesses—and the undersigned organizations, we write to express our support for the confirmation of Judge Sonia Sotomayor as Associate Justice of the Supreme Court of the United States. In her seventeen years of service to date as a federal trial and appellate judge, and throughout the course of her entire career, Judge Sotomayor has strongly distinguished herself through her outstanding intellectual credentials and her deep respect for the rule of law, establishing herself beyond question as fully qualified and ready to serve on the U.S. Supreme Court.

Judge Sotomayor will be an impartial, thoughtful, and highly-respected addition to the Court. Her unique personal background is compelling, and will be both a tremendous asset while serving on the Court and a historic inspiration to others. Her legal career further demonstrates her qualifications to serve in this position. After graduating from Yale Law School, where she served as an editor for the *Yale Law Journal*, Judge Sotomayor spent five years as a criminal prosecutor in Manhattan. She then spent eight years as a corporate litigator with the firm of Pavia and Harcourt, where she gained expertise in a wide range of civil law areas such as contracts and intellectual property. In 1992, on the bipartisan recommendation of her home-state Senators, President George H.W. Bush appointed her District Judge for the Southern District of New York. In recognition of her outstanding record as a trial judge, President Bill Clinton elevated her to the U.S. Court of Appeals in 1998.

During her long tenure on the federal judiciary, Judge Sotomayor has participated in thousands of cases, and has authored approximately 400 opinions at the appellate

level. She has demonstrated a thorough understanding of a wide range of highly complicated legal issues, and has a strong reputation for deciding cases based upon the careful application of the facts to the law. Her record and her inspiring personal story indicate that she understands the judiciary's role in protecting the rights of all Americans, in ensuring equal justice, and respecting our Constitutional values—all within the confines of the law. Moreover, her well-reasoned and pragmatic approach to cases will allow litigants to feel, regardless of the outcome, that they were given a fair day in court.

Given her stellar record and her reputation for fairness, Judge Sotomayor has garnered broad support across partisan and ideological lines, earning glowing praise from colleagues who know her best in the judiciary, law enforcement community, academia, and the legal profession. Her Second Circuit colleague (and also her former law professor) Judge Guido Calabresi describes her as "a marvelous, powerful, profoundly decent person. Very popular on the court because she listens, convinces and can be convinced—always by good legal argument. She's changed my mind, not an insignificant number of times." Judge Calabresi also discredited concerns about Judge Sotomayor's bench manner, explaining that he compared "the substance and tone of her questions with those of his male colleagues and his own questions. And I must say I found no difference at all." Judge Sotomayor's colleague Judge Roger Miner, speaking of her ideology, argued that "I don't think I'd go as far as to classify her in one camp or another. I think she just deserves the classification of outstanding judge." And New York District Attorney Robert Morgenthau, her first employer out of law school, hailed her for possessing "the wisdom, intelligence, collegiality, and good character needed to fill the position for which she has been nominated."

We urge you not to be swayed by the efforts of a small number of ideological extremists to tarnish Judge Sotomayor's outstanding reputation as a jurist. These efforts have included blatant mischaracterizations of a handful of her rulings, as well as efforts to smear her as a racist based largely on one line in a speech that critics have taken out of context from the rest of her remarks. The simple fact is that after serving seventeen years on the federal judiciary to date, she has not exhibited any credible evidence whatsoever of having an ideological agenda, and certainly not a racist one. We hope that your committee will strongly reject the efforts at character assassination that have taken place since her nomination.

In short, Judge Sotomayor has an incredibly compelling personal story and a deep respect for the Constitution and the rule of law. Her long and rich experiences as a prosecutor, litigator, and judge match or even exceed those of any of the Justices currently sitting on the Court. Furthermore, she is fair-minded and ethical, and delivers thoughtful rulings in cases based upon their merits. For these reasons, the undersigned organizations strongly urge you to swiftly confirm Judge Sotomayor to the Supreme Court.

Sincerely,

USHCC

ARIZONA HISPANIC  
CHAMBER OF COMMERCE,  
June 29, 2009.

Hon. PATRICK J. LEAHY,  
*Chairman, Committee on the Judiciary,*  
*U.S. Senate, Washington, DC.*

Hon. JEFF SESSIONS,  
*Ranking Member, Committee on the Judiciary,*  
*U.S. Senate, Washington, DC.*

DEAR CHAIRMAN LEAHY AND RANKING MEMBER SESSIONS: As the new President and CEO of the Arizona Hispanic Chamber of Commerce, I write to express our organization's support for the confirmation of Judge Sonia Sotomayor as Associate Justice of the Supreme Court of the United States. In her seventeen years of service to date as a federal trial and appellate judge, and throughout the course of her entire career, Judge Sotomayor has strongly distinguished herself through her outstanding intellectual credentials and her deep respect for the rule of law, establishing herself beyond question as fully qualified and ready to serve on the Supreme Court.

Judge Sotomayor will be an impartial, thoughtful, and highly-respected addition to the Supreme Court. Her unique personal background is compelling, and will be both a tremendous asset to her on the Court and a historic inspiration to others. Her legal career further demonstrates her qualifications to serve on our nation's highest court.

During her long tenure on the federal judiciary, Judge Sotomayor has participated in thousands of cases, and has authored approximately 400 opinions at the appellate level. She has demonstrated a thorough understanding of a wide range of highly complicated legal issues, and has a strong reputation for deciding cases based upon the careful application of the facts of cases to the law.

Judge Sotomayor has garnered broad support across partisan and ideological lines, earning glowing praise from colleagues in the judiciary, law enforcement community, academia, and legal profession who know her best.

I urge you not to be swayed by the efforts of a small number of detractors who only wish to tarnish Judge Sotomayor's outstanding reputation as a jurist. These efforts have included blatant mischaracterizations of a handful of her rulings, as well as efforts to smear her as a racist based largely on one line in a speech that critics have taken out of context from the rest of her remarks. We hope that your committee will strongly reject the efforts at character assassination that have taken place since her nomination.

In short, Judge Sotomayor has an incredibly compelling personal story and a deep respect for the Constitution and the rule of law. Her long and rich experiences as a prosecutor, litigator and judge match or even exceed those of any of the Justices currently sitting on the Court. Furthermore, she is fair-minded and ethical, and delivers thoughtful rulings in cases based upon their merits. For these reasons, I strongly urge you to vote to confirm Judge Sotomayor.

Respectfully,

ARMANDO A. CONTRERAS,  
*President and CEO,*  
*Arizona Hispanic Chamber of Commerce.*

FORT WORTH HISPANIC  
CHAMBER OF COMMERCE,  
17 July 2009.

Hon. PATRICK J. LEAHY,  
*Senator of the United States of America, Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.*

Subject: Judge Sonia Sotomayor confirmation recommendation.

DEAR SENATOR LEAHY: The Fort Worth Hispanic Chamber of Commerce's Board of Di-

rectors and membership are writing on behalf of Judge Sonia Sotomayor's confirmation as the next United States Supreme Court Justice. We recommend your committee's most favorable and highest recommendation possible to the Senate in favor of her confirmation.

The Fort Worth Hispanic Chamber of Commerce, including experienced federal and state court attorneys, have reviewed Judge Sotomayor's education, experience and her opinions as a jurist; it is our consensus she is eminently qualified, talented and possesses the desire to be an excellent Supreme Court justice. It is clear from an early age she has been driven to excel; a 1976 Princeton University summa cum laude graduate and a graduate of the Yale University School of Law. While at Yale Law School, she was selected to serve as an editor of the Yale Law Journal. Her legal experience includes serving as a New York County Assistant District Attorney, and partner with the law firm of Pavia & Harcourt focusing on intellectual property, international litigation and complex export trading cases. Judge Sotomayor has distinguished herself as a U.S. District Court Judge for the Southern District of New York and now as judge with the United States Court of Appeals for the Second Circuit.

Her proven record on a variety of topics, issues and legal reasoning make her an excellent nomination. It is our firm belief Judge Sotomayor will apply and interpret the legal precedents under the law and will uphold the law with equal justice. We highly endorse Judge Sotomayor's confirmation and urge your vote of approval at your earliest convenience.

Sincerely,

ROSA NAVEJAR,  
*President/CEO.*

Mr. MENENDEZ. Mr. President, with that, I yield the floor.

The PRESIDING OFFICER. The Senator from Rhode Island.

Mr. WHITEHOUSE. Mr. President, I am honored to join my distinguished colleague from New Jersey here today on the Senate floor to speak in support of the confirmation of Judge Sonia Sotomayor as the next Associate Justice of the U.S. Supreme Court.

I had the privilege to sit on the Judiciary Committee for her confirmation hearing, and I join all of my committee colleagues on both sides of the aisle who have complimented Chairman LEAHY for a very well-run hearing. I was proud to vote for Judge Sotomayor in the Judiciary Committee, and I will be proud to vote for her confirmation here on the Senate floor.

Judge Sotomayor's remarkable education and professional qualifications, her commitment to public service, her uncontroversial 17-year record on the Federal bench—longer than any nominee in 100 years—her responsiveness and patient judicial temperament at the hearing, all confirm to me her pledge that she will respect the role of Congress as representatives of the American people; that she will decide cases based on the law and the facts before her; that she will not prejudice any case but listen to every party that comes before her; and that she will respect precedent and limit herself to the issues that the Court must decide; in short, that she will use the broad discretion of a Supreme Court Justice wisely.



I applaud those of my colleagues who have acknowledged that Judge Sotomayor falls well within the mainstream of the American legal profession. At the same time, it is disappointing that so few Republican colleagues have been willing to recognize her clear qualifications for our highest Court. The nearly unanimous party-line opposition offered by Republicans in committee and here on the floor raises serious concerns whether some of my colleagues would ever be willing to vote for anyone outside of the Federalist Society. To my Republican colleagues in opposition, I ask: What Democratic nominee would you vote for, if not Judge Sotomayor, with her vast experience, her commitment to the rule of law, proven indisputably over 17 years, her remarkable credentials, and her extraordinary moving American life story?

Unfortunately, Judge Sotomayor seems to be walking proof that conservative political orthodoxy is now their confirmation test, masked as concerns about judicial activism. Many of my Republican colleagues unfairly ignore her long record to base criticisms on strained interpretations of a few routine and appropriate circuit court opinions and a few remarks taken out of context. Those criticisms feel, quite frankly, like the criticisms of someone who is determined to find fault with a nominee.

Take, for example, the New Haven firefighters case. The *per curiam* opinion in *Ricci* was based on controlling second circuit and Supreme Court precedent. The sixth circuit took the same approach in a similar case arising in Memphis. The role of a circuit court is to follow existing precedence of the Supreme Court and the circuit court. That is what the *Ricci per curiam* did. The Supreme Court may have reversed, but it did so 5 to 4 on the basis of an entirely new test it created. It is absurd to call Judge Sotomayor an activist for following existing precedent. If you want a judicially conservative opinion, the *Ricci per curiam* is just that.

The decision in *Maloney* was also properly conservative in a judicial sense. It approaches with caution a newly minted and narrowly enacted constitutional right whose extension to the States would upset generations of practice and experience by sovereign States regulating guns within their borders. A seventh circuit panel, with two very prominent conservative judges on it, correctly did exactly the same thing. A ninth circuit panel reached a different conclusion, and then that decision was vacated by the circuit to reconsider that case *en banc*.

Rather than engaging in a serious inquiry of Judge Sotomayor's fitness for the Supreme Court, many of my colleagues have made this nomination into a referendum on whether the newly minted right to bear arms should be incorporated against the States for the first time in our Na-

tion's history. This is doubly unfair. First, Judge Sotomayor could not answer questions at her hearing that would suggest how she would rule in later cases. That is inappropriate. Second, it is inappropriate to try to force on a judge a particular political view as the price of admission to her judicial office.

Criticisms of a few stray lines in Judge Sotomayor's various speeches are equally perplexing. Judge Sotomayor's long and noncontroversial 17-year judicial record should allay any concerns about those remarks, but so should the context of those speeches themselves. The "wise Latina" comment we have heard so much about came in a speech that argued how important it is for judges to guard against bias and to be aware of their own prejudices. Is it not better and truer to admit that we all have prejudices we must manage than to pretend that White males form some sort of ideal cultural baseline that has no biases?

Senator SPECTER said it well at the committee vote. "There is nothing wrong with a little ethnic pride and a desire to encourage her law student audience." Maybe we should try to put ourselves in their shoes. Perhaps, with a little empathy ourselves, it might be easier to understand how a profession and a judiciary dominated by White males might look to those young law students, and how important a little encouragement to them might be that their experiences might give them something valuable to contribute; that they are not the exception; that they are welcome and fully a part of our society, and that they bring something valuable not only to the profession but, one day, perhaps, even to the judiciary.

In sum, my Republican colleagues' criticisms of Judge Sotomayor appear to be grounded in conservative political ideology rather than legitimate concern that Judge Sotomayor is not fit to serve on the Supreme Court, grounded in a desire for more of the rightwing Justices who in recent years have filled out a conservative wing on the Supreme Court. That wing has marched the Court deliberately to the right in the last few years, completely discrediting the Republican claim that judges are mere "umpires."

