

Sotomayor Hearings July 13-16, 2009

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*First up is the committee's new chairman, **Patrick Leahy**, Democrat of Vermont, July 13, 2009:*

Today, we consider the nomination of Judge Sonia Sotomayor to be a Justice of the United States Supreme Court. Our Constitution assigns just 101 of us the responsibility to act on behalf of all 320 million Americans in considering this important appointment. The President has done his part and made an historic nomination. Now it is up to the Senate to do its part on behalf of the American people.

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

Judge Sotomayor's journey to this hearing room is a truly American story. She was raised by her mother, Celina, a nurse, in the South Bronx. Like her mother, Sonia Sotomayor worked hard. She....

... graduated as the valedictorian of her class at Blessed Sacrament and at Cardinal Spellman High School in New York.

She was a member of just the third class at Princeton University in which women were included. She continued to work hard, including reading classics that had been unavailable to her when she was younger and arranging tutoring to improve her writing.

She graduated summa cum laude, Phi Beta Kappa, and was awarded the M. Taylor Senior Pyne Prize for scholastic excellence and service to the university, an honor awarded for outstanding merit.

After excelling at Princeton she entered Yale Law School, where she was an active member of the law school community. Upon graduation, she had many options but chose to serve her community in the New York District Attorney's Office, where she prosecuted murders, robberies, assaults and child pornography.

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

Judge Sotomayor's qualifications are outstanding. She has more Federal court judicial experience than any nominee to the United States Supreme Court in 100 years. She is the first nominee in well over a century to be nominated to three different Federal judgeships by three different Presidents.

She is the first nominee in 50 years to be nominated to the Supreme Court after serving as both a Federal trial judge and a Federal appellate judge. She will be the only current Supreme Court Justice to have served as a trial judge. She was a prosecutor and a lawyer in private practice. She will bring a wealth and diversity of experience to the Court.

I hope all Americans are encouraged by Judge Sotomayor's achievements and by her nomination to the Nation's highest court. Hers is a success story in which all Americans can take pride.

Those who break barriers often face the added burden of overcoming prejudice. That has been true on the Supreme Court. Thurgood Marshall graduated first in his law school class, was the lead counsel for the NAACP Legal Defense Fund, sat on the United States Court of Appeals for the Second Circuit, and served as the Nation's top lawyer, the Solicitor General of the United States.

He won a remarkable 29 out of 32 cases before the Supreme Court. Despite his qualifications and achievements, at his confirmation hearing, he was asked questions designed to embarrass him, questions such as "Are you prejudiced against the white people of the South?"

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

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

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

This hearing is an opportunity for Americans to see and hear Judge Sotomayor for themselves and to consider her qualifications. It is the most transparent confirmation hearing ever held. Judge Sotomayor's decisions and confirmation materials have been posted online and made publicly available.

The record is significantly more complete than that available when we considered President Bush's nominations of John Roberts and Samuel Alito just a few years ago. The Judge's testimony will be carried live on several television stations and live via webcast on the Judiciary Committee website.

My review of her judicial record leads me to conclude that she is a careful and restrained judge with a deep respect for judicial precedent and for the powers of the other branches of the government, including the law-making role of Congress.

That conclusion is supported by a number of independent studies that have been made of her record, and shines through in a comprehensive review of her tough and fair record on criminal cases. She has a deep understanding of the real lives of Americans, the duty of law enforcement to help keep Americans safe, and the responsibilities of all to respect the freedoms that define America.

Unfortunately, some have sought to twist her words and her record and to engage in partisan political attacks. Ideological pressure groups have attacked her before the President had even made his selection. They then stepped up their attacks by threatening Republican Senators who do not oppose her.

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

Our ranking Republican Senator on this Committee reflected on the confirmation process recently, saying: "What I found was that charges come flying in from right and left that are unsupported and false. It's very, very difficult for a nominee to push back. So I think we have a high responsibility to base any criticisms that we have

on a fair and honest statement of the facts and that nominees should not be subjected to distortions of their record." I agree.

As we proceed, let no one distort Judge Sotomayor's record. Let us be fair to her and to the American people by not misrepresenting her views.

We are a country bound together by our Constitution. It guarantees the promise that ours will be a country based on the rule of law. In her service as a Federal judge, Sonia Sotomayor has kept faith with that promise. She understands that there is not one law for one race or another. There is not one law for one color or another. There is not one law for rich and a different one for poor. There is only one law.

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

Judge Sotomayor has been nominated to replace Justice Souter, whose retirement last month has left the Court with only eight Justices. Justice Souter served the Nation with distinction for nearly two decades on the Supreme Court with a commitment to justice, an admiration for the law, and an understanding of the impact of the Court's decisions on the daily lives of ordinary Americans.

I believe that Judge Sotomayor will be in this same mold and will serve as a Justice in the manner of Sandra Day O'Connor, committed to the law and not to ideology.

In the weeks and months leading up to this hearing, I have heard the President and Senators from both sides of the aisle make reference to the engraving over the entrance of the Supreme Court. The words engraved in that Vermont marble say: "Equal Justice Under Law." Judge Sotomayor's nomination keeps faith with those words.

*Statement by Sen. Jeff Sessions, ranking Republican member.*

Before I begin, I want to thank Chairman Leahy for his openness and willingness to work together on the procedures for this hearing. I hope it will be viewed as the best hearing this Committee has ever held.

Judge Sotomayor, I join Chairman Leahy in welcoming you here today.

This hearing marks an important milestone in your distinguished legal career. I know your family is proud, and rightfully so. It is a pleasure to have them with us today.

I expect this hearing and resulting debate to be characterized by a respectful tone, a discussion of serious issues, and a thoughtful dialogue, and I have worked hard to achieve that from day one.

I have been an active litigator in federal courts for the majority of my professional life. I have tried cases in private practice, as a federal prosecutor with the Department of Justice, and as Attorney General of the State of Alabama.

The Constitution and our great heritage of law are things I care deeply about—they are the foundation of our liberty and prosperity.

This nomination hearing is critically important for two reasons.

First, Justices on the Supreme Court have great responsibility, hold enormous power, and have a lifetime appointment.

Just five members can declare the meaning of our Constitution, bending or changing its meaning from what the people intended.

Second, this hearing is important because I believe our legal system is at a dangerous crossroads.

Down one path is the traditional American legal system, so admired around the world, where judges impartially apply the law to the facts without regard to their own personal views.

This is the compassionate system because this is the fair system.

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

Here, judges take an oath to administer justice impartially, which reads:

"I . . . do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States. So help me God." [1]

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

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

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

We have seen federal judges force their own political and social agenda on the nation, dictating that the words "under God" be removed from the Pledge of Allegiance [2] and barring students from even silent prayer in schools. [3]

Judges have dismissed the people's right to their property, saying the government can take a person's home for the purpose of developing a private shopping center. [4]

Judges have—contrary to the longstanding rules of war—created a right for terrorists, captured on a foreign battlefield, to sue the United States government in our own courts. [5]

Judges have cited foreign laws, world opinion, and a United Nations resolution to determine that a state death penalty law was unconstitutional. [6]

I'm afraid our system will only be further corrupted as a result of President Obama's views that, in tough cases, the critical ingredient for a judge is the "depth and breadth of one's empathy,"[7] as well as "their broader vision of what America should be." [8]

Like the American people, I have watched this for a number of years, and I fear this "empathy standard" is another step down the road to a liberal activist, results-oriented, and relativistic world where:

- Laws lose their fixed meaning,
- Unelected judges set policy,
- Americans are seen as members of separate groups rather than simply Americans, and
- Where the constitutional limits on government power are ignored when politicians want to buy out private companies.

So, we have reached a fork in the road. And there are stark differences between the two paths.

I want to be clear:

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

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

In my view, such a philosophy is disqualifying.

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

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

Some will respond, "Judge Sotomayor would never say that it's acceptable for a judge to display prejudice in a case."

But, I regret to say, Judge Sotomayor has outlined such a view in many, many statements over the years.

Let's look at just a few examples:

We've all seen the video of the Duke University panel where Judge Sotomayor says "it is [the] Court of Appeals where policy is made. And I know, and I know, that this is on tape, and I should never say that." [9]

And during a speech 15 years ago, Judge Sotomayor said, "I willingly accept that we who judge must not deny the differences resulting from experience and heritage but attempt . . . continuously to judge when those opinions, sympathies, and prejudices are appropriate." [10]

And in the same speech, she said, "my experiences will affect the facts I choose to see as a judge." [11]

Having tried cases for many years, these statements are shocking and offensive to me.

I think it is noteworthy that, when asked about Judge Sotomayor's now-famous statement that a "wise Latina" would come to a better conclusion than others, President Obama, White House Press Secretary Robert Gibbs, and Supreme Court Justice Ginsburg declined to defend the substance of the nominee's remarks.

They each assumed that the nominee misspoke. But the nominee did not misspeak. She is on record making this statement at least five times over the course of a decade.

These are her own words, spoken well before her nomination. They are not taken out of context.

I am providing a copy of the full text of these speeches to the hearing room today.

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

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

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

But even as a lower court judge, the nominee has made some very troubling rulings.

I am concerned by the nominee's decision in Ricci, the New Haven Firefighters case—recently reversed by the Supreme Court—where she agreed with the City of New Haven's decision to change its promotion rules in the middle of the game.

Incredibly, her opinion consisted of just one substantive paragraph of analysis concerning the major legal question involved in the case.

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

While the nominee was Chair of the Fund's Litigation Committee,[12] the organization aggressively pursued racial quotas in city hiring and, in numerous cases, fought to overturn the results of promotion exams.[13]

It seems to me that in Ricci, Judge Sotomayor's empathy for one group of firefighters turned out to be prejudice against the others.

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

Judge Sotomayor, we will inquire into how your philosophy, which allows subjectivity into the courtroom, affects your rulings on issues like:

- Abortion, where an organization in which you were an active leader argued that the Constitution requires that taxpayer money be used for abortions;

- Gun control, where you recently ruled that it is "settled law" that the Second Amendment does not prevent a city or state from barring gun ownership;
- Private property, where you have already ruled that the government could take property from one pharmacy developer and give it to another; and
- Capital punishment, where you personally signed a statement opposing the reinstatement of the death penalty because of the "inhuman[e] psychological burden" it places on the offender and his or her family.

I hope the American people will follow these hearings closely.

They should learn about the issues, and listen to both sides of the argument. And, at the end of the hearing, ask: 'If I must one day go to court, what kind of judge do I want to hear my case?'

'Do I want a judge that allows his or her social, political, or religious views to change the outcome?'

'Or, do I want a judge that impartially applies the law to the facts, and fairly rules on the merits, without bias or prejudice?' It is our job to determine on which side of that fundamental divide the nominee stands.

Statement by Sen. Chuck Grassley, Republican of Iowa:

Judge Sotomayor, congratulations on your nomination to be an Associate Justice on the Supreme Court of the United States. Welcome to the Judiciary Committee. I extend a warm welcome to your family and friends. They must all be very proud of your nomination, and rightfully so.

Judge Sotomayor, you have a distinguished legal and judicial record. No doubt it's one we'd expect of any individual nominated to be a Supreme Court Justice. You made your start from very humble beginnings. You overcame substantial obstacles and went on to excel at some of the nation's top schools. You became an Assistant District Attorney and successful private practice attorney in New York City. You've been on the federal bench as a district court and appellate court judge since 1992. These are all impressive legal accomplishments which certainly qualify you as Supreme Court material.

However, an impressive legal record and a superior intellect are not the only criteria we consider. To be truly qualified, the nominee must understand the proper role of a judge in society. That is, we want to be absolutely certain that the nominee will faithfully interpret the law and Constitution without personal bias or prejudice. This is the most critical qualification of a Supreme Court Justice – the capacity to set aside one's own feelings so he or she can blindly and dispassionately administer equal justice for all.

So the Senate has a constitutional responsibility of "advise and consent" to confirm intelligent, experienced individuals anchored in the Constitution, not individuals who will pursue personal and political agendas from the bench. Judge Sotomayor, you are nominated to the highest court of the land which has the final say on the law. As such, it's even more important for the Senate to ascertain whether you can resist the temptation to mold the Constitution to your own personal beliefs and preferences.

It's even more important for the Senate to ascertain whether you can dispense justice without bias or prejudice. Supreme Court Justices sit on the highest court of the land, so they aren't as constrained to follow precedent to the same extent as district or circuit judges.

There is a proper role of a judge in our system of limited government and checks and balances. Our democratic system of government demands that judges not take on the role of policy makers. That's a role properly reserved



to legislators. The Supreme Court is meant to be a legal institution, not a political one. But some individuals and groups don't see it that way.

They see the Supreme Court as ground zero for their political and social battles. They want Justices to implement their political and social agenda through the judicial process. That's not what our great American tradition envisioned – those battles are appropriately fought in the legislative branch. So it's incredibly important that we confirm the right kind of person to be a Supreme Court Justice.

Supreme Court nominees should respect the constitutional separation of powers. They should understand that the touchstone of being a good judge is the exercise of judicial restraint. Good judges understand that their job is not to impose their own personal opinions of "right" and "wrong." They know their job is to say what the law "is," rather than what they personally think it "ought to be."

Good judges understand that they must meticulously apply the law and the Constitution, even if the results they reach are unpopular. Good judges know that the Constitution and the laws constrain judges every bit as much as they constrain legislators, executives and citizens. Good judges not only understand these fundamental principles, they live and breathe them.

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

The Constitution requires that judges be free from personal politics, feelings and preferences. President Obama's "empathy" standard appears to encourage judges to make use of their personal politics, feelings and preferences. This is contrary to what most of us understand to be the role of the judiciary.

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

Your "wise Latina" comment starkly contradicts a statement by Justice O'Connor that "a wise old woman and a wise old man would eventually reach the same conclusion in a case." These statements go directly to your views of how a judge should use his or her background and experiences when deciding cases. Unfortunately, I fear they don't comport with what I and many others believe is the proper role of a judge or an appropriate judicial method.

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

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

Ideally, the Supreme Court shouldn't be made up of men and women who are on the side of one special group or issue. Rather, the Supreme Court should be made up of men and women who are on the side of the law and

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

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

I'll be asking questions about your judicial qualifications. However, I'm also committed to giving you a fair and respectful hearing, as is appropriate of all Supreme Court nominees. Again, Judge Sotomayor, I congratulate you on your nomination.

*Statement by Sen. Herb Kohl, Democrat of Wisconsin:*

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

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

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

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

Our democracy, our rights, and everything we hold dear about America are built on the foundation of our Constitution. For more than 200 years, the Court has interpreted the meaning of the Constitution and in doing so guaranteed our most cherished rights.

The right to equal education regardless of race. The right to an attorney and a fair trial for the accused. The right to personal privacy. The right to speak, vote and worship without interference from the government. Should you be confirmed, you and your colleagues will decide the future scope of our rights and the breadth of our freedoms. Your decisions will shape the fabric of American society for years to come.

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

Some believe that the confirmation process has become thoroughly scripted, and that nominees are far too careful in cloaking their answers to important questions in generalities and with caveats about future cases. I

recognize this concern, but I also hope that you recognize our desire to have a frank discussion with you about substantive issues.

These are not just concepts for law books. They are issues Americans care about. As crime plagues our communities, we navigate the balance between individual rights and the duty of law enforcement to protect and maintain order. As families struggle to make ends meet in these difficult times, we question the permissible role for government in helping get the economy back on track.

As we continue to strive for equal rights in our schools and workplaces, we debate the tension between admissions policies and hiring practices that acknowledge diversity and those that attempt to be color-blind.

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

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

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

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

Third, we want a nominee with a sense of compassion. This is a quality that I have considered with the last 6 Supreme Court Justices. Compassion does not mean bias or lack of impartiality. It is meant to remind us that the law is more than an intellectual game, and more than a mental exercise.

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

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

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

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

As you have acknowledged, "My experiences in life unquestionably shape my attitudes." And, I hope that we on this Committee can appreciate and relate to ourselves what you said next, "but I am cognizant enough that

mine is not the only experience." You will have an opportunity before this Committee to assure us that your life experiences will impact but not overwhelm your duty to follow the law and Constitution.

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

Statement by Sen. Russ Feingold, Democrat of Wisconsin:

The Supreme Court plays a unique and central role in the life of our nation. Those who sit as Justices have extraordinary power over some of the most important, and most intimate, aspects of the lives of American citizens. It is therefore not surprising at all that the nomination and confirmation of a Supreme Court Justice is such a widely anticipated and widely covered event.

The nine men and women who sit on the court have enormous responsibilities, and those of us tasked with voting on the confirmation of a nominee have a significant responsibility as well. I consider this one of the most consequential things I must do as a United States Senator, and I am honored and humbled to have been given this role by the people of Wisconsin.

"The ultimate responsibility of the Supreme Court is to safeguard the rule of law, which defines us as a nation, and protects us all. In the past eight years, the Supreme Court has played a crucial role in checking some of the previous Administration's most egregious departures from the rule of law. Time after time in cases arising out of actions taken by the administration after September 11, the Court has said 'No. You have gone too far.'

"It said 'No' to the Bush Administration's view that it could set up a law-free zone at Guantanamo Bay. It said 'No' to the administration's view that it could hold a citizen in the United States incommunicado indefinitely, with no access to a lawyer. It said 'No' to the administration's decision to create military commissions without congressional authorization. And it said 'No' to the administration and to Congress when they tried to strip the constitutional right to habeas corpus from prisoners held at Guantanamo.

"These were courageous decisions, and in my opinion, they were correct decisions. They made plain, as Justice O'Connor wrote in the Hamdi decision in 2004, 'A state of war is not a blank check for the president when it comes to the rights of the nation's citizens.'

"These were also close decisions, some decided by a 5-4 vote. That fact underscores the unparalleled power that each Supreme Court justice has. In my opinion, one of the most important qualities that a Supreme Court justice must have is courage: courage to stand up to the president, and to Congress, in order to protect the constitutional rights of the American people and preserve the rule of law.

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

The Court rejected racial discrimination in education; it guaranteed the principle of 'one person, one vote'; it made sure that even the poorest person accused of a crime in this country can be represented by counsel; it made sure that newspapers can't be sued for libel by public figures for making a mistake; it protected the privacy of telephone conversations from unjustified government eavesdropping; it protected an individual's right to possess a firearm for private use, and it even decided a presidential election.

It made these decisions by interpreting and applying open-ended language in our Constitution like 'equal protection of the laws,' 'due process of law,' 'freedom of the press,' 'unreasonable searches and seizures,' and 'the right to bear arms.' These momentous decisions were not simply the result of an umpire calling balls and strikes. Easy cases where the law is clear almost never make it to the Supreme Court. The great constitutional issues that the Supreme Court is called upon to decide require much more than mechanical application of universally accepted legal principles.

"That is why Justices need great legal expertise, but they also need wisdom, they need judgment, they need to understand the impact of their decisions on the parties before them and the country around them, from New York City to small towns like Spooner, Wisconsin, and they need a deep appreciation of and dedication to equality, to liberty, to democracy.

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

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

"Mr. Chairman, every senator is entitled to ask whatever questions he or she wants at these hearings and to look to whatever factors he or she finds significant in evaluating this nominee. I hope Judge Sotomayor will answer all questions as fully as possible. I will have questions of my own on a range of issues.

Certainly, with the two most recent Supreme Court nominations, senators asked tough questions and sought as much information from the nominees as we possibly could get. I expect nothing less from my colleagues in these hearings. I'm glad, however, that Judge Sotomayor will finally have an opportunity to answer some of the unsubstantiated charges that have been made against her.

"One attack that I find particularly shocking is the suggestion that she will be biased against some litigants because of her racial and ethnic heritage. This charge is not based on anything in her judicial record because there is absolutely nothing in the hundreds of opinions she has written to support it.

That long record – which is obviously the most relevant evidence we have to evaluate her – demonstrates a cautious and careful approach to judging. Instead, a few lines from a 2001 speech, taken out of context, have prompted some to charge that she is a racist. I believe that no one who reads the whole Berkeley speech could honestly come to that conclusion.

The speech is actually a remarkably thoughtful attempt to grapple with a difficult issue not often discussed by judges – how do a judge's personal background and experiences affect her judging. And Judge Sotomayor concludes her speech by saying the following:

'I am reminded each day that I render decisions that affect people concretely and that I owe them constant and complete vigilance in checking my assumptions, presumptions and perspectives and ensuring that to the extent that my limited abilities and capabilities permit me, that I reevaluate them and change as circumstances and cases before me require.'

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

"Judge Sotomayor is living proof that this country is moving in the right direction on the issue of race, that doors of opportunity are finally starting to open to all of our citizens. Just as the election of President Obama gave new hope and encouragement to African American children all over this country, Judge Sotomayor's nomination will inspire countless Hispanic American children to study harder and dream higher, and that is something we should all celebrate.

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

Statement by Sen. Chuck Schumer, Democrat of New York:

Thank you, Mr. Chairman and Ranking Member Sessions.

And welcome to the many members of Judge Sotomayor's family, who I know are exceptionally proud to be here today in support of her historic nomination.

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

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

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

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

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

Instead, her record shows that she is in the mainstream:

- She has agreed with your Republican colleagues 95 percent of the time;
- She has ruled for the government in 83 percent of immigration cases;

- She has ruled for the government in 92 percent of criminal cases;
- She has denied race claims in 83 percent of cases;
- She has split evenly in a variety of employment cases.

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

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

- In a case involving a New York police officer who made white supremacist remarks, she upheld his right to make them;
  - In a case brought by plaintiffs who claimed they had been bumped from a plane because of race, she dismissed their case because the law required it;
  - And she upheld the First Amendment right of a prisoner to wear religious beads under his uniform.
- And, in hot-button cases such as ones involving professional sports, she carefully adheres to the facts before her. She upheld the NFL's ability to maintain certain player restrictions, and she also ruled in favor of baseball players to end the Major League Baseball strike.

I'd rather have a Supreme Court justice whose clear and obvious agenda is to examine each case than one whose covert goal is to change the way that courts decide cases.

Third, Judge Sotomayor has hewed carefully to the text of statutes, even when doing so results in rulings that go against so-called "sympathetic" litigants.

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

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

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

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

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

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

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

Statement by Sen. Benjamin Cardin, Democrat of Maryland:

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

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

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

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

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

I remember with great sadness how discrimination was not only condoned but, more often than not, actually encouraged against Blacks, Jews, Catholics, and other minorities in the community. There were neighborhoods that my parents warned me to avoid for fear of my safety because I was Jewish. The local movie theater denied admission to African Americans.

Community swimming pools had signs that said "No Jews, No Blacks Allowed." Even Baltimore's amusement parks and sports clubs were segregated by race. Then came *Brown vs. Board of Education* and, suddenly, my universe and community were changed forever.

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



The nine justices of the United States Supreme Court have the tremendous responsibility of safeguarding the framers' intent and the guiding values of our Constitution while ensuring the protections and rights found in that very Constitution are applied to and relevant to the issues of the day.

At times, the Supreme Court has and should look beyond popular sentiment to preserve these basic principles and the rule of law. The next justice, who will fill Justice Souter's place on the court, will be an important voice on these fundamental issues.

It is my belief that the Constitution and Bill of Rights were created to be living documents that stand together as the foundation for the rule of law in our nation. Our history reflects this. When the Constitution was written, African Americans were considered property and counted only as three-fifths of a person.

Non-whites and women were not allowed to vote. Individuals were restricted by race as to whom they could marry. Decisions by the Supreme Court undeniably have moved our country forward, continuing the progression of Constitutional protections that have changed our Nation for the better.

Before the Court ruled in *Brown vs. Board of Education* that "separate was not equal," the law permitted our society to have separate facilities for black and white students. Before the Court ruled in *Loving vs. Virginia*, a state could prohibit persons from marrying based on race.

Before the Court ruled in *Roe vs. Wade*, women had no constitutional implied right to privacy. These are the difficult questions that have come before the Court, and that the Framers could not have anticipated. New challenges will continue to arise but the basic framework of protections remains.

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

As a relatively new member of the Senate Judiciary Committee, as I prepared for this week, I considered a few key standards that I apply to all judicial nominations. First, I believe nominees must have an appreciation for the Constitution and the protections it provides to each and every American.

She (or he) must embrace a judicial philosophy that reflects mainstream American values, not narrow ideological interests. They should have a strong passion to continue the Court's advances in Civil Rights. There is a careful balance to be found here: our next Justice should advance the protections found in our Constitution, but not disregard important precedent that has made our society stronger by embracing our civil liberties. I believe judicial nominees also must demonstrate a respect for the rights and responsibilities of each branch of government.

These criteria allow me to evaluate a particular judge and whether she or he might place their personal philosophy ahead of the responsibility of the office. The First Congress enacted the Judiciary Act of 1789, which requires judges to swear or affirm that they will "administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me, according to the best of my abilities and understanding, agreeably to the Constitution, and laws of the United States, so help me God."

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

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

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

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

At this time, I also want to recognize Justice David Souter; the justice whose vacancy Judge Sotomayor has been nominated to fill. His jurisprudence is rightly characterized as thoughtful and independent, crafted to keep faith with the requirements of justice and the duties of the judiciary. I thank him for his work.

This week's hearings are essential. With some understanding of the context of Judge Sotomayor's life and the role that she potentially is about to fill on the Supreme Court, I believe it is particularly important during this confirmation hearing to question Judge Sotomayor on the guiding principles she would use on reaching decisions. For example, it is important for me to understand her interpretation of "established precedent" on protecting individual Constitutional rights. I believe it would be wrong for Supreme Court Justices to turn their back on landmark Court precedents protecting individual Constitutional rights.

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

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

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

I want to thank Judge Sotomayor for her public service and readiness to take on this great responsibility for our Nation. I also wish to thank her family for their clear support and sacrifice that has brought us to this hearing today.

*Statement by Sen. Dianne Feinstein, Democrat of California:*

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

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

If confirmed, you will join the Supreme Court with more federal judicial experience than any justice in the past 100 years and you bring with you 29.5 years of very legal experience to the court. By this standard, you are well qualified.

In your 11 years as a federal appellate court judge, you've participated in 3,000 appeals and authored roughly 400 published opinions. In your six years on the federal district court, you were the trial judge in approximately 450 cases.

For 4.5 years, you prosecuted crimes as an assistant D.A. in you spent eight years litigating business cases at a New York law firm.

What is unique about this broad experience is that you have seen the law truly from all sides. On the district court, you saw firsthand the actual impact of the law on people before you in both civil and criminal cases. You considered, wrote and joined thousands of opinions clarifying the law and reviewing district court decisions in your time on the appellate court.

Your 11 years there were a rigorous training ground for the Supreme Court. It is very unique for a judge to have both levels of federal court experience and you will be the only one on the current Supreme Court with this background.

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

You also possess a wealth of knowledge in the complicated arena of business law, with its contract disputes, patent and copyright issues, and antitrust questions. And as an associate and partner at a private law firm, you have tried complex civil cases in the areas of real estate, banking and contracts law, as well as intellectual property, which I'm told was a specialty of yours.

So you bring a deep and broad experience in the law to the Supreme Court. In my nearly 17 years on this committee, I have held certain qualities that a Supreme Court nominee must possess. First, broad and relevant experience, you satisfy that. Second, a strong and deep knowledge of the law and the Constitution, you satisfy that. Third, a firm commitment to follow the law, and you have and all of the statistics indicate that.

Next, a judicial temperament and integrity, and you have both of those. And finally, mainstream legal reasoning, and there is everything in your record..

PROTESTER: Senator, what about (OFF-MIKE).

FEINSTEIN: ... to indicate...(CROSSTALK)

LEAHY: Senator? The police will remove that man. (CROSSTALK)

LEAHY: Let me make very clear there will be no outbursts allowed in this committee either for or against the nominee, either for or against any position that Senator Sessions or I or any other Senator will have. This is a hearing of the United States Senate and we will have order and we will have decorum.

There are people who want to have this hearing. In fairness to Judge Sotomayor, there will be -- it will be done orderly and I will direct the police to remove anybody who does any kind of an outburst either for or against the nominee, either for or against any member of this committee.

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

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

FEINSTEIN: Thank you. Thank you, Mr. Chairman. Bottom line, I believe your record indicates that you possess all of these qualities.

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

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

Of course, these phrases obfuscate and prevent a clear understanding of where a nominee really stands. For example, several past nominees have been asked about the Casey decision, where the court held that the government cannot restrict access to abortions that are medically necessary to preserve a woman's health. Some nominees responded by assuring that Roe and Casey were precedents of the court entitled to great respect.

And in one of the hearings, through questioning by Senator Specter, this line of cases was acknowledged to have created a super-precedent. But once on the court, the same nominees voted to overturn the key holding in Casey that laws restricting a woman's medical care must contain an exception to protect her health.

Their decision did not comport with the answers they gave here and it disregarded *decisus* and the precedents established in Roe, in Ashcroft, in Casey, in Thornburg, in Carhart 1, and in Iqbal (ph). So super-precedent went out the window and women lost a fundamental constitutional protection that had existed for 36 years.

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

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

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

Judge Sotomayor, I believe, you are a warm and intelligent woman. I believe you are well studied and experienced in the law with some 17 years of federal court experience involving 3,000 appeals and 450 trial cases. So I believe you, too, will bring your experiences and philosophy to this highest court. And I believe that will do only one thing and that is strengthen this high institution of our great country.  
Thank you, Mr. Chairman.

Statement by Sen. John Cornyn, Republican of Texas:

Judge Sotomayor, let me join my colleagues in extending a warm welcome to you and your family today. You have had a distinguished career as a lawyer and a judge. I enjoyed sitting down with you soon after you were nominated. And I am pleased to be able to welcome you to the Senate – and to give you an opportunity to introduce yourself to the American people.

In the history of the United States, there have been only 110 people who served on the Supreme Court. We should all stop and think about that. In more than 200 years, we have had only 110 Justices.

That means each and every Supreme Court nomination is a historic moment for our Nation. Each Supreme Court nomination is a time for a national conversation about the Supreme Court and its role. We have to ask ourselves: What is the proper direction of the Supreme Court?

To answer that, we need to recall our history. The Framers created a written Constitution to make sure our constitutional rights were fixed and certain. The state conventions who represented "We the People" looked at that written Constitution and decided to adopt it. The idea was that our rights would be written down for all to see.

This framework gave judges a role that is both unique in our form of government, and important. The role of judges was intended to be modest – that is, self-restrained and limited. Judges were not free to invent new rights as they saw fit. They were supposed to enforce what the Constitution's text says to enforce – and to leave the rest to the elected branches and to "We the People."

Over time, however, the Supreme Court has often veered off the course established by the Framers. First, the Supreme Court has invented new rights not clearly rooted in any constitutional text. For example, the Supreme Court has micromanaged the death penalty, creating new rights spun from whole cloth. It has announced constitutional rules governing everything from punitive damages to sexual activity. It has relied on international law that the People never adopted.

The Supreme Court has even taken on the job of defining the rules for the game of golf. (If you're curious, the case is *PGA Tour v. Martin* from 2001). Some people call this "judicial activism." Whatever you call it, it's pretty far from enforcing the written Constitution that the Framers proposed and the people enacted.

As the Supreme Court has invented new constitutional rights – it has often neglected the old ones. This flip side is troubling, too. Many of the original important safeguards on government power have been watered down or even ignored.

Express constitutional limitations like the Takings Clause of the Fifth Amendment, the Commerce Clause limitations in Article I, and the Second Amendment's right to keep and bear arms have been artificially limited, almost like they were written out of the Constitution. Judges just haven't enforced them like the people expected them to.

So the Supreme Court has veered off course in multiple directions. The important question today is, where should the Supreme Court go from here? I think there are two choices.

First, the Supreme Court could try to get us back on course. That is, the Court could renew its respect for our original plan of government – and return us slowly but surely to the written Constitution. The Supreme Court's recent Second Amendment decision in *DC v. Heller* is a good example of this.

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

Judge Sotomayor, the purpose of this hearing is to determine which path you would take if confirmed to the Supreme Court. Would you vote to return to the written Constitution and the laws written by the elected representatives of the people? Or would you take us even further away from the written Constitution and laws legitimated by the consent of the governed?

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

In looking at your opinions on the Second Circuit, we recognize that lower court judges are supposed to be bound by Supreme Court and circuit precedent. To borrow a football analogy, a lower court judge is like the quarterback who executes the plays – not the coach who calls the plays.

That means many of your cases don't tell us much about your judicial philosophy. But a few of your opinions do raise questions – because they suggest the kinds of plays you'd call if you were promoted to the coaching staff. These opinions raise the question: would you steer the Court in the wrong direction – by limiting the rights that generations of Americans have regarded as fundamental?

So Americans need to know whether you would limit the scope of the Second Amendment – and whether we can count on you to uphold one of the fundamental liberties enshrined in our Bill of Rights.

We need to know whether you would limit the scope of the Fifth Amendment – and whether you would expand the definition of "public use" by which government can take private property from one person and give it to another person.

And we need to know whether you would uphold the plain language of the Equal Protection Clause of the 14th Amendment promising that "No State shall ? deny to any person within its jurisdiction the equal protection of the laws."

Judge Sotomayor: some of your opinions suggest that you would limit some of our basic constitutional rights – and some of your public statements suggest that you would invent rights that do not exist in our written Constitution.

For example, in a 2001 speech, you argued that there is no objectivity in law, but only what you called "a series of perspectives" rooted in the life experience of each judge. In a 2006 speech, you said that judges can and even must change the law – even introducing what you called "radical change" – to meet the needs of an "evolving" society. And in a 2009 speech, you endorsed the use of foreign law in interpreting the Constitution on the grounds that it gives judges "good ideas" that "get their creative juices flowing."

Judge Sotomayor: we thank you for your candor in these speeches. Not every judicial nominee is so open about their judicial philosophy. Yet many Americans wonder what these various statements mean – and what you're trying to get at with these remarks. And many more wonder whether you are the kind of judge who will uphold

the written Constitution – or the kind of judge who will veer us even further off course –and towards new rights invented by judges rather than ratified by the people.

Judge Sotomayor: These are some my concerns. I assure you that you will have every opportunity to address these concerns – and make clear which path you would take if you are confirmed to the Supreme Court. I welcome you to these hearings and I look forward to your testimony.

*Statement by Sheldon Whitehouse, Democrat of Rhode Island:*

Thank you, Mr. Chairman. Judge Sotomayor, welcome to you and your family. Your nomination caps what already has been a remarkable legal career. I join many, many Americans who feel proud to see you here today. It is a great country, and you represent its greatest attributes.

Your record leaves no doubt that you have the intellectual ability to serve as a Justice. From meeting with you and seeing the outpouring of support for your nomination, both from those who know you personally and from professional organizations with which you've worked, I see your collegiality and demeanor as significant attributes in your favor.

I appreciate your years as a prosecutor, serving in the trenches of law enforcement. I am looking forward to learning more about the experience and judgment you appear poised to bring to the Supreme Court.

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

It is fair to inquire into a nominee's judicial philosophy, and we will have serious and fair inquiry. But the pretence that Republican nominees embody modesty and restraint, or that Democratic nominees must be activists, runs counter to recent history.

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

The "umpire" analogy is belied by Chief Justice Roberts, though he cast himself as an "umpire" during his confirmation hearings. Jeffrey Toobin, a well-respected legal commentator, has recently reported that "[i]n every major case since he became the nation's seventeenth Chief Justice,

Roberts has sided with the prosecution over the defendant, the state over the condemned, the executive branch over the legislative, and the corporate defendant over the individual plaintiff." Some umpire. And is it a coincidence that this pattern, to continue Toobin's quote, "has served the interests, and reflected the values of the contemporary Republican party"? Some coincidence.

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

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

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

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

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

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

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

I believe that your diverse life experience, your broad professional background, your expertise as a judge at each level of the federal system, in short your accrued wisdom, will enrich your judgment as a Supreme Court justice. Justice Alito told this Committee that he brings his perspective as the grandson of immigrants to decisions in that area of the law. I am glad he does. As Oliver Wendell Holmes, Jr. famously said, the life of the law has not been logic, it has been experience.

If your wide experience brings life to a sense of the difficult circumstances faced by the less powerful among us:

the woman being shunted around the bank from voicemail to voicemail as she tries to save her home from foreclosure;

the family struggling to get by in the neighborhood the police only come to with raid jackets on;  
the couple up late at the kitchen table after the kids are in bed sweating out how to make ends meet that month;

the man who believes a little differently, or looks a little different, or thinks things should be different;  
the voice no one listens to when the elected branches are deafened by monied interests;



if you have empathy for those people in this job, you are doing nothing wrong. It is far better to listen for those unheard voices, and to seek to understand their points of view, than to ignore them in favor of a particular ideology, or corporation, or just the status quo.

The Founding Fathers set up the American judiciary as a check on the excesses of the elected branches, and as a refuge when those branches are corrupted, or consumed by passing passions.

Courts were designed to be our guardians against what Hamilton in the Federalist Papers called "those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people . . . and which . . . have a tendency . . . to occasion ? serious oppressions of the minor party in the community."

In present circumstances, those oppressions tend to fall on the poor and powerless, those without voice or influence. 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."

A little skepticism of the status quo, an ear for challenges to the prevailing power structure, an extra effort to hear the side of a party who is out-spent and out-gunned—there is no shame in that for a judge. It is exactly what the Founders intended in an American judge.

The courtroom can be the only sanctuary for the little guy when the forces of society are arrayed against him, when proper opinion and elected officialdom will lend him no ear. This is a correct, fitting, and intended function of the judiciary in our constitutional structure, and the empathy President Obama saw in you has a constitutionally proper place in that structure.

If everyone on the Court always voted for the prosecution against the defendant, for the corporation against the plaintiffs, and for the government against the condemned, a vital spark of American democracy would be extinguished. A courtroom is supposed to be a place where the status quo can be disrupted, even upended, when the Constitution or laws may require; where the comfortable can be afflicted and the afflicted find some comfort, all under the shelter of the law.

It is worth remembering that judges of the United States have shown great courage over the years, courage verging on heroism, in providing that sanctuary of careful attention, what James Bryce called "the cool dry atmosphere of judicial determination," amidst the inflamed passions or invested powers of the day.

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

*Statement by Sen. Lindsey Graham, Republican of South Carolina:*

Well, thank you. I've learned something already, the Schumer conservative standard. And we'll -- we'll see how that works.

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

He never had a chance to have this hearing. He was nominated by President Bush to the D.C. Circuit Court of Appeals, which I think most people agree is probably the second highest court in the land, and he never had this day.

So the Hispanic element of this hearing's important, but I don't want it to be lost that this is mostly about liberal and conservative politics more than it is anything else.

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

Now, unless you have a complete meltdown, you're going to get confirmed. (LAUGHTER)

And I don't think you will, but, you know, the drama that's being created here is -- is -- is interesting. And -- and my Republican colleagues who vote against you I assure you could vote for a Hispanic nominee. They just feel unnerved by your speeches and by some of the things that you've said and some of your cases.

Now, having said that, I don't know what I'm going to do yet, but I do believe that you, as an advocate with a Puerto Rican defense legal fund, that you took on some cases that I would have loved to have been on the other side, that your organization advocated taxpayer-funded abortion and said in a brief that to deny a poor black woman Medicaid funding for an abortion was equivalent to the Dred Scott case.

Now, that's a pretty extreme thing to say, but I think it was heartfelt.

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

You were a prosecutor, but your organization argued for the repeal of the death penalty because it was unfairly applied and discriminatory against minorities.

Your organization argued for quotas when it came to hiring. I just want my colleagues to understand that there can be no more liberal group, in my opinion, than the Puerto Rican defense legal fund when it came to advocacy.

And what I hope is, if we ever get a conservative president and they nominate someone who has an equal passion on the other side, that we will not forget this moment, that you could be the NRA general counsel and still be a good lawyer.

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

Now, when it comes to your speeches, that is the most troubling thing to me, because that gives us an indication, when you're able to get outside the courtroom without the robe, an insight into how you think life works, and this wise Latino comment has been talked about a lot.

But I can just tell you one thing: If I had said anything remotely like that, my career would have been over. That's true of most people here. And you need to understand that, and I look forward to talking with you about that comment.

Does that mean that I think that you're racist? You've been called some pretty bad things. No. It just bothers me when somebody wearing a robe takes the robe off and says that their experience makes them better than

someone else. I think your experience can add a lot to the court, but I don't think it makes you better than anyone else.

Now, when I look at your record, there is a lot of truth to what Senator Schumer said. I don't think you've taken the opportunity on the circuit to -- to be a cause-driven judge. But what we're talking about here today is, what will you do when it comes to making policy?

And I'm pretty well convinced I know what you're going to do. You're probably going to decide cases differently than I would. So that brings me back to, what am I supposed to do knowing that? I don't think anybody here worked harder for Senator McCain than I did, but we lost, and President Obama won. And that ought to matter. It does to me.

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

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

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

Now, there was a time when someone like Scalia and Ginsberg got 95-plus votes. If you were confused about where Scalia was coming down as a judge, you shouldn't be voting, anymore than if you were a mystery about what Justice Ginsberg was going to in these 5 percent of the cases. That is no mystery. There's some aspect of you that I'm not sure about that gives me hope that you may not go down the -- Senator Feingold's road when it comes to the war on terror, and we'll talk about that later on.

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

And the one thing I'm worried about is that if we keep doing what we're doing, we're going to deter people from speaking their mind. I don't want milk toast judges. I want you to be able to speak your mind, but you've got to understand that when you gave these speeches as a sitting judge, that was disturbing to me. I want lawyers who believe in something and are willing to fight for it and I want the young lawyers of this country feeling like there's certain clients they can't represent because when they come before the Senate, it will be the end of their career.

So I don't know how I'm going to vote, but my inclination is that elections matter. And I'm not going to be upset with any of my colleagues who find that you're a bridge too far, because in many ways, what you've done in your legal career and the speeches you've made give me great insight as to whether -- where you'll come out on these 5 percent of the cases.

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

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

We've got a chance to start over. I hope we'll take that chance. And you will be asked hard questions and I think you expect that, and my belief is that you will do well, because whether or not I agree with you on the big theme to live is not important.

The question for me is have you earned the right to be here and if I give you this robe to put you on the Supreme Court, do I believe, at the end of the day, that you will do what you think is best, that you have courage, and that you will be fair. Come Thursday, I think I'll know more about that. Good luck.

*Statement by Jon Kyl, Republican of Arizona:*

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

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

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

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

This principle is universally recognized and shared by judges across the ideological spectrum. For instance, Judge Richard Paez of the Ninth Circuit – with whom I disagree on a number of issues –explained this in the same venue where, less than 24 hours earlier, Judge Sotomayor made her now-famous remarks about a 'wise Latina woman' making better decisions than other judges.

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

And then Judge Paez said: 'The same principle applies to judges. We take an oath of office. At the federal level, it is a very interesting oath. It says, in part, that you promise or swear to do justice to both the poor and the rich.'

The first time I heard this oath, I was startled by its significance. I have my oath hanging on the wall in the office to remind me of my obligations. And so, although I am a Latino judge and there is no question about that—I am viewed as a Latino judge—as I judge cases, I try to judge them fairly. I try to remain faithful to my oath.'

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

Unfortunately, a very important person has decided it is time for change—time for a new kind of judge; one who will apply a different standard of judging, including employment of his or her empathy for one of the parties to the dispute. That person is President Obama; and the question before us is whether his first nominee to the Supreme Court follows his new model of judging or the traditional model articulated by Judge Paez.

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

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

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

I respectfully submit that President Obama is simply outside the mainstream in his statements about how judges should decide cases. I practiced law for almost 20 years before every level of state and federal court, including the U.S. Supreme Court, and never once did I hear a lawyer argue that he had no legal basis to sustain his client's position, so that he had to ask the judge to go with his 'gut' or 'heart.' If judges routinely started ruling on the basis of their personal feelings, however well-intentioned, the entire legitimacy of the judicial system would be jeopardized.

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

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

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

In the same lecture, Judge Sotomayor posits that 'there is no objective stance but only a series of perspectives—no neutrality, no escape from choice in judging' and claims that '[t]he aspiration to impartiality is just that—it's an aspiration because it denies the fact that we are by our experiences making different choices than others.' No neutrality, no impartiality in judging? Yet, isn't that what the judicial oath explicitly requires?

And according to Judge Sotomayor, 'Personal experiences affect the facts that judges choose to see. . . . I simply do not know exactly what that difference will be in my judging. But I accept there will be some based on my gender and my Latina heritage.'

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

This is a serious issue, and it's not the only indication that Judge Sotomayor has an expansive view of what a judge may appropriately consider. In a speech to the Puerto Rican ACLU, Judge Sotomayor endorsed the idea that American judges should use 'good ideas' found in foreign law so that America does not 'lose influence in the world.'

As I've explained on the floor of the Senate, the laws and practices of foreign nations are simply irrelevant to interpreting the will of the American people as expressed through our Constitution.

Additionally, the vast expanse of foreign judicial opinions and practices from which one might draw simply gives activist judges cover for promoting their personal preferences instead of the law. You can, therefore, understand my concern when I hear Judge Sotomayor say that unless judges take it upon themselves to borrow ideas from foreign jurisdictions, America is 'going to lose influence in the world.' That's not a judge's concern.

Some people will suggest that we shouldn't read too much into Judge Sotomayor's speeches and articles—that the focus should instead be on her judicial decisions. I agree that her judicial record is an important component of our evaluation, and I look forward to hearing why, for instance, the Supreme Court has reversed or vacated 80 percent of her opinions that have reached that body, by a total vote count of 52 to 19.

But we cannot simply brush aside her extrajudicial statements. Until now, Judge Sotomayor has been operating under the restraining influence of a higher authority—the Supreme Court.

If confirmed, there will be no such restraint that would prevent her from—to paraphrase President Obama—deciding cases based on her heart-felt views. Before we can faithfully discharge our duty to advise and consent, we must be confident that Judge Sotomayor is absolutely committed to setting aside her biases and impartially deciding cases based upon the rule of law. \

*Statement by Sen. Tom Coburn, Republican of Oklahoma:*

Judge, welcome. It is truly an honor to have you before us. It is -- says something remarkable about our country that you're here. And I assure you, during your time before this committee, you will be treated with the utmost respect and kindness.

It will not distinguish, however, that we will be thorough as we probe the areas where we have concerns. There is no question that you have a stellar resume. And if resumes and judicial history were all that we went by, we wouldn't be needing to have this hearing. But, in fact, other things add into that.

Equally important to us providing consent on this nomination is our determination that you have a judicial philosophy that reflects what our founders intended. And there's great division about what that means.

I also wanted to note that I thought this was your hearing, not Judge Roberts' hearing, and that the partial birth abortion ban was a law passed by the United States Congress and was upheld by the Supreme Court. So I have a different point of view on that.

As I expressed to you in our meeting, I think our nation's at a critical point. I think we're starting to see cracks. And the reason I say that is because I think the glue that binds our nation together isn't our political philosophies. We have very different political philosophies.

The thing that binds us together is an innate trust that you can have fair, impartial judgment in this country, that we better than any other nation when we've been wrong have corrected the wrongs of our founding, but we have instilled a confidence that, in fact, when you come before, there is blind justice, and that, in fact, allows us the ability to overlook other areas where we are not so good, because it instills in us the confidence of an opportunity to have a fair hearing and a just outcome.

I am concerned -- and as many of my colleagues -- with some of your statements. And I don't know if the statements were made to be provocative or if they're truly heartfelt in what you have said. But I know that some of those concerns will guide my questioning when we come to the questioning period.

And you were very straightforward with me in our meeting, and my hope is that you will be there, as well. I'm deeply concerned by your assertion that the law is uncertain. That goes completely against what I just said about the rule of law being the glue that binds us together. And your praise for an unpredictable system of justice, I think we want it to be predictable. We want it to be predictable in its fairness and the fact that how cases are viewed. And it shouldn't matter which judge you get; it should matter what the law is and the facts are.

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

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

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

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

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

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

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

With regard to your judicial philosophy, the burden of proof rests on you. But in this case, that burden has been

exaggerated by some of your statements and also by some of President Obama's stated intent to nominate someone who is not impartial, but instead favors certain groups of people.

During the campaign, he promised to nominate someone who's got the heart and the empathy to recognize what it's like to be a young, teenaged mom. The implication is that our judges today don't have that.

Do you realize how astounding that is? The empathy to understand what it's like to be poor, to be African-American or gay or disabled or old. Most of our judges understand what it's like to be old.

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

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

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

Judge Sotomayor, you must prove to the Senate that you will adhere to the proper role of a judge and only base your opinions on the Constitution's statutes and, when appropriate, treaties. That's your oath. That's what the Constitution demands of you.

You must demonstrate that you will strictly interpret the Constitution and our laws and will not be swayed by your personal biases or your political preferences, which you're entitled to.

As Alexander Hamilton stated in Federalist Paper Number 78, the interpretation of the law is a proper and peculiar province of the courts. The Constitution, however, must be regarded by the judges as fundamental law. He further stated it was indispensable in the courts of justices that judges have an inflexible and uniform adherence to the rights of the Constitution.

A nominee who does not adhere to these standards necessarily rejects the role of a judge as dictated by the Constitution and should not be confirmed.

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

*Statement by Sen. Dick Durbin, Democrat of Illinois:*

Thank you very much, Mr. Chairman. Judge Sotomayor, welcome to you and your family. These nomination hearings can be long and painful. But after surviving a broken ankle and individual meetings with 89 different U.S. senators in the past few weeks, you are certainly battle tested.

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



I asked this question with respect to the nominations of Chief Justice Roberts, Justice Alito. And I think it's an important question of any court nominee, particularly, to the Supreme Court. The nine men and women on the Supreme Court serve lifetime appointments, and they resolve many of our most significant issues.

It's the Supreme Court that defines our personal right to privacy and decides the restrictions that are to be placed on the most personal aspects of our lives. The Court decides the rights of the victims of discrimination, immigrants, consumers. The nine justices decide whether Congress has the authority to pass laws to protect our civil rights and our environment.

They decide what checks will exist on the executive branch in war and in peace. Because these issues are so important, we need justices with intelligence, knowledge of the law, the proper judicial temperament, and a commitment to impartial justice. More than that, we need our Supreme Court justices to have an understanding of a real world and the impact their decisions will have on everyday people. We need justices whose wisdom...

PROTESTER: (OFF-MIKE)

LEAHY: The officer will remove the person. The officer will remove the person. We will stand -- the time will go -- as I've said before, and both Judge -- both Senator Sessions and I have said, you are guests of the Senate while you are here. Everybody is a guest of the Senate. Judge Sotomayor deserves respect, to be heard. These Senators deserve the respect of being heard.

No outburst will be allowed. It might interrupt the ability of the senators or of the judge, or, I might say, of our guests who are sitting here patiently listening to everything that's being said.

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

DURBIN: Thank you, Mr. Chairman. More than that, we need our Supreme Court justices to have an understanding of the real world, the impact their decisions have on everyday people. We need justices whose wisdom comes from life, not just from law books.

Sadly, this important quality seems to be in short supply. The current Supreme Court has issued many decisions that I think represent a triumph of ideology over common sense.

When Chief Justice Roberts came before this committee in 2005, he famously said, "A Supreme Court justice is like an umpire, calling balls and strikes." We have observed, unfortunately, that it's a little hard to see home plate from right field. If being a Supreme Court justice were as easy as calling balls and strikes, we wouldn't see many five-and-four decisions in the court. But in the last year alone, 23 of the Supreme Court's 74 decisions were decided by a five- to-four vote.

The recent decision of *Ledbetter v. Goodyear Tire & Rubber* is a classic example of the Supreme Court putting activism over common sense. The question in that case was simple, fundamental - should women be paid the same as men for the same work? Lilly Ledbetter was a manager at a Goodyear Tire plant in Alabama. Worked there for 19 years, didn't learn until she was about to retire that her male colleagues in the same job were paid more.

She brought a discrimination lawsuit. The jury awarded her a verdict. The Supreme Court, in a five-four decision, reversed it, threw out the verdict. The basis for it? They said Lilly Ledbetter filed her discrimination complaint too late. They said her complaint should have been filed within 180 days of the first discriminatory paycheck.

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

In the *Safford v. -- United School District v. Redding*, 13-year-old girl strip-searched at her school because of a false rumor that she was hiding ibuprofen pills. At the oral argument in April, several of the Supreme Court justices asked questions about the case that, unfortunately, revealed a stunning lack of empathy about the eighth grade victim.

One of the justices even suggested that being strip-searched was no different than changing clothes for gym class. Although Justice Ruth Bader Ginsburg helped her eight male colleagues understand why the strip search of a 13-year-old girl was humiliating enough to violate her constitutional rights, a majority of the justice ruled that the school officials were immune from liability.

Five-to-four case in 2007, *Gonzales v. Carhart*, Supreme Court again overturned past precedent and ruled for the first time it was permissible to place restrictions on abortion that don't include an exception regarding a woman's health.

Judge Sotomayor, you have overcome many obstacles in your life that have given you an understanding of the daily realities and struggles faced by everyday people.

You grew up in a housing complex in the Bronx. You overcame a diagnosis of juvenile diabetes at age 8 and the death of your father at age 9.

Your mother worked two jobs so she could afford to send you and your brothers to Catholic schools, and you earned scholarships to Princeton and Yale. I know how proud you are of your mom and your family.

Your first job out of law school was an assistant district attorney where you prosecuted violent crime. You went on to work in a law firm representing corporations, which gave you another valuable perspective.

In 17 years as a federal judge, you've demonstrated an ability to see both sides of the issues. You earned a reputation as being restrained and moderate and neutral. Of the 110 individuals who have served as Supreme Court justices throughout our nation's history, 106 have been white males. Until Thurgood Marshall's appointment to the Supreme Court a generation ago, every justice throughout our nation's history had been a white male.

President Obama's nomination of you to serve as the first Hispanic and the third woman on the Supreme Court is historic. The president knows and we know that, to be the first, you have to meet a higher standard.

Before you can serve on this court, the American people, through their elected senators, will be asked to judge you. We owe it to you and the Constitution to be a fair jury. Thank you, Mr. Chairman.

*Statement by Sen. Amy Klobuchar, Democrat of Minnesota:*

Welcome, Judge Sotomayor. It's a pleasure to see you again today, and I enjoyed the meeting we had in my office a few weeks ago. We had a good conversation – although you did confess to me that when you once visited Minnesota in June, you felt the need to bring a winter parka. I'll try not to hold that against you this week!

I know you have lots of family and friends with you today, supporting you during this important hearing, and we welcome them too. In particular, it's been an honor for me to see your mom here.

When President Obama first announced your nomination, I loved the story about how your mom had saved up money to buy you and your brother the only set of encyclopedias in the neighborhood. It reminded me of when my parents bought a set of Encyclopedia Britannicas in the seventies that always occupied a hallowed place in our hallway. For me, those encyclopedias were a window on the world and a gateway to learning, as they clearly were for you.

From the time you were nine years old, your mom raised you and your brother on her own. She struggled to buy those encyclopedias on her nurse's salary, but she did it because she believed deeply in the value of education.

You went on to be the valedictorian of your high school class, to graduate at the top of your class in college and to attend law school.

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

When I think about the inspiring journey of your life, I'm reminded of other Supreme Court Justices who came from – and I'll use your own words here, Judge – "very modest and challenging circumstances."

I think about Justice O'Connor, who lived the first years of her life on a ranch in rural Arizona with no running water, no indoor plumbing, and no electricity. By sheer necessity, she learned to mend fences, ride horses, brand cattle, fire a rifle and drive a truck before she turned thirteen.

I also think about Justice Thurgood Marshall, who was the great-grandson of a slave.

His mother was a teacher; while his father worked as a Pullman car waiter before becoming a steward at an all-white country club.

Justice Marshall waited tables to help put himself through college, and his mother had to pawn her wedding and engagement rings to pay his entrance fees at Howard University Law School here in Washington.

And then there's Justice Blackmun, who grew up in a St. Paul working-class neighborhood in my home state of Minnesota.

He was able to attend Harvard College only because he received a scholarship at the last minute from the Harvard Club of Minnesota. Once there, he worked as a tutor and as a janitor to help pay expenses.

Through four years of college and three years of law school, his family never had enough money to bring him home to Minnesota for Christmas.

Each of these very different Justices grew up with their own, very different "challenging circumstances."

No one can doubt that, for each one of these Justices, their life experiences shaped the work they did on the Supreme Court.

This should be unremarkable. And, in fact it's completely appropriate. After all, our own Committee demonstrates the value that comes from members who have different backgrounds and perspectives.

For instance, at the same time my accomplished colleague Senator Whitehouse, who was the son of a renowned diplomat, grew up in Laos and Cambodia during the time of the Vietnam War – I was working as a carhop at the A&W Root Beer stand in the suburbs in Minnesota.

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

We've been tremendously blessed on this Committee with the gift of having members with different backgrounds and different experiences – just as different experiences are a gift for any court in this land. So when one of my colleagues questioned whether you, Judge Sotomayor, would be a justice "for all of us, or just for some of us," I couldn't help but remember something that Hubert Humphrey once said: America is "all the richer for the many different and distinctive strands of which it is woven."

Along those lines, Judge Sotomayor, you are only the third woman in history to come before this Committee as a Supreme Court nominee. And as you can see there are currently only two women, my distinguished colleague Senator Feinstein and myself, on this Committee.

So, I think it's worth remembering that when Justice O'Connor graduated from law school, the only offers she got from law firms were for legal secretary positions. Justice O'Connor – who graduated third in her class at Stanford Law School – saw her accomplishments reduced to one question: "Can she type?" Justice Ginsburg faced similar obstacles.

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

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

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

As we consider your nomination, we know that you are more than the sum of your professional experiences. Still, you bring one of the most wide-ranging legal resumes to this position: local prosecutor, civil litigator, trial judge and appellate judge.

Straight out of law school, you went to work as a prosecutor in the Manhattan District Attorney's Office – and you ended up staying there for five years.

When you're a prosecutor, the law ceases to be an abstract subject and becomes all too real. It's not just a dusty book in your basement.

You see firsthand, every day, how the law has a very real impact on the lives of real people – whether it's crime victims and their families, or defendants and their families, or the neighborhoods where people live.

It also has a big impact on the individual prosecutor.

No matter how many years may pass, you never forget some of the very difficult cases. For you, Judge, we know this includes the case of a serial burglar-turned-killer (the "Tarzan Murderer").

For me, there will always be the case of Tyesha Edwards, an 11-year-old girl with an unforgettable smile who was at home doing her homework at the kitchen table when she was struck and killed by a stray bullet from a gang shooting out on the street.

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

So, Judge, I'm interested in talking to you more about what you learned from that job, and how that job shaped your legal career and your approach to judging.

I'm also interested in learning more about your views on some criminal law issues. I want to explore your views on the Fourth Amendment, the meaning of the Confrontation Clause, and sentencing law and policy.

I'd like to know in criminal cases as well as civil cases how you would balance the text of statutes and the Constitution with pragmatic considerations based on your real-world experience. It seems to me, in cases like *Falso*, *Santa*, and *Howard*, that you had a keen understanding of the real-world implications of your decisions.

I often get concerned that those pragmatic experiences are missing in judicial decision-making, especially when I look at the recent Supreme Court case in which the majority broadly interpreted the Confrontation Clause to include crime lab workers. I agree with the four dissenting Justices that the ruling "has vast potential to disrupt criminal procedures that already give ample protections against the misuse of scientific evidence."

Your old boss, Manhattan District Attorney Robert Morgenthau, called you a "fearless and effective" prosecutor.

This is how he put it once in an interview: "We want people with good judgment, because a lot of the job of a [prosecutor] is making decisions. . . . I also want to see some signs of humility in anybody that I hire. We're giving young lawyers a lot of power, and we want to make sure that they're going to use that power with good sense and without arrogance."

These are among the very same qualities that I'm looking for in a Supreme Court Justice.

I, too, am looking for a person with good judgment –someone with intellectual curiosity and independence, but who also understands that her judicial decisions affect real people.

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

Finally, a good prosecutor knows that her job is to enforce the law without fear or favor. Likewise, a Supreme Court Justice must interpret the laws without fear or favor.

And I believe your background and experiences, including your understanding of law enforcement, will help you to always remember that the cases you hear involve real people – with real problems – looking for real remedies. With excellent judgment and a sense of humility, I believe you can be a Justice "for all of us." Thank you.

*Statement by Sen. Ted Kaufman, Democrat of Delaware:*

Welcome, Judge Sotomayor, and welcome also to your family and friends. Like my colleagues, I want to congratulate you on your nomination.

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

Supreme Court justices serve for life, and once the Senate confirms a nominee, she is likely to be affecting the law and American lives much longer than many of the Senators who confirmed her.

The "advise and consent" process for this nomination began after Justice Souter announced his intent to resign and President Obama consulted with members of both parties before making his selection. It has continued since then, with help from an extensive public debate amongst analysts and commentators, scholars and activists, both in the traditional press and in the blogosphere.

This public vetting process, while not always accurate or temperate, is extremely valuable both to the Senate and to the public. One of the great benefits of a free society is our ability, collectively, to delve deeply into an extensive public record. We've seen a wide-ranging discussion of the issues, in which anyone can help dissect and debate even the most minute legal issue and personal expressions of opinion.

In another, less public part of the process, Judge Sotomayor has met with close to 90 percent of the Senate. Those meetings, too, are extremely useful. I know I learned a great deal in my meeting, and I'm confident that my colleagues did as well.

For me, the critical criteria for judging a Supreme Court nominee are the following: A first-rate intellect, significant experience, unquestioned integrity, absolute commitment to the rule of law, unwavering dedication to being fair and open-minded, and the ability to appreciate the impact of court decisions on the lives of ordinary people. Based on what we've learned so far, this is an impressive nominee.

Judge Sotomayor, I am confident that this hearing will give this committee, and the rest of the Senate, the information we need to complete our constitutional duty. As senators, I believe we each owe you a decision based upon your record and your answers to our questions. That decision should not turn on empty code words like "judicial activist," or on charges of guilt by association, or on any litmus test. Instead, we should focus on your record and your responses, and determine whether you have the qualities that will enable you to serve well all Americans, and the rule of law, on our nation's highest court.

As my colleagues already have noted, your rise from humble beginnings to extraordinary academic and legal achievement is an inspiration to us all. And I note that you would bring more federal judicial experience to the Supreme Court than any justice in over 100 years.

You also have incredibly valuable practice experience, not only as a prosecutor but also as a commercial litigator. In terms of your judicial record, you appear to have been careful, thoughtful, and open-minded. In fact, what strikes me most about your record is that it seems to reveal no biases. You appear to take each case as it comes, without predilection, giving full consideration to the arguments of both sides before reaching a decision.

When Justice Souter announced his retirement in May, I suggested that the Court would benefit from a broader range of experience among its members. My concern at the time wasn't the relative lack of women or racial or ethnic minorities on the Court, though that deficit is glaring. I was pointing to the fact that most of the current Justices, whether they be black or white, women or men, share roughly the same life experiences.

I am heartened by what you would bring to the Court, based on your upbringing, your story of achievement in the face of adversity, your professional experience as a prosecutor and commercial litigator, and, yes, the prospect of your being the first Latina to sit on the high court.

Though the Supreme Court is not a representative body, we should hold as an ideal that it broadly reflect the citizens it serves. Diversity serves many goals. Outside the courtroom, it better equips our institutions to understand more of the viewpoints and backgrounds that comprise our pluralistic society. Moreover, a growing body of social research suggests that groups with diverse experiences and backgrounds simply come to the right outcome more often than do non-diverse groups that may be just as talented. I believe a diverse Court will function better as well.

Another concern I have about the current Supreme Court is its handling of business cases. Too often it seems to disregard settled law and congressional policy choices.

Based on my education, experience, and inclination, I am not anti-business. But whether it's preempting state consumer protection laws, striking down punitive damages awards, restricting access to the courts, or overruling 96 years of pro-consumer antitrust law, today's court gives me the impression that in business cases the working majority is outcome-oriented and therefore too one-sided.

Given our current economic crisis, and the failures of regulation and enforcement that led to that crisis, that bias is particularly troubling. Congress can and will enact a dramatically improved regulatory system.

The President can and will make sure that the relevant enforcement agencies are populated with smart, motivated, and effective agents. But a Supreme Court resistant to federal government involvement in and regulation of markets could undermine those efforts.

A judge, or a court, has to call the game the same way for all sides. Fundamental fairness requires that in the courtroom, everyone comes to the plate with the same count of no balls and no strikes.

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

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

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

Statement by Sen. Al Franken, Democrat of Minnesota:

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

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

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

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

These televised hearings have taught Americans a lot about our Constitution – and the role that the courts play in upholding and defending it. I look forward to listening to your questions and to the issues that you and your constituents care about.

To Judge Sotomayor, welcome. For the next few days, I expect to learn from you as well. You are the most experienced nominee to the Supreme Court in 100 years. And after meeting with you in my office last week, I know that aside from being a fine jurist, you are also an exceptional individual. Your story is inspiring and one in which all Americans should take pride.

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

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

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

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

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

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



I am wary of judicial activism and I believe in judicial restraint. Except under the most exceptional circumstances, the judicial branch is designed to show deep deference to Congress and not make policy by itself.