Jeffrey Toobin is a well-respected legal commentator, particularly focusing on the Supreme Court. He has recently reported:

In every major case since he became the Nation's 17th Chief Justice, Roberts has sided with the prosecution over the defendant, the State over the condemned, the executive branch over the legislative, and the corporate defendant over the individual plaintiff. And is it a coincidence that this pattern has served the interests and reflected the values of the contemporary Republican Party?

Some coincidence. Some umpire.

The phrase "liberal judicial activism" is now conservative speak for any outcome the far right dislikes. They did not use it when the conservative

block of the Court announced, by the barest of a 5-to-4 margin, an individual right to bear arms that had gone unnoticed by the Supreme Court for the first 220 years of its history. If that is not an activist decision, the term has no meaning. It is just activism that conforms with a deliberate Republican strategy of many years duration to pack onto America's courts proven conservative judges who will deliver the political goods they seek.

Setting aside all this politics, we should also never forget, never overlook the historic role that judges play in protecting the less powerful among us. We should always appreciate how a real-world understanding of the real-life impact of judicial decisions is a proper and necessary part of the process of judging.

Judge Sotomayor's wide experience, I hope, will bring her a sense of the difficult circumstances faced by the less powerful among us—the woman on the phone, shunted around the bank from voice mail to voice mail for hours as she tries to find someone to help her avoid foreclosure for her home; the family struggling to get by in the neighborhood where the police only come with raid jackets on; the couple up late at night at the kitchen table after the kids are in bed sweating out how to make ends meet that month; or the man who believes a little differently or looks a little different or thinks things should be different. If Justice Sotomayor's wide experience gives her empathy for those people so that she gives them a full and fair hearing and seeks to understand the real-world impact of her decisions on them, she will be doing nothing wrong—nothing wrong by the measure of history, nothing wrong by the measure of justice.

Experience, judgment, wise use of discretion, and a willingness to stand against oppression have always been the historic hallmarks of a great judge.

As to experience, Justice Oliver Wendell Holmes famously explained:

The life of the law has not been logic; it has been experience. The felt necessities of the time the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.

As to judgment, Justice John Paul Stevens has observed:

[T]he work of federal judges from the days of John Marshall to the present, like the work of the English common-law judges, sometimes requires the exercise of judgment—a faculty that inevitably calls into play notions of justice, fairness, and concern about the future impact of a decision.

As to discretion, Justice Benjamin Cardozo wrote:

The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at

will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains.

And, as Alexander Hamilton explained in the *Federalist Papers*, courts were designed to be our guardians against "those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people . . . and which . . . have a tendency . . . to occasion . . . serious oppressions of the minor party in the community." Those oppressions tend to fall on the poor and voiceless. But as Hamilton noted, "[c]onsiderate men, of every description ought to prize whatever will tend to beget or fortify that temper in the courts: as no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer to-day." We should not discard the wisdom of centuries.

Experience, judgment, discretion, and protection from oppression—the standard for judges of Hamilton, Holmes, Cardozo, and Stevens. History stands with them. And thoughtful people will note that empathy is a common thread through each of these characteristics.

Why might empathy matter? When might it make a difference? Take, for example, the history of the Colfax massacre.

Go back to Sunday, April 13, 1873 when a gang of White men murdered more than 60 Black freedmen in Colfax, LA. Some were burned in a courthouse where they had taken refuge; others were shot as they fled the burning courthouse; others were taken prisoner and then executed. U.S. Attorney James Roswell Beckwith determined to prosecute white citizens involved in the Colfax Massacre—not a popular call in those days. The case was tried before a U.S. District Judge William B. Woods, who determined that rule of law should prevail in his district. Predictably, polite White society was outraged. It took notable human empathy in that place and time to see the massacre of the Black freedmen as a crime, and to contemplate trying White men for the murder of Black men. The case was brought as one of the first applications of the Federal Enforcement Act, implementing the Constitution's new 14th amendment, so there was wide room for judicial discretion in that uncharted area of law—no "balls and strikes" here. District Judge Woods assured a fair trial, but he also was prepared to honor Congress's desire that outrages upon the Black community should be punished as crime. He had sufficient empathy with the widows and children of the slain freedmen to

take seriously their need for vindication, and he had sufficient courage to face the scorn and anger of the White community.

Another judge was involved, U.S. Supreme Court Justice Joseph P. Bradley, who under the procedural rules of the time "rode circuit" for Louisiana, and could sit in on trials. And sit in he did. He had no sympathy for the former slaves, and little regard for Congress's intent to punish the abuse of freedmen. Disagreeing from the trial court bench with Judge Woods, Justice Bradley found repeated technical faults with the indictments, took a restricted view of the authorities of the 14th amendment, dismissed the charges, and released the defendants to flee, on low bail, pending an appeal.

The U.S. Supreme Court upheld its colleague Bradley's opinions, thereby gutting the 14th amendment and the Enforcement Act for a generation, and a wave of murder and violence by Klansmen and White League members, emboldened by de facto immunity from prosecution, swept the South. Reconstruction was vitiated in those weeks. Justice, for the murder of a Black man by a White, departed the South for nearly a century.

History and the law ultimately proved district Judge Woods correct, but how much turned on the character of two judges: one who had the empathy to see Black men as victims of crime, and the courage to outrage White opinion by allowing the trial of White community leaders, before a mixed jury no less; the other a judge who valued the status quo, and recoiled from any shock to proper White opinion and authority; indeed, who was the reflection of that proper opinion.

That is what we mean by empathy, and while the divisions in our society are less today, there are still people who feel voiceless, whose voices a judge must be attuned to hear; there are still Americans who come to court bearing disadvantages that have nothing to do with the merits of their case. Empathy to look through those disadvantages to see the real merits of the case, even when it is unpopular or offends the power structure is the hallmark of a great judge. The words of Hamilton, Holmes, Stevens, and Cardozo I have quoted display it as history; the contrasting approaches of the two judges after the Colfax massacre display it as justice.

My Republican colleagues' misunderstanding of judicial history has led to a missed opportunity for bipartisan support of a highly qualified and moderate judge who falls well within the mainstream of American legal thought. We could be celebrating the first Latina justice of the Supreme Court as a great American achievement. Instead we are having to defend basic principles of American history from assault from the right. I hope that, as the future looks back on this day, it will be the

historic nature of this nomination that will be remembered, not the strange and strained efforts to impose right-wing political orthodoxy on the courts that defend our constitutional rights.

I look forward to Judge Sotomayor's service as an excellent Supreme Court Justice. I will vote proudly for her confirmation.

Mr. President, I ask unanimous consent to have printed in the *RECORD* a letter of support of Justice Sotomayor from New York City's mayor, Michael Bloomberg.

I also ask to have printed in the *RECORD* a letter of support for Judge Sotomayor from former FBI Director Louis Freeh.

I yield the floor.

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

THE CITY OF NEW YORK,  
OFFICE OF THE MAYOR,  
New York, NY, July 7, 2009.

Hon. PATRICK J. LEAHY,  
Chairman, Judiciary Committee, U.S. Senate  
Washington, DC.

Hon. JEFF SESSIONS,  
Ranking Member, Judiciary Committee,  
U.S. Senate,  
Washington, DC.

DEAR CHAIRMAN LEAHY AND SENATOR SESSIONS: As Mayor of the largest city in the country and the place where Judge Sonia Sotomayor has spent her career, I strongly support President Barack Obama's nomination of Judge Sotomayor to serve as an Associate Justice of the United States Supreme Court.

One of my responsibilities as Mayor is to appoint judges to New York's Family and Criminal Courts, which gives me the opportunity to assess the qualifications of many judicial candidates. Over the past seven and half years, I have interviewed candidates for more than 40 judicial seats and have, like you, developed a strong sense of the qualities that will strengthen our justice system. Based on this experience, I have great confidence that Judge Sotomayor's rulings demonstrate her knowledge of the law, objectivity, fairness, and impartiality, which are essential qualities for any judge. Just as important, she possesses the character, temperament, intelligence, integrity, and independence to serve on the nation's highest court, and her well-respected record of interpreting the law and applying it to today's world is perhaps the best indication of her exceptional ability as a judge.

Judge Sotomayor's impressive 30-year career has given her experience in nearly all areas of the law. As an Assistant District Attorney in Manhattan, she earned a reputation as an effective prosecutor. As a Judge in the Southern District of New York, she established a record that amply supported her appointment to the Second Circuit And in her current role as a Judge in the U.S. Court of Appeals for the Second Circuit, she is admired for her knowledge and understanding of legal doctrine, having taken part in over 3,000 panel decisions and authored close to 400 opinions. In each role, she has served the public with integrity and diligence.

Judge Sonia Sotomayor is an outstanding choice for the United States Supreme Court, and I stand firmly behind her candidacy.

Sincerely,

MICHAEL R. BLOOMBERG,  
Mayor.

FREEH SPORKIN & SULLIVAN, LLP,  
July 9, 2009.

Hon. PATRICK LEAHY,  
Chairman, U.S. Senate Judiciary Committee,  
Washington, DC.

Hon. JEFF SESSIONS,  
Ranking Member, U.S. Senate Judiciary Com-  
mittee, Washington, DC.

DEAR SENATORS: 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 experience and the judicial qualities 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.

I first met Judge Sotomayor in 1992 when she was appointed to the United States District Court for the Southern District of New York. As the then newest judge in the storied Courthouse at Foley Square in lower Manhattan, we followed the tradition of having the newly-minted judge mentored by the last-arriving member of the bench. Despite the questionable wisdom of this practice, I had the privilege of serving as Judge Sotomayor's point of contact for orientation and to help her get underway as she took on a full, complex civil and criminal case docket.

A few weeks of "New Judges School" sponsored by the Administrative Office of the Courts does not in any meaningful way begin to prepare a new District Judge for the unrelenting rigor of conferences, motions, hearings, applications, trials and other miscellaneous duties—including appeals from the Bankruptcy Court—which instantly construct what often appears to be an overwhelming schedule for a new judge. To make matters more challenging, when I was a new judge the Court followed the tradition of allowing the active judges to select a fixed number of their pending cases for reassignment to the new arrival.

Into this very pressurized and unforgiving environment, where a new judge's every word, decision, writing and question is scrutinized and critiqued by one of the harshest, professional audiences imaginable, Judge Sotomayor quickly distinguished herself as a highly competent judge who was open-minded, well-prepared, properly demanding of the lawyers who came before her, fair, honest, diligent in following the law, and with that rare and invaluable combination of legal intellect and "street smarts."

As I spent a lot of time reading her opinions, observing her in the courtroom conducting the busy, daily docket of a trial judge, and discussing her cases and complex legal issues, I was greatly impressed with how quickly she mastered and employed the critical skills of her new position.

To me, there is no better measure by which to evaluate a judge than the standards of the former Chief Judge of the U.S. District Court of Minnesota and nationally renowned American jurist, Edward J. Devitt. A former Member of Congress and World War II Navy hero, Judge Devitt was appointed to the federal bench by President Eisenhower and became one of the country's leading trial judges and teacher of judges. A standard Jury Instruction textbook (Devitt and Blackmun) as well as the profession's most coveted award recognizing outstanding judges, the Devitt Award, bears his name.

I recently had the honor of participating in the dedication of a courtroom named for Judge Devitt. The judges and lawyers who spoke in tribute to Judge Devitt very ably and insightfully described the critical characteristics which define and predict great judges. But rather than discuss Judge Devitt's many decisions, particular rulings

or the "sound bite" analyses which could have been parsed from the thousands of complex and fact specific cases which crossed his docket, they focused on those ultimately more profound and priceless judicial qualities which ensure that Article Three judges with lifetime tenure uphold the Rule of Law with fairness, courage and justice for all.

Teaching hundreds of new American judges over several decades, Judge Devitt liked to use a "nutshell version" for emphasis and because he always got right to the heart of things. So he offered three rules:

1. "Judging takes more than mere intelligence;

2. Always take the bench prepared. Listen well to all sides, stay open as you are listening and recognize any pre-conceptions that you may bring to the matter. Then, make a decision and never look back;

3. Call them as you see them."

Sonia Sotomayor would have gotten an "A plus" from the "Judge from Central Casting," as Judge Devitt was often called by his peers.

A great part of Judge Devitt's legacy is his famous "Ten Commandments to Guide the New Federal Judge," which he gave me, and which I passed on to Judge Sotomayor:

1. "Be Kind;
2. Be Patient;
3. Be Dignified;
4. Don't Take Yourself Too Seriously;
5. Remember That a Lazy Judge Is a Poor One;
6. Don't Be Dismayed When Reversed;
7. Remember There Are No Unimportant Cases;
8. Don't Impose Long Sentences;
9. Don't Forget Your Common Sense; and
10. Pray For Divine Guidance."