Yet looking at recent decisions on voting rights, campaign finance reform, and a number of other topics, it appears that appropriate deference may not have been shown in the past few years – and there are ominous signs that judicial activism is on the rise in these areas.

I agree with Senator Feingold and Senator Whitehouse that we hear a lot about judicial activism when politicians talk about what kind of judge they want in the Supreme Court. But it seems that their definition of an activist judge is one who votes differently than they would like. Because during the Rhenquist Court, Justice Clarence Thomas voted to overturn federal laws more than Justices Stevens and Breyer combined.

Second, I am concerned that Americans are facing new barriers to defending their individual rights. The Supreme Court is the last court in the land where an individual is promised a level playing field and can seek to right a wrong:

- It is the last place an employee can go if he or she is discriminated against because of age, gender, or color.
- It is the last place a small business owner can go to ensure free and fair competition in the market.
- It is the last place an investor can go to try to recover losses from securities fraud.
- It is the last place a person can go to protect the free flow of information on the internet.
- It is the last place a citizen can go to protect his or her vote.
- It is the last place where a woman can go to protect her reproductive health and rights.

Yet from what I see, on each of those fronts, for each of those rights, the past decade has made it a little bit harder for American citizens to defend themselves.

As I said before, Judge, I'm here to learn from you. I want to learn what you think is the proper relationship between Congress and the Courts, between Congress and the Executive. I want to learn how you go about weighing the rights of the individual, the small consumer or business-owner, and more powerful interests. And I want to hear your views on judicial restraint and activism in the context of important issues like voting rights, open access to the Internet, and campaign finance reform. We're going to have a lot of time together, so I'm going to start listening. Thank you, Mr. Chairman.

Opening Statement by Judge Sonia Sotomayor before the Senate Judiciary Committee, July 13, 2009,  
as prepared for delivery

Thank you, Mr. Chairman. I also want to thank Senators Schumer and Gillibrand for that kind introduction. In recent weeks, I have had the privilege and pleasure of meeting eighty-nine gracious Senators, including all the members of this Committee. I thank you for the time you have spent with me. Our meetings have given me an illuminating tour of the fifty states and invaluable insights into the American people.

There are countless family members, friends, mentors, colleagues, and clerks who have done so much over the years to make this day possible. I am deeply appreciative for their love and support. I want to make one special note of thanks to my mom. I am here today because of her aspirations and sacrifices for both my brother Juan and me. Mom, I love that we are sharing this together. I am very grateful to the President and humbled to be here today as a nominee to the United States Supreme Court.

The progression of my life has been uniquely American. My parents left Puerto Rico during World War II. I grew up in modest circumstances in a Bronx housing project. My father, a factory worker with a third grade education, passed away when I was nine years old.

On her own, my mother raised my brother and me. She taught us that the key to success in America is a good education. And she set the example, studying alongside my brother and me at our kitchen table so that she could become a registered nurse. We worked hard.

I poured myself into my studies at Cardinal Spellman High School, earning scholarships to Princeton University and then Yale Law School, while my brother went to medical school. Our achievements are due to the values that we learned as children, and they have continued to guide my life's endeavors. I try to pass on this legacy by serving as a mentor and friend to my many godchildren and students of all backgrounds.

Over the past three decades, I have seen our judicial system from a number of different perspectives – as a big-city prosecutor, a corporate litigator, a trial judge and an appellate judge. My first job after law school was....

... as an assistant District Attorney in New York. There, I saw children exploited and abused. I felt the suffering of victims' families torn apart by a loved one's needless death.

And I learned the tough job law enforcement has protecting the public safety. In my next legal job, I focused on commercial, instead of criminal, matters. I litigated issues on behalf of national and international businesses and advised them on matters ranging from contracts to trademarks.

My career as an advocate ended — and my career as a judge began — when I was appointed by President George H.W. Bush to the United States District Court for the Southern District of New York. As a trial judge, I decided over four hundred and fifty cases, and presided over dozens of trials, with perhaps my best known case involving the Major League Baseball strike in 1995.

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

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

In the past month, many Senators have asked me about my judicial philosophy. It is simple: fidelity to the law. The task of a judge is not to make the law – it is to apply the law. And it is clear, I believe, that my record in two courts reflects my rigorous commitment to interpreting the Constitution according to its terms; interpreting statutes according to their terms and Congress’s intent; and hewing faithfully to precedents established by the Supreme Court and my Circuit Court. In each case I have heard, I have applied the law to the facts at hand.

The process of judging is enhanced when the arguments and concerns of the parties to the litigation are understood and acknowledged. That is why I generally structure my opinions by setting out what the law requires and then by explaining why a contrary position, sympathetic or not, is accepted or rejected. That is how I seek to strengthen both the rule of law and faith in the impartiality of our justice system. My personal and professional experiences help me listen and understand, with the law always commanding the result in every case.

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

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

SENATE COMMITTEE ON THE JUDICIARY HOLDS A HEARING ON THE NOMINATION OF JUDGE SONIA SOTOMAYOR TO BE AN ASSOCIATE JUSTICE OF THE U.S. SUPREME COURT, JULY 14, 2009

Members: SPEAKERS: SEN. PATRICK J. LEAHY, D-VT. CHAIRMAN SEN. HERB KOHL, D-WIS. SEN. DIANNE FEINSTEIN, D-CALIF. SEN. RUSS FEINGOLD, D-WIS. SEN. CHARLES E. SCHUMER, D-N.Y. SEN. RICHARD J. DURBIN, D-ILL. SEN. SHELDON WHITEHOUSE, D-R.I. SEN. BENJAMIN L. CARDIN, D-MD. SEN. RON WYDEN, D-ORE. SEN. AMY KLOBUCHAR, D-MINN. SEN. EDWARD E. "TED" KAUFMAN, D-DEL. SEN. ARLEN SPECTER, D-PA. SEN. AL FRANKEN, D-MINN. SEN. JEFF SESSIONS, R-ALA. RANKING MEMBER SEN. ORRIN G. HATCH, R-UTAH SEN. CHARLES E. GRASSLEY, R-IOWA SEN. JON KYL, R-ARIZ. SEN. LINDSEY GRAHAM, R-S.C. SEN. JOHN CORNYN, R-TEXAS SEN. TOM COBURN, R-OKLA.  
WITNESSES: JUDGE SONIA SOTOMAYOR, NOMINATED TO BE AN ASSOCIATE JUSTICE OF THE U.S. SUPREME COURT

LEAHY: Good morning, everybody. Just so we can understand what's going on, I'm not sure whether we have votes or not today. To the extent if we do have votes, to the extent that we can keep the hearing going during votes and have different senators leave between them, we will. If we can't, then I will recess for those votes.

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

And with that, as I said yesterday when we concluded, and now the American people finally have heard from Judge Sotomayor, and I appreciate your opening statement yesterday. You've had weeks of silence. You have followed the traditional way of nominees. I think you've visited more senators than any nominee I know of for just about any position.

But the -- we get used to the traditional, the press is outside, questions are asked, you give a....

...nice wave and keep going. But finally you're able to speak, and I think your statement yesterday went a long way to answering the critic and the naysayers.

And so we're going to start with the questions here. I would hope that everybody will keep their questions pertaining to you and to your background as a judge. You're going to be the first Supreme Court nominee in more than 50 years who served as a federal trial court judge, the first in 50 years to have served as both a federal trial court and a federal appellate court judge.

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

SOTOMAYOR: Senator Leahy, yesterday, many of the senators emphasized that their -- the values they thought were important for judging, and central to many of their comments was the fact that a judge had to come to the process understanding the importance and respect the Constitution must receive in the judging

process and an understanding that that respect is guided by, and should be guided by, a full appreciation of the limited jurisdiction of the court in our system of government, but understanding its importance as well.

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

LEAHY: Well, you -- let's go into some of the particulars on this. One of the things that I found appealing in your record, that you were a prosecutor, as many of us, both the ranking member and I had that privilege, and you worked on the front lines, an assistant district attorney in the Manhattan D.A.'s office.

Your former boss, District Attorney Robert Morgenthau, the dean of the American Prosecutors, said one of the most important cases you worked on was the prosecution of the man known as the Tarzan Burglar. He terrorized people in Harlem. He would swing on ropes into their apartments and rob them and steal, and actually killed three people.

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

How did that experience -- did that experience shape your views in any way as -- both as a lawyer but also as a judge? I mean, this was getting into about as nitty-gritty as you could into the whole area of criminal law.

SOTOMAYOR: I became a lawyer in the prosecutor's office. To this day, I owe who I have become as a -- who I became as a lawyer and who have -- who I have become as a judge to Mr. Morgenthau. He gave me a privilege and honor in working in his office that has shaped my life. When I say I became a lawyer in his office, it's because in law school, law schools teach you on hypotheticals.

SOTOMAYOR: They set forth facts for you. They give you a little bit of teaching on how those facts are developed, but not a whole lot. And then they ask you to opine about legal theory and apply legal theory to the facts before you.

Well, when you work in a prosecutor's office, you understand that the law is not legal theory. It's facts. It's what witnesses say and don't say. It's how you develop your position in the record. And then it's taking those facts and making arguments based on the law as it exists.

That's what I took with me as a trial judge. It's what I take with me as an appellate judge. It is respect that each case gets decided case by case, applying the law as it exists to the facts before you.

You asked me a second question about the Tarzan murderer case, and that case brought to life for me in a way that perhaps no other case had fully done before the tragic consequences of needless deaths.

In that case, Mr. Maddicks was dubbed "the Tarzan murderer" by the press because he used acrobatic feats to gain entry into apartments. In one case, he took a rope, placed it on a pipe on top of a roof, put a paint can at the other end, and threw it into a window in a building below and broke the window. He then swung himself into the apartment and, on the other side, shot a person he found.

He did that repeatedly, and, as a result, he destroyed families. I saw a family that had been in tact, with a mother living with three of her children, some grandchildren. They all worked at various jobs. Some were going to school.

They stood as they watched one of their -- the mother stood as she watched one of her children be struck by a bullet that Mr. Maddicks fired and killed him because the bullet struck the middle of his head.

That family was destroyed. They scattered to the four winds, and only one brother remained in New York who could testify. That case taught me that prosecutors, as all participants in the justice system, must be sensitive to the price that crime imposes on our entire society.

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

SOTOMAYOR: There had never been a case quite like that, where an individual who used different acrobatic feats to gain entry into an apartment was tried with all of his crimes in one indictment. I researched very carefully the law and found a theory in New York law, called the Molyneax (ph) theory then, that -- that basically said if you can show a pattern that established a person's identity or assisted in establishing a person's identity -- simplifying the argument, by the way -- then you can try different cases together.

This was not a conspiracy under law because Mr. Maddicks acted alone. So I had to find a different theory to bring all his acts together. Well, a presented that to the trial judge. It was a different application of the law. But what I did was draw on the principles of the Molyneax (ph) theory. And arguing those principles to the judge, the judge permitted that joint trial of all of Mr. Maddox's activities.

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

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

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

LEAHY: Let's go into that because I -- you know, obviously, the Tarzan case is -- was unique at least. And as I said, Mr. Morgenthal singled that out as an example of the kind of lawyer you are. And I find compelling your story about being in the apartment. I've stood in homes at three o'clock in the morning as they're carrying the body out from a murder. I can understand how you're feeling. But in applying the law and applying the facts, you told me once that, ultimately and completely, the law is what controls.

And I was struck by that when you did. And so there's been a great deal of talk about the Ricci case -- Ricci v. DeStefano. And you and two other judges were assigned this appeal involving firefighters in New Haven. The plaintiffs were challenging the decision to voluntarily discard the result of a paper-and-pencil test to measure leadership abilities.

LEAHY: Now, the legal issue that was presented to you in that case was not a new one, not in your circuit. In fact, there was a unanimous decade's old Supreme Court decision as well. In addition, in 1991, Congress acted to reinforce (inaudible) the law.

I might note that every Republican member of this committee still serving in the Senate supported that statement of the law. So you have a binding precedent. You and two other judges came to a unanimous decision. Your decision deferred to the district court's ruling allowing the city's voluntary determination that could not justify using that paper-and-pencil test under our civil rights laws and settled -- you said it was settled judicial precedent.

A majority of the Second Circuit later voted not to revisit the panel's unanimous decision; therefore, they upheld your decision.

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

Ironically, if you had done something other than follow the precedent, some would be now attacking you as being an activist. You followed the precedent. So now they attack you as being biased and racist. It's kind of a unique thing. You're damned if you do and damned if you don't. How do you react to the Supreme Court's decision in the New Haven firefighters case?

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

The issue was not what we would do or not do, because we were following precedent, and you, when on (ph) circuit court, are obligated on a panel to follow established circuit precedent. The issue in Ricci was what the city did or could do when it was presented with a challenge to one of its tests that -- for promotion.

This was not a quota case; this was not an affirmative action case. This was a challenge to a test that everybody agreed had a very wide difference between the pass rate of a variety of different groups. The city was faced with the possibility recognized in law that the employees who were disparately impacted -- that's the terminology used in the law and is a part of the civil rights amendment that you were talking about in 1991 -- that those employees who could show a disparate impact, a disproportionate pass rate, that they could bring a suit and that then the employer had to defend the test that it gave.

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

And so the question before the panel was, was the decision a -- of the city based on race or based on its understanding of what the law required it to do?

SOTOMAYOR: Given Second Circuit precedent, *Bushey v. New York State* -- New York State Civil Services Commission, the panel concluded that the city's decision in that particular situation was lawful under established law.

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

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

SOTOMAYOR: Absolutely.

LEAHY: And if today, now that the Supreme Court has changed their decision without you having to relitigate the case, it would -- it may open, obviously, a different result. Certainly, the circuit would be bound by the new decision even though it's only a 5-to-4 decision, a circuit would be bound by the new decision of the Supreme Court. Is that correct?

SOTOMAYOR: Absolutely, sir.

LEAHY: Thank you.

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

LEAHY: During the course of this nomination, there have been some unfortunate comments, including outrageous charges of racism made about you on radio and television. Some -- one person referred to you as being the equivalent of the head of the Ku Klux Klan. Another leader in the other party referred to you as -- as being a bigot.

And to the credit of the senators, the Republican senators as well as the Democratic senators, they have not repeated those charges. But you haven't been able to respond to any of these things. You've had to be quiet. Your critics have taken a line out of your speeches and twisted it, in my view, to mean something you never intended.

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

What -- and you also said in your speech, I quote, that you "love America and value its lessons," that great things could be achieved in one works hard for it.

And then you said judges must transcend their personal sympathies and prejudices and aspire to achieve a greater degree of the fairness and integrity based on reason of law. And I'll throw one more quote in there. It's what you told me that ultimately and completely, the law is what counts -- or the law is what controls. So tell us, you've heard all of these charges and countercharges, the wise Latina and on and on. Here's your chance. You tell us -- you tell us what's going on here, Judge.

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

SOTOMAYOR: I gave a variant of my speech to a variety of different groups, most often to groups of women lawyers or to groups, most particularly, of young Latino lawyers and students.



As my speech made clear in one of the quotes that you reference, I was trying to inspire them to believe that their life experiences would enrich the legal system, because different life experiences and backgrounds always do. I don't think that there is a quarrel with that in our society.

I was also trying to inspire them to believe that they could become anything they wanted to become, just as I had. The context of the words that I spoke have created a misunderstanding, and I want -- and misunderstanding -- and to give everyone assurances, I want to state up front, unequivocally and without doubt, I do not believe that any ethnic, racial or gender group has an advantage in sound judging. I do believe that every person has an equal opportunity to be a good and wise judge regardless of their background or life experiences.

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

That has to be what she meant, because judges disagree about legal outcomes all of the time -- or I shouldn't say all of the time, at least in close cases they do. Justices on the Supreme Court come to different conclusions. It can't mean that one of them is unwise, despite the fact that some people think that. So her literal words couldn't have meant what they said. She had to have meant that she was talking about the equal value of the capacity to be fair and impartial.

LEAHY: Well, and isn't that what -- you've been on the bench for 17 years. Have you set your goal to be fair and show integrity, based on the law?

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

LEAHY: Well, and doesn't your oath of office actually require you to do that?

SOTOMAYOR: That is the fundamental job of a judge.

LEAHY: Good. Let me (ph) talk to you about another decision that's been talked about, *District of Columbia v. Heller*. In that one, the Supreme Court held that the Second Amendment guarantees to Americans the right to keep and bear arms, and that it's an individual right.

LEAHY: I've owned firearms since my early teen years. I suspect a large majority of Vermonters do. I enjoy target shooting on a very regular basis at our home in Vermont. So I watched that decision rather carefully and found it interesting. Is it safe to say that you accept the Supreme Court's decision as establishing that the Second Amendment right is an individual right? Is that correct?

SOTOMAYOR: Yes, sir.

LEAHY: Thank you. And in the Second Circuit decision, *Maloney v. Cuomo*, you, in fact, recognized the Supreme Court decided in *Heller* that the personal right to bear arms is guaranteed by the Second Amendment of the Constitution against federal law restrictions. Is that correct?

SOTOMAYOR: It is.

LEAHY: And you accept and applied the *Heller* decision when you decided *Maloney*?

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

LEAHY: Well, that -- let me -- let me refer to that, because Justice Scalia's opinion in the Heller case expressly left unresolved and explicitly reserved as a separate question whether the Second Amendment guarantee applies to the states and laws adopted by the -- by the states.

Earlier this year, you were on a Second Circuit panel in a case posing that specific question, analyzing a New York state law restriction on so-called chuka sticks (ph), a martial arts device.

Now, the unanimous decision of your court cited Supreme Court precedent as binding on your decision, and that Supreme Court -- longstanding Supreme Court cases have held that the Second Amendment applies only to the federal government and not to the states.

And I noticed that the panel of the Seventh Circuit, including people like Judge Posner, one of the best-known very conservative judges, cited the same Supreme Court authority, agreed with the Second Circuit decision. We all know that not every constitutional right has been applied to the states by the Supreme Court. I know one of my very first cases as a prosecutor was a question of whether the Fifth Amendment guaranteed a grand jury indictment has been made applicable to the states. The Supreme Court has not held that applicable to the states.

Seventh Amendment right to jury trial, Eighth Amendment prohibition against excessive fines, these have not been made applicable to the states. And I understand that petitions asking -- seeking to have the Supreme Court revisit the question applied to the Second Amendment to the states are pending (inaudible) that case appears before the Supreme Court and you're there how you're going to rule, but would you have an open mind, as -- on the Supreme Court, in evaluating that, the legal proposition of whether the Second Amendment right should be considered fundamental rights and thus applicable to the states?

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

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

In Supreme Court province (ph), the right is not fundamental. It's a legal term. It's not talking about the importance of the right in a legal term. It's talking about is that right incorporated against the states. When Maloney (ph) came before the Second Circuit, as you indicated, myself and two other judges read what the Supreme Court said, saw that it had not explicitly rejected its precedent on application to the states and followed that precedent because it's the job of the Supreme Court to change it.

LEAHY: Well...

SOTOMAYOR: You asked me -- I'm sorry, Senator. I didn't mean...

LEAHY: No, no, go ahead.

SOTOMAYOR: ... to cut you off.

LEAHY: No, go ahead.

SOTOMAYOR: If you asked me whether I have an open mind on that question, absolutely. My decision in Maloney (ph) and on any case of this type would be to follow the precedent of the Supreme Court when it speaks directly on an issue. And I would not prejudice any question that came before me if I was a justice on the Supreme Court.

LEAHY: Let me just ask -- I just asked Senator Sessions if he might have one -- might want to ask one more question. And it goes to the area of prosecution. You've heard appeals in over 800 criminal cases. You affirmed 98 percent of the convictions for violent crimes, including terrorism cases. Ninety-nine percent of the time at least one of the Republican appointed judges on the panel agreed with you.

Let me just ask you about one, the United States vs. Giordano. It was a conviction against the mayor of Waterbury, Connecticut. The victim in that case are the young daughter and niece of a prostitute, young children who as young as nine and 11 were forced to engage in sexual acts with the defendant. The mayor was convicted under a law passed by Congress prohibiting the use of any facility or means of interstate commerce to transmit or contact information about persons under 16 for the purpose of illegal sexual activity.

You spoke for a unanimous panel in the Second Circuit, which included Judge Jacobs and Judge Hall. You upheld that conviction against the constitutional challenge that the federal criminal statute in question exceeded Congress' power in the commerce clause. I mention that only because I appreciate your deference to the constitutional congressional authority to prohibit illegal conduct. Did you have any difficulty in reaching the conclusion you did in the -- in the Giordano case?

SOTOMAYOR: No, sir.

LEAHY: Thank you. I'm glad you reached it. Senator Sessions? And I appreciate Senator Sessions' forbearance.

SESSIONS: Welcome. It's good to have you back, Judge, and your family and friends and supporters. And I hope we'll have a good day today, look forward to dialogue with you. I got to say that I liked your statement on the fidelity of the law yesterday and some of your comments this morning.

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

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

Let me recall that yesterday you said it's simple fidelity to the law. The task of a judge is not to make law; it's to apply law. I heartily agree with that. However, you previously have said the court of appeals is where policy is

made. And you said on another occasion the law that lawyers practice and judge declare is not a definitive -- capital L -- Law that many would like to think exists," close quote.

So I guess I'm asking today what do you really believe on those subjects. That there is no real law and that judges do not make law? Or that there is no real law and the court of appeals is where policy is made? Discuss that with us, please.

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

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

In that conversation with the students, I was focusing on what district court judges do and what circuit court judges do. And I know noted that district court judges find the facts, and they apply the facts to the individual case. And when they do that, they're holding, they're finding doesn't bind anybody else. Appellate judges, however, establish precedent. They decide what the law says in a particular situation. That precedent has policy ramifications because it binds not just the litigants in that case, it binds all litigants in similar cases, in cases that may be influenced by that precedent.

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

SESSIONS: Judge, I would just say, I don't think it's that clear. I looked at that on tape several times, and I think a person could reasonably believe it meant more than that.

But yesterday you spoke about your approach to rendering opinions and said, quote, "I seek to strengthen both the rule of law and faith in the impartiality of the justice system," and I would agree. But you have previously said this: "I am willing to accept that we who judge must not deny differences resulting from experiences and heritage, but attempt, as the Supreme Court suggests, continuously to judge when those opinions, sympathies and prejudices are appropriate."

So first, I'd like to know, do you think there's any circumstance in which a judge should allow their prejudices to impact their decision-making?

SOTOMAYOR: Never their prejudices. I was talking about the very important goal of the justice system is to ensure that the personal biases and prejudices of a judge do not influence the outcome of a case. What I was talking about was the obligation of judges to examine what they're feeling as they're adjudicating a case and to ensure that that's not influencing the outcome. Life experiences have to influence you. We're not robots to listen to evidence and don't have feelings. We have to recognize those feelings and put them aside. That's what my speech was saying ...

SESSIONS: Well, Judge ...

SOTOMAYOR: ... because that's our job.

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

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

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

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

SESSIONS: I agree with that.

SESSIONS: I know one judge that says that if he has a feeling about a case, he tells his law clerks to, "Watch me. I do not want my biases, sympathies or prejudices to influence this decision, which I've taken an oath to make sure is impartial." I just am very concerned that what you're saying today is quite inconsistent with your statement that you willingly accept that your sympathies, opinions and prejudices may influence your decision-making.

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

SESSIONS: Well, yesterday, you also said that your decisions have always been made to serve the larger interest of impartial justice, a good -- good aspiration, I agree. But in the past, you've repeatedly said this: "I wonder whether achieving the goal of impartiality is possible at all in even most cases and I wonder whether by ignoring our differences as women, men or people of color we do a disservice to both the law and society." Aren't you saying there that you expect your background and -- and heritage to influence your decision-making?

SOTOMAYOR: What I was speaking about in that speech was -- harkened back to what we were just talking about a few minutes ago, which is life experiences to influence us, in good ways. That's why we seek the enrichment of our legal system from life experiences.

That can affect what we see or how we feel, but that's not what drives a result. The impartiality is an understanding that the law is what commands the result.

And so, to the extent that we are asking the questions, as most of my speech was an academic discussion about, what should we be thinking about, what should we be considering in this process, and accepting that life experiences could make a difference. But I wasn't encouraging the belief or attempting to encourage the belief that I thought that that should drive the result.

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

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

SESSIONS: Judge...

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

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

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

SOTOMAYOR: It's not a question of choosing to see some facts or another, Senator. I didn't intend to suggest that. And in the wider context, what I believe I was -- the point I was making was that our life experiences do permit us to see some facts and understand them more easily than others.

But in the end, you're absolutely right. That's why we have appellate judges that are more than one judge because each of us, from our life experiences, will more easily see different perspectives argued by parties. But judges do consider all of the arguments of litigants. I have. Most of my opinions, if not all of them, explain to parties by the law requires what it does.

SESSIONS: Do you stand by your statement that my experiences affect the facts I choose to see?

SOTOMAYOR: No, sir. I don't stand by the understanding of that statement that I will ignore other facts or other experiences because I haven't had them. I do believe that life experiences are important to the process of judging. They help you to understand and listen but that the law requires a result. And it would command you to the facts that are relevant to the disposition of the case.

SESSIONS: Well, I will just note you made that statement in individual speeches about seven times over a number of years span. And it's concerning to me. So I would just say to you I believe in Judge Seiderbaum's (ph) formulation. She said -- and you disagreed. And this was really the context of your speech. And you used her -- her statement as sort of a beginning of your discussion.

And you said she believes that a judge, no matter what their gender or background, should strive to reach the same conclusion. And she believes that's possible. You then argued that you don't think it's possible in all, maybe even most, cases. You deal with the famous quote of Justice O'Connor in which she says a wise old man should reach the same decision as a wise old woman. And you pushed backed from that. You say you don't think that's necessarily accurate. And you doubt the ability to be objective in your analysis.

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

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

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

It was bad, because it left an impression that I believed that life experiences commanded a result in a case, but that's clearly not what I do as a judge. It's clearly not what I intended in the context of my broader speech, which was attempting to inspire young Hispanic, Latino students and lawyers to believe that their life experiences added value to the process.

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

Judge, on the -- so philosophy can impact your judging. I think it's much more likely to reach full flower if you sit on the Supreme Court, and then you will -- than it will on a lower court where you're subject to review by your colleagues in the higher court.

And so, with regard to how you approach law and your personal experiences, let's look at the New Haven firefighters case, the Ricci case. In that case, the city of New Haven told firefighters that they would take an exam, set forth the process for it, that would determine who would be eligible for promotion.

The city spent a good deal of time and money on the exam to make it a fair test of a person's ability to see -- to serve as a supervisory fireman, which, in fact, has the awesome responsibility at times to send their firemen into a dangerous building that's on fire, and they had a panel that did oral exams and not -- wasn't all written, consisting of one Hispanic and one African-American and -- and one white.

And according to the Supreme Court, this is what the Supreme Court held: The New Haven officials were careful to ensure broad racial participation in the design of the test and its administration. The process was open and fair. There was no genuine dispute that the examinations were job-related and consistent with business purposes, business necessity.

But after -- but after the city saw the results of the exam, it threw out those results, because, quote, "not enough of one group did well enough on the test."

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

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

SOTOMAYOR: No, sir. The panel was composed of me and two other judges. In a very similar case of the 7th Circuit in an opinion offered by Judge Easterbrook -- I'm sorry. I misspoke. It wasn't Judge Easterbrook. It was Judge Posner -- saw the case in an identical way. And neither judge -- I've confused some statements that Senator Leahy made with this case. And I apologize.

In a very similar case, the 6th Circuit approached a very similar issue in the same way. So a variety of different judges on the appellate court were looking at the case in light of established Supreme Court and 2nd Circuit precedent and determined that the city facing potential liability under Title VII could choose not to certify the test if it believed an equally good test could be made with a different impact on affected groups.

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

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

SESSIONS: Judge, there was a -- apparently, unease within your panel. I -- I was really disappointed. And I think a lot of people have been that the opinion was so short. It was pro curiam. It did not discuss the serious legal issues that the case raised. And I believe that's legitimate criticism of what you did.

But it appears, according to Stuart Taylor, a respected legal writer for the National Journal -- that Stuart Taylor concluded that -- that it appears that Judge Cabranes was concerned about the outcome of the case, was not aware of it because it was a pro curiam unpublished opinion. But it began to raise the question of whether a rehearing should be granted.

You say you're bound by the superior authority. But the fact is when the re -- the question of rehearing that 2nd Circuit authority that you say covered the case, some say it didn't cover so clearly -- but that was up for debate. And the circuit voted, and you voted not to reconsider the prior case. You voted to stay with the decision of the circuit.

And, in fact, your vote was the key vote. Had you voted with Judge Cabranes, himself of -- of -- of Puerto Rican ancestry -- had you voted with him, you -- you -- you could have changed that case. So in truth you weren't bound by that case had you seen it in a different way. You must have agreed with it and agreed with the opinion and stayed with it until it was reversed by the court. Let me just mention this. In 1997...

LEAHY: Is that a question or a...

SESSIONS: Well, that was a response to some of what you said, Mr. Chairman, because you misrepresented factually what the -- the posture of the case.

LEAHY: Well, I obviously...

SESSIONS: In 1997...

LEAHY: I obviously will disagree with that. But that -- we'll have a chance to vote on this issue.

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



you would you follow the Supreme Court's binding decision in Adarand v. Pena.

In Adarand, the Supreme Court held that all governmental discrimination, including Affirmative Action programs, that discriminated by race of an applicant must face strict scrutiny in the courts. In other words, this is not a light thing to do. When one race is favored over another, you must have a really good reason for it, or it's not acceptable.

After Adarand, the government agencies must prove there is a compelling state interest in support of any decision to treat people differently by race. This is what you answered: "In my view, the Adarand court correctly determined that the same level of scrutiny -- strict scrutiny applies for the purpose of evaluating the constitutionality of all government classifications, whether at the state or federal level, based on race," close quote. So that was your answer, and it deals with government being the City of New Haven.

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

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

And the Supreme Court decided, not on a basis of strict scrutiny, that what it did here was wrong -- what the city did here was wrong, but on the basis that the city's choice was not based on a substantial basis in evidence to believe it would be held liable under the law. Those are two different standards, two different questions that a case would present.

SESSIONS: But Judge, it wasn't that simple. This case was recognized pretty soon as a big case, at least. I noticed what perhaps kicked off Judge Cabranes's concern was a lawyer saying it was the most important discrimination case that the circuit had seen in 20 years. They were shocked they got a -- basically one-paragraph decision per curiam unsigned back on that case.

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

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

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

SOTOMAYOR: The panel decision was based on a 78-page district court opinion. The opinion referenced it. In its per curium, the court incorporated in differently, but it was referenced by the circuit. And it released on that very thoughtful, thorough opinion by the district court.

And that opinion discussed Second Circuit precedent in its fullest -- to its fullest extent. Justice Cabranes had one view of the case. The panel had another. The majority of the vote -- it wasn't just my vote -- the majority of the court, not just my vote, denied the petition for rehearing.

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

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

SESSIONS: Well, Judge, I think it's not fair to say that a majority -- I guess it's fair to say a majority voted against rehearing. But it was 6 to 6. Unusual that one of the judges had to challenge a panel decision, and your vote made the majority not to rehear it.

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

But do you think that Frank Ricci and the other firefighters whose claims you dismissed felt that their arguments and concerns were appropriately understood and acknowledged by such a short opinion from the court?

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

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

In the end, the body that had the discretion and power to decide how these tough issues should be decided, let alone the precedent that had been recognized by our circuit court and another -- at least, the Sixth Circuit -- but along what the court thought would be the right test or standard to apply.

And that's what the Supreme Court did. It answered that important question because it had the power to do that - - not the power but the ability to do that because it was faced with the arguments that suggested that. The panel was dealing with precedent and arguments that rely on our precedent.

SESSIONS: Thank you, Judge. And I appreciate this opportunity. And I -- I would just say, though, had the procurement opinion stood without a rehearing requested by one of the judges in the whole circuit and kicked off the discussion, it's very, very unlikely that we would have heard about this case or the Supreme Court would have taken it up. Thank you, Mr. Chairman.

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

I put into the record the New York City Bar, which said you were extremely well credentialed to sit on the Supreme Court. I'll put that in there. I'll put in the Congressional Research Service, which analyzed your cases

and found that you consistently deal with the law and with stare decisis, the upholding of past judicial precedent.

I've put in that the nonpartisan Brennan Center found you solidly in the mainstream and then another analysis of more than 800 of your cases which found you followed a (ph) traditional consensus judge on criminal justice issues.

I thought I'd put those in. It's one thing to talk about speeches you might give; I'm more interested on cases you might decide. Senator Kohl?

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

SOTOMAYOR: Good morning.

KOHL: Senator Sessions has spent a great deal of time on the New Haven case, and so I would like to see if we can't put it into some perspective. Isn't it true that Ricci was a very close case? Isn't it true that 11 of the 22 judges the reviewed the case did agree with you and that it was only reversed by the Supreme Court by a one-vote 5-4 margin?

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

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

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

KOHL: All right. Judge, we've heard several of our colleagues now, particularly on the other side, criticize you because they believe some things that you have said in speeches show that you'll not be able to put your personal views aside.

But I believe rather than pulling lines out of speeches, oftentimes out of context, the better way is to examine your record as a judge. In fact, when I asked now-Justice Alito what sort of a justice he was going to make, he said, quote, "If you want to know what sort of justice I would make, look at what sort of judge I've been."

KOHL: So you've served now as a federal judge for the past 17 years, the last 11 as an appellate court judge. If we examine the record, I believe it's plain that you are a careful jurist, respectful of precedent, and author of dozens of moderate and carefully reasoned decisions. The best evidence, I believe, is the infrequency with which you have been reversed.

You have authored over 230 majority opinions in your 11 years on the Second Circuit Court of Appeals. But in only three out of those 230-plus cases have your decisions been reversed by the Supreme Court -- a very, very low reversal rate of 2 percent.

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

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

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

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

SOTOMAYOR: Few judges could claim they love baseball more than I do. (LAUGHTER) For obvious reasons. But analogies are always imperfect. And I prefer to describe what judges do, like umpires, is to be impartial and bring an open mind to every case before them. And by an open mind, I mean a judge who looks at the facts of each case, listens and understands the arguments of the parties, and applies the law as the law commands. It's a refrain I keep repeating because that is my philosophy of judging -- applying the law to the facts at hand. And that's my description of judging.

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

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

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

I'm a judge who believes that the facts drive the law and the conclusion that the law will apply to that case. And when I say "drives the law," I mean determines how the law will apply in that individual case. If you would ask me instead, if you permit me, to tell you a justice from the past that I admire for applying that approach to the law, it would be Justice Cardozo.

Now, Justice Cardozo didn't spend a whole lot of time on the Supreme Court. He had an untimely passing. But he had been a judge on the New York Court of Appeals for a very long time.

And during his short tenure on the bench, one of the factors that he was so well known for was his great respect for precedent and his great respect for -- respect and deference to the legislative branch and to the other branches of government and their powers under the Constitution.

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

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

In past confirmation hearings, we've seen nominees who tell us one thing during our private meetings and in the confirmation hearings and then go to the court and become a justice that is quite different from the way they've

portrayed themselves at the hearing. So I'd like to ask you questions about a few issues that have generated much discussion. First, affirmative action.

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

Without asking you how you would rule in any particular case, what do you think of affirmative action? Do you believe that affirmative action is a necessary part of our society today?

Do you agree with Justice O'Connor that she expects in 25 years the use of racial preferences will no longer be necessary to promote diversity? Do you believe affirmative action is more justified in education than in employment? Or do you think it makes no difference?

SOTOMAYOR: The question of whether affirmative action is necessary in our society or not and what form it should take is always, first, a legislative determination, in terms of legislative or government employer determination, in terms of what issue it is addressing and what remedy it is looking to structure.

The Constitution promotes and requires the equal protection of law of all citizens in its 14th Amendment. To ensure that protection, there are situations in which race in some form must be considered; the courts have recognized that. Equality requires effort, and so there are some situations in which some form of race has been recognized by the court.

SOTOMAYOR: It is firmly my hope, as it was expressed by Justice O'Connor in her decision involving the University of Michigan Law School admissions criteria, that in 25 years, race in our society won't be needed to be considered in any situation. That's the hope. And we've taken such great strides in our society to achieve that hope, but there are situations in which there are compelling state interests and the admissions case that Justice O'Connor was looking at, the court recognized that in the education field.

And the state is applying a solution that is very narrowly tailored. And there, the court determined that the law school's use of race is only one factor among many others with no presumption of admission whatsoever was appropriate under the circumstances.

In another case, companion case, the court determined that a more fixed use of race that didn't consider the individual was inappropriate, and it struck down the undergraduate admissions policy. That is what the court has said about the educational use of race in a narrow way.

The question, as I indicated, of whether that should apply in other contexts has not been looked at by the Supreme Court directly. The holdings of that case have not been applied or discussed in another case. That would have to await another state action that would come before the court where the state would articulate its reasons for doing what it did and the court would consider if those actions were constitutional or not.

KOHL: Judge, *Bush v. Gore*. Many critics saw the *Bush v. Gore* decision as an example of the judiciary improperly injecting itself into a political dispute. In your opinion, should the Supreme Court even have decided to get involved in *Bush v. Gore*?

SOTOMAYOR: That case took the attention of the nation, and there's been so much discussion about what the Court did or didn't do. I look at the case, and my reaction as a sitting judge is not to criticize it or to challenge it even if I were disposed that way because I don't take a position on that.

The Court took and made the decision it did. The question for me, as I look at that sui generis situation, it's only happened once in the lifetime of our country, is that some good came from that discussion. There's been and was enormous electoral process changes in many states as a result of the flaws that were reflected in the process that went on.

That is a tribute to the greatness of our American system which is whether you agree or disagree with a Supreme Court decision, that all of the branches become involved in the conversation of how to improve things. And as an indicated, both Congress, who devoted a very significant amount of money to electoral reform in certain of its legislation -- and states have looked to address what happened there.

KOHL: Judge, in a 5-4 decision in 2005, the Supreme Court ruled that *Kelo v. City of New London* was a -- that it was constitutional for local government to seize private property for private economic development. Many people, including myself, were alarmed about the consequences of this landmark ruling because, in the words of dissenting Justice O'Connor, under the logic of the *Kelo* case, quote, "Nothing is to prevent the state from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory," unquote.

This decision was a major shift in the law. It said that private development was a permissible, quote, "public use," according to the Fifth Amendment, as long as it provided economic growth for the community. What is your opinion of the *Kelo* decision, Judge Sotomayor? What is an appropriate, quote, "public use" for condemning private property?

SOTOMAYOR: *Kelo* is now a precedent of the court. I must follow it. I am bound by a Supreme Court decision as a Second Circuit judge.

As a Supreme Court judge, I must give it the deference that the doctrine of stare decisis, which suggests the question of the reach of *Kelo* has to be examined in the context of each situation, and the court did, in *Kelo*, note that there was a role for the courts to play in ensuring that takings by a state did, in fact, intend to serve the public -- a public purpose and public use.

I understand the concern that many citizens have expressed about whether *Kelo* did or did not honor the importance of property rights, but the question in *Kelo* was a complicated one about what constituted public use. And there, the court held that a taking to develop an economically blighted area was appropriate.

KOHL: Yes. That's what they decided in *Kelo*. I asked you your opinion, and apparently you feel that you're not in a position to offer an opinion because it's precedent, and now you're required to follow precedent as an appellate court judge. But I asked you if you would express your opinion, assuming that you became a Supreme Court Justice, and assuming that you might have a chance some day to review the scope of that decision.

SOTOMAYOR: I don't pre-judge issues.

KOHL: OK.

SOTOMAYOR: That is actually -- I come to every case with an open mind.

KOHL: All right.

SOTOMAYOR: Every case is new for me.

KOHL: That's good. All right. Let's leave that. As you know, Judge, the landmark case of *Griswold v. Connecticut* guarantees that there is a fundamental constitutional right to privacy as it applies to contraception. Do you agree with that? In your opinion, is that settled law?

SOTOMAYOR: That is the precedent of the court, so it is settled law.

KOHL: Is there a general constitutional right to privacy? And where is the right to privacy, in your opinion, found in the Constitution?

SOTOMAYOR: There is a right of privacy. The court has found it in various places in the Constitution, has recognized rights under those various provisions of the Constitution. It's found it in the Fourth Amendment's right and prohibition against unreasonable search and seizures.

Most commonly, it's considered -- I shouldn't say most commonly, because search and seizure cases are quite frequent before the court, but it's also found in the 14th Amendment of the Constitution when it is considered in the context of the liberty interests protected by the due process clause of the Constitution.

KOHL: All right. Judge, the court's ruling about the right to privacy in *Griswold* laid the foundation for *Roe v. Wade*. In your opinion, is *Roe* settled law?

SOTOMAYOR: The court's decision in *Planned Parenthood v. Casey* reaffirmed the court holding of *Roe*. That is the precedent of the court and settled, in terms of the holding of the court.

KOHL: Do you agree with Justices Souter, O'Connor, and Kennedy in their opinion in *Casey*, which reaffirmed the core holding in *Roe*?

SOTOMAYOR: As I said, I -- *Casey* reaffirmed the holding in *Roe*. That is the Supreme Court's settled interpretation of what the core holding is and its reaffirmance of it.

KOHL: All right. Let's talk a little bit about cameras in the court. You sit on a court of appeals which does allow cameras into court. And, from all indications, your experience with it has not been negative. In fact, I understand it's been somewhat positive.

So how would you feel about allowing cameras in the Supreme Court, where the country would have a chance to view discussions and arguments about the most important issues that the Supreme Court decides with respect to our Constitution, our rights, and our future?

SOTOMAYOR: I have had positive experiences with cameras. When I have been asked to join experiments of using cameras in the courtroom, I have participated. I have volunteered.

Perhaps it would be useful if I explain to you my approach to collegiality on a court. It is my practice, when I enter a new enterprise, whether it's on a court or in my private practice or when I was a prosecutor, to experience what those courts were doing or those -- those individuals doing that job were doing, understand and listen to the arguments of my colleagues about why certain practices were necessary or helpful or why certain practices shouldn't be done or new procedures tried, and then spend my time trying to convince them.

But I wouldn't try to come in with prejudice so that they thought that I was unwilling to engage in a conversation with them or unwilling to listen to their views. I go in, and I try to share my experiences, to share my thoughts, and to be collegial and come to a conclusion together.

And I can assure you that, if this august body gives me the privilege of becoming a justice of the Supreme Court, that I will follow that practice with respect to the tall issues of procedure on the court, including the question of cameras in the courtroom.

KOHL: I appreciate the fact that, if you can't convince them, it won't happen. But how do you feel? (LAUGHTER) How do you feel about admitting cameras in the Supreme Court, recognizing that, you know, you cannot decree it by fiat?

SOTOMAYOR: You know, I'm a pretty...

KOHL: Think it's a good idea?

SOTOMAYOR: I'm a pretty good litigator, or I was a really good litigator, and -- and I know that when I worked hard at trying to convince my colleagues of something after listening to them, they'll often try it for a while. I mean, we'll have to talk together. We'll have to figure out that issue together.

KOHL: OK.

SOTOMAYOR: I will -- I would be, again, if I was fortunate enough to be confirmed, the new voice in the discussion. A new voices often see things and talk about them and consider taking new approaches.

KOHL: All right. Judge, all of us in public office, other than federal judges, have specific fixed terms. And we must periodically run for reelection if you want to remain in office. Even most state court judges have fixed terms of office.

The federal judiciary, as you know, is very different. You have no term of office. Instead you serve for life. So I'd like to ask you -- would you support term limits for Supreme Court justices, for example, 15, 20 or 25 years? Would this help ensure that justices do not become victims of a cloistered, ivory tower existence and that you will be able to stay in touch with the problems of ordinary Americans -- term limits for Supreme Court justices?

SOTOMAYOR: All questions of policy are within the providence of Congress first. And so, that particular question would have to be considered by Congress first. But it'd have to consider it in light of the Constitution and then of statutes that govern these issues. And so, that first step and decision would be Congress'.

I can only know that there was a purpose to the structure of our Constitution. And it was a view by the -- by the founding fathers that they wanted justices who would not be subject to political whim or to the emotions of a moment. And they felt that by giving them certain protections that that would ensure that -- their objectivity and their impartiality over time.

KOHL: Sure.

SOTOMAYOR: I do know, having served with many of my colleagues who have been members of the court, sometimes for decades -- I had one colleague who was still an active member of the court in his 90s. And at close to 90, he was learning the Internet and encouraging my colleagues of a much younger age to participate in learning the Internet.

So I don't think that it's service or the length of time. I think there is wisdom that comes to judges from their experience that helps them in the process over time. I think in the end it is a question of one of what the structure of our government is best served by. And as I said, that policy question will be considered first by



Congress and the processes set forth by the Constitution. But I do think there is a value in the services of judges for long periods of time.

KOHL: All right, Judge. Finally, I'd like to turn to anti-trust law. Anti-trust law is not some mysterious legal theory, as you know, that only lawyers can understand. Anti-trust is just an old-fashioned word for fair competition, Judge. And it is a law we use to protect consumers and competitors alike from unfair and illegal trade practices.

A prominent anti-trust lawyer named Kyle Hittinger (ph) was quoted in an A.P. story recently of saying that, quote, "Judge Sotomayor has surprisingly broke the pro-business record in the area of anti-trust. In nearly every case in which she has -- she was one of the three judges considering a dispute, the court ruled against the plaintiff bringing an anti-trust complaint." I'd like you to respond to that and to one other thing I'd like to -- to raise.

In 2007, Leegin case in a 5-4 decision, Supreme Court overturned a 97-year-old precedent and held that vertical price fixing no longer automatically violated anti-trust law. In effect, this means that a manufacturer is now free to set minimum prices at retail for its products and, thereby, to prohibit discounting of its products.

What do you think of this decision? Do you think it was appropriate for the Supreme Court, by judicial fiat, to overturn a nearly century-old decision on the meaning of the Sherman Act that businesses and consumers had come to rely on and which had been never altered by Congress? Those two things -- anti-trust.

SOTOMAYOR: I cannot speak, Senator, to whether Leegin was right or wrong. It's now the established law of the court. That case, in large measure, centered around the justices' different views of the effects of stare decisis on a question which none of them seemed to dispute that there were a basis to question the economic assumptions of the court in this field of law.

Leegin is the court's holding. Its teachings and holding I will have to apply in new cases, so I can't say more than what I know about it and what I thought the court was doing there.

With respect to my record, I can't speak for why someone else would view my record as suggesting a pro an anti approach to any series of cases. All of the businesses cases, as with all of the cases, my structure of approaching is the same. What is the law requiring?

I would note that I have cases that have upheld anti-trust complaints and uphold those cases going forward. I did it in my Visa- Mastercard anti-trust decision. And that was also a major decision in this field. All I can say is that with business and the interest of any party before me, I will consider and apply the law as it is written by Congress and informed by precedent.

KOHL: Thank you very much, Judge Sotomayor. I thank you, Mr. Chairman.

LEAHY: Thank you. Judge Sotomayor, we've -- this would probably be an appropriate place to take a short break, and we will. And then what we will -- we will come back. At some point, we will break for the both the Republicans and the Democrats to be in a caucus lunch but it also gives you a chance to have lunch. So we'll take a -- we'll take a 10-minute -- flexible 10-minute break. And I thank you for your patience here, Judge Sotomayor. And we'll be back.

(RECESS)

LEAHY: There's been some question during the break from -- from the press what our schedule will be. And I fully -- I fully understand that they have to work out their own schedules.

But I -- what I would suggest would just -- Senator Kohl ask questions. We'll go to -- next is Senator Hatch, a former chairman of this committee. Following Senator Hatch, we'll go to Senator Feinstein. They'll bring us to roughly 12:30.

Because of the caucuses, we'll break at 12:30, but then resume right at 2 o'clock, which will mean -- I've -- I've talked to Republicans and Democrats. It means everybody will have to leave their -- want to come back and leave their caucus a few minutes early, but I think -- I think everybody will understand that. So Senator Hatch is a former chairman of this committee and a friend of many years. And I recognize Senator Hatch.

HATCH: Well, thank you, Mr. Chairman. Welcome again and to your lovely family. We're -- we're grateful to have you all here. Now, let me ask you a question about settled law. If a holding in the Supreme Court means it is settled, do you believe that -- that *Gonzales v. Carhart*, upholding the partial-birth abortion ban, is settled law?

SOTOMAYOR: All precedents of the Supreme Court I consider settled law, subject to the deference to doctrine of stare decisis would counsel.

Day 2 Part 2

HATCH: I want to begin here today by looking at your cases in an area that is very important to -- to many of us, and that's the Second Amendment, the right to keep and bear arms, and your conclusion that the -- that the right is not fundamental.

Now, in the 2004 case entitled *United States v. Sanchez Villar*, you handled the Second Amendment issue in a short footnote. You cited the second circuit's decision in *United States v. Toner* for the proposition that the right to possess a gun is not a fundamental right.

Toner, in turn, relied on the Supreme Court's decision in *United States v. Miller*. Last year, in the....

...*District of Columbia v. Heller*, the Supreme Court examined *Miller* and concluded that, quote, "The case did not even purport to be a thorough examination of the Second Amendment," unquote, and that *Miller* provided, quote, "no explanation of the content of the right," unquote. You're familiar with that.

SOTOMAYOR: I am, sir.

HATCH: OK. So let me ask you, doesn't the Supreme Court's treatment of *Miller* at least cast doubts on whether relying on *Miller*, as the second circuit has done, for this proposition is proper?

SOTOMAYOR: The issue...

HATCH: Remember, I'm saying at least cast doubts.

SOTOMAYOR: Well, that is what I believe Justice Scalia implied in his footnote 23, but he acknowledged that the issue of whether the right, as understood in Supreme Court jurisprudence, was fundamental. It's not that I considered it un-fundamental, but that the Supreme Court didn't consider it fundamental so as to be incorporated against the state.

HATCH: Well, it didn't decide that point.

SOTOMAYOR: Well, it not only didn't decide it, but I understood Justice Scalia to be recognizing that the court's precedent had held it was not. His opinion with respect to the application of the Second Amendment to government regulation was a different inquiry and a different inquiry as to the meaning of *U.S. v. Miller* with respect to that issue.

HATCH: Well, if *Heller* had already been decided, would you have addressed that issue differently than *Heller* or would you take the position that it -- that the doctrine of incorporation is inevitable with regard to state -- state issues?

SOTOMAYOR: That's the very question that the Supreme Court is more than likely to be...

HATCH: To decide.

SOTOMAYOR: ... considering. There are three cases addressing this issue, at least, I should say, three cases...

HATCH: Right.

SOTOMAYOR: ... addressing this issue in the circuit courts. And so it's not a question that I can address. As I said, I bring an open mind to every case.

HATCH: I accept that. In Sanchez Villar, you identified the premise that a right to possess a gun is not fundamental and the conclusion that New York's ban on gun possession was permissible under the Second Amendment, but there's not a word actually connecting the premise to the conclusion. Without any analysis at all, that footnote that you wrote leaves the impression that unless the right to bear arms is considered fundamental, any gun restriction is necessarily permissible under the Second Amendment. Is that what you believe?

SOTOMAYOR: No, sir, because that's not -- I'm not taking an opinion on that issue, because it's an open question. Sanchez was...

HATCH: So you admit it's an open question.

SOTOMAYOR: Well, I admit that Justice -- admit. I -- the courts have been addressing that question. The Supreme Court, in the opinion authored by Justice Scalia, suggested that it was a question that the court should consider.

I'm just attempting to explain that U.S. v. Sanchez was using fundamental in its legal sense, that -- whether or not it had been incorporated against the states.

With respect to that question, moreover, even if it's not incorporated against the states, the question would be would the states have a rational basis for the regulation it has in place. And I believe that the question there was whether or not a prohibition against felons possessing firearms was at question, if my memory serves me correctly, if it doesn't. But even Justice Scalia, in the majority opinion in Heller, recognized that that was a rational basis regulation for a state under all circumstances, whether or not there was a Second Amendment right.

HATCH: Well, in the District of Columbia v. Heller, the Supreme Court observed that, quote, "It has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right," unquote. And the court also observed this, quote, "By the time of the founding, the right to have arms had become fundamental for English subjects," unquote. Now, the court also described the right to bear arms as a natural right. Do you recall that from that decision?

SOTOMAYOR: I do remember that discussion.

HATCH: OK. All right.

In what way does the court's observation that the Second Amendment codified a pre-existing fundamental right to bear arms affect your conclusion that the Second Amendment does not protect a fundamental right?

SOTOMAYOR: My conclusion in the Maloney case or in the U.S. Sanchez-Villar was based on precedence and the holding of precedence that the Second Circuit did not apply to the states.

HATCH: Well, what's ... excuse me, I'm sorry. I didn't mean to interrupt you. What's your understanding of the test or standard the Supreme Court has used to determine whether a right should be considered fundamental? I'm not asking a hypothetical here. I'm only asking about what the Supreme Court has said in the past on this question. I recall (inaudible) emphasizing that a right must be deeply rooted in our nation's history and tradition, that it is necessary to an Anglo-American regime of ordered liberty, or that it is an enduring American tradition.

I think I've cited that pretty accurately on what the court has held with regard to what is a fundamental right. Now, those are different formulations from the Supreme Court's decisions, but I think the common thread there is obvious. Now, is that your understanding of how the Supreme Court has evaluated whether a right should be deemed fundamental?

SOTOMAYOR: The Supreme Court's decision with respect to the Second Circuit incorporation -- Second Amendment incorporation doctrine is reliant on old precedent of the court, and I don't mean to use that as precedent that doesn't bind when I call it old. I'm talking about precedent that was passed in the 19th century.

Since that time, there is no question that different cases addressing different amendments of the Constitution have applied a different framework. And whether that framework and the language you quoted are precise or not, I haven't examined that framework in a while to know if that language is precise or not. I'm not suggesting it's not, Senator. I just can't affirm that description.

SOTOMAYOR: My point is, however, that once there's Supreme Court precedent directly on point, and Second Circuit precedent directly on point on a question, which there is on this incorporation doctrine and how it uses the word "fundamental," then my panel, which was unanimous on this point -- there were two other judges -- and at least one other -- or one other panel on the Seventh Circuit by Justice -- by Justice -- by Judge Easterbrook has agreed that, once you have settled precedent in an area, then, on a precise question, then the Supreme Court has to look at that.

And under the deference one gives to stare decisis and the factors one considers in deciding whether that older precedent should be changed or not, that's what the Supreme Court will do.

HATCH: OK. As I noted, the Supreme Court puts the Second Amendment in the same category as the First and the Fourth Amendments as pre-existing rights that the Constitution merely codified. Now, do you believe that the First Amendment rights, such as the right to freely exercise religion, the freedom of speech, or the freedom of the press, are fundamental rights?

SOTOMAYOR: Those rights have been incorporated against the states. The states must comply with them. So in -- to the extent that the court has held that...

HATCH: Right.

SOTOMAYOR: ... then they are -- they have been deemed fundamental, as that term is understood legally.

HATCH: What about the Fourth Amendment, about unreasonable -- unreasonable searches and seizures?

SOTOMAYOR: As well.

HATCH: Same...

SOTOMAYOR: But with respect to the holding as it relates to that particular amendment.

HATCH: I understand. Let me turn to your decision in *Maloney v. Cuomo*. This was the first post-Heller decision about the Second Amendment to reach any federal court, or federal appeals court. I think I should be more specific. In this case, you held that the Second Amendment applies only to the federal government, not to the states, and this was after Heller. And am I right that your authority for that proposition was the Supreme Court's 1886 decision in *Presser v. Illinois*?

SOTOMAYOR: That, plus some Second Circuit precedent that had held...

HATCH: OK.

SOTOMAYOR: ... that it had not been -- that the amendment had not...

HATCH: But Presser was definitely one of the...

SOTOMAYOR: It was, but...

HATCH: ... cases you relied on? OK. In that case -- or, I should say, that case involved the 14th Amendment's privileges and immunities clause. Is that correct? You're aware of that?

SOTOMAYOR: It may have. I haven't read it recently enough to remember exactly.

HATCH: You can take my word on it.

SOTOMAYOR: OK. I'll accept...

HATCH: Thank you. Last year's decision in *Heller* involved the District of Columbia, so it did not decide the issue of whether the Second Amendment applies to the states or is incorporated, but the court did say that its 19th century cases about applying the Bill of Rights to the states, quote, "did not engage the sort of 14th Amendment inquiry required by our later cases," unquote.

Now, here's my question: Am I right that those later cases to which the court referred involved the 14th Amendment's due process clause rather than its privileges and immunities clause?

SOTOMAYOR: As I said, I haven't examined those cases recently enough to be able to answer your question, Senator. But what I can say is that, regardless of what those cases addressed or didn't address, the Second Circuit had very directly addressed the question of whether the Second -- whether it viewed the Second Amendment as applying against the states. To that extent, if that precedent got the Supreme Court's teachings wrong, it still would bind my court.

HATCH: I understand that.

SOTOMAYOR: ... to the extent that justice...

HATCH: I'm talking about something beyond that. I'm talking about what should be done here. Isn't the Presser case that you relied on in *Maloney* to say that the Second Amendment does not apply to the states one of those 19th century cases where they've used the privileges and immunities clause, not the 14th Amendment due process clause, to incorporate? See, the later cases have all used 14th Amendment, as far as I can recall.

SOTOMAYOR: As I said, Senator, I just haven't looked at those cases to analyze it. I know what *Heller* said about them. In *Maloney*, we were addressing a very, very narrow question.

HATCH: Right.

SOTOMAYOR: And in the end, the issue of whether that precedent should be followed or not, it's a question the Supreme Court's going to address if it accepts certiorari in one of the three cases in which courts have looked at this question, the court of appeals has.

HATCH: Well, the reason -- the reason I'm going over this is because I believe you've applied the wrong line of cases in Maloney, because you were applying cases that used the privileges and immunities clause and not cases that used the 14th Amendment due process clause.

Let me just clarify your decision in Maloney. As I read it, you held that the Second Amendment does not apply to state or local governments. You also held that, since the right to bear arms is not fundamental, all that is required to justify a weapons restriction is some reasonably conceivable state effects that could provide a rational basis for it. Now, am I right that this is a very permissive standard that could be easily met, the rational basis standard?

SOTOMAYOR: Well, all standards of the court are attempting to ensure that government action has a basis.

HATCH: Right.

SOTOMAYOR: In some cases, the court looks at the action and applies a stricter scrutiny to the government's action. In others, if it's not a fundamental right in the way the law defines that, but it hasn't been incorporated against the states, then the standard of review is of rational basis.

HATCH: And my point is, it's a permissive standard that can be easily met. Is that correct?

SOTOMAYOR: Well, the government can remedy a social problem that it is identifying or a difficulty it's identifying in conduct not in the most narrowly tailored way, but one that reasonably seeks to achieve that result. In the end, it can't be arbitrary and capricious.

HATCH: Well...

SOTOMAYOR: That's a word that is not in the definition...(CROSSTALK)

HATCH: Maybe I could use the words "more easily met." How's that? OK?

SOTOMAYOR: As I said, it -- the rational basis does look more broadly than strict scrutiny may.

HATCH: Right, that's my point. That's my point. As a result of this very permissive legal standard -- and it is permissive -- doesn't your decision in Maloney mean that virtually any state or local weapons ban would be permissible?

SOTOMAYOR: Sir, in Maloney, we were talking about nunchuk sticks.

HATCH: I understand.

SOTOMAYOR: Those are martial arts sticks.

HATCH: Two sticks bound together by rawhide or some sort of a...

SOTOMAYOR: Exactly. And -- and when the sticks are swung, which is what you do with them, if there's anybody near you, you're going to be seriously injured, because that swinging mechanism can break arms, it can bust someone's skull...

HATCH: Sure.

SOTOMAYOR: ... it can cause not only serious, but fatal damage. So to the extent that a state government would choose to address this issue of the danger of that instrument by prohibiting its possession in the way New York did, the question before our court -- because the Second Amendment has not been incorporated against the state -- was, did the state have a rational basis for prohibiting the possession of this kind of instrument?

Every kind of regulation would come to a court with a particular statute, which judicial -- judicial -- legislative findings as to why a remedy is needed, and that statute would then be subject to rational basis review.

HATCH: Well, the point that I'm really making is that the decision was based upon a 19th century case that relied on the privileges and immunities clause, which is not the clause that we use to invoke the doctrine of incorporation today, and that's just an important consideration for you as you see these cases in the future.

Let me just change the subject. In the Ricci case -- and I'm very concerned about that, because -- because of a variety of reasons. The court split 5-4 on whether to grant summary judgment to the firefighters. And it was a summary judgment, meaning it didn't have to be distributed to the other judges on the court.

The only reason that Judge Cabranes raised the issue is that he read it in the newspaper and then said, "I want to see that case." Then he got it and he realized, "My gosh, this is a case of first impression."

So the court split 5-4 -- it was 5-4 -- on whether to grant summary judgment to the firefighters. Now, even the four dissenters said that the firefighters deserved their day in court to find more facts.

But all nine justices disagreed with your handling of that particular case. Now, thus, your decision in Ricci -- I mean, even though there was a 5-4 decision, all nine of them disagreed with your handling.

Now, OK, but as you noted, your decision in Ricci v. Destefano has become very controversial. People all over the country are tired of courts imposing their will against one group or another without justification.

Now, the primary response or defense so far seems to be that you had no choice, because you were bound by clear and longstanding precedent. Most say you were bound by second circuit precedent. Some say it was Supreme Court precedent.

So I need to ask you about this. To be clear, this case involved not only disparate impact, discrimination, but both disparate treatment and disparate impact. That's what made it a case of first impression.

The city says that they had to engage in disparate treatment or they would have been sued for disparate impact. So it was how these two concepts of discrimination, disparate treatment and disparate impact, relate in the same case.

But back to the issue of whether you were bound by clear, longstanding precedent, as I recall your opinion in this case, whether it was the summary order or the pro curium opinion, did not cite any Supreme Court or second circuit court precedent at all. Is that right?

SOTOMAYOR: I believe they cited the Bushey case.



HATCH: OK. The only case citation in your opinion was to the district court opinion, because you were simply adopting what the district court had said rather than doing your own analysis of the issues, and I think that is right. But you can correct me if I'm wrong, I'd be happy to be corrected.

HATCH: But didn't the district court say that this was actually a very unusual case? This is how the distinct court put it. Quote, "This case presents the opposite scenario of the usual challenge to an employment or promotional examination as plaintiffs attack not the use of allegedly racially discriminatory exam results, but defendants' reason for their refusal to use those results," unquote.

Now, this seems complicated, I know, but you know more about it than probably anybody here in this room. The district court cited three Second Circuit precedents, but didn't -- didn't two of them -- the Kirkland (ph) and the Bushey cases -- didn't they deal with race- norming of test scores, which did not occur in this case?

SOTOMAYOR: They dealt with when employees could prove a disparate impact of a case and when there would be...

HATCH: But based upon race-norming.

SOTOMAYOR: But the principles underlying when employees could bring a case are the same, when they establish a prima facie case, which is, can an employee be sued -- employer be sued by employees who can prove a disparate impact? And the basic principles of those cases were the same, regardless of what form the practice at issue took.

HATCH: OK. Well, the third case, the Hayden case, didn't it present a challenge to the design of the employment test rather than the results of the test?

SOTOMAYOR: I'm sorry. Say this again? I...

HATCH: The Hayden case, didn't -- didn't it actually present a challenge to the design of the case, rather than the results of the -- the design of the employment test rather than the results of the test?

SOTOMAYOR: Again, regardless of what the challenge is about, what test is at issue, the core holding of that precedent was that, if an employee could show a disparate impact from a particular practice or test or activity by a employer, then that employee had a prima facie case of liability under Title VII.

So the question is, was the city subject to potential liability because the employees -- the city of New Haven -- because the employees could bring a suit under established law challenging that the city of New Haven had violated Title VII?

HATCH: Which was one... SOTOMAYOR: So that -- that was the question.

HATCH: OK. It was one of the reasons why it's a very important case. When the circuit -- Second Circuit considered whether to review the decision en block, didn't you join an opinion admitting that the case presents, quote, "difficult issues," unquote?

SOTOMAYOR: Well, the district court noted that it was a different scenario, but it evaluated its decision -- it evaluated the case in a 78-page decision and gave a full explanation, one which the panel agreed with by adopting the opinion of the district court.

Those questions, as I indicated, are always whether -- given the risk the city was facing, the fact that it could face a law school -- lawsuit and its conclusion that perhaps a better test could be devised, that would not have a disparate impact, whether it was liable for discrimination -- disparate -- not disparate -- different treatment under the law, the Supreme Court came back and said "New standard."

SOTOMAYOR: As I understood the dissenters in that case, what they were saying is, to the majority, if you're going to apply a new standard, then give the Second Circuit a chance to look at the record and apply that standard. It wasn't disagreeing that the circuit wasn't applying the law as it was understood at the time. If the circuit -- the dissenters, as I read what they were doing, was saying send it back to the circuit and let them look at this in the first instance.