In my brief role as Judge Sotomayor's "second seat" on the Southern District trial bench, I probably spent more time with her in those first months than any other member of our great Court. And I was delighted to observe and conclude that she exhibited all the desired characteristics that Judge Devitt prescribed for his "students."

Since 1992 I have followed Judge Sotomayor's career on the bench both as a trial judge and later as a member of our Second Circuit Court of Appeals. Along with my former colleague judges and lawyers, we have seen her grow and mature into a truly outstanding judge, who embodies all of Judge Devitt's wise counsel and the most prized characteristics of judicial courage, integrity, intelligence and fair adjudication of the Rule of Law.

Judge Sotomayor's early demonstration of judicial restraint, appropriate deference to the other two Branches of government and her fidelity to upholding the rule of law can perhaps best be seen in a 1998 case. Sitting as a District Judge, she carefully heard a minimum wage lawsuit and, in recognition of the limits of judicial power, she relied on the statutory text and precedent to reach her decision: "The question of whether such a program should be exempted from the minimum wage laws is a policy decision either Congress or the Executive Branch should make."

Judge Sotomayor will bring great legal as well as judicial experience to the Supreme Court and will serve there with distinction in the fine tradition of Judge Devitt. As the only "trial judge" on the current Court, she will import an immense wealth of experience which comes uniquely from judges who preside over cases with witnesses, juries, real time procedural and evidence rulings and the challenging (and unpredictable) dynamics of a trial courtroom. It will also be a very valuable asset for the Court to have a former criminal prosecutor (it has only one now) who was widely respected by judges, defense attorneys and law enforcement officers.

Most importantly, Judge Sotomayor will continue to exemplify the "Devitt Rules" we want all our judges to follow, and the courage, integrity and experience required to protect the Rule of Law. The efforts by some to discredit the Judge are far afield from the eminent jurist whom I know, and I hope that no Senator will be misled or motivated by partisan rancor to vote against someone who so fully fits the measure of what we should want in a Supreme Court justice. I hope you will consider her nomination expeditiously so she is confirmed and prepared to participate in the Court's first session on September 9, 2009.

Sincerely,

LOUIS J. FREEH.

The PRESIDING OFFICER. The Senator from Utah is recognized.

Mr. HATCH. Mr. President, I enjoyed my colleague's remarks. I don't agree with him, but he is certainly a great colleague and we appreciate him.

Mr. President, I rise today to explain why I cannot support the nomination of Judge Sonia Sotomayor to be an Associate Justice of the Supreme Court. I do so with regret because the prospect of a woman of Puerto Rican heritage serving on the Supreme Court says a lot about America. Judge Sotomayor has achieved academic and professional success, and I applaud her public service. But in the end, her record creates too many conflicts with fundamental principles about the judiciary in which I deeply believe.

It did not have to be this way. President Obama could have taken a very positive step for our country by choosing a Hispanic nominee whom all Senators could support. President Obama could have done so and I regret that he did not.

I commend the distinguished chairman and ranking member of the Judiciary Committee, Senators LEAHY and SESSIONS, for conducting a fair and thorough confirmation hearing. Judge Sotomayor herself said that the hearing was as gracious and fair as she could have asked for.

I evaluate judicial nominees by focusing on qualifications, which include not only legal experience but, more importantly, judicial philosophy. Judge Sotomayor's approach to judging is more important to me than her resume. I ask unanimous consent to have printed in the RECORD following my remarks an article that I published earlier this year in the Harvard Journal of Law & Public Policy. It is titled "The Constitution as the Playbook for Judicial Selection" and explains more fully the principles I will mention here.

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

(See Exhibit 1)

Mr. HATCH. President Obama has described the kind of judge he intends to appoint. As a Senator, he said that judges decide cases based on their "deepest values . . . core concerns . . . broader perspectives . . . and the depth and breadth of [their] empathy." As a presidential candidate, he pledged to

appoint judges who indeed have empathy for certain groups. And as President, he has said that a judge's personal empathy is an essential ingredient in judicial decisions.

This standard is seriously out of sync with mainstream America. By more than 3 to 1 Americans believe that judges should decide cases based on the law as written, rather than on their own sense of fairness or justice. The American people reject President Obama's standard for the kind of judge we need on the Federal bench.

At the Judiciary Committee hearing, Judge Sotomayor said that her judicial philosophy is simply fidelity to the law. While some of my Democratic committee colleagues said that they wanted to avoid slogans, codewords, and euphemistic phrases, they apparently accepted this one at face value. Unfortunately, it begs rather than answers the important questions.

Some Senators on the other side of the aisle try to confine concerns about Judge Sotomayor's record to a single case and a single phrase. That political spin, I will admit, makes for a quotable sound-bite. But even a casual observer of this process knows that this political spin is simply not true.

Ironically, those who would narrowly characterize the case against confirmation want us to confine our examination of Judge Sotomayor's record only to her cases while ignoring her speeches and articles. A partial review, however, cannot provide a complete picture. Appeals court decisions that are bound by Supreme Court precedent are not the same as Supreme Court decisions freed from such constraints. Taking Judge Sotomayor's entire record seriously not only gives us more of the information we need, but also gives her the respect she deserves.

Debates over judicial nominations are debates over judicial power, and America's founders gave us solid guidance about the proper role of judges in our system of government. Judges interpret and apply written law to decide cases. While judges cannot change the words of our laws, they can still control statutes and the Constitution by controlling the meaning of those words. That would result in the rule of judges, not the rule of law. To borrow Judge Sotomayor's phrase, judges would not have fidelity to the law, but fidelity to themselves.

In September 2001, Judge Sotomayor introduced Justice Antonin Scalia when he spoke at Hofstra Law School. She repeated a legend about Justice Oliver Wendell Holmes and Judge Learned Hand. Like Judge Sotomayor, Judge Hand served on both the Southern District of New York and the Second Circuit. As they departed after having lunch, Judge Hand called out: Do justice, sir, do justice. Justice Holmes replied: That is not my job, my job is to apply the law.

Is it a judge's role to do justice or to apply the law? President Obama says that a judge's personal empathy is an

essential ingredient for doing justice. At the hearing on Judge Sotomayor's nomination, one of my Democratic colleagues invoked what he called "America's common law inheritance" to describe Federal judges with broad discretion to decide cases based on their personal notions of justice or fairness.

That may be the judiciary some of my colleagues would prefer, but it is not the judiciary America's Founders gave us. Federal judges are not common-law judges. They may not decide cases based on subjective feelings they find inside themselves, but only on objective law they find outside themselves. Thankfully, the American people overwhelmingly say today what America's Founders said, that judges must follow the law rather than their personal empathy to decide cases.

The question is which kind of Supreme Court Justice Sonia Sotomayor will be. In one speech that she gave several times over nearly a decade while she was on the bench, she spoke directly about how judges should approach deciding cases. In this speech, she said that factors such as race and gender affect how judges decide cases and, as she put it, "the facts I choose to see." She embraced the notion that there is no objectivity or neutrality in judging, and that impartiality is merely an aspiration which judges probably cannot achieve, and perhaps should not even attempt. She said that judges must decide when their personal sympathies and prejudices are appropriate in deciding cases.

Judge Sotomayor and her advocates have tried unsuccessfully to blunt this speech's more controversial edges. Their claim that she used the speech solely to inspire young lawyers or law students, even if true, is irrelevant because the speech is controversial for its content, not its audience.

My concern only grew after discussing this speech with Judge Sotomayor during the hearing. Rather than adequately defend or disavow these views, she presented a different, and contradictory, picture. I am not the only one who noticed. The Washington Post editorialized that Judge Sotomayor's attempts to explain away or distance herself from past statements "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."

In another speech just a few months ago, Judge Sotomayor addressed whether judges may use foreign law to interpret and apply American law in deciding cases. The distinguished ranking member of the committee mentioned this as well. She said that foreign law "will be very important in the discussion of how we think about the unsettled issues in our own legal system." She endorsed the idea that

judges may, as they interpret American law, consider anything, from any source, that they find persuasive.

Once again, Senators discussed this issue with Judge Sotomayor at her hearing. And once again, she neither defended nor disavowed these controversial statements but presented a different, contradictory picture. In her speech, she hoped that judges would continue to consult what others have said, including foreign law, to "interpret our law in the best way we can." But in the hearing, she said that "I will not use foreign law, to interpret the Constitution or American statutes." In her speech, she said that judges may use ideas from any source that they find persuasive. But in the hearing, she said that foreign law cannot be used to influence a legal decision. These different versions are clearly at odds with each other.

Judge Sotomayor took a different tack in answering post-hearing questions. She said that decisions of foreign courts may not serve as "binding or controlling precedent" in deciding cases. The issue, however, is not whether a decision by the Supreme Court of France literally binds the Supreme Court of the United States. Of course it does not. The issue is whether that foreign decision may influence our Supreme Court in determining what our statutes and the Constitution mean. And in her answers to post-hearing questions, Judge Sotomayor once again said that decisions of foreign courts can indeed be "a source of ideas informing our understanding of our own constitutional rights."

In these speeches, Judge Sotomayor described how such things as race, gender, life experience, personal sympathies, or prejudices affect judges and their decisions. That is certainly possible. But I waited for her to say that judges have an obligation to eliminate the influence of these factors. I wanted her to say that because these things undermine a judge's impartiality, judges must be vigilant to prevent their influence. That would have given me more solace about what Judge Sotomayor's phrase, fidelity to the law, really means. But she never said it. Instead, she endorsed the notion that judges may look either inside themselves to their empathy, or outside to foreign law, for ideas and notions to guide their decisions.

Turning to her cases, the Supreme Court has disagreed with Judge Sotomayor in nine of the ten cases it has reviewed, three of them in the most recent Supreme Court term alone. That is nine of her ten cases they reviewed. And these were not close decisions, either. The total vote in the cases reversing Judge Sotomayor was a lopsided 52-19.

In one case, Judge Sotomayor had held that the Environmental Protection Agency could not consider cost-benefit analysis when adopting a regulation. The Supreme Court reversed

her, citing its own precedents extending back more than 30 years and holding that the EPA's use of cost-benefit analysis was well within the bounds of its statutory authority.

In another case, Judge Sotomayor had reopened part of a bankruptcy proceeding that had closed more than 20 years ago to resurrect a tort suit. Justice Souter, whom Judge Sotomayor would replace, wrote the opinion for the Supreme Court's 7-2 decision reversing her.

In another case, Judge Sotomayor declared unconstitutional a State law providing for political party election of judges because she felt the law did not give people what she called a "fair shot." The Supreme Court unanimously reversed her, saying that traditional electoral practice "gives no hint of even the existence, much less the content," of the fair-shot standard Judge Sotomayor had invented.

In one case, the Supreme Court affirmed Judge Sotomayor's result but rejected her reasoning because her reading of the relevant statute "flies in the face of the statutory language."

And in the one case where the Supreme Court affirmed both Judge Sotomayor's result and reasoning, it did so by the slimmest 5-4 margin. This is a very shaky record on appeal.

The *Ricci v. DeStefano* case, which has been mentioned quite a lot around here, is one of the cases in which the Supreme Court reversed Judge Sotomayor. The Court reversed her result by a 5-4 vote but unanimously rejected her reasoning. In this case, Judge Sotomayor affirmed the city of New Haven's decision to throw out the results of a fairly designed and administered firefighter promotion exam because too few racial minorities passed it.

This case presents troubling questions of both process and substance. Judge Sotomayor initially used a summary order that did not have to be circulated to the full Second Circuit. That bothered me a great deal, because judges know when they issue a summary order, the rest of the judges are not going to see it. She then converted it to a per curiam opinion that is permissible only when the law is entirely settled. The summary order and the per curiam opinion were each a mere single paragraph and neither appears to be an appropriate vehicle for deciding this challenging case.

On the merits, Title VII of the 1964 Civil Rights Act prohibits two kinds of discrimination. It prohibits disparate treatment, which is intentional, and disparate impact, which may be unintentional. Disparate treatment focuses on the motivation of an employment decision, while disparate impact focuses on its effect. While discrimination cases typically involve one or the other, the *Ricci* case involved both. In this case, the city claimed it had to engage in disparate treatment of those who passed the promotion exam because it feared a disparate impact lawsuit by those who failed the exam.

I point out that this case involved both disparate treatment and disparate impact because Judge Sotomayor and her advocates claim that her decision was based squarely on settled and longstanding Second Circuit and Supreme Court precedent. We have heard some of that here on the floor tonight. Contrary to her statement to me at the hearing, however, her one-paragraph opinion cited no precedent at all. The only case she cited was the district court opinion in that very case. But the district court actually acknowledged that this case was the opposite of the norm. Rather than those failing an employment test challenging the use of the results, in this case those who passed the test challenged the refusal to use the results. None of the precedents cited by the district court involved this kind of case.

For this reason, six of Judge Sotomayor's Second Circuit colleagues believed that the full circuit should have reviewed her decision, arguing that the case raised important questions of first impression in the Second Circuit and the entire Nation. When it reversed Judge Sotomayor, the Supreme Court similarly observed that there were few, if any, precedents in any court even discussing the issue in this case.

In a column published today in *National Journal*, the respected legal analyst Stuart Taylor carefully analyzed whether Judge Sotomayor's decision in *Ricci* was indeed compelled by precedent. We have all read Stuart Taylor over the years. He is one of the most prescient commentators and journalists with regard to the law. He concludes: "The bottom line is that Circuit precedents did not make Sotomayor rule as she did. Supreme Court precedent favored the firefighters. Sotomayor's ruling was her own." I ask unanimous consent that Mr. Taylor's column appear in the RECORD following my remarks.

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

(See Exhibit 2.)

Mr. HATCH. In addition to claiming that her decision in *Ricci* was grounded in either Second Circuit or Supreme Court precedent, Judge Sotomayor offered at the hearing that the Sixth Circuit had addressed a similar issue in the same way. I can only assume she did so to imply that if the Sixth Circuit independently came to the same conclusion in a parallel case, then it would be difficult to say that Judge Sotomayor's decision in *Ricci* is controversial.

I would first note that in *Oakley v. City of Memphis*, the Sixth Circuit actually analyzed the case, applied the law to the facts, and issued a real opinion. I wish Judge Sotomayor had done that in her case. But more importantly, Judge Sotomayor failed to mention that the Sixth Circuit case was issued 3 months after hers and, in fact, relied upon her decision as persuasive authority. That is no evidence

that her decision was procedurally or substantively sound.

Neither are her decisions on the Second Amendment right to keep and bear arms. Last year, in *District of Columbia v. Heller*, the Supreme Court clearly identified the proper analysis for deciding whether the Second Amendment binds States as well as the Federal Government. Several months later, Judge Sotomayor ignored that directive and clung to her previous insistence, following a different analysis the Supreme Court had discarded, that the right to bear arms does not apply to the States. She also held that the right to bear arms is so insignificant that virtually any conceivable reason is sufficient to justify a weapons restriction.

When I asked her about these decisions at the hearing, she refused to acknowledge that the Supreme Court's so-called rational basis test is its most permissive legal standard. Yet this is practically a self-evident truth in the law, one that Judge Sotomayor herself cited and applied just last fall to uphold a weapons restriction in *Maloney v. Cuomo*.

She likewise gave short shrift to the fundamental right to private property. In *Didden v. Village of Port Chester*, Judge Sotomayor affirmed dismissal of a property owner's lawsuit after the village condemned his property and gave it to a developer. The Supreme Court, incorrectly in my view, had previously held in *Kelo v. City of New London* that economic development can constitute the public use for which the Fifth Amendment allows the taking of private property. In *Didden*, however, the village had only announced a general plan for economic development. No taking of anyone's property had occurred. Mr. Didden sued only after the village actually took his property.

In yet another cursory opinion that for some reason took more than a year to produce, Judge Sotomayor denied Mr. Didden even a chance to argue his case. She said that the 3-year period for filing suit began not when the village actually took his property, but when the village earlier had merely announced its general development plan. In other words, Mr. Didden should have sued over the taking of his property before his property had been taken. But had he done so then, he would certainly have been denied his day in court because his legal rights had not yet been violated. This catch-22 amounts to a case of dismissed if he did, and dismissed if he did not. Once again, Judge Sotomayor gave inadequate protection to a fundamental constitutional right.

In another effort to blunt the impact of such controversial decisions, Judge Sotomayor's supporters attempt to portray her as moderate by observing that on the Second Circuit, she agreed with Republican-appointed colleagues 95 percent of the time. On the one hand, this is one of several misguided attempts to defend her by suggesting that a calculator is all it takes properly to evaluate a judicial record. On



the other hand, however, this claim comes from the same Democratic Senators who voted against Justice Samuel Alito just a few years ago. On the Third Circuit, he had agreed with his Democratic-appointed colleagues 99 percent of the time over a much longer tenure. It shows how specious some of the arguments are.

Let me return to where I began. I believe that Judge Sotomayor is a good person. I respect her achievements and applaud her service to her community, the judiciary, and the country. While appointment of the first Puerto Rican Justice says a lot about America, however, I believe that appointing a Justice with her judicial philosophy says the wrong thing about the power and role of judges in our system of government.

A nominee's approach to judging is more important than her resume, especially on the Supreme Court where Justices operate with the fewest constraints. Judge Sotomayor has expressed particular admiration for Justice Benjamin Cardozo. His book on the judicial process contains a chapter titled "The Judge as a Legislator" in which he compares judges to legislators who decide difficult cases on the basis of personal reflections and life considerations. That sounds very much like President Obama's appointment standard and Judge Sotomayor's expressed judicial philosophy. I believe it is inconsistent with the limited role that America's founders prescribed for judges in our system of government.

My colleagues know that I take a generous approach to the confirmation process and I believe some deference to the President of the United States and his choice is appropriate. I have rarely voted against any judicial nominee and took very seriously the question of whether to do so now. To that end, I studied her speeches, articles, and cases. I spoke with experts and advocates from different perspectives. I participated in all three question rounds during the Judiciary Committee hearing.

But in the end, neither general deference to the President nor a specific desire to support a Hispanic nominee could overcome the serious conflicts between Judge Sotomayor's record and the principles about the judiciary and liberty in which I deeply believe.

I was the one who started the Republican Senatorial Hispanic Task Force and ran it for many years, bringing Democrats, Independents, and Republicans together in the best interest of the Hispanic community to try to give them more of a voice. I feel pretty deeply about Hispanic people, as I do all people.

I just want everybody to know that this took a lot of consideration on my part to come to the conclusion I have. I wish President Obama had taken a different course, but this is the decision I have to make in this case. As I say, I like Judge Sotomayor. I particularly like her life story and her won-

derful family. I did not want to vote against her but I think I have explained here some of the serious concerns I have.

#### EXHIBIT 1

##### THE CONSTITUTION AS THE PLAYBOOK FOR JUDICIAL SELECTION

Orrin G. Hatch\*

The Federalist Society plays an indispensable role in educating our fellow citizens about the principles of liberty, a task that is both critical and challenging. It is critical because, as James Madison put it, "a well-structured people alone can be permanently a free people."<sup>1</sup> The ordered liberty we enjoy is neither self-generating nor self-sustaining, but is based on certain principles that require certain conditions. Knowledge and defense of those principles and conditions will be the difference between keeping and losing our liberty.

This educational challenge, however, has perhaps never been more daunting. We live in a culture in which words mean anything to anyone, celebrities substitute for statesmen, and people are no longer well instructed. Forty-two percent of Americans do not know the number of branches in the federal government, and more than sixty percent cannot name all three.<sup>2</sup> Four times as many Americans say that a detailed knowledge of the Constitution is absolutely necessary as say they actually have such knowledge.<sup>3</sup> Twenty-one percent of Americans believe the First Amendment protects the right to own a pet.<sup>4</sup>

A few factors contribute to this state of affairs. Most people get their information about the legal system only from television. Unless people sue each other or commit crimes—habits we really should not encourage—they will likely have no firsthand knowledge or experience to draw from. Furthermore, people hold lawyers in low esteem. If you plug the term "lawyer joke" into Yahoo, it returns a whopping 25.7 million hits, a number on the rise almost as fast as the national debt. The problem with lawyer jokes is that most lawyers do not think they are funny and most other people do not think they are jokes. This low view of lawyers means people have little motivation to learn more about what lawyers and judges really do.

The media do not help this state of affairs. The Harvard Journal of Law & Public Policy recently published an excellent article by Michigan Supreme Court Justice Stephen Markman,<sup>5</sup> who served as my chief counsel when I chaired the Senate Judiciary Subcommittee on the Constitution in the early 1980s. He describes how the media's penchant for focusing on winners and losers significantly shapes and distorts how people understand what judges actually do, often for the worse.<sup>6</sup>

Nonetheless, the timing of this Essay is auspicious in several respects. First, I write in the wake of two very relevant Federalist Society student symposia, last year's about the people and the courts<sup>7</sup> and this year's about the separation of powers.<sup>8</sup> Second, President Obama has been particularly clear from the time he was a candidate about his intention to appoint judges who will exercise a strikingly political version of judicial power.<sup>9</sup> Third, he has already started acting on that intention by making his first judicial nominations.<sup>10</sup> New Presidents typically make their first judicial nominations in July or even August, yet the Senate Judiciary Committee has already held a hearing on the President's first nominee to the U.S. Court of Appeals, and the President sent two more nominees to the Senate just a few days ago.

Mark Twain popularized the notion that there are three kinds of lies: lies, damned

lies, and statistics.<sup>11</sup> I prefer Senator Daniel Patrick Moynihan's comment that you may be entitled to your own opinion, but not your own set of facts.<sup>12</sup> Either way, I will statistically describe two macro and two micro factors of the judicial confirmation process to show its recent transformation before turning to how it should be conducted going forward.

The two macro factors are hearings and confirmations. The Judiciary Committee held hearings for fewer judicial nominees during the 110th Congress than any Congress since before I entered the Senate. This lack of hearings is not the result of the Judiciary Committee's inability to multitask. Instead, it is the result of a political choice, one that has been reversed since the last election. The Judiciary Committee has already held a hearing on President Obama's first appeals court nominee, just two weeks after that nominee arrived in the Senate.<sup>13</sup> Under a Republican President, Judiciary Committee Chairman Patrick Leahy waited an average of 197 days to give an appeals court nominee a hearing.<sup>14</sup> The last election amounted to the political equivalent of Drano, as the confirmation pipes are now wonderfully unobstructed and flowing freely once again.

Some might assume that Republicans demonstrate such strong partisan preference, but they would be wrong. Since I was first elected, Democrats running the Senate have granted hearings to forty-one percent more Democratic than Republican judicial nominees. When Republicans run the Senate, the partisan differential is less than five percent.

Moving from the Judiciary Committee to the Senate floor, the second macro factor is confirmations. In the last eight years, President Bush had the slowest pace of judicial confirmations of any President since Gerald Ford. Last year, the Senate confirmed fewer judicial nominees than in any President's final year since 1968, the end of the Johnson Administration. By comparison, when I chaired the Judiciary Committee during President Clinton's last year in office, the Senate confirmed twice as many appeals court nominees as it did last year.

As with hearings, the picture is not the same when Republicans are in charge. When Democrats run the Senate, they confirm forty-five percent more Democratic than Republican judicial nominees. When Republicans run the Senate, the differential is only nine percent.

At the ground level, the two micro factors in the confirmation process are votes and filibusters. The Senate has traditionally confirmed most unopposed lower court nominees by unanimous consent rather than by time-consuming roll call votes. From 1950 to 2000 the Senate confirmed only 3.2 percent of all district and appeals court nominees by roll call vote. During the Bush presidency, that figure jumped to nearly sixty percent. The percentage of roll calls without a single negative vote nearly tripled. And under President Bush, for the first time in American history, the filibuster was used to defeat majority-supported judicial nominees.<sup>15</sup> With all due respect to Mark Twain, I think these numbers accurately give you at least a taste for the partisan division and conflict that now characterize the judicial confirmation process. It has become, to edit Thomas Hobbes just a bit, quite nasty and brutish.

Turning from what has been to what should be, I believe we can get on a better path by, as Madison emphasized in *The Federalist* No. 39, "recurring to principles."<sup>16</sup> The judicial selection process has changed because ideas about judicial power have changed. My basic thesis is this: Our written Constitution and its separation of powers define both judicial power and judicial selection. They define the judicial philosophy

that is a necessary qualification for judicial service, and they counsel that the Senate defer to the President when he nominates qualified individuals.

Consider a judicial nomination as a hiring process based on a job description. The job description of a judge is to interpret and apply law to decide cases. This job description does not mean whatever a President, political party, or Senate majority wants it to mean. Our written Constitution and its separation of powers set the judicial job description. Interpreting written law must be different than making written law. Because law written in statutes or the Constitution is not simply words, but really the meaning of the words, only those with authority to make law may determine what the words of our laws say and what those words mean. Judges do not have authority to make law, so they do not have authority to choose what the words of our laws say or what they mean. In other words, judges apply the law to decide cases, but they may not make the law they apply. Judges and the law they use to decide cases are two different things. Judging, therefore, is about a process that legitimates results, a process by which the law made by the people and those they elect determines winners and losers.

The Constitution and its separation of powers compel this judicial job description. This kind of judge is consistent with limited government and the ordered liberty it makes possible. Justice Markman's article describes what he calls a "traditional jurisprudence—one that views the responsibility of the courts to say what the law 'is' rather than what it 'ought' to be."<sup>17</sup> Such a philosophy of judicial restraint—an understanding of the limited power and role of judges—is a qualification for judicial service. This is the kind of judge a President should nominate.