HATCH: Well, as I understand it, Judge Cabranes basically didn't know the decision was done until he read it in the newspaper and then asked to look at it. And his opinion, joined by five other judges, supporting en banc review opens with these words. Quote, "This appeal raises important questions of first impression in our circuit and, indeed, in the nation regarding the application of the 14th Amendment and Title VII's prohibition on discriminatory employment practices," unquote. Was he wrong?

SOTOMAYOR: That was his view. He expressed it in his -- in his opinion on his vote. I can't speak for him. I know that the -- I know that the panel...

HATCH: No, I'm just asking you to speak for you. Look, when the Supreme Court reversed you, Justice Kennedy wrote, quote, "This action presents two provisions of Title VII to be interpreted and reconciled with few, if any, precedence in the courts of appeals discussing the issue," unquote. He was referring to the lack of precedent anywhere in the country, not just the 2nd Circuit. Was he wrong?

SOTOMAYOR: He was talking about whether -- I understood him to be talking about, not whether the precedent that existed would have determined the outcome as the panel did, but whether the courts should be looking at these two provisions in a different way to establish a choice, a different choice in considerations by the city.

As I indicated, that argument about what new standard or new approach to the questions that the city should consider before it denies certification of a test, yes, had not been addressed by other courts. But the ability of a city when presented with a prima facie case to determine whether or not it would attempt to reach a non-disparate impact had been recognized by the courts.

HATCH: OK. If even the district court acknowledged that this was an unusual case and if there was little or no 2nd Circuit precedent directly on point for a case like this, you know, one of the questions that I had is why did your panel not just do your own analysis and your own opinion. Judge Cabranes pointed out that the pro curiam approach that simply adopts the district court's reasoning is reserved for cases that involve only, quote, "straightforward questions that do not require explanation," unquote.

As I asked you about a minute ago, you yourself joined an opinion regarding rehearings saying the case raised difficult questions. Now, the issue that I'm raising is why did you not analyze the issues yourself and apply what law existed to the difficult and perhaps unprecedented cases or issues in the case.

HATCH: And whether you got it right or wrong -- and the Supreme Court did find that you got it wrong because they reversed it -- I just can't understand the claim that you were just sticking to branding (ph) clear, longstanding precedent when all of that was part of the total decision. And all nine justices found it to be a flaw that you didn't -- you know, that you didn't give serious, adequate consideration to what really turned out to be a case of first -- a case of first impression.

Look, it seems to be always to look at these things in retrospect, and you're under a lot of pressure here. But I just wanted to cover that case because I think it's important that that case be covered. I think it's also important for you to know how I feel about these type of cases and I think many here in the United States Senate. These are important cases.

These are cases where people are discriminated against. And let me just make one last point here. You have nothing to do with this, I know. But there's a rumor that People for the American Way has -- that this organization has been smearing Frank Ricci, who is only one of 20 plaintiffs in this case, because he may be willing to be a witness in this -- in these proceedings.

I hope that's not true. And I know you have nothing to do with it, so don't -- don't think I'm trying to make a point against you. I'm not. I'm making a point that that's the type of stuff that doesn't belong in Supreme Court nomination hearings. And I know you would agree with me on that.

SOTOMAYOR: Absolutely, Senator. I would never, ever endorse, approve, or tolerate, if I had no one control over individuals, that kind of conduct.

HATCH: I believe that.

SOTOMAYOR: Reprehensible.

HATCH: I believe that, and I want you to know I've appreciated this little time we've had together.

SOTOMAYOR: Thank you, Senator.

LEAHY: Senator Hatch, thank you. I would also put in record because race-related cases come up, an independent study Supreme Court expert, Tom Goldstein, found of the 97 race-related cases which Judge Sotomayor participated in the Second Circuit, she and the rest of her panel rejected discrimination claims (inaudible) 80 times, agreed them 10 times, rejecting discrimination claims by a margin of 8 to 1.

Mr. Goldstein found that in 10 cases favoring discrimination, nine of those were unanimous. And of those, nine in seven, the unanimous panel included at least one Republican-appointed judge. And he said it seems absurd to say Judge Sotomayor allows race to affect her decision making. And without objection, that report will be part of the record. I yield now to Senator Feinstein, the chair of the U.S. Senate...

SESSIONS: Mr. Chairman, I would just like to cite for the record a Washington Post study that show that Judge Sotomayor's votes came out liberal 59 percent of the time compared with 52 percent for other judges who, like her, were appointed by Democratic presidents and that the Democratic appointees were 13 percent more liberal than Republican appointees.

So I don't know. It's not a huge difference, but the suggestion that -- I would just make that for the record and (inaudible) whatever else you offered. And I would offer, Mr. Chairman, a correction of the record regarding the Miguel Estrada case, I have a statement from him. He was nominated by President Bush and would offer that into the record as an explanation of how his nomination was blocked by consistent filibuster by the Democrats when there was a majority to confirm him.

LEAHY: Thank you, and that will be in the record.

I would also not want anything -- make any suggestion that Mr. Estrada is anything but an exceptionally good lawyer. The argument there was not so much with him, but withholding by -- of some material by the Bush administration, something he had no control over. Senator Feinstein?

FEINSTEIN: Thank you very much, Mr. Chairman. I'm puzzled why Mr. Estrada keeps coming up. Mr. Estrada had no judicial experience. The nominee before us has considerable judicial experience. And Mr. Estrada wouldn't answer questions presented to him.

This nominee, I think, has been very straightforward. She has not used catchy phrases. She has answered the questions directly the best she could. And to me, that gets points.

I must say that, if there's a test for judicial temperament, you pass it with an A-plus-plus. I want you to know that, because I wanted to respond, and my adrenaline was moving along. And you have just sat there, very quietly, and responded to questions that, in their very nature, are quite provocative. So I want to congratulate you about that.

Now, it was just said that all nine justices disagreed with you in the Ricci case, but I want to point out that Justice Ginsburg and three other justices stated in the dissent that the Second Circuit decision should have been affirmed. Is that correct?

SOTOMAYOR: Yes.

FEINSTEIN: Thank you very much. Also, a senator made a comment about the Second Circuit not being bound in the Ricci case that I wanted to follow up on, because I think what he said was not correct. You made the point that the unanimous Ricci panel was bound by Second Circuit precedent, as we've said. The senator said that you easily could have overruled that precedent by voting for the case to be heard en banc. First, my understanding is that a majority of the Second Circuit voted not to re-hear the case. Is that correct?

SOTOMAYOR: That's correct.

FEINSTEIN: Secondly, it took a significant change in disparate law -- in disparate impact law to change the result of the Second Circuit reached in this case. And the Supreme Court itself in Ricci recognized that it was creating a new standard. Is my understanding correct?

SOTOMAYOR: Yes, Senator.

FEINSTEIN: You see? So what's happening here, ladies and gentlemen and members, is that this very reserved and very factual and very considered nominee is being characterized as being an activist when she is anything but. And I have a problem with this, because some of it is getting across out there. Calls began to come into my office, "Wow, she's an activist."

In my view, because you have agreed with your Republican colleagues on constitutional issues some 98 percent of the time, I don't see how you can possibly be construed to be an activist. And by your comments here, and you've -- and as I walked in the room earlier, somebody asked you how you see your role, and you said, "To apply the law as it exists with the cases behind it."

That's a direct quote. It's a very clear statement. It does not say, "Oh, I think it's a good idea," or it does not say any other cliché. It states a definitive statement.

And later, you said, "Precedent is that which gives stability to the law," and I think that's a very important statement.

FEINSTEIN: And what we're talking about here is following precedent, so let me ask you in a difficult area of the law a question.

The Supreme Court has decided on more than seven occasions that the law cannot put a woman's health at risk. It said it in Roe in '73; in Danforth in '76; in Planned Parenthood in '83; in Thornburgh in '86; in Casey in '92; in Carhart in 2000; and in Ayotte in 2006.

With both Justices Roberts and Alito on the court, however, this rule seems to have changed, because, in 2007, in Carhart II, the court essentially removed this basic constitutional right from women.

Now, here's my question: When there are multiple precedents and a question arises, are all the previous decisions discarded, or should the court re-examine all the cases on point?

SOTOMAYOR: It's somewhat difficult to answer that question...

FEINSTEIN: I know.

SOTOMAYOR: ... because, before the court in any one case is this particular factual situation. And so how the court's precedent apply to that unique factual situation -- because often what comes before the court is something that's different than its prior decision, not always, but often.

In the Carhart case, the court looked to its precedents. And as I understood that case, it was deciding a different question, which was whether there were other means, safer means, and equally effective means for a woman to exercise her right than the procedure at issue in that case.

That was, I don't believe, a rejection of its prior precedents. Its prior precedents are still the precedents of the court. The health and welfare of a woman must be -- must be compelling consideration.

FEINSTEIN: So you believe that the health of the woman still exists...

SOTOMAYOR: It is a part...(CROSSTALK)

SOTOMAYOR: You mentioned many cases. It has been a part of the court's jurisprudence and a part of its precedents. Those precedents must be given deference in any situation that arises before the court.

FEINSTEIN: Thank you very much. I appreciate that. I'd also like to ask you your thoughts on how a precedent should be overruled. In a rare rebuke of his colleagues, Justice Scalia has sharply criticized Chief Justice Roberts and Justice Alito for effectively overruling the court's precedents without acknowledging that they were doing so.

Scalia wrote in the Hein case, and I quote, "Overruling prior precedent is a serious undertaking, and I understand the impulse to take a minimalist approach. But laying just claim to be honoring stare decisis requires more than beating a prior precedent to a pulp and then sending it out to the lower courts weakened, denigrated, more incomprehensible than ever, and yet somehow technically alive," end quote.

FEINSTEIN: In Wisconsin Right to Life v. FEC, he said that Chief Justice Roberts' opinion, quote, "effectively overruled a 2003 decision without saying so," end quote, and said this kind of, quote, "faux judicial restraint," end quote, was really, quote, "judicial obfuscation," end quote.

Here's the question. When the court decides to overrule a previous decision, is it important that it do so outright and in a way that is clear to everyone?

SOTOMAYOR: The doctrine of stare decisis, which means stand by a decision, stand by a prior decision, has a basic premise and that basic premise is that there is a value in society to predictability, consistency, fairness, evenhandedness in the law.

And the society has an important expectation that judges won't change the law based on personal whim or not, but that they will be guided by a humility they should show in the thinking of prior judges who have considered weighty questions and determined, as best as they could, given the tools they had at the time, to establish precedent.

There are circumstances in which a court should reexamine precedent and perhaps change its direction or perhaps reject it, but that should be done very, very cautiously. And I keep emphasizing the "verys" because the presumption is in favor of deference to precedent.

The question then becomes what are the factors you use to change it and then courts have looked at a variety of different factors, applying each in a balance and determining where that balance falls at a particular moment.

It is important to recognize, however, that the development of the law is step-by-step, case-by-case, and there are some situations in which there is a principled way to distinguish precedent from application to a new situation.

No, I do not believe a judge should act in an unprincipled way, but I recognize that both the doctrine of stare decisis starts from a presumption that deference should be given to precedence and that the development of the law is case-by-case. It's always a very fine balance.

FEINSTEIN: Thank you very much. I appreciate that. I wanted to ask a question on executive power and national security. We have seen the executive branch push the boundaries of power, claiming sweeping authority to disregard acts of Congress, and that's one way to collect communications of Americans without warrants and to detain people indefinitely without due process.

Now, the president in literally hundreds of signing statements affixed to a signature on a bill indicated part of a bill that he would, in essence, disregard. He didn't veto the bill. He signed the bill and said, "But there are sections that I," in so many words, "will disregard."

FEINSTEIN: Most egregiously, in 2005, when Congress passed a bipartisan bill banning torture, President Bush signed it, but he also issued a signing statement saying he would only enforce the law, quote, "consistent with the constitutional authority of the president to supervise the unitary executive branch and consistent with the constitutional limitations on the judicial power," end quote.

In other words, although he signed the bill, it was widely interpreted that he was asserting the right not to follow it. Does the Constitution authorize the president to not follow parts of laws duly passed by the Congress that he is willing to sign that he believes are an unconstitutional infringement on executive authority?

SOTOMAYOR: It's a very broad question.

FEINSTEIN: It's one that we are grappling with.

SOTOMAYOR: And -- and that's why I have to be very cautious in answering it...

FEINSTEIN: That's fine.

SOTOMAYOR: ... because not only is Congress grappling with this issue, but so are courts, by claims being raised by many litigants who are -- who are asserting -- whether they're right or wrong would need to be addressed in each individual case -- that the president, in taking some activity against the individual, has exceeded Congress's authorization or his powers.

The best I can do in answering your question, because there are so many pending cases addressing this issue in such a different variety of ways, is to say that the best expression of how to address this always in a particular situation was made by Justice Jackson in his concurrence in the Youngstown steel seizure cases, and that involved President Truman's seizure of steel factories.

There, Justice Jackson has sort of set off the framework in an articulation that no one's thought of a better way to make it. He says that you always have to look at an assertion by the president that he or she is acting within executive power in the context of what Congress has done or not done.

And he always starts with, first, you look at whether Congress has expressly or implicitly addressed or authorized the president's act in a certain way. And if the president has, then he's acting at his highest stature of power.

If the president is acting in prohibition of an express or implied act of Congress, then he's working at his lowest ebbs. If he's acting where Congress hasn't spoken, then we're in what Justice Jackson called the zone of twilight.

The issue in any particular case is always starting with what Congress says or has not said and then looking at what the Constitution has with -- says about the powers of the president minus Congress's powers in that area.

You can't speak more specifically than that, in response to your statement that were a part of your question, other than to say the president can't act in violation of the Constitution. No one's above the law. But what that is in a particular situation has to be looked at in the factual scenario before the court.

## Day 2 Part 3

FEINSTEIN: Thank you very much. This is really very relevant to what we do, and we have often discussed this Jackson case, or the steel case, but we just recently passed a Foreign Intelligence Surveillance Act. And one of the amendments -- because I did the amendment -- was to strengthen the exclusivity clause of the law, which has been in the bill since the beginning, but that there are no exceptions from....

...which the president can leave the four corners of this bill. So it will remain to be seen how that works out, over time, but I can certainly say to you that it's a most important consideration as we looked at these matters of national security.

So let me ask you this: you joined a Second Circuit opinion last year that held that the executive should not forbid companies that receive national security letters to tell the public about those letters.

The panel's opinion in the case said, quote, "The national security context in which NSLs" -- national security letters -- "are authorized imposes on courts a significant obligation to defer to the judgments of executive branch officials," end quote, but also that "Under no circumstance should the judiciary become the handmaiden of the executive," end quote. That's *Doe v. Mukasey*.

Given that the executive branch has responsibility for protecting the national security, how should courts balance the executive branch's expertise in national security matters with the judicial branch's constitutional duty to enforce the Constitution and prevent abuse of power?

SOTOMAYOR: I can talk about what we did in *Doe* as reflective of the approach that I took and joined in that case. It's difficult to talk about an absolute approach in any case because each case presents its own actions by parties and its own set of competing considerations often.

In *Doe*, the district court had invalidated a congressional statute altogether, reasoning that the statute violated the Constitution in a number of different ways and that those violations did not authorize Congress to act in the manner it did.

As the panel said in that decision, recognizing that deference to the executive is important in national security questions, and that deference to congress, because the court was -- district court was invalidating an act of Congress, that we had, as an appellate court, to be very cautious about what we were doing in this area and to balance and keep consistent with constitutional requirements the actions that were being taken.

SOTOMAYOR: Giving that due deference, we upheld to most of the statute, and what we did was address two provisions of the statute that didn't pass, in our judgment, constitutional muster. One of them was that the law, as Supreme Court precedent had commanded, required that if the government was going to stop an individual from speaking in this particular context, that the government had to come to court immediately to get court approval of that step.

The statute, instead, required the individual who was restricted to come and challenge the restriction. We said, "No, government's acting. You have a right to speak." If you have a right to speak, you should know what the grounds for that right are and you should be told or brought to court to be given an opportunity to have that restriction lifted.

The other was a question of who bore the burden of supporting that restriction, and the statute held that it was the individual who was being burdened who had to prove that there wasn't a reason for it. The government agreed with our court that that burden violated Supreme Court precedent and the premises of freedom of speech



and agreed that the burden should not be that way and we read the statute to explain what the proper burden was.

There is, in all of these cases, a balance and deference that's needed to be given to the executive and to Congress in certain situations, but we are a court that protects the Constitution and the rights of individuals under it and we must ensure and act with caution whenever reviewing a claim before us.

FEINSTEIN: Thank you very much. One question on the commerce clause in the Constitution. That clause, as you well know, is used to pass laws in a variety of contexts, from protecting schools from guns to highway safety to laws on violent crime, child pornography, laws to prevent discrimination and to protect the environment, to name just a few examples.

When I questioned now Chief Justice Roberts, I talked about how, for 60 years, the court did not strike down a single federal law for exceeding congressional power under the commerce clause. In the last decade, however, the court has changed its interpretation of the commerce clause and struck down more than three dozen cases. My question to the chief justice and now to you is: do you agree with the direction the Supreme Court has moved in more narrowly, interpreting congressional authority to enact laws under the commerce clause?

SOTOMAYOR: It is...

FEINSTEIN: Generally, not relating to any one case.

SOTOMAYOR: No, I know. But the question assumes a prejudgment by me of what's an appropriate approach or not in a new case that may come before me as a second circuit judge or, again, if I'm fortunate enough to be a justice on the Supreme Court.

So it's not a case I can answer in a broad statement. I can say that the court, in reviewing congressional acts as it relates to an exercise of powers under the commerce clause, has looked at a wide variety of factors and considered that in different areas.

But there is a framework that those cases have addressed and that framework would have to be considered with respect to each case that comes before the court.

SOTOMAYOR: Now, I know that you mentioned the number of different cases and if you have one in particular that concerns you, perhaps I could talk about what the framework is that the court established in those cases.

FEINSTEIN: All right. I'll give you one very quickly: restricting the distance that somebody could bring a gun close to a school.

SOTOMAYOR: Well, the gun-free zones school act, which the court struck down in Lopez...

FEINSTEIN: Right, Lopez.

SOTOMAYOR: ... in that case and in some of its subsequent cases, the court was examining, as I mentioned, a wide variety of factors. They included whether the activity that the government was attempting to regulate was economic or non-economic, whether it was an area in which states traditionally regulated, whether the statute at issue had an interstate commerce provision to -- as an element of the crime, and then considered whether there was a substantial effect on commerce.

It looked at the congressional findings on that last element, the court did, and determined that there weren't enough in the confluence of factors that it was looking at to find that the Constitution -- that that particular statute was within Congress's powers.

That's the basic approach it has used to other statutes it has looked at. I would note that its most recent case in this area, the Raich case, the court did uphold a crime that was non-economic, in the sense of that it involved just the possession of marijuana. And there, it looked at the broader statute in which that provision was passed and the intent of Congress to regulate a market in illegal drugs.

So the broad principles established in those cases have been the court's precedent. Its most recent holding suggested another factor for courts to look at in each situation will provide a unique factual setting that the court will apply those principles to.

FEINSTEIN: One last question on that point. One of the main concerns is that this interpretation, which is much more restrictive now, could impact important environmental laws, whether it be the Endangered Species Act, the Clean Air Act, the Clean Water Act, or anything that we might even do in cap and trade.

SOTOMAYOR: Oh, in fact, there are cases pending before the courts raising those arguments. And so those are issues that the courts are addressing. I can't speak much more...

FEINSTEIN: Right, I understand.

SOTOMAYOR: ... further than that because of the restrictions on me.

FEINSTEIN: It's just that Congress has to have the ability to legislate. And in those general areas, it's the commerce clause that enables that legislation.

Now, as you pointed out, we did revise the gun -- and make -- the Lopez case -- and make specific findings and perhaps, you know, with more care toward the actual findings that bring about the legislative conclusion, that we might be able to continue to legislate in these areas.

FEINSTEIN: But my hope is that you would go to the court with the sensitivity that this body has to be able to legislate in those areas. They involve all of the states. And they're very important questions involving people's well-being, control of the environment, the air, the water, et cetera.

SOTOMAYOR: I do believe that in all of the cases the court has addressed this issue that it pays particular attention to congressional findings. I know that individuals may disagree with what the court has done in individual cases. But it has never disavowed the importance of deference to legislative findings with respect to legislation that it's passing within its powers under the Constitution.

FEINSTEIN: Thank you. I wish you best of luck.

SOTOMAYOR: Thank you.

FEINSTEIN: Thank you very much.

SESSIONS: Mr. Chairman, I correct one thing. I said I had a letter earlier from Miguel Estrada. That was not correct. It wasn't a letter. Thank you.

LEAHY: Yes, if we could have a copy of whatever you put in the...

SESSIONS: OK.

LEAHY: I did send Mr. Estrada a note last night because I had (inaudible) something I said about him I wanted to let him know that.

SESSIONS: Well, we both made an error talking about him.

LEAHY: OK. Well -- but then one thing we should remember that Mr. Estrada is not the nominee here. Just as with all the statements made about President Obama's philosophy, his confirmation hearing was last November, not now. It's just you, Judge Sotomayor. And have a good lunch. And we will come back. I'm trying to think who's next. Senator Grassley will be recognized when we come back in. And we will start right at 2:00. Chuck? OK. This hearing is in recess.

(RECESS)

LEAHY: Judge, I once on a television interview said, if I could do what -- anything I wanted to do in life, I said, "Well, if I ever have to work for a living, I want to be a photographer," because I do, at which point, two minutes after the interview, the phone rang. My mom was still alive. She called. She said, "Don't you ever say that. They'll think you don't work." (LAUGHTER) Actually, I don't. I just recognize senators here. You're doing all of the work. And I -- I appreciate the way you're doing it.

I turn next to -- to Senator Grassley. Then, after Senator Grassley, to Senator Feingold.  
Senator Grassley?

GRASSLEY: Welcome once again, Judge. I hope you had a good break. And I appreciate very much the opportunity to ask you some questions. I'd like to start off my round with some questions about your understanding of individual property rights and how they're protected by the Constitution.

And let me say, as I observe property rights around the world, there's a big difference between developed nations and developing nations. And respect for private property has a great deal to do with the advancement of societies.

So I believe all Americans care about this right. They want to protect their homes and anything they own from unlawful taking by government. But this is also a right that is important for agricultural interests. As you know, besides being a senator, I come from an agricultural state in Iowa and am a farmer, as well.

I'm sure that ordinary Americans, besides the economic interests that might be involved, are all very well concerned about where you stand on property rights. So some of these issues have been discussed, but I want to go into a little more depth on Kelo as an example.

Could you explain what your understanding is of the state of the Fifth Amendment's taking cause jurisprudence after the Supreme Court decision in Kelo? Senator Brownback said this aptly when Chief Justice Roberts was before this committee: Quote, "Isn't it now the case that it is much easier for one man's home to become another man's castle?" Your general understanding of the takings clause?

SOTOMAYOR: Good afternoon, Senator Grassley. And it's wonderful to see you again.

GRASSLEY: Thank you.

SOTOMAYOR: I share your view of the importance of property rights under the Constitution. As you know, I was a commercial litigator that represented national and international companies, and it wasn't even the case that it was a difference between developed and underdeveloped countries.

Many of my clients who were from developed countries chose to -- in part, to invest in the United States because of the respect that our Constitution pays to property rights in its various positions, in its various amendments.

With respect to the Kelo question, the issue in Kelo, as I understand it, is whether or not a state who had determined that there was a public purpose to the takings under the -- the takings clause of the Constitution that requires the payment of just compensation when something is -- is condemned for use by the government, whether the takings clause permitted the state, once it's made a proper determination of public purpose and use, according to the law, whether the state could then have a private developer do that public act, in essence. Could they contract with a private developer to effect the public purpose?

And so the holding as I understood it in Kelo was a question addressed to that issue.

SOTOMAYOR: With respect to the importance of property rights and the process that the state must use, I just point out to you that in -- in another case involving that issue that came before me in a particular series of cases that I had involving a village in New York, that I -- I ruled in favor of the property rights -- the property owner's rights to challenge the process that the state had followed in his case and to hold that the state had not given him adequate notice of their intent to use the property -- well, not adequate notice not to use the property, but to be more precise, that they hadn't given him an adequate opportunity to express his objection to the public taking in that case.

GRASSLEY: Could I zero in on two words in the Kelo case? The Constitution uses the word use, public use. Where as the Kelo case talked about taking private property for public purpose. In your opinion, is public use and public purpose the same thing?

SOTOMAYOR: Well, as I understood the Supreme Court's decision in Kelo, it was looking at the court's precedence over time and determining that its precedence had suggested that the two informed each other, that public purpose in terms of developing an area that would have a public improvement and use that the two would inform each other.

GRASSLEY: Do you believe that the Supreme Court overstepped their constitutional authorities when they went beyond the words of the Constitution, in other words, to the word purpose, and thus expanded the ability of government to take an individual's private property? Because I think everybody believes that Kelo was an expansion of previous precedent there.

SOTOMAYOR: I know that there are many litigants who have expressed that view. And, in fact, there has been many state legislators that have passed state legislation not permitting state governments to take in the situation that the Supreme Court approved of in Kelo. The question of whether the Supreme Court overstepped the Constitution, as I've indicated, the court, at least my understanding of the majority's opinion, believed and explained why it thought not.

I have to accept because it is precedent that as precedent. And so, I can't comment further than to say that I understand the questions and I understand what state legislatures have done and would have to await another situation, or the court would, to apply the holding in that case.

GRASSLEY: Then I think that answers my next question. But it was going to be to ask you whether you think that Kelo improperly undermines the constitutionally-protected private property rights. I presume you're saying that you believe that's what the court said and it doesn't undermine property rights.

SOTOMAYOR: I can only talk about what the -- the courts said in the context of that particular case and to explain that it is the court's holding. And so, it's entitled to stare decisis effect and deference.

GRASSLEY: I see.

SOTOMAYOR: But the extent of that has to await the next step, the next cases.

GRASSLEY: OK. Well, then maybe it would be fair for me to ask you what is your understanding of the constitutional limitations then on government entity -- any government entity taking land for public purpose?

SOTOMAYOR: Well, that was the subject of much discussion in the Kelo case among the justices. And with certain justices in the dissent hypothesizing that the limits were difficult to see, the majority taking the position that there were limits. As I've indicated to you, opining on a hypothetical is very, very difficult for a judge to do.

GRASSLEY: OK.

SOTOMAYOR: And as a potential justice on the Supreme Court but, more importantly, as a Second Circuit judge still sitting, I can't engage in a question that involves hypotheses.

GRASSLEY: Right. Let me ask you a couple obvious then. Does the Constitution allow for takings without any compensation?

SOTOMAYOR: Well, the Constitution provides when the government takes it has to pay compensation. As you know, the question of what constitutes an actual taking is a very complex one because there is a difference between taking a home and regulation that may or may not constitute a taking. It's -- so I'm not at all trying to not answer your question.

GRASSLEY: OK. Well, then let me ask you another question. Maybe you can't answer it. Would you strike down a taking that provided no compensation at all?

SOTOMAYOR: Well, as I explained, if the taking violates the Constitution, I would be required to strike it down.

GRASSLEY: Let me move on to the Didden case v. the Village of Port Chester. It raised serious concerns about whether you understand the protection provided by the Constitution for individual property rights. In this case, Mr. Didden alleged that his local village government violated his Fifth Amendment rights when it took his property to build a national chain drugstore. At the meeting with the government agency, another developer, Mr. Didden was told that he could give the developer \$800,000 or a 50 percent interest in his pharmacy project. And if Mr. Didden did not accept either condition, the government would simply take his property.

Two days after Mr. Didden refused to comply with these demands, the government began proceeding to take his land. The district court denied Mr. Didden his day in court, and your panel affirmed that decision in a five-paragraph opinion. Why did you deny Mr. Didden his day in court? How can these facts, in essence, allegations of extortion at least not warrant the opportunity to call witnesses to see if Mr. Didden was telling an accurate story?

SOTOMAYOR: The Didden case presented a narrow issue that the court below...

PROTESTER: (OFF-MIKE)

LEAHY: Officer, remove that man immediately.

PROTESTER: (OFF-MIKE)

LEAHY: We will stand in order...

PROTESTER: (OFF-MIKE)

LEAHY: We will stand in order...

PROTESTER: (OFF-MIKE)

LEAHY: Officers, you will remove that man.

PROTESTER: (OFF-MIKE)

LEAHY: You know...(LAUGHTER) And they did. And they did.

LEAHY: Again, both Senator Sessions and I have said, as all previous chairs and ranking members of this have said, this is a hearing of the United States Senate. The judge deserves respect. Senators in asking questions deserve respect.

I will order the removal of anyone who disrupts it, whether they're supportive of the nominee or opposed to the nominee, whether they're supportive of a position I take or opposed to it. We will have the respect that should be accorded to both the nominee and to the United States Senate.

SESSIONS: Thank you, Mr. Chairman. I think you've handled this well throughout, and I support you 100 percent.

LEAHY: Thank you. Senator -- Senator Grassley, we did stop the clock, so it did not take from your time.

GRASSLEY: Thank you. People always say I have the ability to turn people on. (LAUGHTER) Maybe you could start over again with your -- with your sentence, please.

(UNKNOWN): Where were we?

SOTOMAYOR: I hope I remember where we were.

GRASSLEY: OK.

SOTOMAYOR: Senator, the right of property owners to have their day in court is a very important one, but there is a corollary to the right to have your day in court, which is that you have to bring it to court in a timely manner...

GRASSLEY: OK.

SOTOMAYOR: ... because people who are relying on your assertion of rights should know when you're going to make them. And so there's a doctrine called the statute of limitations that says if a party knows or has reason to know of their injury, then that party has to come in to court and raise their arguments within that statute that sets the limits of the action. GRASSLEY: I...

SOTOMAYOR: In the -- oh, I'm sorry.

GRASSLEY: No, no, no...

SOTOMAYOR: No, no, no.

GRASSLEY: ... you, please. I interrupted you. I should not have interrupted you.

SOTOMAYOR: No, I...

GRASSLEY: Please, go ahead.

SOTOMAYOR: In the Didden case, the question was whether Mr. Didden knew that the state was intending to take his property and for what it, the state, claimed was a public use and that it had plans to have a private developer take his -- they take his property and the private developer develop the land.

So there was a full hearing by the village on this question of whether there was a public use of the land. Mr. Didden didn't claim in the action before the courts that he didn't have notice of that hearing. He did not raise a challenge in that hearing to the public taking. And he didn't raise a challenge to the state's intent to have a private developer develop the land.

Now, in that case, the developer was developing not just Mr. Didden's property. It was one piece of property in a larger development project. And that larger development project had been based on the village's conclusions from its very lengthy hearings in accordance with New York law that the area was blighted and that the area needed economic development.

SOTOMAYOR: So to that issue became the issue before the court in the sense of, had Mr. Didden, knowing that he could be injured by the state's finding of public use and the state's decision to let a private developer develop this land -- did he bring his lawsuit in a timely manner. And the court below and our court ruled on that basis that he hadn't because he had reason to know about the injury that could -- that could come to him.

GRASSLEY: Well, since Mr. Didden's claim was based on conduct of the developer, how could he ever have filed a successful claim under the standard that you just mentioned?

SOTOMAYOR: Mr. Didden alleged in his complaint that the private developer had extorted him. Extortion, under the law, is defined as an unlawful demand for money. On this one piece of property, within a larger development that the private developer was actively engaged in doing what he had contracted with the state to do, to revive the economic base by making investments in it, the private developer knew that Mr. Didden had his claims. The private developer had his agreement with state.

And so he was doing -- at least this was the private developer's argument -- what he was entitled to do which is to say we disagree. I'm claiming that I have a right under contract. You're claiming that you have a right under the takings clause. Let's settle this.

I'm going to lose X amount of money. So you pay me back for me not to do what I'm entitled to do under the law. That's, however, was -- those were the claims of the parties in the action. In the end, the decision of the court was if you believe that the takings of your property were not proper under the public use -- under the takings clause, and you knew that the state had entered a contract with this private developer, then you had knowledge that you could be injured and you should have come to court earlier.

GRASSLEY: Why was the situation in Didden not the kind of prohibited pretextual (ph) taking articulated in Kelo? How was this not some sort of form of extortion? And if there wasn't a pretext in the Didden case where the developer says give me the money personally or we'll take your land, then what is the pretext?

SOTOMAYOR: Well, as I -- as I have described the case...

GRASSLEY: Yes, I understand.