Our written Constitution and its separation of powers also define how the confirmation stage of the judicial selection process should operate. The Constitution gives the power to nominate and appoint judges to the President, not to the Senate. The best way to understand the Senate's role is that the Senate advises the President whether to appoint his nominees by giving or withholding its consent. I explored this role in more detail in the *Utah Law Review* a few years ago in the context of showing that the use of the filibuster to defeat majority-supported judicial nominees is inconsistent with the separation of powers.<sup>18</sup> One basis on which the Senate may legitimately withhold its consent to a judicial nominee, however, is that the nominee is not qualified for judicial service. Qualifications include more than information on a nominee's resume. And with all due respect to the American Bar Association, their rating does not a qualification determine. Instead, qualifications for judicial service include whether a nominee's judicial philosophy—his understanding of a judge's power and role—is in sync with our written Constitution and its separation of powers.

Judges, after all, take an oath to support and defend the Constitution of the United States. To be qualified for judicial service, a nominee must believe there is such a thing, that the supreme law of the land is not simply in the eye of the judicial beholder, and that judges need something more than a legal education, a personal opinion, and an imagination to interpret it.

I propose looking to the basic principles of our written Constitution and its separation of powers to guide the judicial selection process. For the President, those principles require nominees with a restrained judicial philosophy. For the Senate, they require deference to a President's qualified nominees. Senators, of course, must decide how to balance qualifications and deference. Our writ-

ten Constitution and its separation of powers, however, provide normative guidance for the judicial selection process. Presidents and Senators will have to decide, and be accountable for, how they use or reject that guidance.

No matter how philosophically sound this proposal may be—and I believe it is philosophically rock solid—it may nevertheless be politically controversial. We have traveled a long way from Alexander Hamilton describing the judiciary as the weakest and least dangerous branch.<sup>19</sup> We have traveled a long way from the Supreme Court saying in 1795 that the Constitution is "certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the Legislature, and can be revoked or altered only by the authority that made it."<sup>20</sup> We have traveled a long way from the Senate Judiciary Committee saying in 1872 that giving the Constitution a meaning different from what the people provided when adopting it would be unconstitutional.<sup>21</sup>

For a long time now, we have instead labored under Chief Justice Charles Evans Hughes's notion that the Constitution is whatever judges say it is.<sup>22</sup> It has become fashionable to suppose that the only law judges may not make is law we do not like. Legal commentator Stuart Taylor correctly observes that "[l]ike a great, ever-spreading blob, judicial power has insinuated itself into every nook and cranny."<sup>23</sup> One of my predecessors as Senator from Utah who later served on the Supreme Court, George Sutherland, described the transformation in 1937 as it was literally under way. He warned that abandoning the separation of powers by ignoring the distinction between interpreting and amending the Constitution would convert "what was intended as inescapable and enduring mandates into mere moral reflections."<sup>24</sup> Less than two decades later, Justice Robert Jackson described what he saw as a widely held belief that the Supreme Court decides cases based on personal impressions rather than impersonal rules of law.<sup>25</sup>

Judicial power and judicial selection are inextricably linked. Sometimes the Senate can appear to produce a lot of activity but take very little action. To some, that means the Senate is the world's greatest deliberative body. To others, it means that it produces a lot of sound and fury signifying nothing. But I hope that the debate over President Obama's judicial nominees will really be a debate over the kind of judge our liberty requires. The debate should be about whether judges should decide cases by using enduring mandates and impersonal rules of law or by using their own moral reflections and personal impressions.

President Obama has already taken sides in this debate. When he was a Senator, he voted against the nomination of John Roberts to be Chief Justice, stating that judges decide cases based on their deepest values, their core concerns, and the content of their hearts.<sup>26</sup> On the campaign trail, he pledged that he would select judges according to their empathy for certain groups such as the poor, African Americans, gays, the disabled, or the elderly.<sup>27</sup> The real debate is about whether judges may decide cases based on empathy at all, not the groups for which they have empathy. It is about whether judges may make law at all, not about what law judges should make. Conservatives as well as liberals often evaluate judges and judicial decisions by their political results rather than by their judicial process. But a principle is just politics unless it applies across the board. Professor Steven Calabresi, one of the Federalist Society's founders, wrote last fall that "[n]othing less than the

very idea of liberty and the rule of law are at stake in this election."<sup>28</sup> He was right, and they remain at stake in the ongoing selection of federal judges.

Judges have no authority to change the law, regardless of whether they change it in a way I like. I am distinguishing here between judicial philosophy, which relates to process, and political ideology, which relates to results. Senators often reveal their view of judicial power when participating in judicial selection, proving once again that the two are inextricably linked. During the debate over Chief Justice Roberts's nomination, for example, one of my Democratic colleagues wanted to know whether the nominee would stand with families or with special interests. She said the American people were entitled to know how he would decide legal questions even before he had considered them.<sup>29</sup> Another Democratic Senator similarly said that the real question was whose side the nominee would be on when he decided important issues.<sup>30</sup> Would he be on the side of corporate or consumer interests, the side of polluters or Congress when it seeks to regulate them, or the side of labor or management?

In this activist view of judicial power, the desired ends defined by a judge's empathy justify whatever means he uses to decide cases. This activist view of judicial power is at odds with our written Constitution and its separation of powers and, therefore, with ordered liberty itself. The people are not free if they do not govern themselves. The people do not govern themselves if their Constitution does not limit government. The Constitution cannot limit government if judges define the Constitution.

Terry Eastland aptly described the result of judicial activism in a 2006 essay titled *The Good Judge*: "The people's text, whether made by majorities or, in the case of the Constitution, supermajorities, would be displaced by the judges' text. The justices became lawmakers."<sup>31</sup> This quotation highlights one of the many differences between God and federal judges. God, at least, does not think He is a federal judge. And it brings up the question of how many federal judges it takes to screw in a light bulb. Only one, because the judge simply holds the bulb as the entire world revolves around him.

There is perhaps some reason for optimism. One poll found last year that, no matter for whom they voted, nearly three-quarters of Americans said they wanted judges "who will interpret and apply the law as it is written and not take into account their own viewpoints and experiences."<sup>32</sup> This debate is indeed the one we should be having, whether judges have the power to make law. When judges apply law they have properly interpreted rather than improperly made, their rulings may have the effect of helping or hurting a particular cause, of advancing or inhibiting a particular agenda. They may, at least by the political science bean counters, be considered liberal or conservative. The point, therefore, is not which side wins in a particular case, but whether the winner is decided by the law or by the judge. When judges interpret law, the law produces the results. Thus, the people can choose to change the law. When judges make law, judges produce the results and the people are left with no recourse at all. That state of affairs is the antithesis of self-government.

Let me close by saying that the effort to defend liberty never ends. Andrew Jackson reminded us as he left office in 1837 that "eternal vigilance by the people is the price of liberty; and that you must pay the price if you wish to secure the blessing."<sup>33</sup> The approach I outline actually joins an effort that began long ago and reminds me of a resolution passed by the Senate Republican Conference in 1997:

Be it resolved, that the Republican Conference opposes judicial activism, whereby life-tenured, unaccountable judges exceed their constitutional role of interpreting already enacted, written law, and instead legislate from the bench by imposing their personal preference or views of what is right or just. Such activism threatens the basic democratic values on which our Constitution is founded.<sup>34</sup>

There you have it. Our written Constitution and its separation of powers define both judicial power and judicial selection. They require judicial restraint as a qualification for judicial service and require Senate deference to a President's qualified nominees. The weeks and months ahead will provide opportunities to debate these principles and their application. Nothing less than ordered liberty is at stake. I know the Federalist Society will be right in the thick of that debate.

## ENDNOTES

\* United States Senator (R-Utah); J.D., University of Pittsburgh School of Law, 1962; B.A., Brigham Young University, 1959. This Essay was delivered as a speech to the Harvard Law School Federalist Society and Harvard Journal of Law & Public Policy at the Union Club in Boston, Massachusetts, on April 4, 2009.

1. James Madison, Second Annual Message, in 8 *The Writings of James Madison* 123, 127 (Gaillard Hunt ed., 1908).

2. Press Release, Nat'l Constitution Ctr., Startling Lack of Constitutional Knowledge Revealed in First-Ever National Poll (1997).

3. Steve Farkas et al., *Knowing it by Heart: Americans Consider the Constitution and its Meaning* 16 (2002), available at [http://www.publicagenda.org/files/pdf/knowing\\_by\\_heart.pdf](http://www.publicagenda.org/files/pdf/knowing_by_heart.pdf).

4. Christopher Lee, *Noted with Interest*, Wash. Post, Mar. 3, 2006, at A15; see also McCormick Tribune Freedom Museum, *Americans' Awareness of First Amendment Freedoms*, Forum for Education and Democracy, Mar. 1, 2006, <http://www.forumforeducation.org/node/147>.

5. Stephen J. Markman, *An Interpretivist Judge and the Media*, 32 Harv. J.L. & Pub. Pol'y 149 (2009).

6. *Id.* at 151-52.

7. Symposium, *The People & The Courts*, 32 Harv. J.L. & Pub. Pol'y 1 (2009).

8. Symposium, *Separation of Powers in American Constitutionalism*, 33 Harv. J.L. & Pub. Pol'y (forthcoming 2010).

9. See *infra* notes 26-27.

10. President Obama has nominated David Hamilton to the U.S. Court of Appeals for the Seventh Circuit, Gerard Lynch to the Second Circuit, and Andre Davis to the Fourth Circuit. Michael A. Fletcher, *Obama Names Judge to Appeals Court*, Wash. Post, Mar. 18, 2009, at A4; Jerry Markon, *Obama Taps 2 for Key Appellate Courts*, Wash. Post, Apr. 3, 2009, at A6. Each is currently a U.S. District Judge.

11. Mark Twain, *Chapters from My Autobiography—XX*, 186 N. Am. Rev. 465, 471 (1907) (quoting Benjamin Disraeli).

12. Timothy J. Penny, *Facts Are Facts*, Nat'l Rev. Online, Sept. 4, 2003, [http://www.nationalreview.com/nrof\\_comment/comment-penny090403.asp](http://www.nationalreview.com/nrof_comment/comment-penny090403.asp).

13. President Obama nominated David Hamilton to the Seventh Circuit on March 17, 2009. Fletcher, *supra* note 10. His hearing was on April 1, 2009. U.S. Senate Judiciary Comm., *Official Hearing Notice* (Apr. 1, 2009), <http://judiciary.senate.gov/hearings/hearing.cfm?id=3757>.

14. This statistic, like those that follow, was compiled by Senator Hatch's staff from sources including the Congressional Record; Federal Judicial Center, *Biographical Directory of Federal Judges*, <http://www.fjc.gov/public/home.nsf/hisj>; The Library of Con-

gress, Legislative Information Service Databases, <http://thomas.loc.gov/>; and the records of the Senate Judiciary Committee and Senator Hatch's staff. The statistics are on file with Senator Hatch's staff.

15. See Orrin G. Hatch, *Judicial Nomination Filibuster Cause and Cure*, 2005 Utah L. Rev. 803, 819-23.

16. *The Federalist* No. 39, at 240 (James Madison) (Clinton Rossiter ed., 1961).

17. Markman, *supra* note 5, at 149.

18. See Hatch, *supra* note 15, at 82631.

19. *The Federalist* No. 78 (Alexander Hamilton).

20. *Vanhorne's Lessee v. Dorrance*, 2 U.S. 304, 308 (1795).

21. See Raoul Berger, *Original Intention in Historical Perspective*, 54 Geo. Wash. L. Rev. 296, 297-98 (1986) (citing S. Rep. No. 21, 42d Cong., 2d Sess. 2 (1872)).

22. Charles Evans Hughes, *Speech before the Elmira Chamber of Commerce*, May 3, 1907, in *Addresses and Papers of Charles Evans Hughes* 133, 139 (Robert H. Fuller & Gardner Richardson eds., 1908).

23. Stuart Taylor Jr., *Imperial Judges Could Pick the President—Again*, 36 Nat'l J. 2877, 2877 (2004).

24. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 404 (1937) (Sutherland, J., dissenting).

25. *Brown v. Allen*, 344 U.S. 443, 535 (1953) (Jackson, J., concurring in the result).

26. 151 Cong. Rec. S10366 (daily ed. Sept. 22, 2005) (statement of Sen. Obama).

27. Posting of Mark Murray to First Read, <http://firstread.msnbc.msn.com/archive/2007/07/17/274143.aspx> (July 17, 2007, 16:21 EDT) (report by Carrie Dann).

28. Steven G. Calabresi, *Obama's "Redistribution" Constitution*, Wall St. J., Oct. 28, 2008, at A17.

29. 109 Cong. Rec. S10641 (daily ed. Sept. 29, 2005) (statement of Sen. Stabenow).

30. Interview by Matt Lauer with Senator Edward Kennedy, available at <http://www.tedkennedy.com/journal/165/senator-kennedy-nbctoday-show-interview>.

31. Terry Eastland, *The "Good Judge": Antonin Scalia's two decades on the Supreme Court*, Wkly. Standard, Nov. 13, 2006.

32. Press Release, *The Federalist Society*, *Key Findings from a National Survey of 800 Actual Voters* (Nov. 5, 2008), available at [http://www.fed-soc.org/publications/pubid.1183/pub\\_detail.asp](http://www.fed-soc.org/publications/pubid.1183/pub_detail.asp).

33. Andrew Jackson, *Farewell Address*, in 2 *The Statesman's Manual: The Addresses and Messages of the Presidents of the United States* 947, 957 (Edwin Williams ed., New York, Edward Walker 1846).

34. On file with Author.

## EXHIBIT 2

[From the National Journal, Aug. 4, 2009]

(By Stuart Taylor Jr.)

## DID PRECEDENT MAKE SOTOMAYOR RULE AGAINST RICCI?

Judge Sonia Sotomayor has not defended her most widely criticized decision—the one rejecting a discrimination lawsuit by 17 white firefighters, and one Hispanic, against the city of New Haven, Conn.—as a just or fair result.

That would have been an uphill battle: Polls in June showed that huge majorities of the public wanted the Supreme Court to reverse Sotomayor's decision.

And as I've explained elsewhere, although the Supreme Court split 5-4 in ruling for the firefighters in *Ricci v. DeStefano*, all nine justices rejected the specific legal rule applied by Sotomayor's three judge panel. That rule would allow employers to deny promotions after the fact to those who did best on any measure of qualifications—no matter how job-related and racially neutral—on which blacks or Hispanics did badly.

Instead of defending her panel's quota-friendly rule and its harsh impact on the

high-scoring firefighters, Sotomayor and her supporters have argued that she essentially had no choice. The rule that her panel applied had been dictated, they say, by three precedents of her own court, the U.S. Court of Appeals for the 2nd Circuit.

Some critics have expressed skepticism about this claim, but the media have shed little light on its plausibility. I seek to shed some below.

Because some of this gets technical, I'll begin with critics' simplest rebuttal to Sotomayor's precedent-made-me-do-it claim:

Even assuming for the sake of argument that the Sotomayor panel's decision was dictated by the three 2nd Circuit precedents, it is undisputed that the full 2nd Circuit could have modified or overruled them if Sotomayor had voted to rehear the case en banc, meaning with all active 2nd Circuit judges participating. Instead, Sotomayor cast a deciding vote in the 7-6 decision not to rehear the case, suggesting she was satisfied with the ruling.

There is also ample reason to doubt that any of the three 2nd Circuit precedents actually required the Sotomayor panel to rule as it did, as some politicized professors have pretended.

Sotomayor fleshed out her vague testimony about the issue in answers to senators' written questions. She quoted her 2nd Circuit colleague Barrington Parker's concurrence, which she and three other judges had joined, in the 7-6 vote not to rehear Ricci. Judge Parker wrote:

There was controlling authority in our decisions—among them, *Hayden v. County of Nassau* [in 1999] and *Bushey v. N.Y. State Civil Serv. Comm'n* [in 1984]. These cases clearly establish for the circuit that a public employer, faced with a prima facie case of disparate-impact liability under Title VII, does not violate Title VII or the Equal Protection Clause by taking facially neutral, albeit race-conscious, actions to avoid such liability.

To unpack the legal language: Title VII is the employment discrimination portion of the 1964 Civil Rights Act. Title VII disparate-impact lawsuits are typically brought by blacks or Hispanics who challenge as discriminatory employers' use of objective tests on which those minorities do poorly. New Haven's ostensible reason for denying promotions to the white and Hispanic firefighters who had done well on qualifying exams was fear of being hit with a disparate impact lawsuit by blacks who had done poorly. And any black plaintiffs would indeed have had a prima facie disparate-impact case, which is legalese for proof that blacks had done much worse on the tests than whites.

But Judge Parker gave short shrift to the fact that even when plaintiffs have a prima facie case, an employer such as the city "could be held liable for disparate-impact discrimination only if the examinations were not job related and consistent with business necessity, or if there existed an equally valid, less-discriminatory alternative," as the Supreme Court stressed in *Ricci*.

In addition, Parker's reading of both *Hayden* and *Bushey* is conspicuously overbroad. Their facts (especially *Hayden's*) were quite different from those of *Ricci*. And *Bushey* has been undermined by subsequent Supreme Court precedents and legislation.

That's why Judge Jose Cabranes, in the main dissent from the 2nd Circuit's 7-6 denial of rehearing en banc, began:

"This appeal raises important questions of first impression"—meaning questions not controlled by precedent—"in our circuit and, indeed, in the nation, regarding the application of the Fourteenth Amendment's Equal

Protection Clause and Title VII's prohibition on discriminatory employment practices."

The question at the core of the case, Cabranes said, was: "May a municipal employer disregard the results of a qualifying examination, which was carefully constructed to ensure race neutrality, on the ground that the results of the examination yielded too many qualified applicants of one race and not enough of another?"

This and other questions raised by the case, Cabranes continued, were "indisputably complex and far from well-settled" and "not addressed by any precedent of the Supreme Court or our Circuit," including Hayden and Bushey.

Ricci differed from Hayden in three critical respects. First, as Cabranes explained, Hayden had approved Nassau County's "race-conscious design of an employment examination," which was achieved mainly by eliminating tests of cognitive skills. Ricci, on the other hand, involved "race-based treatment of examination results" (emphasis added) to override local civil service laws under which promotions are virtually automatic for the firefighters with the best scores on job-related oral and written tests.

Second, Hayden stressed that the white plaintiffs "cannot establish that they were injured or disadvantaged" by the Nassau County test's race-conscious design. The Ricci plaintiffs were very clearly injured: They were denied promotions that they had done everything possible to earn under New Haven's civil service laws, and thus were "deprived of the pursuit of happiness on account of race," in the words of Washington Post columnist Richard Cohen.

Third, Hayden upheld the Nassau County exam's black-friendly design in part "to rectify prior discrimination" by the county against blacks seeking police jobs. Ricci involved no claim of prior discrimination by New Haven against blacks.

Bushey was a lawsuit by whites challenging New York State's race-norming of scores—by substantially raising each minority applicant's score—on a qualifying exam to become a correction captain. The 2nd Circuit's mixed ruling in the case was entitled to little or no weight as a precedent in Ricci for at least four reasons:

While Bushey held that the state could use unspecified "race-conscious remedies" to avert a lawsuit by minorities who had done badly on a test, the 2nd Circuit ordered further proceedings to determine whether the race-norming remedy chosen by the state went too far, and violated Title VII by "trammel[ing] the interests of nonminority candidates." In Ricci, the Sotomayor panel gave no weight at all to the interests of nonminority candidates.

In a key provision of the 1991 Civil Rights Act, Congress banned the sort of race-norming that the state had used in Bushey. This provision stated broadly that employers may not "adjust the scores of, use different cutoff scores for, or otherwise alter the results of employment-related tests on the basis of race." Indeed, by throwing out ("altering"?) the results of its test, New Haven arguably violated the 1991 provision, as well as others, in Ricci itself.

Bushey noted that the white plaintiffs' initial claims that their constitutional rights had been violated "are not before us," because on appeal they had relied solely on their Title VII claims. In Ricci, "significant constitutional claims . . . of first impression [were] at the core of this case," as Cabranes wrote. The Sotomayor panel completely ignored them.

The high-scoring firefighters' constitutional claims in Ricci were especially strong because landmark Supreme Court decisions in 1989 and 1995 had washed away the founda-

tions of Bushey and another 2nd Circuit decision cited by Sotomayor defenders, *Kirkland v. New York State Department of Correctional Services* (1980). The 1989 and 1995 decisions held for the first time that (respectively) state and federal favoritism toward blacks is just as suspect under the Constitution as favoritism toward whites. "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination" and be struck down unless "narrowly tailored" to serve a "compelling" governmental interest, according to the 1995 decision, *Adarand Constructors v. Peña*.

The justices' constitutional rulings seem quite contrary to the 2nd Circuit's approach not only in Bushey but also in Ricci, in which—Cabranes suggested—Sotomayor and her allies "took the city's justifications at face value," ignoring strong evidence that its decision to dump the test scores was driven by racial politics, not legal principle. The result, Cabranes said, was that "municipal employers could reject the results of an employment examination whenever those results failed to yield a desired racial outcome—i.e. failed to satisfy a racial quota."

Later, in the Supreme Court's June 29 majority opinion in Ricci, Justice Anthony Kennedy said it was unnecessary to address the firefighters' constitutional claims because their Title VII claims alone were sufficient to win the case. But Kennedy stressed that there were "few, if any, precedents in the courts of appeals discussing the issue."

The bottom line is that 2nd Circuit precedents did not make Sotomayor rule as she did. Supreme Court precedent favored the firefighters. Sotomayor's ruling was her own.

**THE PRESIDING OFFICER.** The Senator from Oklahoma.

**Mr. INHOFE.** Mr. President, let me confess that I feel totally inadequate standing here tonight and talking about the subject of the confirmation of Judge Sotomayor. I am not a lawyer. I am amidst these brilliant lawyers. I listened to Senator HATCH and Senator SESSIONS. They have the kind of background where they can really get into this and look constitutionally and legally and evaluate, and I am not in that position.

I would like to speak on this nomination for the following reasons. I want to reaffirm my opposition to her confirmation.

I was the first Member of the Senate on the day she was nominated who announced I would not be supporting her. I recognize, as Senator HATCH said, that she will be confirmed. We know that.

I remember what Senator SCHUMER, the senior Senator from New York, said shortly after she was first nominated. He made the statement that Republicans are going to have to vote for her because they don't want to vote against a woman, vote against a Hispanic. He was right. But I would suggest that after the hearing, that statement is not nearly as true as it was before the hearings because of some of the extreme positions she has taken.

I have to say that from a nonlawyer perspective, I look at it perhaps differently than my colleagues who are learned scholars in the legal profession. A lifetime appointment to the Supreme Court requires not only a respect for

the rule of law but also for the separation of powers and an acknowledgment that the Court is not a place where policy is made. The Court is about the application of the law and not where judges get to make the world a place they want it to be. I saw that all throughout the hearings I watched with a great deal of interest.

In May of 2005, Judge Sotomayor asserted that the "court of appeals is where policy is made." She also wrote in a 1996 law review article that "change—sometimes radical change—can and does occur in a legal system that serves a society whose social policy itself changes."

The Constitution is absolutely clear: Policy is made in the Halls of Congress, right here—that is what we do for a living—not in the courtroom. Legislators write the laws. Judges interpret them. We understand that. Even those of us who are nonlawyers remembered that all the way through school, Sotomayor is correct that societies change, but the policies that are made to reflect these changes are done through Members of Congress who are elected to represent the will of the people.

Obviously, we are talking about a lifetime appointment. There is no accountability after this point. When judges go beyond interpreting the laws and the Constitution and legislate from the bench, they overstep their jurisdiction and their constitutional duty. Allowing judges who are not directly elected by the people and who serve lifelong terms to rewrite laws from the bench is dangerous to the vitality of a representative democracy. Simply put, judicial activism places too much power in the hands of those who are not directly accountable to the people. That is what we are talking about, a lifetime appointment.

Judge Sotomayor has overcome significant adversity to achieve great success, and I agree with Senator HATCH in his comments that we admire her for her accomplishments under adverse conditions. However, while her experiences as a Latina woman have shaped who she is as a person, they should not be used, as she affirms, to affect her judicial impartiality and significantly influence how she interprets the law and the Constitution.

In 2001, Judge Sotomayor gave a speech at the University of California, Berkeley in which she stated:

I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life.

She has on several occasions conveyed the same idea. Between 1994 and 2003, she delivered speeches using similar language at Seton Hall University, the Woman's Bar Association of the State of New York, Yale University, the City University of New York School of Law. It is not a slip of the tongue once; this is a statement that has been reaffirmed and reaffirmed. Quite frankly, that was the reason for

my opposition back in 1998 when she was nominated to be on the circuit court of appeals. The statements she made show a very biased opinion that someone who is not a lawyer sees and thinks should disqualify someone for the appointment.

She further stated in 1994, in a presentation in Puerto Rico, that:

Justice O'Connor has often been cited as saying that "a wise old man and a wise old woman reach the same conclusion" in deciding cases . . . [however] I am also not sure that I agree with that statement . . . I would hope that a wise woman with the richness of her experience would, more often than not, reach a better conclusion.

That is pretty emphatic. There is no other way you can interpret that. She thinks that a woman with her experience can make a better conclusion than a White male. I consider that racist. Sotomayor not only suggests the possibility of judicial impartiality but also that gender and ethnicity should influence a judge's decision.

Furthermore, President Obama said that in choosing the next Supreme Court nominee, he would use an empathy standard. While judges may and should be empathetic people, they must be impartial judges first. If empathy was a guiding standard, with whom should a judge empathize? Should more empathy be shown to one race, one gender, one religion, one lifestyle? True justice does not see race, gender, or creed. We are all equal in the eyes of the law, and the law must be applied equally. That is why she wears a blindfold. It is supposed to be blind justice.