SOTOMAYOR: ... the question comes up in the context of what did Mr. Didden know, did he have enough to know he could be injured, was there no public use to the -- to which the property would apply, and what rights did the private developer have with the state.

And so the extortion question came up in a legal context surrounding the relative rights of the parties. And so as I said, extortion is a term -- a legal term which is someone demanding money with no lawful claim to it. I'm simplifying this. There's different definitions of extortion that apply to different situations. But in the context of this case, that's the simplest description of the case, I believe.

GRASSLEY: The Second Circuit panel in Didden took over a year to issue its rulings, suggesting that you understood the novelty and importance of this case, yet your opinion dealt with Mr. Didden's Fifth Amendment claim in just one paragraph. Did you believe that this was an ordinary takings case?

SOTOMAYOR: Well, cases present claims by parties. And to the extent that Mr. Didden was raising claims that sounded in the issues the court was looking at in Kelo, certainly if Kelo had not come out and the court had to, for whatever reason, determine that somehow the Kelo decision affected the statute of limitations question, it may have had to reach the question.

But courts do often wait for supreme courts to act on cases that are pending in order to see if some form of its analysis changes or not or inform whether a different look should be given to the case. But on the bottom-line issue, Kelo didn't change, in the judgment of the panel, the statute of limitations question.

GRASSLEY: OK. Regardless of the statutes of limitations, I am curious why you didn't elaborate on your Kelo analysis. And why wasn't this opinion published?

SOTOMAYOR: Well, Kelo didn't control the outcome; the statute of limitations did. So there was no basis to go into an elaborate discussion of Kelo.

The discussion of Kelo really was to say that we had understood the public taking issue that Mr. Didden had spent a lot of time in his argument about, but the ruling was based on the narrow statute of limitations ground. So the Kelo discussion didn't need to be longer because it wasn't the holding of the case. The holding of the case was the statute of limitations.

GRASSLEY: OK. This -- on another case, the Supreme Court reversed you 6-3 just three months ago in *Entergy Corporation v. Riverkeeper*. You had held that the Environmental Protection Agency, which is the agency with expertise, could not use a cost-benefit analysis in adopting regulations from the construction of water structures that had an impact on fish.

Rather, you interpreted the Clean Water Act to hold that EPA had to require upgrades to technology that achieved the greatest reduction in adverse environmental impact, even when the costs of those upgrades were disproportionate to benefit. Following long-established precedent, the Supreme Court held that the EPA was reasonable in providing a cost-benefit analysis when adopting regulations under the Clean Water Act. In



reversing, the Supreme Court questioned your proper applications of settled law that agency regulations should be upheld, so long as they're reasonable.

Under Chevron, agency interpretation of statutes are entitled to deference so long as they are reasonable, in other words, if they aren't capricious and arbitrary. Do you find it unreasonable that the EPA was willing to allow money to be spent in a cost-effective manner by not requiring billions of additional dollars to be spent to save a minimal number of additional fish?

SOTOMAYOR: To be able to answer your question, I would need to explain a little bit more about the background. The Supreme Court has now ruled in that case that the conclusion of the Second Circuit would not be upheld on this narrow question. But the question the 2nd Circuit was looking at is what did Congress intend or mean when in the statute at issue it said that the agency had to use the best technology available to minimize an adverse environmental impact. Those were the statute's words.

In looking at that, the circuit applied general statutory construction principles, which is, in our judgment, what was the ordinary meaning of that and...

GRASSLEY: Are you saying you're not bound by Chevron then?

SOTOMAYOR: No, absolutely not.

GRASSLEY: OK, go ahead.

SOTOMAYOR: Chevron -- Chevron speaks to agency action or interpretation. But ultimately the task of a court is to give deference to what Congress wants. That's the very purpose of Congress' legislation. And so, what the court was trying to do there was to see if the agency's interpretation in light of the words of the statute and how Congress has used cost-benefit analysis in other statutes in this area and determine what Congress intended.

And so, we looked at the language. And it said just what it said -- best technology available to minimize adverse environmental impact. We looked at how Congress used cost benefit in similar statutes and similar provisions. Or I shouldn't say similar -- in other provisions. We noted that under the statutes at issue when Congress wanted the agency to use cost-benefit analysis, it said so.

In this provision, Congress was silent. But the language, in the panel's judgment, was the language. And so, in trying to discern what Congress' intent was, we came to the conclusion, not that cost had no role in the agency's evaluation, but that Congress had specified a more limited role than cost benefit. We described it as cost effectiveness.

And, in fact, we voted to vote it past our decision, asked and sent the case back to describe to us exactly what the agency had done and why. Had it used cost benefit? Had it used cost effectiveness? The cost was always going to be a part of what the agency could consider. The issue was more in what approach did Congress' words intend.

And so, agency deference is important. But Congress is the one who writes the statutes. So you have to start as a court with what did Congress intend.

GRASSLEY: It seems to me like you're saying when going (ph) the expertise of the statute that the agency was being arbitrary and capricious in...

SOTOMAYOR: Not -- not at all, sir. We were trying to look at the statute as a whole and determine what Congress meant by words that appeared to say that best technology available had to minimize an environmental effect.

GRASSLEY: OK.

SOTOMAYOR: As I said, that does have -- and as our opinion said, considerations of cost. But given that Congress didn't use the cost benefit -- give the agency cost benefit approval in the terms of this particular provision while it had in others, we determined that the agency and precedent interpreting provisions limited the use of cost benefit analysis.

GRASSLEY: In another 2004 administrative law case dealing with environmental issues, NRDC v. Abraham, you voted to strike down a Bush administration regulation and reinstate a Clinton administration environmental rule that had never even become final. In this case, it appears you also fairly narrowly interpreted Chevron deference when striking down EPA adoptions of reasonable regulations.

If you were elevated to the Supreme Court, do you intend to replace an agency's policy decisions with your own personal policy opinions, as it appears you did in both -- in the Abraham case?

SOTOMAYOR: No, sir. In that case, we were talking about and deciding an issue of whether the agency had followed its own procedures in changing policy. We weren't substituting our judgment for that of the agency. We were looking at the agency's own regulations as to the procedure that it had to follow in order to change an approach by the agency.

So that was a completely different question. With respect to deference to administrative bodies, in case after case where Chevron deference required deference, I have voted in favor of upholding administrative -- executive and administrative decisions.

GRASSLEY: This will probably have to be my last question. Since 2005, you have been a presiding judge on a panel of an appeal filed by eight states and environmental groups arguing that greenhouse gases are a public nuisance that warrant a court-imposed injunction to reduce emissions.

Your panel, in Connecticut v. American Electric Power, has sat on that case for 45 months or nearly three times the average of the Second Circuit. Why, after four years, have you failed to issue a decision in this case?

SOTOMAYOR: The American Bar Association rule on code of conduct does not permit me to talk about a pending case. I can talk to you about one of the delays for substantial a period of time in that decision, and it was that the Supreme Court was considering a case, a Massachusetts case, that had some relevancy or at least had relevancy to the extent that the panel asked the parties to brief further the applicability of that case to that decision.

GRASSLEY: OK. Thank you, Mr. Chairman.

LEAHY: Thank you, Senator Grassley. Senator Feingold?

FEINGOLD: Judge, let me first say I don't mind telling how much I'm enjoying listening to you, both your manner and your obvious, tremendous knowledge and understanding of the law. In fact, I'm enjoying it so much that I hope when you go into these deliberations about cameras in the courtroom, that you consider the possibility that I and other Americans would like the opportunity to observe your skills for many years to come in the comfort of our family rooms and living rooms.

SOTOMAYOR: You were a very good lawyer, weren't you, Senator? (LAUGHTER)

FEINGOLD: But I'm not going to ask you about that one now. Others have covered it. Let me get into a topic that I discussed at length with -- with two most recent Supreme Court nominees, Chief Justice Roberts and Justice Alito, and that's the issue of executive power.

In 2003, you spoke at a law school class about some of the legal issues that have arisen since 9/11. You started your remarks with a moving description of how Americans stood together in the days after those horrific events and how people from small, Midwestern towns and people from New York City found their common threads as Americans, you said.

As you said in that speech, while it's hard to imagine that something positive could ever result from such a tragedy, that there was a sense in those early days of coming together as one community, that we would all help each other get through this.

And it was, of course, something that none of us had ever experienced before and something I've often discussed, as well. But what I have to also say is that, in the weeks and months that followed, I was gravely disappointed that the events of that awful day, the events that had brought us so close together as one nation, were sometimes used, Judge, to justify policies that departed so far from what America stands for.

So I'm going to ask you some questions that I asked now-Chief Justice Roberts at his hearing. Did that day, 9/11, change your view of the importance of individual rights and civil liberties and how they can be protected?

SOTOMAYOR: September 11th was a horrific tragedy for all of the victims of that tragedy and for the nation. I was in New York. My home is very close to the World Trade Center. I spent days not being able to drive a car into my neighborhood because my neighborhood was used as a staging area for emergency trucks.

The issue of the country's safety and the consequences of that great tragedy are the subject of continuing discussion among not just senators, but the whole nation.

In the end, the Constitution, by its terms, protects certain individual rights. That protection is often fact-specific. Many of its terms are very broad. So what's an unreasonable search and seizure? What are other questions or facts specific?

But in answer to your specific question, did it change my view of the Constitution? No, sir, the Constitution is a timeless document. It was intended to guide us through decades, generation after generation, to everything that would develop in our country. It has protected us as a nation. It has inspired our survival. That doesn't change.

FEINGOLD: Well, I appreciate that answer, Judge. Are there any elements of the government's response to September 11th that you think maybe 50 or 60 years from now we as a nation will look back on with some regret?

SOTOMAYOR: I'm a historian by undergraduate training. I also love history books. It's amazing how difficult it is to make judgments about one's current positions. That's because history permits us to look back and to examine the actual consequences that have arisen, and then judgments are made.

As a judge today, all I can do, because I'm not part of the legislative branch -- it's the legislative branch who has the responsibility to make laws consistent with that branch's view of constitutional requirements and its powers. It's up to the president to take his actions. And then, it's up to the court to just examine each situation as it arises.

FEINGOLD: I can understand some hesitance on this. But the truth is that courts are already dealing with these very issues. The Supreme Court itself has now struck down a number of post- 9/11 policies. And you yourself sat on a panel that struck down one aspect of the National Security Letter statutes that were expanded by the Patriot Act.

So, I'd like to hear your thoughts a bit on whether you see any common themes or important lessons in the Court's decisions in *Rasul*, *Hamdi*, *Hamdan* and *Boumediene*. What is your general understanding of that line of cases?

SOTOMAYOR: That the Court is doing its task as judges. It's looking, in each of those cases, at what the actions are of either the military, and what Congress has done or not done, and applied constitutional review to those actions.

FEINGOLD: And is it fair to say, given that line of cases, that we can say that, at least as regards the Supreme Court, it believes mistakes were made with regard to the post-9/11 policies? Because in each of those cases, there was an overturning of a decision, either by the Congress or the executive.

SOTOMAYOR: I smiled only because that's not the way that judges look at that issue. We don't decide whether mistakes were made. We look at whether action was consistent with constitutional limitations, or statutory limitations.

FEINGOLD: And in each of those cases, there was a problem with either a constitutional violation or a problem with a congressional action. Right?

SOTOMAYOR: Yes.

FEINGOLD: That's fine. As I'm sure you're aware, many of us on the committee discussed at length with the prior Supreme Court nominees the framework for evaluating the scope of executive power in the national security context. You already discussed this at some length with Senator Feinstein, Justice Jackson's test in the *Youngstown* case.

And I and others on the committee are deeply concerned about the very broad assertion of executive power that's been made in recent years, an interpretation that has been used to authorize the violation of clear statutory prohibitions, from the Foreign Intelligence Surveillance Act and the anti-torture statute.

You discussed with Senator Feinstein the third category, the lowest ebb category, in the *Youngstown* framework. And that's where, as Justice Jackson said, the president's power is at its lowest ebb, because Congress has, as you well explained it, specifically prohibited some action.

I take the point of careful scholars who argue that, hypothetically speaking, Congress could conceivably pass a law that is plainly unconstitutional. For example, if Congress passed a law that said that somebody other than the president would be the commander in chief of a particular armed conflict, and not subject to presidential direction, presumably, that would be out of bounds.

But setting aside such abstract hypotheticals, as far as I'm aware -- and I'm pretty sure this is accurate -- the Supreme Court has never relied on the *Youngstown* framework to conclude that the president may violate a clear statutory prohibition. In fact, in *Youngstown* itself, the court rejected President Truman's plan to seize the steel mills. Now, is that your understanding of the Supreme Court precedent in this area?

SOTOMAYOR: I haven't cases, or a sufficient number of cases, in this area to say that I can remember every Supreme Court decision on a question related to this topic.

As you know, in the *Youngstown* case, the court held that the president had not acted within his powers in seizing the steel mills in the particular situation existing before him at the time. But the question or the framework doesn't change, which is, each situation would have to be looked at individually, because you can't determine ahead of time with hypotheticals what a potential constitutional conclusion will be.

As I may have said in -- to an earlier question, academic discussion is just that. It's presenting the extremes of every issue and attempting to debate about, on that extreme of the legal question, how should the judge rule?

FEINGOLD: I'll concede that point, Judge. I just -- I mean, given your tremendous knowledge of the law and your preparation, I'm pretty sure you would have run into any example of where this had happened. And I just want to note that I am unaware of and if anybody is aware of an example of where something was justified under the president's power under the lowest ebb, I'd love to know about it, but I -- I think that's a -- that's not a question of a hypothetical. That's a factual question about what the history of the case law is.

SOTOMAYOR: I -- I can only accept your assumption. As I said, I -- I have not had sufficient cases to have looked at what I know in light of that particular question that you're posing.

FEINGOLD: In August 2002, the Office of Legal Counsel at the Department of Defense issued two memoranda considering the legal limits on interrogation of terrorism detainees. And one of these contained a detailed legal analysis of the criminal law prohibiting torture.

It concluded, among other things, that enforcement of the anti-torture statute would be an unconstitutional infringement on the president's commander-in-chief authority.

But, Judge, that memo did not once cite to the *Youngstown* case or to Justice Jackson's opinion in *Youngstown*. And we just learned on Friday in a new inspector general report that a November 2001 OLC memo providing the legal basis for the so-called terrorist surveillance program also did not cite *Youngstown*.

Now, I don't think you would have to be familiar with those memos to answer my question. Does it strike you as odd that a complex legal analysis of the anti-torture statute or the FISA act that considers whether the president could violate those statutes would not even mention the *Youngstown* case?

SOTOMAYOR: I have never been an adviser to a president. That's not a function I have served, so I don't want to comment on what was done or not done by those advisers in that case. And it's likely that some question -- and I know some are pending before the court in one existing case, so I can't comment.

All I can comment -- on whether that's surprising or not, I can only tell you that I would be surprised if a court didn't consider the *Youngstown* framework in a decision involving this question, because it is -- that case's framework is how these issues are generally approached.

FEINGOLD: Good. I appreciate that answer.

Let me go to a topic that Senator Leahy and Senator Hatch discussed with you at some length, the Second Amendment. And I have long believed that the Second Amendment grants citizens an individual right to own firearms. And, frankly, I was elated when the court ruled in *Heller* last year basically what I think had been a mistake all along, to not recognize it as an individual right.

FEINGOLD: The question of whether the Second Amendment rights are incorporated in the 14th Amendment's guarantee of due process of law and, therefore, applicable to the states, as you pointed out, was not decided in Heller. And a Supreme Court decision in 1886 specifically held that the Second Amendment applies only to the federal government.

So, in my view, it is unremarkable that as a circuit court judge in the Maloney case you would follow applicable Supreme Court precedent that directly controlled the case rather than apply your own guess of where the court may be headed after Heller. In other words, I think that's -- would be an unfair criticism of a case that I think you needed to rule that way given the state of the law.

But let me move on that from because many of my constituents would like to know more about how you would make such a decision as a member of the highest courts. So I want to follow up on that.

First of all, am I right that if you're confirmed and the court grants cert in the Maloney case, you would have to recuse yourself from its consideration?

SOTOMAYOR: Yes, sir. My own judgment is that it would seem odd, indeed, if any justice would sit in review of a decision that they authored. I would think that the judicial code of ethics that govern recusals would suggest and command that that would be inappropriate.

FEINGOLD: Fair enough. What about if one of the other pending appeals comes to the Court such as the Seventh Circuit decision in *NRA v. Chicago* which took the same position as your position in Maloney, would you have to recuse yourself from that one as well?

SOTOMAYOR: There are many cases in which a justice, I understand, has decided cases as a circuit court judge that are not the subject of review that raise issues that the Supreme Court looks at later. What I would do in this situation, I would look at the practices of the justices to determine whether or not that would counsel to recuse myself.

I would just note that many legal issues, once they come before the Court, present a different series of questions than one addresses at the circuit court.

FEINGOLD: Well, let's assume you were able to sit to one of these cases or a future case that deals with this issue of incorporating the right to bear arms as applied to the states. How would you assess whether the Second Amendment or any other amendment that has not yet been incorporated through the 14th Amendment should be made applicable to the states? What's the test that the Supreme Court should apply?

SOTOMAYOR: That's always the issue that litigants are arguing in litigation. So to the extent that the Supreme Court has not addressed this question yet and there's a strong likelihood it may in the future, I can't say to you that I've prejudged the case and decided this is exactly how I'm going to approach it...

FEINGOLD: But what would be the general test for incorporation?

SOTOMAYOR: Well...

FEINGOLD: I mean, what is the general principle?

SOTOMAYOR: One must remember that the Supreme Court's analysis in its prior precedent predated its principles or the development of cases discussing the incorporation doctrine. Those are newer cases. And so the framework established in those cases may well inform -- as I said, I've hesitant of prejudging and saying they will or won't because that will be what the parties are going to be arguing in the litigation. But it is...

FEINGOLD: Well...

SOTOMAYOR: I'm sorry.

FEINGOLD: No, no. Go ahead.

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SOTOMAYOR: No, I was just suggesting that I do recognize that the court's more recent jurisprudence in incorporation with respect to other amendments has taken -- has been more recent. And those cases as well as stare decisis and a lot of other things will inform the Court's decision how it looks at a new challenge to a state regulation.

FEINGOLD: And -- and, of course, it is true that, despite that trend that you just described, that the Supreme Court has not incorporated several constitutional amendments as against the states, but most of those are....

...covered by constitutional provisions in state constitutions and the Supreme Court decisions that refuse to -- that refuse to incorporate the federal constitutional protections, like the case involving the Second Amendment, a 19th century case, date back nearly a century.

So after Heller, doesn't it seem almost inevitable that, when the Supreme Court does again consider whether the Second Amendment applies to the states, that it will find the individual right to bear arms to be fundamental, which is a word that we've been talking about today.

After all, Justice Scalia's opinion said this: By the time of the founding, the right to have arms -- bear arms had become fundamental for English subjects. Blackstone, whose works we have said constituted the pre-eminent authority on English law for the founding generation, cited the arms provision of the Bill of Rights as one of the fundamental rights of Englishmen. It was, he said, the natural right of resistance and self-preservation and the right of having and using arms for self-preservation and defense.

SOTOMAYOR: As I said earlier, you're a very eloquent advocate, but a decision on what the Supreme Court will do and what's inevitable will come up before the justices in great likelihood in the future. And so I feel that I'm threading the line of...

FEINGOLD: OK.

SOTOMAYOR: ... answering a question about what the court will do in a case that may likely come before it in the future.

FEINGOLD: Well, let me try it in a more -- less lofty way then. We talked of nunchucks before.

SOTOMAYOR: OK.

FEINGOLD: That's an easier kind of case. But what Heller was about was that there was a law here in D.C. that said you couldn't have a handgun if you wanted to have it in your house to protect yourself. It is now protected under the Constitution that the citizens of the District of Columbia can have a handgun.

Now, what happens if we don't incorporate and the people of the state of Wisconsin -- let's say we didn't have a constitutional provision in Wisconsin. We didn't have one until the 1980s, when I and other state senators proposed that we have a right to bear arms provision.

But isn't there a danger here that if you don't have this incorporated against the states that we'd have this result where the citizens of D.C. have a constitutional right to have a handgun, but the people of Wisconsin might not have that right? Doesn't -- doesn't that make it almost inevitable that you would have to apply this to the states?

SOTOMAYOR: It's a question the court will have to consider...



FEINGOLD: I appreciate your patience.

SOTOMAYOR: ... and its meaning of Heller. Senator, the Supreme Court did hold that there is in the Second Amendment an individual right to bear arms, and that is its holding, and that is the court's decision. I fully accept that.

And in whatever new cases come before me that don't involve incorporation as a circuit -- Second Circuit judge, I would have to consider those -- those issues in the context of a particular state regulation of firearms or other instruments.

FEINGOLD: I accept that answer, and I'm going to move on to another area I like to call secret law, and that's the development of controlling legal authority that has direct effects on the rights of Americans, but is done entirely in secret.

FEINGOLD: There are two strong examples of that. First, the FISA court often issues rulings containing substantive interpretation of the FISA act or FISA that, with very few exceptions, have been kept from the public. And until a recent change in the law, many of them were not available to the full Congress, either, meaning that members had been called upon to vote on statutory changes without knowing how the court had interpreted the existing statutes.

Second, the Office of Legal Counsel at the Justice Department issues legal opinions that are binding on the executive branch, but are also often kept from the public and Congress.

Now, I understand that these legal documents may sometimes contain classified operational details that would need to be redacted. But I'm concerned that the meaning of law, like FISA, which directly affects the privacy rights of Americans could develop entirely in secret. I think it flies in the face of our traditional notion of an open and transparent American legal system. Does this concern you at all? Can you say a little bit about the importance of the law itself being public?

SOTOMAYOR: Well, the question for a judge, as a judge would look at it, is to examine first what policy choices the Congress is making in its legislation. It is important to remember that some of the issues that you are addressing were part of congressional legislation as to how FISA would operate. And, as you just said, there's been amendments subsequent to that. And so, a court would start with what Congress has -- what Congress has done, and whether the acts of the other branch of government is consistent with that or not.

The issue of whether and how a particular document would affect national security or affect questions of that nature would have to be looked at in -- with respect to an individual case. And, as I understand it, there are review processes in the FISA procedure. I'm not a member of that court. So, I'm -- I'm not intimately familiar with those procedures. But I know that this is a part of the review process there, in part.

And so, when you ask concern, there is always some attention paid to the issue of -- of the public reviewing or looking at the actions that a court is taking. But that also is tempered with the fact that there are situations in which complete openness can't be had for a variety of different reasons.

And so, courts -- I did as a District Court judge, and I have as a Circuit Court judge -- looked at situations in which judges had to -- had to determine whether juries should be impaneled anonymously. And in those situations, we do consider the need for public actions. But we also consider that there may be, in some individual situations, potential threats to the safety of jurors that require an anonymous jury. I'm attempting to speak about this as a -- always a question of balance.

GRAHAM: But -- but most (inaudible)...(CROSSTALK)

SOTOMAYOR: You have to look at first what Congress says about that.

GRAHAM: But the concerns you just raised, don't they have to do more with the facts that shouldn't be revealed than the legal basis? It's -- it's sort of hard for me to imagine a threat to national security by revealing properly redacted documents that simply refer to the legal basis for something. Isn't there a distinction between those two things?

SOTOMAYOR: I -- I can't -- it's difficult to speak from the abstract. In -- in large measure, just as I explained, I've never been a part of the FISA court. And so, I've never had the experience of reviewing what those documents are, and whether they, in fact, can be redacted or not without creating risk to national security. And one has to think about what the -- what explanations the government has.

There are so many issues a court would have to look at.

GRAHAM: Let me go to something completely different. There's been a lot of talk about this concept of empathy in the context of your nomination. A judge's ability to feel empathy does not, of course, mean the judge should rule one way or another, as you well explained.

But I agree with President Obama that it's a good thing for our country for judges to understand the real-world implications of their decisions and the effects on regular Americans and to seek to understand both sides of an issue.

Judge, your background is remarkable. As you explained yesterday, your parents came to New York from Puerto Rico during World War II. And after your father died, your mother raised you on her own in a housing project in the South Bronx. You are a lifelong New Yorker and a Yankee fan, as I understand it. But many Americans don't live in big cities. Many of my constituents live in rural areas and small towns, and they root for the Brewers and the Packers.

Now, some might think that you don't have a lot in common with them. What can you tell me about your ability as a judge to empathize with them, to understand the everyday challenges of rural and small-town America and how Supreme Court decisions might affect their lives?

SOTOMAYOR: Yes, I live in New York City, and it is a little different than other parts of the country. But I spend a lot of time in other parts of the country. I've visited a lot of states. I've stayed with people who do all types of work. I've lived on -- not lived -- I've visited and vacationed on farms. I've lived and vacationed in mountaintops. I've lived and vacationed in all sorts -- not lived. I'm using the wrong word.

I've visited all sorts of places. In fact, one of my habits is when I travel somewhere new, I try to find a friend I know to stay with them. And it's often not because I can't afford a hotel. Usually, the people who are inviting me would be willing to pay.

But it's because I do think it's important to know more than what I live and to try to stay connected to people and to different experiences. I don't think that one needs to live an experience without appreciating it, listen to it, watching it, reading about it. All of those things -- experiencing it for a period of time -- help judges in appreciating the concerns of other experiences that they don't personally have.

And as I said, I try very, very hard to ensure that, in my life, I introduce as much experience with other people's lives as I can.

GRAHAM: I realize I'm jumping back and forth through these issues. But the last one I want to bring up has to do with the wartime Supreme Court decisions like Korematsu that we look back at with some bewilderment, of course. The Korematsu vs. the United States decision in which the Supreme Court upheld a government policy to round up and detain more than a hundred thousand Japanese Americans during World War II.

It seems inconceivable that the U.S. government would have decided to put huge numbers of citizens in detention centers based on their race and yet the Supreme Court allowed that to happen. I asked Chief Justice Roberts about this, I'll ask you as well. Do you believe that Korematsu was wrongly decided?

SOTOMAYOR: It was, sir.

GRAHAM: Does a judge have a duty to resist the kind of wartime fears that people understandably felt during World War II which likely played a role in the 1944 Korematsu decision?

SOTOMAYOR: A judge should never rule from fear. A judge should rule from law and the Constitution. It is inconceivable to me today that a decision permitting the detention and arrest of an individual solely on the basis of their race would be considered appropriate by our government.

FEINGOLD: Now, some of the great justices in the history of our country were involved in that decision. How does a judge resist those kind of fears?

SOTOMAYOR: One hopes, by having the -- the wisdom of a Harlan in Plessy, by having the wisdom to understand always, no matter what the situation, that our Constitution has held us in good stead for over 200 years and that our survival depends on upholding it.

FEINGOLD: Thank you, Judge.

LEAHY: Thank -- thank you very much, Senator Feingold. What I was going to do is go Senator Kyl, Senator Schumer, and then we will take a break. Senator Kyl?

KYL: Thank you, Mr. Chairman. Judge, could I return briefly to a series of questions that Senator Feingold asked at the very beginning relating to the Maloney decision relating to the Second Amendment.

SOTOMAYOR: Sure.

KYL: Yes...

SOTOMAYOR: Good afternoon, by the way.

KYL: Oh, I'm sorry?

SOTOMAYOR: Good afternoon, by the way.

KYL: Yes, good afternoon. You had indicated, of course, if that case were to come before the court, under the recusal statute, you would recuse yourself from participating in the decision.

SOTOMAYOR: In that case, yes.

KYL: Yes. And you're aware -- or maybe you're not -- but There are two other decisions both dealing with the same issue of incorporation, one in the Ninth Circuit, one in the Seventh Circuit. The Seventh Circuit decided the case similarly to your circuit; the Ninth Circuit has decided it differently, although that case is on rehearing.

If the court should take all three -- let's assume the Ninth Circuit stays with its decision, so you do have the conflict among the circuits, and the court were to take all three decisions at the same time, I take it the recusal issue would be the same. You would recuse yourself in that situation?

SOTOMAYOR: I haven't actually been responding to that question, and I think you're right for posing it. I clearly understand that recusing myself from Maloney would be appropriate. The impact of a joint hearing by the court would suggest that I would have to apply the same principle.

But as I indicated, issues of recusal are left to the discretion of justices because their participation in cases is so important. It is something that I would discuss with my colleagues and follow their practices...

KYL: Sure.

SOTOMAYOR: ... with respect to a question like this.

KYL: I -- I appreciate that. And I -- I agree with your reading of it. The law, 28 USC Section 455, provides, among other things, and I quote, "Any justice, judge or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned," end of quote.

And that, of course, raises the judge's desire to consult with others and ensure that impartiality is not questioned by participating in a decision. I would -- I would think -- and I would -- I would want your responses -- I would think that there would be no difference if the Maloney case is decided on its own or if it is decided as one of two or three other cases all considered by the court at the same time.

SOTOMAYOR: As I said, that's an issue that's different than the question that was posed earlier.

KYL: Would you not be willing to make an unequivocal commitment on that at this time?

SOTOMAYOR: It's impossible to say. I will recuse myself on any case involving Maloney. How the other cert is granted, and whether joint argument is presented or not, I would have to await to see what happens.

KYL: Well, let me ask you this. Suppose that the other two cases are considered by the Court -- your circuit is not involved -- or that the Court takes either the 7th or 9th Circuit, and decides the question of incorporation of the Second Amendment.

I gather that, in subsequent decisions, you would consider yourself bound by that precedent, or that you would consider that to be the decision of the Court on the incorporation question.

SOTOMAYOR: Absolutely. The decision of the Court in Heller is -- its holding has recognized an individual right to bear arms...

KYL: Right.

SOTOMAYOR: ... as applied to the federal government.

KYL: If, as a result -- I mean, that was the matter before your circuit. And if, as a result of the fact that the Court decided one of the other, or both of the other two circuit cases and resolved that issue, so that the same matter would have been before the Court, would it not also make sense for you to indicate to this committee now, that should that matter come before the Court, and you're on the Court, that you would necessarily recuse yourself from its consideration?

SOTOMAYOR: I didn't quite follow the start of your question...

KYL: All right. Let me restate it.

SOTOMAYOR: ... Senator Kyl. I want to answer precisely...

KYL: Sure.

SOTOMAYOR: ... but I'm not quite sure...

KYL: You agree with me, that if the Court considered either the 7th or 9th Circuit, or both, decisions, and decided the issue of incorporation of the Second Amendment to make it applicable to the states, you would consider that binding precedent of the Court. That, of course, was the issue in Maloney.

As a result, since it's the same matter that you resolved in Maloney, wouldn't you have to, in order to comply with the statute, recuse yourself if either, or both, or all three of those cases came to the Court?

SOTOMAYOR: Senator, as I indicated, clearly, the statute would reach Maloney. How I would respond to the Court taking certiorari, in what case, and whether it took certiorari in one or all three, is a question that I would have to await to see what the Court decides to do, and what issues it addresses in its grant of certiorari.

There's also the point that whatever comes before the Court will be on the basis of a particular state statute, which might involve other questions.

It's hard to speak about recusal in the abstract, because there's so many different questions that one has to look at.

KYL: And I do appreciate that. And I appreciate that you should not commit yourself to a particular decision in a case.

If the issue is the same, however, it's simply the question of incorporation, that is a very specific question of law. It doesn't depend upon the facts. I mean, it didn't matter that, in your case, you were dealing with a very dangerous arm -- but not a firearm, for example -- you still considered the question of incorporation.

Well, let me just try to help you along here.

Both Justice Roberts and Justice Alito made firm commitments to this committee. Let me tell you what Justice Roberts said. He said that he would recuse himself -- and I'm quoting now -- from matters in which he participated while a judge on the Court of Appeals -- matters.

And since you did acknowledge that the incorporation decision was the issue in your decision -- in your 2nd Circuit case -- and the question that I asked was whether, if that is the issue from the 9th and 7th Circuits, you would consider yourself bound by that.

It would seem to me that you should be willing to make the same kind of commitment that Justice Roberts and Justice Alito did.

SOTOMAYOR: I didn't understand their commitment to be broader than what I have just said, which is that they would certainly recuse themselves from any matter, I understood it to mean any case that they had been involved in as a -- as a circuit judge. If their practice was to recuse themselves more broadly, then, obviously, I would take counsel from what they did.

But I believe, if my memory is serving me correctly -- and it may not be, but I think so -- that Justice Alito, as a Supreme Court justice, has heard issues that were similar to ones that he considered as a circuit court judge. So as I've indicated, I will take counsel from whatever the practices of the justices are with the broader question of what...

KYL: I appreciate that. Issues which are similar is different, though, from an issue which is the same. And I would just suggest that there would be an appearance of impropriety. If you've already decided the issue of incorporation one way, that's the same issue that comes before the Court. And then you, in effect, review your own decision.