Rather than looking to factors beyond the law, judges must solely examine the facts of the case and the law itself. Their ability to equally apply justice under the law is the standard by which we should select judges. So we have two different standards right now with which I disagree. One is that judges should make policy and, secondly, that gender and ethnicity should influence decisions.

Another belief on which Judge Sotomayor and I fundamentally disagree is that American judges should consider foreign law when deciding cases. This probably concerns me more than any of the rest of them—the fact that we have this obsession in these Halls, in this Senate, that nothing is good unless it somehow comes from the United Nations or is coming from some multinational origin.

In 2007, in the forward to a book—and I read this myself—titled, "The International Judge," Sotomayor wrote:

[T]he question of how much we have to learn from foreign law and the international community when interpreting our Constitution is not the only one worth posing.

This past spring, Judge Sotomayor gave an alarming speech at the ACLU which addressed this topic. She said:

[T]o suggest to anyone that you can outlaw the use of foreign or international law is a sentiment that is based on a fundamental misunderstanding, what you would be asking American judges to do is to close their minds to good ideas. . . .

No, Judge Sotomayor, it is sovereignty that we are talking about. Statements like these make it clear that President Obama has nominated a judge to our highest Court who believes our courts should rely on foreign decisions when interpreting our Constitution. And I have to say, whatever happened to sovereignty? This obsession with multinationalism has to come to an end. I believe America will reject this type of thought. Americans do not want the rest of the world interpreting our laws, and neither do I.

Finally, Mr. President, Judge Sotomayor's record on the second amendment is constitutionally outrageous. Maybe it is because I come from Oklahoma, but that is the thing I hear about more than anything else down there, and my own kids, I might add.

I do not believe Judge Sotomayor can be trusted to uphold the individual freedom to keep and bear arms if future second amendment cases come before her. I have received no assurances from her past decisions or public testimony that she will be willing to fairly consider the question of whether the second amendment is a fundamental right and thus restricts State action as it relates to the second amendment. It is incomprehensible to me that our Founding Fathers could have intended the right to keep and bear arms as non-binding upon the States and instead leave the right to be hollowed out by State and local laws and regulations. History and common sense do not support this.

I have to tell you, this has been more of a concern in my State of Oklahoma than anything else. I cannot confirm a nominee who believes the second amendment is something other than a fundamental right and instead treats it as a second class amendment to the Constitution. I do not know what a second class amendment to the Constitution is. This is not in line with my beliefs and not in line with the beliefs of the majority of Americans—certainly from my State of Oklahoma.

Today, I am persuaded the confirmation hearings served only to highlight many of my concerns. The numerous inconsistencies of her testimony with her record have persuaded not only me but the American people that Judge Sotomayor is not qualified to serve as a Justice on the highest Court, the U.S. Supreme Court. I say that because a recent Zogby Poll—and as several other polls have also consistently confirmed—following the confirmation hearings revealed that only 49 percent of Americans support Judge Sotomayor's confirmation, with an equal number opposing it. This is significant because she played the race card all the way through this thing and was talking about the Hispanic effect. But the same poll showed that among Hispanic voters, only 47 percent say they are in favor of her confirmation.

In other words, there are fewer people in the Hispanic community who are

favoring her confirmation than in the non-Hispanic. These numbers are evidence of the fact that Judge Sotomayor has not gained the approval of the American people during her confirmation hearings, and she certainly has not gained mine.

I was the first Member of the Senate to publicly announce my opposition to Judge Sotomayor after her nomination to the Supreme Court on May 26. On that date, I stated I could not confirm her. In addition to all the above, there is another reason. While I do not often agree with Vice President BIDEN, I do agree with his statement that once you oppose a Federal court nominee, you cannot support that nominee for a higher court because the bar is higher. I think that is very significant to point out here because there are several who are still serving today, as I am, who opposed her to the circuit court in 1998. I think Vice President BIDEN is correct. As the standard goes up, once you get to the U.S. Supreme Court, that is the end. So that should be the very highest standard. So it is unconceivable that anyone who would have opposed her in 1998 could turn around and support her now.

I have to say there are a lot of reasons I have pointed out. One is judges making policy. I object to that; I find that offensive. Gender and ethnicity should be a consideration; that is wrong. The international thing, that we have to go to the international community to see that we are doing the right thing in interpreting our Constitution; that is a sovereignty issue. The second amendment, that is a concern.

So even though Judge Sotomayor will be confirmed, it will be without my vote. I would have to say for the sake of my 20 kids and grandkids that I will oppose Judge Sotomayor's nomination to the U.S. Supreme Court.

Mr. President, I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. SESSIONS. 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. SESSIONS. Mr. President, I believe there are a few minutes left on this side of the aisle. I would just like to share a few thoughts. I see Senator BROWN is here and would also like to speak tonight. I think some others may also.

One of the things that has been discussed tonight from my Democratic colleagues is the great American ideal of equal justice under law. Those words are indeed chiseled on the face of the Supreme Court across the street, and it has been invoked as a reason to support this nominee. But I would suggest that at its most fundamental level that is one of the serious objections and concerns we have.



Lawsuits have parties. If you have empathy for one party, if you have a sympathy for one party, if you have a prejudice that favors one party, then that is not equal justice. In her own speeches and statements, Judge Sotomayor has said: I accept the fact that my background, my sympathies, even my prejudices—those are her words—will affect the facts, affect how I decide cases—that her background will “affect the facts I choose to see.” These were not just speeches given one time but repeated over a period of a decade.

So it raises real questions about that because the oath that a judge takes is a powerful thing. The oath reflects the ideal of American justice. And the oath says a judge will not be a respecter of persons. The oath says a judge shall do equal justice to the poor and the rich alike. The oath says a judge will be impartial; that they will carry out their duties under the Constitution and under the laws of the United States—not above the laws of the United States. A judge is not above the law. They are not empowered to utilize any of their personal views, politics, morals, or values in the process of their judging to manipulate the law, to carry out an agenda they may believe is the greatest thing for all of America. They are not entitled to do that.

So from her speeches and her approach to the law, there is a great concern to the extent of which I have not seen before in speeches and expressions, in Law Review articles by this nominee that suggests an acceptance of the fact that her background and experiences, opinions, sympathies, and prejudices will affect her rulings.

She goes on to say: I accept the fact that my background will “affect the facts I choose to see.” For a lawyer like myself who has practiced a good bit in Federal court, tried quite a few cases, this is a stunning development that a judge is going to tell me: Well, I may not see those facts because of my background, my sympathies, and my prejudices. That is what a judge puts on that robe for. The robe is to symbolize they pull themselves apart from the everyday pressures that are on them, the everyday biases and prejudices; that they will be a neutral, fair, objective umpire and will call the balls and strikes, call the game without taking sides, without trying to achieve a given result. This is the ideal of American justice.

One of our colleagues said he objected because some of us were advocating a strange and strained conservative orthodoxy, that we would not vote for anybody who did not agree with some sort of philosophy like that. What I said at the opening of the hearing was that I would not vote for her, and no Senator should vote for any nominee, whether liberal or conservative, who was not committed—committed—as their oath commits them, to setting aside personal values, opinions, and so forth, and rendering true

justice based on the law and the facts, whether they like the law or not.

So I think this is a big deal. They say: Well, you never confirmed a liberal Democrat, SESSIONS. You are a conservative Republican. But I would. And I voted for quite a number of them under President Clinton. I expect I will vote for quite a number under President Obama. I voted for 95 percent of President Clinton's nominees in the time I was in the Senate. It is not their politics. It is not the church they belong to. It is not whether they go to church. It is not what their moral values are. It is when they get on that bench and they decide cases, are they going to follow the law and the facts? That is the question, and that is what we are looking for.

It is sort of surprising to see a nominee express repeatedly over a period of years a contrary view. And to suggest that, well, it may be an aspiration to be unbiased, but it is just a mere aspiration—and to explicitly reject the classical formulation of a judge's role as expressed by Justice O'Connor, when she said: A wise old woman and a wise old man should reach the same conclusion—well, that is what we always have believed in America. Now we have this new theory that, well, you can bring to bear your background, and you might reach a better conclusion because you have different experiences you can bring to bear. That is not our goal in America, in my view.

Our legal system is built on a belief that there is a right answer to even the most difficult cases, and judges ought to give their absolute best effort to find that right answer. It is based on law and the facts and not what their personal views and values are. That is what we are all about. I think it is an important issue. And the activist, whether liberal or conservative, the activist judge allows those values and prejudices and political views and ideology to affect their rulings. It causes them to find some way to achieve a result that furthers an agenda they believe in. That is not justice, that is politics.

When President Obama says he wants a judge who will show empathy, I ask: Whom does he show empathy for? If you show empathy for one party, haven't you had a bias against the other? Who got empathy in the firefighters case? Was that equal justice under law—under law?

The Constitution says no one shall be deprived of equal protection of the laws on account of their race. But the firefighters who passed the test—a test that was never found to be defective, and the Supreme Court found it was not found to be defective—they had that test thrown out because they didn't like the racial results of it. Isn't that discriminating against the people who worked hard and studied and passed the test?

Lieutenant Vargas testified before our committee. I asked him, and he said if everybody had studied as hard

as he had, a lot more of them would have passed. It was just a question of the commitment to learn the things necessary to be a leader in a fire department where you send people into life-and-death situations. This is not a little matter. You need to know things.

So I don't want anybody to think that what we are doing is some strange or strained approach to the law. I believe we are asking fundamental questions about law and justice in America and the Supreme Court of the United States. Aren't we entitled to expect that this nominee, such as every other judge who has ever taken the bench in any Federal court in America, should be not mildly committed to the oath but absolutely committed to the oath; committed to not being a respecter of persons; committed to equal justice for the poor and the rich; committed to impartiality; committed to conducting their office under the Constitution and under the laws of the United States and not above it.

I think that is what we need to be looking for. I am afraid this nominee, based on several important cases and a plethora of speeches over a decade, doesn't meet the standard. I wish it weren't so. I thought things would get better at the hearing. I don't think they did. That is my best judgment. So that is why I have concluded I cannot support her nomination.

I thank the Chair and yield the floor.

Mr. BROWN. Mr. President, I am a father of daughters who were raised with the belief that the United States is only as strong as its commitment to combating prejudice and promoting equality under the law. It is something I learned from my own mother. I am also a husband of a woman whose parents' sacrifice allowed her to be the first in her family to go to college, opening a world of possibility grounded in the basic American values of hard work and opportunity for all. It is with them in mind and with appreciation for the confidence Judge Sonia Sotomayor inspires that I am proud to support her to be the next Associate Justice of the U.S. Supreme Court.

Judge Sotomayor has cleared hurdle after hurdle to achieve the promise of the American dream. She has earned the admiration of her peers by demonstrating again and again her respect for the law, her respect for the rule of law, and her dedication to its impartial interpretation. For more than three decades, as we have heard on the floor and we heard in committee, as a district attorney in New York, a civil litigator in private practice, a Federal judge in the Second Court of Appeals, Judge Sotomayor has shown that she is tough and she is fair and she is a thoughtful arbiter of justice. She will be an outstanding Associate Justice of the U.S. Supreme Court.

During her confirmation hearings, Judge Sotomayor responded thoughtfully and thoroughly to a wide range of questions. In fact, she answered more questions in depth than any nominee in

recent history. Combined with first-class legal reasoning and disciplined intellect, Sonia Sotomayor's life experiences will make her a valuable addition to the Court.

She was raised in public housing in the Bronx. At age 9, she lost her father, a factory worker. Raised by her mother, a nurse, she battled childhood diabetes while excelling at every level in school. My best friend also suffered from childhood diabetes. He lived with diabetes for some 40 years. I know how it made him more disciplined, it made him more compassionate, and if I could use the word, it made him more empathetic toward those around him. It made him an all-around better person, it made him a better judge of character, and it made him more fair.

After graduating from our Nation's finest universities, Sonia Sotomayor reached the heights of the legal profession. Each of these experiences exposed her to the array of the American experience.

Current and former Supreme Court Justices from across the ideological spectrum have described how their personal experiences informed their judicial perspective. Judge Sandra Day O'Connor, nominated by President Reagan, once said:

We're all creatures of our upbringing. We bring whatever we are as people to a job like the Supreme Court. We have our life experiences.

Empathy, perhaps?

Justice Samuel Alito, a conservative nominated by President Bush, said during his confirmation hearings:

When I get a case about discrimination, I have to think about people in my own family who suffered discrimination because of the ethnic background or because of religion or because of gender. And I do take that into account.

Empathy, perhaps?

I don't recall when Judge Alito appeared in front of the Judiciary Committee that people questioned his empathy and questioned his ability to do his job because of his background. Similarly, Judge Sotomayor's background and life experiences will impart a new sense of perspective to the Court.

As I hear this discussion of empathy and I hear this accusation of Judge Sotomayor being an activist judge, I think about who has sat on the Supreme Court through much of this Nation's history. Most of the people who sat on the Supreme Court were people of privilege. Most of the people who sat on the Supreme Court were people who were born into privilege. We have seen the Supreme Court, the highest Court in the land, particularly in recent years, side in case after case with the wealthy over the poor. We have seen them side with large corporations over workers. We have seen them side with the elite of our society over others in our society. Maybe they decided that way because the Justices came from privileged backgrounds themselves and that is the way they saw the world around them. I don't hear those discus-

sions on the floor. I didn't hear those discussions in the Senate Judiciary Committee from those who oppose Judge Sotomayor's nomination.

Similar to Presidents Reagan and Bush and every President before, President Obama chose Sonia Sotomayor because he felt her views and her interpretations of our Nation's law reflect the way forward for our Nation. On issues ranging from criminal justice and labor and employment, Judge Sotomayor has an extraordinary record of following, defending, and upholding the rule of law as a Federal prosecutor, as a trial judge, and as an appellate judge. Nearly every major law enforcement organization in this Nation, ranging from the Fraternal Order of Police to the National Sheriff's Association to the National District Attorneys Association, has endorsed her. The American Bar Association awarded its highest ratings when evaluating Judge Sotomayor's judicial temperament and her treatment of all litigants. And the Judiciary Committee has received a letter of support for Judge Sotomayor's nomination from the American Hunters and Shooters Association, an organization that advocates for second amendment rights. The association told us some in the firearm community have leveled a number of charges against Judge Sotomayor that do not pass the truth test. They also wrote:

Conservatives should applaud Judge Sotomayor as a model of judicial restraint on the Circuit Court, even if that restraint has frustrated gun rights outcomes in the immediate cases.

Mr. President, 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 follow

AMERICAN HUNTERS  
& SHOOTERS ASSOCIATION,  
June 29, 2009.

Senator PATRICK LEAHY,  
Chairman, Senate Judiciary Committee,  
U.S. Senate, Washington, DC.

DEAR CHAIRMAN LEAHY: In 1991, President George H.W. Bush appointed Judge Sotomayor to the U.S. District Court for the Southern District of New York. Senator Al D'Amato (R-NY) led the fight for her initial Senate confirmation, which was approved by unanimous consent. Her later nomination to the U.S. Appeals Court (Second Circuit) was made by President Bill Clinton and also moved along by then Senator Al D'Amato. She received strong bi-partisan support with a vote of 67-29.

Some in the firearm community have leveled a number of charges against Judge Sotomayor that do not pass the truth test. In the recent case of *Maloney v. Cuomo*, a unanimous Second Circuit panel, which included Judge Sotomayor acknowledged that the landmark ruling in *District of Columbia v. Heller* confers an individual right of citizens to keep and bear arms.

The *Maloney* court also explained, as the *Heller* majority had, that earlier Supreme Court precedents had held that the Second Amendment "is a limitation only upon the power of congress and the national government and not upon that of the state." The panel noted that while *Heller* raises ques-

tions about those earlier Supreme Court decisions, the Second Circuit was obligated to follow direct precedent "leaving to the Supreme Court the prerogative of overruling its own decisions." While we are disappointed that the Supreme Court has not yet extended this right to the states, we note that Conservative Judge Frank Easterbrook of the 7th Circuit agreed with Sotomayor's ruling as being consistent with precedent. Judge Sotomayor has established herself as a model jurist in terms of respecting precedent. We suspect that her critics from the leadership of several well-known gun organizations are just as interested in supporting precedent as she is, now that the precedent to be protected is clearly enshrined within the *Heller* decision.

As the President of the American Hunters and Shooters Association, I am eager to see the Supreme Court take up the incorporation issue of the Second Amendment to the states. As a gun owner in Maryland, it is my fervent hope that the Supreme Court will extend the protections guaranteed by the Second Amendment, as defined in the *Heller* decision, to the citizens of the United States of America who reside outside the District of Columbia, as it has with the First and Fourth Amendments.

Our own views on gun ownership notwithstanding, it is the role of the President, who was elected by a rather impressive majority, to nominate and the Senate's duty to advise and consent. The Senate would be wise to consent to this nomination.

Conservatives should applaud Judge Sotomayor as a model of judicial restraint on the Circuit Court, even if that restraint has frustrated gun rights outcomes in the immediate cases. As moderate progressives, we hope that the nominee views the settled law in *Heller* as ripe for an activist expansion by incorporation to the states in harmonizing the different Circuit Court decisions.

On behalf of the American Hunters and Shooters Association, we extend our strong support for the confirmation of Judge Sotomayor to the U.S. Supreme Court. We fervently hope you and your fellow Judiciary Committee members will see fit to support this nomination.

Most respectfully submitted,

RAY SCHOENKE,  
President.

Mr. BROWN. Mr. President, Judge Sotomayor is a groundbreaking Supreme Court nominee, who unfortunately is facing gratuitous, groundless mischaracterizations. She is to be commended for her exemplary conduct in the face of critical and vicious personal attacks. Unfortunately, we have seen it all too many times. Judge Sotomayor is a woman and she is Puerto Rican. She is also a beloved daughter, sister, and aunt. She is a highly respected judge, with more relevant experience than any member of the current Supreme Court—than any member of the current Supreme Court.

Louis Brandeis, confirmed in 1916 as the Court's first Jewish nominee, faced massive distortions and mischaracterizations. Justice Thurgood Marshall, confirmed in 1967 as the Court's first African-American Justice, faced extraordinary personal attacks. Both Justice Brandeis and Justice Marshall made lasting legacies on the Court that ensured our Nation's progress to meet the very Democratic ideals enshrined in our Constitution. I would offer that

their background perhaps made them even better Justices.

President Obama was elected in a historic election, where the American people turned pages of history to forge a new path for our Nation. It is a new path shaped by common sense and compassion and belief in the potential of our people and the greatness of our Nation. The Supreme Court is a vital part of this path forward.

Exercising one of his most important powers, President Obama nominated someone who will help ensure that our Supreme Court honors the Constitution and that every American is protected by it.

President Obama said:

What she will bring to this court is not only the knowledge and experience acquired over the course of a brilliant legal career, but the wisdom accumulated from an inspiring life journey.

I congratulate Judge Sotomayor, her mother Celina, and the rest of the Sotomayor family. I also congratulate Justice David Souter on his well-earned retirement. Justice Souter's probing intellect and brilliant legal mind deserve our Nation's sincere thanks and gratitude.

Commitment to the rule of law is the foundation of our Nation, where democratic values are enshrined in the Constitution that preserves and strengthens our basic freedom. As Senators, one of our most important Constitutional responsibilities is to confirm a Justice of the Supreme Court. I urge my Senate colleagues to join me in confirming Judge Sonia Sotomayor as the next Associate Justice of the U.S. Supreme Court.

Thank you. I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

#### MORNING BUSINESS

Mr. BROWN. Mr. President, I ask unanimous consent that the Senate proceed to a period of morning business, with Senators permitted to speak for up to 10 minutes each.

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

The ACTING PRESIDENT pro tempore. The Republican leader is recognized.

#### FLOODING IN LOUISVILLE

Mr. McCONNELL. Mr. President, I wish to make a few short observations about a severe storm that hit my hometown and dumped 6 inches of rain in 75 minutes in Louisville just today, causing major flooding and trapping people in their cars and in their neighborhoods. The Louisville Police and

Fire and Rescue have been working nonstop since early this morning to assist those in need. I wish to commend them for the courageous and outstanding work they have been performing throughout the day.

Not surprisingly, I have heard from a number of my constituents. I appreciate very much their calls to keep me informed on the latest developments. We are going to continue to monitor the situation back home. In the meantime, our thoughts and prayers go out to everyone in Louisville today.

#### COMMENDING THE SIMPSON COUNTY HISTORICAL SOCIETY

Mr. McCONNELL. Mr. President, I rise today to pay tribute to the accomplishments of the Simpson County Historical Society, which is celebrating its 50th anniversary in September, making it one of the oldest continuously operating historical societies in Kentucky.

The society's half century of promoting research and knowledge of history makes it one of south-central Kentucky's treasures. At the society's very first meeting in 1959, 37 individuals met in a private home to discuss the creation of the organization.

For many years the society maintained a small collection at the Goodnight Library until members convinced the county to let them use the old county jail and jailer's house as a headquarters. The facility now serves as the Simpson County Archives and Museum. Their collection contains thousands of items, including books, manuscripts, original documents and papers, pictures, county records, tapes, CDs, microfilm, microfiche, computers, and more.

The research materials, librarians and volunteers at the archives have helped thousands of visitors connect to their past and learn about their genealogy.

The dedicated staff and volunteers at the society have made it very successful. In 2006, Mary Garrett, Nancy Neely, Sarah Richardson, Sarah Smith, Beatrice Snider, Margaret Snider, and Dorothy Steers received the Lifetime Presidential Volunteer Service Awards for over 4,000 hours of volunteer service.

The group not only preserves history, but gives much to the community, for instance by supporting several historical markers in Simpson County and providing grants for schools and groups interested in preserving history. They also offer scholarships for students who want to study history.

Mr. President, I ask my colleagues to join me in honoring, as listed below, the society and their officers for their hard work and dedication to the preservation and research of Kentucky's and Simpson County's history over the past 50 years and for many more years to come:

#### SIMPSON COUNTY HISTORICAL SOCIETY OFFICERS—2009

President Dr. James Henry Snider, Vice-President Jean Almand, Secretary Jason

Herring, Assistant Secretary Bonnye Moody, Treasurer Commie Jo Hall, Librarian Kenny Lynn Scott, Directors Katherine McCutchen, Emily Mayes, Sarah Jernigan, Past President and Business Manager Sarah Jo Cardwell, Gayla Coates, Nancy Thomas, Commie Jo Hall, Morris Hester, Betty Nolan, Elizabeth Wakefield, Allison Cummings, Helen Cardwell, and Stacie Goosetree

#### SIMPSON COUNTY HISTORICAL SOCIETY VOLUNTEERS

Myrtle Alexander, Kathy Allen (Dinning), David Forrest Almand, Jean Almand, Margaret Beach, Roxanne Boyer, Lucille Brown, Jean Burton, Barry Byrd, Bill Byrd, Helen Cardwell, Ruth Cardwell, Sarah Jo Cardwell, Pattye Caudill, Billy Jeff Cherry, Ruth Cherry, Liz Chisholm, Jim Clark, Gayla Coates, Sue Cooper, Irene Harding Cornett, Joe Craft, Nettie Craft, Mary Crow, Allison Cummings, Elizabeth Dinning, Elizabeth Dunn, Ruth Forshee, Jackie Forshee, Kathy Forshee, Larry Forshee, Mary Garrett, Paul Garrett, Addie Gillespie, Nora Belle Gillespie, Cheryl Goodlad, Stacie Goosetree, Kay Gregath, John Gregory, Commie Jo Hall, Janet Head, Jason Herring, Jimmy Jennett, Tracy Jennett, Dorothy Jent, Earl Jent, Amy Kepley, Ricky Kepley, Donna Laser, Mary Malone, Emily Martin, Emily Mayes, Charles McCutchen, Katherine McCutchen, Hallie McFarland, Mary Rose Meador, Lowrie Mervine, Peggy Mervine, Betty Milliken, Edna Milliken, Thomas N. Moody, Anne Mullikin, Nancy Neely, Tom Scott Neely, Dorothy Newbold, Mary Ogles, Olaine Owen, Mildred Perry, Jo Ann Phillips, Marian Phillips, Ruth Richards, Mozelle Richardson, Sarah Richardson, Wendell Richardson, Mattie Lou Riggins, Janet Roark, Betty Rogers, Lou Ella Rutherford, Edna Earl Scott, Kenny Lynn Scott, Ellen Smith, Henry Price Smith, Sarah Smith, Billy Briggs Snider, Beatrice Snider, James D. Snider, Margaret Snider, Lori Snider, James Henry Snider, D. B. Snider, Pearl Snider, Dorothy Steers, Geraldine "Jerri" Stewart, Rowena Sullivan, Robert E. Taylor, Nancy Thomas, Jane Truelove, L. L. Valentine, Dan Ware, Bessie Watwood, Alisha Westmoreland, Michelle Willis, Christine Wilburn, Geraldine Wright, Joan Yorgason.

#### VOTE EXPLANATION

Mr. LIEBERMAN. Mr. President, I was unable to participate in the rollcall vote on the motion to invoke cloture on the Kohl substitute amendment, No. 1908, to H.R. 2997, the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2010 and on the rollcall vote on amendment No. 1910 introduced by Senator McCain. Both rollcall votes took place yesterday.

Had I been present, I would have voted yea in support of the motion to invoke cloture and yea in support of Senator McCain's amendment. The McCain amendment would have cut \$17.5 million set aside for the Rural Utilities Service, High Energy Cost Grant Program—a program that was eliminated in President Obama's fiscal year 2010 budget.

I commend the chairman of the subcommittee, Senator KOHL, and the ranking member, Senator BROWNBACK, for their bipartisan work on this important bill that will fund agriculture priorities, nutrition assistance programs, and food and drug safety measures that are critical for my State of