That, to me, would be a matter of inappropriate and, perhaps, you would recuse yourself. I understand your answer. Let me ask you about what the president said -- and I talked about it in my opening statement -- whether you agree with him. He used two different analogies. He talked once about the 25 miles -- the first 25 miles of a 26-mile marathon.

And then he also said, in 95% of the cases, the law will give you the answer, and the last 5 percent legal process will not lead you to the rule of decision. The critical ingredient in those cases is supplied by what is in the judge's heart. Do you agree with him that the law only takes you the first 25 miles of the marathon and that that last mile has to be decided by what's in the judge's heart?

SOTOMAYOR: No, sir. That's -- I don't -- I wouldn't approach the issue of judging in the way the president does. He has to explain what he meant by judging. I can only explain what I think judges should do, which is judges can't rely on what's in their heart. They don't determine the law. Congress makes the laws. The job of a judge is to apply the law. And so it's not the heart that compels conclusions in cases. It's the law. The judge applies the law to the facts before that judge.

KYL: Appreciate that. And has it been your experience that every case, no matter how tenuous it's been and every lawyer, no matter how good their quality of advocacy, that in every case, every lawyer has had a legal argument of some quality it make? Some precedent that he's cited? It might not be the Supreme Court. It might not be the court of appeals. It might be a trial court somewhere. It might not even be a court precedent. It may be a law review article or something. But have you ever been in a situation where a lawyer said I don't have any legal argument to me, Judge, please go with your heart on this or your gut?

SOTOMAYOR: Well, I've actually had lawyers say something very similar to that. (LAUGHTER) I've had lawyers where questions have been raised about the legal basis of their argument. I thought one lawyer who put up his hands and said, but it's just not right. (LAUGHTER) But it's just not right is not what judges consider. What judges consider is what the law. says.

KYL: You've always been able to find a legal basis for every decision that you've rendered as a judge?

SOTOMAYOR: Well, to the extent that every legal decision has -- it's what I do in approaching legal questions is, I look at the law that's being cited. I look at how precedent informs it. I try to determine what those principles

are of precedent to apply to the facts in the case before me and then do that. And so one -- that is a process. You use...

KYL: Right. And -- and all I'm asking -- this is not a trick question.

SOTOMAYOR: No, I wasn't...

KYL: I can't imagine that the answer would be otherwise than, yes, you've always found some legal basis for ruling one way or the other, some precedent, some reading of a statute, the Constitution or whatever it might be. You haven't ever had to throw up your arms and say, "I can't find any legal basis for this opinion, so I'm going to base it on some other factor"?

SOTOMAYOR: It's -- when you say -- use the words "some legal basis," it suggests that a judge is coming to the process by saying, "I think the result should be here, and so I'm going to use something to get there."

KYL: No, I'm not trying to infer that any of your decisions have been incorrect or that you've used an inappropriate basis. I'm simply confirming what you first said in response to my question about the president, that, in every case, the judge is able to find a basis in law for deciding the case. Sometimes there aren't cases directly on point. That's true. Sometimes it may not be a case from your circuit. Sometimes it may be somewhat tenuous and you may have to rely upon authority, like scholarly opinions and law reviews or whatever.

But my question is really very simple to you: Have you always been able to have a legal basis for the decisions that you have rendered and not have to rely upon some extra-legal concept, such as empathy or some other concept other than a legal interpretation or precedent?

SOTOMAYOR: Exactly, sir. We apply law to facts. We don't apply feelings to facts.

KYL: Right. Now, thank you for that. Let me go back to the beginning. I raised this issue about the president's interpretation, because he clearly is going to seek nominees to this court and other courts that he's comfortable with and that would imply who have some commonality with his view of the law in judging. It's a concept that I also disagree with.

But in this respect, it is -- the speeches that you have given and some of the writings that you've engaged in have raised questions, because they appear to fit into what the president has described as this group of cases in which the legal process or the law simply doesn't give you the answer.

And it's in that context that people have read these speeches and have concluded that you believe that gender and ethnicity are an appropriate way for judges to make decisions in cases. Now, that's -- that's my characterization.

KYL: I want to go back through the -- I've read your speeches, and I've read all of them several times. The one I happened to mark up here is the Seton Hall speech, but it was virtually identical to the one at Berkeley.

You said this morning that your -- the point of those speeches was to inspire young people. And I think there is some in your speeches that certainly is inspiring, and, in fact, it's more than that. I commend you on several of the things that you talked about, including your own background, as a way of inspiring young people, whether they're minority or not, and regardless of their gender. You said some very inspirational things to them.

And I take it that, therefore, in some sense, your speech was inspirational to them. But, in reading these speeches, it is inescapable that your purpose was to discuss a different issue, that it was to discuss -- in fact, let

me put it in your words. You said, "I intend to talk to you about my--I--my Latina identity, where it came from, and the influence I perceive gender, race, and national original representation will have on the development of the law.

And then, after some preliminary and sometimes inspirational comments, you got back to the theme and said, "The focus of my speech tonight, however, is not about the struggle to get us where we are and where we need to go, but instead to discuss what it will mean to have more women and people of color on the bench."

You said, "No one can or should ignore asking and pondering what it will mean, or not mean, in the development of the law." You talked to -- you cited some people who had a different point of view than yours, and then you came back to it and said, "Because I accept the proposition that, as Professor Resnick (ph) explains, 'To judge is an exercise of power,' and because as Professor Martha Minow of Harvard Law School explains, 'There is no objective stance, but only a series of perspectives. No neutrality, no escape from choice in judging,'" you said. "I further accept that our experiences as women and people of color will in some way affect our decisions."

Now, you're deep into the argument here. You've agreed with Resnick that there is no objective stance, only a series of perspectives, no neutrality - which just as an aside, it seems to me, is relativism run amok.

But then you say, "What Professor Minow's quote means to me is not all women are people of color or all in some circumstances, or me in any particular case or circumstance, but enough women and people of color in enough cases will make a difference in the process of judging." You're talking here about different outcomes in cases, and you go on to substantiate your case by, first of all, citing a Minnesota case in which three women judges ruled differently than two male judges in a father's visitation case.

You cited two excellent studies, which tended to demonstrate differences between women and men in making decisions in cases. You said, "As recognized by legal scholars, whatever the cause is, not one woman or person of color in any one position, but as a group, we will have an effect on the development of law and on judging."

KYL: So, you develop the theme. You substantiated it with some evidence to substantiate your point of view. Up to that point, you had simply made the case, I think, that judging could certainly reach -- or judges could certainly reach different results and make a difference in judging depending upon their gender or ethnicity. You hadn't rendered a judgment about whether that -- they would be better judgments or not.

But then, you did. You quoted Justice O'Connor to say that, a wise old woman, wise old man, would reach the same decisions, and then you said: I'm also not sure I agree with that statement. And that's when you made the statement that's now relatively famous. I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion.

So here, you're reaching a judgment that, not only will it make a difference, but that it should make a difference. And you went on. And -- and this is the last thing that I'll quote here. You said: In short, I -- well, I think this is important.

You note that some of the old white guys made some pretty good decisions eventually -- Oliver Wendell Holmes, Cardozo and others. And -- and you acknowledge that they made a big difference in discrimination cases. But it took a long time to understand. It takes time and effort, something not all people are willing to give, and so on.

And then you concluded this: In short, I accept the proposition that difference will be made by the presence of women and people of color on the bench, and that my experiences will affect the facts that I choose to see. You



said: I don't know exactly what the difference will be in my judging. But I accept that there will be some based on gender and my Latina heritage.

You don't, as -- as you said in your response to Senator Sessions, you said that you weren't encouraging that. And you -- you talked about how we need to set that aside. But you didn't, in your speech, say that this is not good. We need to set this aside. Instead, you seem to be celebrating it. The clear inference is, it's a good thing that this is happening.

So, that's why some of us are concerned, first with the president's elucidation of his point of view here about judging, and then these speeches, several of them, including speeches that were included in Law Review articles that you edited, that all say the same thing.

And it would certainly lead one to a conclusion that, a, you understand it will make a difference; and b, not only are you not saying anything negative about that, but you seem to embrace the difference in -- in concluding that you'll make better decisions. That's the basis of concern that a lot of people have. Please take the time you need to respond to my question.

SOTOMAYOR: Thank you. I have a record for 17 years. Decision after decision, decision after decision. It is very clear that I don't base my judgments on my personal experiences or -- or my feelings or my biases. All of my decisions show my respect for the rule of law, the fact that regardless about if I identify a feeling about a case, which was part of what that speech did talk about, there are situations where one has reactions to speeches -- to activities.

It's not surprising that, in some cases, the loss of a victim is very tragic. A judge feels with those situations in acknowledging that there is a hardship to someone doesn't mean that the law commands the result. I have any number of cases where I have acknowledged the particular difficulty to a party or disapproval of a party's actions and said, "No, but the law requires this."

So, my views, I think, are demonstrated by what I do as a judge. I'm grateful that you took notice that much of my speech, if not all of it, was intended to inspire. And my whole message to those students, and that's the very end of what I said to them, was: I hope I see you in the courtroom somebody. I don't know if I said it in that speech, but I often end my speeches with saying, "And I hope someday you're sitting on the bench with me."

And so, the intent of the speech, its structure, was to inspire them to believe, as I do, as I think everyone does, that life experiences enrich the legal system.

I used the words "process of judging." That experience that you look for in choosing a judge, whether it's the ABA rule that says the judge has to be a lawyer for X number of years or it's the experience that your committee looks for in terms of what's the background of the judge, have they undertaken serious consideration of constitutional questions. All those experiences are valued because our system is enriched by a variety of experiences.

And I don't think that anybody quarrels with the fact that diversity on the bench is good for America. It's good for America because we are the land of opportunity. And to the extent that we're pursuing and showing that all groups can be lawyers and judges, that's just reflecting the values of our society.

KYL: And if I could just interrupt you right now, to me, that's the key. It's good because it shows these young people that you're talking to that, with a little hard work, it doesn't matter where you came from. You can make it. And that's why you hope to see them on the bench. I totally appreciate that.

The question though is whether you leave them with the impression that it's good to make different decisions because of their ethnicity or gender. And it strikes me to you could have easily said in here now, of course, blind lady justice doesn't permit us to base decisions in cases on our ethnicity or gender. We should strive very hard to set those aside when we can.

I found only one rather oblique reference in your speech that could be read to say that you warned against that. All of the other statements seemed to embrace it or, certainly, to recognize it and almost seem as if you're powerless to do anything about it. I accept that this will happen, you said. So while I appreciate what you're saying, it still doesn't answer to me the question of whether you think that these -- that ethnicity or gender should be making a difference.

SOTOMAYOR: I -- there are two different, I believe, issues to address and to look at because various statements are being looked at and being tied together. But the speech, as its structured, didn't intend to do that and didn't do that.

Much of the speech about what differences there will be in judging was in the context of my saying or addressing an academic question. All the studies that you reference I cited in my -- in my speech were just that, studies. They were suggesting that there could be a difference. They were raising reasons why. I was inviting the students to think about that question.

Most of the quotes that you had and reference say that. We have to ask this question. Does it make a difference? And if it does, how? And the study about differences in outcomes was in that context. That was a case in which three women judges went one way and two men went the other, but I didn't suggest that that was driven by their gender. You can't make that judgment until you see what the law actually said.

SOTOMAYOR: And I wasn't talking about what law they were interpreting in that case. I was just talking about the academic question that one should ask.

KYL: If I could just interrupt, I think you just contradicted your speech because you said in the line before that, enough women and people of color in enough cases will make a difference in the process of judging.

Next comment, the Minnesota Supreme Court has given us an example of that. So you did cite that as an example of gender making a difference in judging.

Now, look, I'm not -- I -- I don't want to be misunderstood here as disagreeing with a general look into question -- into the question of whether people's gender, ethnicity or background in some way affects their -- their judging. I suspect you can make a very good case that that is true in some cases. You cite a case here for that proposition.

Neither you nor I probably know whether for sure that was the reason, but one could infer it from the decision that was rendered. And then you cite two other studies.

I am not questioning whether the studies are not valuable. In fact, I would agree with you that it's important for us to be able to know these things so that we are on guard to set aside prejudices that we may not even know that we have.

Because when you do judge a case -- I mean, let me just go back in time. I tried a lot of cases, and it always depended on the luck of the draw, what judge you got; 99 times out of 100 it didn't matter. So what we got? Judge Jones, fine. We got Judge Smith, fine. It didn't matter, because you knew they would all apply the law.

In federal district court in Arizona, there was one judge you didn't want to get. All -- all of the lawyers knew that, because they knew he had predilections that was really difficult for him to set aside. It's a reality. And I suspect you've seen that on some courts, too.

So it is a good thing to examine whether or not those biases and prejudices exist in order to be on guard and to set them aside. The fault I have with your speech is that you not only don't let these students know that you need to set it aside; you don't say that that's what you need this information for. But you're almost celebrating. You think -- you say, if there are enough of us, we will make a difference, inferring that it is a good thing if we begin deciding cases differently.

Let me just ask you one last question here. I mean, can you -- have you ever seen a case where, to use your example, the wise Latina made a better decisions than the non-Latina judges?

SOTOMAYOR: No. What I've seen...(CROSSTALK)

KYL: I mean, I know you like all of your decisions, but...(UNKNOWN): (OFF-MIKE)

KYL: I was just saying that I know that she appreciates her own decisions, and I'm -- I don't mean to denigrate her decisions, Mr. Chairman (inaudible)

SOTOMAYOR: I was using a rhetorical riff that hearkened back to Justice O'Connor, because her literal words and mine have a meaning that neither of us, if you were looking at it, in their exact words make any sense.

Justice O'Connor was a part of a court in which she greatly respected her colleagues. And yet those wise men -- I'm not going to use the other word -- and wise women did reach different conclusions in deciding cases. I never understood her to be attempting to say that that meant those people who disagreed with her were unwise or unfair judges.

SOTOMAYOR: As you know, my speech was intending to inspire the students to understand the richness that their backgrounds could bring to the judicial process in the same way that everybody else's background does the same.

I think that's what Justice Alito was referring to when he was asked questions by this committee and he said, you know, when I decide a case, I think about my Italian ancestors and their experiences coming to this country. I don't think anybody thought that he was saying that that commanded the result in the case.

These were students and lawyers who I don't think would have been misled, either by Justice O'Connor's statement, or mine, in thinking that we actually intended to say that we could really make wiser and fairer decisions.

I think what they could think, and would think, is that I was talking about the value that life experiences have, in the words I used, to the process of judging. And that is the context in which I understood the speech to be doing.

The words I chose, taking the rhetorical flourish, it was a bad idea. I do understand that there are some who have read this differently, and I understand why they might have concern.

But I have repeated -- more than once -- and I will repeat throughout, if you look at my history on the bench, you will know that I do not believe that any ethnic, gender or race group has an advantage in sound judging. You noted that my speech actually said that. And I also believe that every person, regardless of their background and life experiences, can be good and wise judges.

LEAHY: In fact, if I might...

KYL: Excuse me. Just for the record, I don't think it was your speech that said that, but that's what you said in response to Senator Sessions' question this morning.

LEAHY: When we get -- the reference is made to Justice Alito, that was on January 11, 2006.

KYL: What he said, "When I get a case" -- this is Justice Alito speaking -- "When I get a case about discrimination, I have to think about people in my own family who suffered discrimination, because of their ethnic background, or because of religion, or because of gender. And I do take that into account." We'll take a 10-minute break.

(RECESS)

LEAHY: (OFF-MIKE) the photographers a chance -- all the photographers a chance to get back into -- into position. First off, Judge, I -- I compliment your -- your family. You can't see them sitting behind you, because -- but they've all been sitting there very attentively. And I -- I have to think that, after a while, they probably would rather just be at home with you, but I do appreciate it. And -- and so we're going to go to Senator Schumer, who did such a good job of introducing you yesterday. Senator Schumer?

SCHUMER: Thank you, Mr. Chairman. And thank all of my colleagues. First, I'm going to follow up on some of the line of questioning of Senator Sessions and Kyl, but I would like to first thank my Republican colleagues. I think the questioning has been strong, but respectful.

I'd also like to compliment you, Judge. I think you've made a great impression on America today. The American people have seen today what we have seen when you have met with us one on one.

You're very smart and knowledgeable, but down to earth. You're a strong person, but also very nice person. And you've covered the questions thoughtfully and modestly.

So now I'm going to go onto that line of question. We've heard you asked about snippets of statements that have been used to criticize you and challenge your impartiality, but we've heard precious little about the body and totality of your 17-year record on the bench, which everybody knows is the best way to evaluate a nominee.

In fact, no colleague has pointed to a single case in which you've said the court should change existing law, in which you've attempted to change existing law explicitly or otherwise, and I've never seen such a case anywhere in your long and extensive record.

So if a questioner is focusing on a few statements or, quote, "those few words" and doesn't refer at all to the large body of cases where you've carefully applied the law regardless of sympathies, I don't think that's balanced or down the middle.

And by focusing on these few statements, rather than your extensive record, I think some of my colleagues are attempting to try and suggest that you might put your experiences and empathies ahead of the rule of law, but the record shows otherwise. And that's what I now want to explore.

Now, from everything I've read in your judicial record and everything I've heard you say, you put rule of law first, but I want to clear it up for the record, so I want to talk to you a little bit about what having empathy means, and then I want to turn to your record on the bench, which I believe is the best way to get a sense of what your record will be on the bench in the future.

Now, I believe that empathy is the opposite of indifference, the opposite of, say, having ice water in your veins, rather than the opposite of neutrality. And I that's the mistake in concept that some have used.

But let's start with the basics. Will you commit to us today that you will give every litigant before the court a fair shake and that you will not let your personal sympathies toward any litigant overrule what the law requires?

SOTOMAYOR: That commitment I can make and have made for 17 years.

SCHUMER: OK. Well, good. Let's turn to that record. I think your record shows extremely clearly that, even when you might have sympathy for the litigants in front of you, as a judge, your fidelity is first and foremost to the rule of law, because, as you know, in the courtroom of a judge who ruled based on empathy, not law, one would expect that the most sympathetic plaintiffs would always win, but that's clearly not the case in your courtroom.

For example, in -- and I'm going to take a few cases here and go over them with you. For example, in *In Re: Air Crash Off Long Island*, which is sort of a tragic but interesting name for a case, you heard the case of families of the 213 victims of the tragic TWA crash, which we all know about in New York.

The relatives of the victims sued manufacturers of the airplane, which spontaneously combusted in midair, in order to get some modicum of relief, though, of course, nothing a court could do would make up for the loss of the loved ones. Did you have sympathy for those families?

SOTOMAYOR: All of America did. That was a loss of life that was traumatizing for New York state, because it happened off the shores of Long Island. And I know, senator, that you were heavily involved in ministering to the families...

SCHUMER: I was.

SOTOMAYOR: ... during that case.

SCHUMER: Right.

SOTOMAYOR: Everyone had sympathy for their loss. It was absolutely tragic.

SCHUMER: And many of them were poor families, many of them from your borough in the Bronx. I met with them. But ultimately, you ruled against them, didn't you?

SOTOMAYOR: I didn't author the majority opinion in that case. I dissented from the majority's conclusion. But my dissent suggested that the court should have followed what I viewed as existing law, and reject their claims.

SCHUMER: Yes.

SOTOMAYOR: Or at least a portion of their claim.

SCHUMER: Right. Your dissent that, "the appropriate remedial scheme for deaths occurring off the United States coast is clearly a legislative policy choice, which should not be made by the courts." Is that correct?

SOTOMAYOR: Yes, sir.

SCHUMER: And that's exactly, I think, the point that my colleague from Arizona and others were making about how a judge should rule. How did you feel ruling against individuals who had clearly suffered a profound personal loss and tragedy, and were looking to the courts -- and to you -- for a sense of justice?

SOTOMAYOR: One, in as tragic, tragic, horrible situation like that, can't feel anything but personal sense of regret. But those personal senses can't command a result in a case.

As a judge, I serve the greater interest. And that greater interest is what the rule of law supplies.

As I mentioned in that case, it was fortuitous that there was a remedy. And that remedy, as I noted in my case, was Congress. And, in fact, very shortly after the 2nd Circuit's opinion, Congress amended the law, giving the victims the remedies that they had sought before the court. And my dissent was just pointing out that, despite the great tragedy, that the rule of law commanded a different result.

SCHUMER: And it was probably very hard, but you had to do it. Here's another case, *Washington v. County of Rockland* -- Rockland is a county, a suburb of New York -- which was a case involving black corrections officers who claimed that they were retaliated against after filing discrimination claims. Remember that case?

SOTOMAYOR: I do.

SCHUMER: Did you have sympathy for the officers filing that case?

SOTOMAYOR: Well, to the extent that anyone believes that they've been discriminated on the basis of race, that not only violates the law, but one would have -- I wouldn't use the word "sympathy" -- but one would have a sense that this claim is of some importance, and one that the court should very seriously consider.

SCHUMER: Right. Because, I'm sure, like Judge Alito said, and others, you had suffered discrimination in your life as well. So, you could understand how they might feel, whether they were right or wrong in the outcome, in the -- in the -- in filing.

SOTOMAYOR: I've been more fortunate than most. The discrimination that I have felt has not been as life-altering as it has for others. But I certainly do understand it, because it is a part of life that I'm familiar with and have seen others suffer so much with, as I have in my situation.

SCHUMER: Now, let me ask you again. How did you feel ruling against law enforcement officers, the kind of people you've told us repeatedly you've spent your career working with DA's office and elsewhere, and for whom you have tremendous respect?

SOTOMAYOR: As with all cases where I might have a feeling of some identification with, because of background or because of experiences, one feels a sense of understanding what they have experienced. But in that case, as in the TWA case, the ruling that I endorsed against them was required by law.

SCHUMER: Here's another one. It was called *Boykin v. Keycorp*. It was a case in which an African-American woman filed suit after being denied a home equity loan, even after her loan application was conditionally approved based on her credit report. She claimed that she was denied the opportunity to own a home, because of her race, her sex and the fact that her perspective home was in a minority- concentrated neighborhood. She didn't even have a lawyer or anyone else to interpret the procedural rules for her. She filed this suit on her own. Did you sympathy for the woman seeking a home loan from the bank?

SOTOMAYOR: Clearly, everyone has sympathy for an individual who wants to own their own home. That's the typical dream and aspiration, I think, of most Americans. And -- and if someone is denied that chance for a reason that they believe is improper, one would recognize and understand their feelings.

SCHUMER: Right. And in fact, you ruled that her claim wasn't timely. Rather than overlooking the procedural problems with the case, you held fast to the complicated rules that keep our system working efficiently, even if it meant that claims of discrimination could not be heard. We never got to whether she was actually discriminated against, because she didn't file in a timely manner. Is...

SOTOMAYOR: I...

SCHUMER: Is my summation there accurate? You want to elaborate?

SOTOMAYOR: Yes, in terms of the part of the claim that -- that we held was barred by the statute of limitations. In my -- in a response to the earlier question -- to an earlier question, I indicated that the law requires some finality. And that's why Congress passes or state legislature passes statutes of limitations that require people to bring their claims within certain time frames. Those are statutes, and they must be followed if a situation -- if they apply to a particular situation.

SCHUMER: Finally, let's look at a case that cuts the other way with a pretty repugnant litigant. This is the case called *Pappas v. Giuliani*. And you considered claims of a police employee who was fired for distributing terribly bigoted and racist materials. First, what did you think of the speech in question that this officer was distributing?

SOTOMAYOR: Nobody, including the police officer, was claiming that the speech wasn't offensive, racist and insulting. There was a question about what his purpose was in sending the letter. But my opinion dissent in that case pointed out that offensiveness and racism of the letter, but I -- I issued a dissent from the majority's affirmance of his dismissal from the police department because of those letters.

SCHUMER: Right. As I understand it, you wrote that what the actual literature that the police officer was distributing was, quote, "patently offensive, hateful and insulting." But you also noted that, quote -- and this is your words in a dissent, where the majority was on the other side -- quote, "Three decades of jurisprudence and the centrality of First Amendment freedoms in our lives," that's your quote, the employee's right to speech had to be respected.

SOTOMAYOR: In the situation of that case, that was the position that I took because that's what I believed the law commanded.

SCHUMER: Even though, obviously, you wouldn't have much sympathy or empathy for this officer or his actions. Is that correct?

SOTOMAYOR: I don't think anyone has sympathy for what was undisputedly a racist statement, but the First Amendment commands that we respect people's rights to engage in hateful speech.

SCHUMER: Right. Now, I'm just going to go to a group of cases here rather than one individual case. We could go -- we could go -- we could do this all day long where sympathy, empathy would be on one side, but you found rule of law on the other side and you sided with rule of law.

And so, you know, again, to me, analyzing a speech and taking words maybe out of context doesn't come close to analyzing the cases as to what kind of judge you'll be, and that's what I'm trying to do here.

Now, this one -- my office conducted an analysis of your record in immigration cases, as well as the record of your colleagues. And in conducting this analysis, I came across a case entitled *Jian v. Board of Immigration*

Appeals (ph), where your colleague said something very interesting. This was Judge Jon Newman. He's a very respected judge on your circuit.

He said something very interesting when discussing asylum cases. Specifically, he said the following. This is Judge Newman. Quote, "We know of no way to apply precise calibers to all asylum cases so that any particular finding would be viewed by any -- any 3 of the 23 judges of this court as either sustainable or not sustainable. Panels will have to do what judges always do in similar circumstances: apply their best judgment, guided by the statutory standard governing review and the holdings of our precedents, to the administrative decision and the record assembled to support it."

In effect, what Judge Newman is saying is these cases would entertain more subjectivity, let's say, because, as he said, you could -- you could side many of them as sustainable or not sustainable.

SCHUMER: So given the subjectivity that exists in the asylum cases, it's clear that if you wanted to be, quote, "an activist judge," you could certainly have found ways to rule in favor of sympathetic asylum-seekers even when the rule of law might have been more murky and not have dictated an exact result.

Yet, in the nearly 850 cases you have decided in the Second Circuit, you ruled in favor of the government -- that is, against the petitioner seeking asylum, the immigrant seeking asylum -- 83 percent of the time.

That happens to be the exact statistical median rate for your court. It's not one way or the other. This means that, with regard to immigration, you are neither more liberal nor more conservative than your colleagues. You simply did what Judge Newman said. You applied your best judgment to the record at hand.

Now, can you discuss your approach to immigration cases, explain to this panel and the American people the flexibility that judges have in this context, and your use of this flexibility in a very moderate manner?

SOTOMAYOR: Reasonable judges look at the same set of facts and may disagree on what those facts should result in. It harkens back to the question of wise men and wise women being judges.

Reasonable people disagree. That was my understanding of Judge Newman's comment in the quotation you made.

In immigration cases, we have a different level of review, because it's not the judge making the decision whether to grant or not grant asylum. It's an administrative body.

And I know that I will -- I'm being a little inexact, but I think using old terminology is better than using new terminology. And by that I mean, the agency that most people know as the Bureau of Immigration has a new name now, but that it's more descriptive than its new name.

SCHUMER: ICE. Some people think the new name's descriptive, but that's...(LAUGHTER)

SOTOMAYOR: In immigration cases, an asylum seeker has an opportunity to present his or her case before an immigration judge. They then can appeal to the Bureau of Immigration and argue that there was some procedural default (ph) below (ph), or that the immigration judge or the bureau itself has committed some error of law.

They then are entitled by law to appeal directly to the 2nd Circuit. In those cases, because they are administrative decisions, we are required under the Chevron doctrine, and other tests in administrative law, to give deference to those decisions.



But like with all processes, there are occasions when processes are not followed, and an appellate court has to ensure that the rights of the asylum seeker have been -- whatever those rights may be -- have been given. There are other situations in which an administrative body hasn't adequately explained its reasoning. There are other situations where administrative bodies have actually applied erroneous law.

No institution is perfect. And so, that accounts for why, given the deference -- and I'm assuming your statistic is right, senator, because I don't add up the numbers. OK?

SOTOMAYOR: But I do know that in immigration cases, the vast majority of the Bureau of Investigation cases are -- the petitions for review are denied. So, that means that...

SCHUMER: Right. The only point I'm making here, if some are seeking to suggest that your empathy or sympathy overrules rule of law, this is a pretty good body of law to look at. A, it's a lot of cases, 850. B, one would think -- I'm not going to ask you to state it -- that you'll have sympathy for immigrants and immigration. And, third, there is some degree of flexibility here, as Judge Newman said, just because of the way the law is. And yet you are exactly in the middle of the Second Circuit.

If empathy were governing you, I don't think you would have ended up in that position, but I'll let everybody judge whether that's true. But the bottom line here, in the air crash case, in Washington, in Boykin (ph), in this whole mass of asylum cases, you probably had sympathy for many of the litigants, if not all of them, ruled against them.

The cases we've just discussed are just a sampling of your lengthy record, but they do an effective job of illustrating the fact that, in your courtroom, rule of law always triumphs.

And would you agree? I mean, that seems to me, looking at your record. You know it much better than I do, that rule of law triumphing probably best characterizes your record as your 17 years as a judge.

SOTOMAYOR: I firmly believe in the fidelity to the law. In every case I approach, I start from that working proposition and apply the law to the facts before us.

SCHUMER: And has there ever been a case in which you ruled in favor of a litigant simply because you were sympathetic to their plight, even if rule of law might not have led you in that direction?

SOTOMAYOR: Never.

SCHUMER: Thank you. Let's go on here a little bit to foreign law, which is an issue that has also been discussed. Your critics have tried to imply that you'll improperly consider foreign law and sources in cases before you. You gave a speech in April that's been selectively quoted. Discussing whether it's permissible to use foreign law or international law to decide cases, you stated clearly that, quote, "American analytic principles do not permit us" -- that's your quote -- "to do so."

Just so the record is 100 percent clear, what do you believe is the appropriate role of any foreign law in the U.S. courts?

SOTOMAYOR: American law does not permit the use of foreign law or international law to interpret the Constitution. That's a given. And my speech explained that, as you noted, explicitly. There is no debate on that question; there's no issue about that question.

The question is a different one because there are situations in which American law tells you to look at international or foreign law. And my speech was talking to the audience about that. And, in fact, I pointed out that there are some situations in which courts are commanded by American law to look at what others are doing.

So, for example, if the U.S. is a party to a treaty and there's a question of what the treaty means, then courts routinely look at how other courts of parties who are signatories are interpreting that.

SOTOMAYOR: There are some U.S. laws that say you have to look at foreign law to determine the issue. So, for example, if two parties have signed a contract in another country that's going to be done in that other country, then American law would say, you may have to look at that foreign law to determine the contract issue.

The question of use of foreign law then is different than considering the ideas that it may on an academic level, provide. Judges -- and I -- I'm not using my words. I'm using Justice Ginsberg's words. You build up your story of knowledge as a person, as a judge, as a human being with everything you read.

For judges, that includes law review articles. And there are some judges who have opined negatively about that. OK? You use decisions from other courts. You build up your story of knowledge. It is important in the speech I gave, a noted and agreed with Justices Scalia and Thomas that one has to think about this situation very carefully because there are so much differences in foreign law from American law. But that was the setting up my speech and the discussion that my speech was addressing.

SCHUMER: Right. And you've never relied on a foreign court to interpret U.S. law nor would you?

SOTOMAYOR: In fact, I know that, in my 17 years on the bench, other than applying it in treaty interpretation or conflicts of law situations, that I've not cited foreign law.

SCHUMER: Right. And it is important American judges consider many nonbinding sources when reaching a determination. For instance, consider Justice Scalia's well-known regard for dictionary definitions in determining the meaning of words or phrasing or statutes being interpreted by a court.

In one case, MCI vs. AT&T, that's a pretty famous case, Justice Scalia cited not one but five different dictionaries to establish the meaning of the word "modify" in a statute. Would you agree that dictionaries are not binding on American judges?

SOTOMAYOR: They're a tool to help up in some situations to interpret what is meant by the words that Congress or a legislature uses. SCHUMER: Right. Right. So it was not improper for Justice Scalia to consider dictionary definitions, but they're not binding. Same as citing a foreign law as long as you don't make it binding on the case?

SOTOMAYOR: Yes. Well, foreign law, except in the situation...

SCHUMER: Of treaties.

SOTOMAYOR: And even then is not binding. It's American principles of construction that are binding.

SCHUMER: Right. OK. Good. Now, we'll go to a little easier topic since we're close to the end here. It's a topic that you like and I like. And that is we've heard a lot of discussions about baseball in metaphorical terms. Judges as umpires. We had a lot of that yesterday, a little of that today. But I want to talk about baseball a little more concretely. First, am I correct you share my love for America's pastime?

SOTOMAYOR: It's often said that I grew up in the shadow of Yankee Stadium. To be more accurate, I grew up sitting next to my dad, while he was alive, watching baseball.

SCHUMER: OK.

SOTOMAYOR: And it's one of my fondest memories of him.

SCHUMER: So given that you live near Yankee Stadium and you're from the Bronx, I was going to ask you are you a Mets or Yankee fan, but I guess you've answered that. Right?

LEAHY: Be careful. You want to keep the chairman on your side. (LAUGHTER)

SCHUMER: No, no. As much as Judge Scalia (sic) might want to be nominated, I don't think she would adapt the Red Sox as her team, as you have, Mr. Chairman. (LAUGHTER) Judge Sotomayor, I'm sorry. Who did I say?

LEAHY: Scalia.

SCHUMER: Oh. (LAUGHTER) I don't want what Judge Scalia -- who Judge Scalia roots for, but I know who Judge Sotomayor roots for.

SOTOMAYOR: I know many residents of Washington, D.C. have asked me to look at the Senators for...

SCHUMER: Anyway, I do want to talk, ask you just about the 1995 player strike case, which comes up, but it's an interesting case for everybody. And I don't think -- you won't -- you won't have to worry about talking about it, because I don't think the Mets vs. Yankees will come up or the Red Sox vs. the Yankees will come up before the courts, although the Yankees could use all the help they can get right now.

But could you tell us a little bit about the case and why you listed it in your questionnaire that you filled out as one of your 10 most important cases? And that will be my last question, Mr. Chairman.

SOTOMAYOR: That was -- and people often forget how important some legal challenges seem before judges decide the case. Before the case was decided, all of the academics and all of newspapers and others talking about the case were talking about the novel theory that the baseball owners had developed in challenging the collective bargaining rights of players and owners.

In that case, as with all the cases that I approach, I look at what the law is, what precedent says about it, and I try to discern in a new factual challenge how the principles apply. And that's the process I used in that case. And it became clear to me after looking at that case that that process led to affirming the decision of the national labor relationships board that it could and should issue an injunction on the grounds that it claimed. So that, too, was a case where there's a new argument, a new claim, but where the application of the law came from taking the principles of the law and applying it to that new claim.

LEAHY: Thank you very much, Senator Schumer. Senator Graham?

GRAHAM: Thank you, Mr. Chairman.

LEAHY: And then we'll go to Senator Durbin.

GRAHAM: OK. Thank you, Judge. I know it's been a long day, and we'll try to keep it moving here. I think you're one senator after me away from taking a break.

My problem, quite frankly, is that, as Senator Schumer indicated, the cases that you've been involved in to me are left of center, but not anything that jumps out at -- at me, but the speeches really do.

I mean, the speech you gave to the ACLU about foreign law, we'll talk about that probably in the next round, was pretty disturbing. And I keep talking about these speeches because what I'm -- and I listen to you today. I think I'm listening to Judge Roberts.

I mean, I'm, you know, listening to a strict constructionist here, so we've got to reconcile in our own minds here to put the puzzle together to go that last mile, is that you got Judge Sotomayor, who has come a long way and done a lot of things that every American should be proud of.

You've got a judge who has been on a circuit court for a dozen years. Some of the things trouble me, generally speaking left of center, but within the mainstream, and you have these speeches that just blow me away. Don't become a speechwriter, if this law thing doesn't work out, because these speeches really throw a wrinkle into everything.

GRAHAM: And that's what we're trying to figure out. Who are we getting here? You know, who are we getting as a nation? Now, legal realism, are you familiar with that term?

SOTOMAYOR: I am.

GRAHAM: What does it mean for someone who may be watching the hearing?

SOTOMAYOR: To me, it means that you are guided in reaching decisions in law by the realism of the situation, of the -- it's less -- it looks at the law through the...

GRAHAM: Kind of touchy-feely stuff?

SOTOMAYOR: That's not quite words that I would use because there are many academics and judges who have talked about being legal realists, but I don't apply that label to myself at all. As I said, I look at law and precedent and discern its principles and apply it to the situation...

GRAHAM: So you would not be a disciple of the legal realism school?

SOTOMAYOR: No.

GRAHAM:: OK. All right. Would you be considered a strict constructionist in your own mind?

SOTOMAYOR: I don't use labels to describe what I do. There's been much discussion today about what various labels mean and don't mean. Each person uses those labels and gives it their own sense of...

GRAHAM: When Judge Rehnquist says he was a strict constructionist, did you know what he was talking about?

SOTOMAYOR: I think I understood what he was referencing, but his use is not how I go about looking at...

GRAHAM: What does strict constructionism mean to you?

SOTOMAYOR: Well, it means that you look at the Constitution as its written or statutes as they're written and you apply them exactly by the words.

GRAHAM: Right. Would you be an originalist?

SOTOMAYOR: Again, I don't use labels. And because...

GRAHAM: What is an originalist?

SOTOMAYOR: In my understanding, an originalist is someone who looks at what the founding fathers intended and what the situation confronting them was, and you use that to determine every situation presented -- not every but most situations presented by the Constitution.

GRAHAM: Do you believe the Constitution is a living, breathing, evolving document?

SOTOMAYOR: The Constitution is a document that is immutable to the sense that it's lasted 200 years. The Constitution has not changed except by amendment. It is a process -- an amendment process that is set forth in the document.

It doesn't live other than to be timeless by the expression of what it says. What changes is society. What changes is what facts a judge may get presented...

GRAHAM: What's the best way for society to change, generally speaking? What's the most legitimate way for a society to change?

SOTOMAYOR: I don't know if I can use the words "change." Society changes because there's been new development in technology, medicine, in -- in society growing.

GRAHAM: Do you think judges -- do you think judges have changed society by some of the landmark decisions in the last 40 years?

SOTOMAYOR: Well, in the last few years?

GRAHAM: 40 years.

SOTOMAYOR: I'm sorry. You said...

GRAHAM: 40, I'm sorry. 40. Do you think *Roe v. Wade* changed American society?

SOTOMAYOR: *Roe v. Wade* looked at the Constitution and decided that the Constitution, as applied to a claim's right, applied.

GRAHAM: Is there anything in the Constitution that says a state legislator or the Congress cannot regulate abortion or the definition of life in the first trimester?

SOTOMAYOR: The holding of the Court as...

GRAHAM: I'm asking the Constitution. Does the Constitution, as written, prohibit a legislative body at state or federal level from defining life or relating the rights of the unborn or protecting the rights of the unborn in the first trimester?

SOTOMAYOR: The Constitution in the 14th Amendment, has a...

GRAHAM: I'm sorry. Is there anything in the document written about abortion?

SOTOMAYOR: The word "abortion" is not used in the Constitution, but the Constitution does have a broad provision concerning a liberty provision under the due process...

GRAHAM: And that gets us to the speeches. That broad provision of the Constitution that's taken us from no written prohibition protecting the unborn, no written statement that you can't voluntarily pray in school, and on and on and on and on, and that's what drives us here, quite frankly. That's my concern. And when we talk about balls and strikes, maybe that's not the right way to talk about it.

But a lot of us feel that the best way to change society is to go to the ballot box, elect someone, and if they are not doing it right, get rid of them through the electoral process. And a lot of us are concerned from the left and the right that unelected judges are very quick to change society in a way that's disturbing. Can you understand how people may feel that way?

SOTOMAYOR: Certainly, sir.

GRAHAM: OK. Now, let's talk about you. I like you, by the way, for whatever that matters. Since I may vote for you that ought to matter to you. One thing that stood out about your record is that when you look at the almanac of the federal judiciary, lawyers anonymously rate judges in terms of temperament. And here's what they said about you.

She's a terror on the bench. She's temperamental, excitable, she seems angry. She's overall aggressive, not very judicial. She does not have a very good temperament. She abuses lawyers. She really lacks judicial temperament. She believes in an out -- she behaves in an out-of-control manner. She makes inappropriate outbursts. She's nasty to lawyers. She will attack lawyers for making an argument she does not like. She can be a bit of a bully.

When you look at the evaluation of the judges on the Second Circuit, you stand out like a sore thumb in terms of your temperament. What is your answer to these criticisms?

SOTOMAYOR: I do ask tough questions at oral arguments.

GRAHAM: Are you the only one that asks tough questions in oral arguments?

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SOTOMAYOR: No, sir. No, not at all. I can only explain what I'm doing which is when I ask lawyers tough questions, it's to give them an opportunity to explain their positions on both sides and to persuade me that they're right.

I do know that, in the Second Circuit, because we only give litigants 10 minutes of oral argument....

...each, that the processes in the second circuit are different than in most other circuits across the country. And that some lawyers do find that our court, which is not just me, but our court generally, is described as a hoc bench, it's term that lawyers use. It means that they're peppered with questions.

Lots of lawyers who are unfamiliar with the process in the second circuit find that tough bench difficult and challenging.

GRAHAM: If I may interject, judge, they find you difficult and challenging more than your colleagues. And the only reason I mention this is that it stands out. When you -- there are many positive things about you and these hearings are designed to talk about the good and the bad and I never liked appearing before a judge that I thought was a bully.

It's hard enough being a lawyer, having your client there to begin with, without the judge just beating you up for no good reason. Do you think you have a temperament problem?

SOTOMAYOR: No, sir. I can only talk about what I know about my relationship with the judges of my court and with the lawyers who appear regularly from our circuit. And I believe that my reputation is stuck as such that I ask the hard questions, but I do it evenly for both sides.

GRAHAM: And in fairness to you, there are plenty of statements in the record in support of you as a person, that do not go down this line. But I will just suggest to you, for what it's worth, judge, as you go forward here, that these statements about you are striking. They're not about your colleagues.

The ten-minute rule applies to everybody and that obviously you've accomplished a lot in your life, but maybe these hearings are time for self-reflection. This is pretty tough stuff that you don't see from -- about other judges on the second circuit.

Let's talk about the wise Latina comment, yet again. And the only reason I want to talk about it yet again is that I think what you said -- let me just put my vices on the table here. One of the things that I constantly say when I talk about the war on terror is that one of the missing ingredients in the Mideast is the rule of law that Senator Schumer talked about.

That the hope for the Mideast, Iraq and Afghanistan is that there'll be a courtroom one day that if you find yourself in that court, it would be about what you allegedly did, not who you are.

It won't be about whether you're a Sunni, Shia, a Kurd or a Pashtun, it will be about what you did. And that's the hope of the world, really, that our legal system, even though we fail at times, will spread. And I hope one day that there will be more women serving in elected office and judicial offices in the Mid-East because I can tell you this, from my point of view. One of the biggest problems in Iraq and Afghanistan is the mother's voice is seldom heard about the fate of her children.

And if you wanted to change Iraq, apply the rule of law and have more women involved and having a say about Iraq. And I believe that about Afghanistan. And I think that's true here.

GRAHAM: I think, for a long time, a lot of talented women were asked, can you type? And were trying to get beyond that and improve as a nation. So when it comes to the idea that we should consciously try to include more people in the legal process and the judicial process, from different backgrounds, count me in.

But your speeches don't really say that to me.

They -- along the lines of what Senator Kyl was saying -- they kind of represent the idea, there's a day coming when there'll be more of us -- women and minorities -- and we're going to change the law.

And what I hope we'll take away from this hearing is there need to be more women and minorities in the law to make a better America. And the law needs to be there for all of us, if and when we need it.

And the one thing that I've tried to impress upon you through jokes and being serious, is the consequences of these words in the world in which we live in. You know, we're talking about putting you on the Supreme Court and judging your fellow citizens.

And one of the things that I need to be assured of is that you understand the world as it pretty much really is. And we've got a long way to go in this country, and I can't find the quote, but I'll find it here in a moment -- the wise Latina quote. Well, do you remember it? (LAUGHTER)

SOTOMAYOR: Yes.

GRAHAM: OK. Say it to me. Can you recite it from memory? I've got it. (LAUGHTER) All right. "I would hope that a wise Latina woman, with the richness of her experience, would more often than not reach a better conclusion than a white male." And the only reason I keep talking about this is that I'm in politics. And you've got to watch what you say, because, one, you don't want to offend people you're trying to represent.

But do you understand, ma'am, that if I had said anything like that, and my reasoning was that I'm trying to inspire somebody, they would have had my head? Do you understand that?

SOTOMAYOR: I do understand how those words could be taken that way, particularly if read in isolation.

GRAHAM: Well, I don't know how else you could take that. If Lindsey Graham said that I will make a better senator than X, because of my experience as a Caucasian male makes me better able to represent the people of South Carolina, and my opponent was a minority, it would make national news, and it should.

Having said that, I am not going to judge you by that one statement. I just hope you'll appreciate the world in which we live in, that you can say those things, meaning to inspire somebody, and still have a chance to get on the Supreme Court. Others could not remotely come close to that statement and survive. Whether that's right or wrong, I think that's a fact.

GRAHAM: Does that make sense to you?

SOTOMAYOR: It does. And I would hope that we've come in America to the place where we can look at a statement that could be misunderstood, and consider it in the context of the person's life. (CROSSTALK)

GRAHAM: You know what? If that comes of this hearing, the hearing has been worth it all, that some people deserve a second chance when they misspeak and you would look at the entire life story to determine whether



this is an aberration or just a reflection of your real soul. If that comes from this hearing, then we've probably done the country some good. Now, let's talk about the times in which we live in. You're from New York. So you've grown up in New York all your life?

SOTOMAYOR: My entire life.

GRAHAM: What did September the 11th, 2001, mean to you?

SOTOMAYOR: It was the most horrific experience of my personal life and the most horrific experience in imagining the pain of the families of victims of that tragedy.

GRAHAM: Do you know anything about the group that planned this attack, who they are and what they believe? Have you read anything about them?

SOTOMAYOR: I've followed the newspaper accounts. I've read some books in the area, so I believe I have an understanding of that...(CROSSTALK)

GRAHAM: What would a woman's life be in their world, if they can control a government or a part of the world? What do they have in store for women?

SOTOMAYOR: I understand that some of them have indicated that women are not equal to men.

GRAHAM: I think that's a very charitable statement. Do you believe that we're at war?

SOTOMAYOR: We are, sir. We have -- we have tens and thousands of soldiers on the battlefields of Afghanistan and Iraq. We are at war.

GRAHAM: Are you familiar with military law much at all? And if you're not, that's OK. (CROSSTALK)

SOTOMAYOR: No, no, no, no. I'm thinking, because I've never practiced in the area. I've only read the Supreme Court decisions in this area.

GRAHAM: Right.

SOTOMAYOR: I've obviously examined by referencing cases some of the procedures involved in military law, but I'm not personally familiar with military law. I haven't participated.

GRAHAM: I understand. From what you read and what you understand about the enemy that this country faces, do you believe there are people out there right now plotting our destruction?

SOTOMAYOR: Given the announcements of certain groups and the messages that have been sent with videotapes, et cetera, announcing that intent, then the answer would be on -- based on that, yes.

GRAHAM: Under the law of armed conflict -- and this is where I may differ a bit with my colleagues -- it is an international concept, the law of armed conflict.

Under the law of armed conflict, do you agree with the following statement, that if a person is detained who is properly identified to accepted legal procedures under the law of armed conflict as a part of the enemy force, there is not requirement based on a length of time that they be returned to the battle or released?

In other words, if you capture a member of the enemy force, is it your understanding of the law that you have to, at some period of time, let them go back to the fight?

SOTOMAYOR: I -- it's difficult to answer that question in the abstract for the reason that I indicated later. I have not been a student of the law of war, other than to...

GRAHAM: We'll have another round. I know you'll have a lot of things to do, but try to-- try to look at that. Look at that general legal concept. And the legal concept I'm espousing (ph) is that under the law of war, Article 5 specifically of the Geneva Convention, requires the detaining authority to allow an impartial decision maker to determine the question of status. Whether or not you're a member of the enemy force. And see if I'm right about the law, but it that determination is properly had, there is no requirement, under the law of armed conflict, to release a member of the enemy force that still presents a threat. I would like you to look at that. Now let's talk about --Thank you.

Let's talk about your time as a lawyer. The Puerto Rican Legal Defense Fund, is that right? Is that the name of the organization?

SOTOMAYOR: It was then. I think you'd -- I know it has changed names recently.

GRAHAM: OK. How long were you a member of that organization?

SOTOMAYOR: Nearly 12 years.

GRAHAM: OK.

SOTOMAYOR: If not 12 years.

GRAHAM: Right. During that time, you were involved in litigation matters, is that correct?

SOTOMAYOR: The fund was involved in litigations, I was a board member of the fund.

GRAHAM: OK. Are you familiar with the position that the fund took regarding taxpayer-funded abortion? The briefs they filed?

SOTOMAYOR: No, I never reviewed those briefs.

GRAHAM: Well, in their briefs, they argued, and I will submit the quotes to you, that if you deny a low-income woman Medicaid funding, taxpayer funds, to have an abortion, if you deny her that, that's a form of slavery. And I can get the quotes. Do you agree with that?

SOTOMAYOR: I wasn't aware of what was said in those briefs. Perhaps it might be helpful if I explained what the function of a board member is and what the function of the staff would be in an organization like the fund.

GRAHAM: OK.

SOTOMAYOR: In a small organization as the Puerto Rican Legal Defense Fund was back then, it wasn't the size of other legal defense funds, like the NAACP Legal Defense Fund, or the Mexican-American Legal Defense Fund, which are organizations that undertook very similar work to PRLDF.

In an organization like PRLDF, a board member's main responsibility is to fundraise. And I'm sure that a review of the board meetings would show that that's what we spent most of our time on. To the extent that we looked at the organization's legal work, it was to ensure that it was consistent with the broad mission statement of the fund.

GRAHAM: Did the mission statement of the fund include taxpayer-funded abortion?

SOTOMAYOR: Our mission...

GRAHAM: Was that one of the goals?

SOTOMAYOR: Our mission statement was broad, like the Constitution.

GRAHAM: Yes.

SOTOMAYOR: Which meant that its focus was on promoting the equal opportunities of Hispanics in the United States.

GRAHAM: Well, Judge, I've got -- and I'll share them with you, and we'll talk about this more, a host of briefs for a 12-year period, where the fund is advocating to the state court and the federal courts, that to deny a woman taxpayer funds, a low-income woman taxpayer assistance in having an abortion, is a form of slavery, it's an unspeakable cruelty to the life and health of a poor woman. Was it or was it not the position of the fund to advocate taxpayer-funded abortions to low-income women?

SOTOMAYOR: I wasn't -- and I didn't, as a board member, review those briefs. Our lawyers were charged...

GRAHAM: Would it bother you if that's what they did?

SOTOMAYOR: Well, I know that the fund, during the years I was there, was involved in public health issues as it affected the Latino community. It was involved...

GRAHAM: Is abortion a public health issue?

SOTOMAYOR: Well, it was certainly viewed that way generally by a number of...

GRAHAM: Do you...

SOTOMAYOR: ... civil rights organizations at the time.

GRAHAM: Do you personally view it that way?

SOTOMAYOR: It wasn't a question of whether I personally viewed it that way or not. The issue was whether the law was settled on what issues the fund was advocating on behalf of the community it represented. And...

GRAHAM: Well, the fund -- oh, I'm sorry. Go ahead.

SOTOMAYOR: And so, the question would become, was there a good faith basis for whatever arguments they were making, as the fund's lawyers were lawyers...

GRAHAM: Well, yes...

SOTOMAYOR: ... who had an ethical obligation...

GRAHAM: And quite frankly, that's, you know -- lawyers are lawyers. And people who have causes that they believe in have every right to pursue those causes.

And the fund, when you look -- you may have been a board member, but I am here to tell you, that file briefs constantly for the idea that taxpayer-funded abortion was necessary, and to deny it would be a form of slavery, challenged parental consent as being cruel.

And I can go down a list of issues that the fund got involved in, that the death penalty should be stricken, because it has -- it's a form of racial discrimination. What's your view of the death penalty, in terms of personally?

SOTOMAYOR: The issue for me with respect to the death penalty is that the Supreme Court, since Gregg, has determined that the death penalty is constitutional under certain situations.

GRAHAM: Right.

SOTOMAYOR: I have rejected challenges to the federal law and its application in the one case I handled as a district court judge, but it's a reflection of what my views are on...

GRAHAM: As an advocate...

SOTOMAYOR: ... the law.

GRAHAM: As an advocate, did you challenge the death penalty as being an inappropriate punishment, because of the effect it has on race?

SOTOMAYOR: I never litigated a death penalty case personally. The fund...

GRAHAM: Did you ever sign a memorandum saying that?

SOTOMAYOR: I signed the memorandum for the board to take under consideration, what position on behalf of the Latino community the fund should take on New York State reinstating the death penalty in the state. It's hard to remember, because so much time has passed...

GRAHAM: Yes, well...

SOTOMAYOR: ... in the 30 years since...

GRAHAM: We'll give you a chance to look at some of the things I'm talking about, because I want you to be aware of what I'm talking about.

Let me ask you this. I've got 30 seconds left. If a lawyer on the on the other side filed a brief in support of the idea that abortion is the unnecessary and unlawful taking of an innocent life and public money should never be used for such a heinous purpose, would that disqualify them, in your opinion, from being a judge?

SOTOMAYOR: An advocate advocates on behalf of the client they have. And so that's a different situation than how a judge has acted in the cases before him or her.

GRAHAM: OK. And the only reason I mention this, Judge, is that the positions you took or this fund took, I think, like the speeches, tell us some things. And we'll have a chance to talk more about your full life, but I appreciate the opportunity to talk with you.

SOTOMAYOR: Thank you, sir.

LEAHY: Thank you very much, Senator Graham. Senator Durbin?

DURBIN: Thank you, Mr. Chairman. Judge, good to see you again.

SOTOMAYOR: Hello, Senator. Thank you. And I thank you again for letting me use your conference room when I was as hobbled as I was.

DURBIN: You were more than welcome there. And there was more traffic of senators in my conference room than I've seen since I was elected to the Senate, so...(LAUGHTER)

This has been an interesting exercise today for many of us who've been on the Judiciary Committee for a while, because the people new to it may not know, but there's been a little bit of a role reversal here. The Democratic side is now largely speaking in favor of our president's nominee. The other side is asking questions more critical.

And in the previous two Supreme Court nominees, the tables were turned. There were more critical questions coming from the Democratic side.

And there's also another contrast, obvious contrast. The two previous nominees that were considered while I was on the committee, Chief Justice Roberts and Justice Alito, were -- are white males. And, of course, you come to this as a minority woman candidate.

When we asked questions of the white male nominees of a Republican president, we were basically trying to find out whether -- to make sure that they would go far enough in understanding the plight of minorities, because clearly that was not in their DNA. The questions being asked of you from the other side primarily are along the lines of, will you go too far in siding with minorities?

It's an interesting contrast as I watch this play out. And two things have really been the focus on the other side, although a lot of questions have been asked.

One was, I should say, your speeches, one or two speeches. I took a look here. I think you've given over 500 speeches. And so that they would only find fault in one or two to bring up is a pretty good track record from this side of the table. If, as politicians, all we had were two speeches that would raise some questions among our critics, we would be pretty fortunate.

And when it came down to your cases, it appears that you've been involved at least as a federal judge in over 3,000 cases. And it appears that the Ricci case really is the focus of more attention than almost any other decision.

DURBIN: I think that speaks pretty well of you for 17 years on the bench. And I -- I'm going to join, as others have said, in commending the other side, because although their questions have sometimes been pointed, I think they've been fair. And I think you've handled the responses well.

I would like to say that, on the speech, which has come up time and again, the "wise Latina" speech, you know, the next paragraph in that speech -- and I don't know if it has been read to the members, but it should be. Because after you made the quote, which has been the subject of many inquiries here, you went on to say "Let us not forget that wise men like Oliver Wendell Holmes and Justice Cardozo voted on cases which upheld both sex and race discrimination in our society. Until 1972, no Supreme Court case ever upheld the claim of a woman in a gender discrimination case"

You went on to say, "I, like Professor Carter, believe that we should not be so myopic as to believe that others of different experiences or backgrounds are incapable of understanding the values and needs of people from a different group. Many are so capable. As Judge Sieterbaum, (ph) who may still be here, pointed out to me, nine white men on the Supreme Court in the past have done so on many occasions and on many issues, including Brown"

That, to me, tells the whole story. You are, of course proud of your heritage, as I'm proud of my own, but to suggest that a special insight and wisdom comes with it, is to overlook the obvious. Wise men have made bad decisions, white men have made decisions favoring minorities. Those things have happened when people look to the law and look to the Constitution.

So I would like to get into two or three areas, if I might, to follow up on, because they're areas of particular interest to me. And I'll return to one that Senator Graham just touched on and that is the death penalty.

A book which I greatly enjoyed, I don't know if you ever had a chance to read, "Becoming Justice Blackmun" a story of Justice Blackmun's career and many of the things that happened to him. Now, late in his career, he decided that he could no longer support the death penalty. And it was a long, thoughtful process that brought him to this moment.

And he made the famous statement, maybe the best-known line attributed to him, in a decision, Collins, vs. Collins, "From this day forward, I no longer shall tinker with the machinery of death" The opinion said, and I quote, "Twenty years have passed since" and this is 1994.

"Twenty years have passed since this court declared that the death penalty must be imposed fairly and with reasonable consistency, or not at all. See Furman vs. Georgia and despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice and mistake."

Judge Sotomayor, I know that you've thought about this issue. Senator Graham made reference to the Puerto Rican Legal Defence Education Fund memo that you once signed on the subject. What is your thought about Justice Blackmun's view that, despite our best legal efforts, the imposition of the death penalty in the United States has not been handled fairly.

SOTOMAYOR: With respect to the position the fund took in 1980-81 with respect to the death penalty, that was, as I noted, a question of being an advocate and expressing views on behalf of a community on a policy choice New York State was making: Should we, or should we not reinstitute the death penalty? As a judge, what I have, and look at and realize is, that in 30 years, or 40, actually, there has been -- excuse me, Senator. Oh, I'm sorry.

DURBIN: It's all right.

SOTOMAYOR: ... enormous changes in our society, many, many cases looked at by the Supreme Court addressing the application of the death penalty, addressing issues of its application and when they're constitutional or not. The state of this question is different today than it was when Justice Blackmun came to his views.

As a judge, I don't rule in an abstract. I rule in the context of a case that comes before me and a challenge to a situation and an application of the death penalty that arises from an individual case.

I've been and am very cautious about expressing personal views since I've been a judge. I find that people who listen to judges express their personal views on important questions that the courts are looking at, that they have a sense that the judge is coming into the process with a closed mind, that their personal views will somehow influence how they apply the law.

That's one of the reasons why, since I've been a judge, I've always been very careful about not doing that. And I think my record speaks more loudly than I can...

DURBIN: It does.

SOTOMAYOR: ... about the fact of how careful I am about ensuring that I'm always following the law and not my personal views.

DURBIN: Well, and the one death penalty case that you handled as a district court judge, *United States vs. Heatley*, this is after, in 1983, I believe it was or 1981, I'm sorry, that you signed on to the Puerto Rican Legal Defense Education Fund memo recommending that the organization oppose reinstating the death penalty in New York.

After you'd done that, some years later, you were call on to rule on a case involving the death penalty. Despite the policy concerns that you and I share, you denied the defendant's motion to dismiss and pave the way for the first federal death penalty case in Manhattan in more than 40 years.

Now, the defendant, ultimately accepted a plea bargain of life, and you rejected his challenge to the death penalty and found that he'd shown no evidence of discriminatory intent. So that makes your point. Whatever your personal feelings, you, in this case, at the district court level, ruled in a fashion that upheld the death penalty.

I guess I am trying to take it a step beyond. And maybe you won't go to where I want to take you, and some nominees don't. But I guess the question that arises in my mind is how a man like Justice Blackmun, after a life on the bench, comes to the conclusion that, despite all our best efforts, the premise of your 1981 memo is still the same; that, ultimately, the imposition of the death penalty in our country is too arbitrary. Minorities in America today account for a decision proportionate 43 percent of executions.

That's a fact since 1976. And while white victims account for about one-half of all murder victims, 80 percent of death penalty cases involve victims who are white. This raises from obvious questions we have to face on this side of the table. I'm asking you if it raises questions of justice and fairness on your side of the table.

SOTOMAYOR: In the *Heatley* case, it was the first prosecution in the Southern District of New York of a death penalty case in over 40 years.

Mr. Heatley was charged with being a gang leader of a crack and cocaine enterprise who engaged in over -- if the number wasn't 13, it was very close to that, 13 murders to promote that enterprise.

He did challenge the application of the death penalty charges against him on the ground that the prosecutor had made its decision to prosecute him and refused him a cooperation agreement on the basis of his race.

The defense counsel, much as you have, Senator, raised any number of concerns about the application of the death penalty. And in the response to his argument, I held hearings not on that question, but on the broader question of what had motivated -- on the specific legal question, what had motivated this prosecutor to enter this prosecution and whether he was denied the agreement he sought on the basis of race. I determined that that was not the case and rejected his challenge.

With respect to the issues of concerns about the application of the death penalty, I noted for the defense attorneys that, in the first instance, one back question of the -- the effects of the death penalty, how it should be done, what circumstances warrant it or don't, in terms of the law, that that's a legislative question.

And, in fact, I said to him -- I -- I acknowledged his concerns. I acknowledged that many had expressed views about that. But that's exactly what I said, which is, I can only look at the case that's before me and decide that case.

DURBIN: And this is a recent case before the Supreme Court I'd like to make reference to, D.A.'s Office vs. Osborne, involving DNA. It turns out there are only three states in the United States that don't provide state legislative access to DNA evidence that might be -- might exonerate someone who is in prison.

I am told that, since 1989, 240 post-conviction DNA exonerations have taken place across this country, 17 involving inmates on death row. Now, the Supreme Court in the Osborne case was asked, what about those three states? Is there a federal right to access to DNA evidence for someone currently incarcerated who questions whether or not they were properly charged and convicted? And the court said, no, there was no federal right, but it was a 5-4 case. So, though I don't quarrel with your premise that it's our responsibility on this side of the table to look at the death penalty, the fact is, in this recent case, this Osborne case, there was a clear opportunity for the Supreme Court right across the street to say, "We think this gets to an issue of due process as to whether someone sitting on death row in Alaska, Massachusetts or Oklahoma, where their state law gives them no access, under the law, to DNA evidence."

So I ask you, either from the issue of DNA or from other perspectives, isn't it clear that the Supreme Court does have some authority in the due process realm to make decisions relating to the arbitrariness of the death penalty?

SOTOMAYOR: The court is not a legislative body. It is a reviewing body of whether a particular act by a state in a particular case is constitutional or not. In a particular situation, the Court may conclude that the state has acted unconstitutionally and invalidate the act, but it's difficult to answer a question about the role of the Court outside of the functions of the Court which is we don't make broad policies. We decide questions based on cases and the principles implicated by that particular case before you.

DURBIN: I follow you, and I understand the limitations on policy-related questions that you are facing. So I'd like to go to another area relating to policy and ask your thoughts on it. We have, on occasion, every two years here, a chance to go across the street for a rather historic dinner. The members of the United States Senate sit down you know with the members of the U.S. Supreme Court. We look forward to it. It's a tradition that's maybe six or eight years old, Mr. Chairman. I don't think much older.

LEAHY: Great tradition.



DURBIN: Great tradition. And we get -- we get to meet them. They get to meet us. I sat down with one Supreme Court justice, I won't name this person. But I said at that time that I was character a crime subcommittee in Judiciary and said to this justice what topic do you think I should be looking into as a senator when it comes to justice in the United States.

And this justice said our system of corrections and incarceration in America. It has to be the worst. It's hard to imagine how it could be much worse if we tried to design it that way. Today, in the United States, 2.3 million people are in prison. We have the most prisoners of any country in the world as well as the highest per capita rate of prisoners in the world.

In America today, African-Americans are incarcerated six times the rate of white Americans. Now, there's one significant reason for this, and you have faced at least an aspect of it as a judge, and that is the crack powder disparity in sentencing. I will readily concede I voted for it as did many members of the House of Representatives frightened by the focus of this new, narcotic called crack that was so cheap and so destructive that we had to do something dramatic. We did.

We put a hundred to one ratio in terms of sentencing. Now, we realize we made a serious mistake. Eighty-one percent of those convicted for crack offenses in 2007 were African-American although only about 25% of crack cocaine users are African-Americans. I held a hearing on this, and a Judge Walton (ph), associate director of the Office of National Drug Control Policy testified. And he basically said that this sentenced disparity between crack and powder has had a negative impact in courtrooms across America.

Specifically, he stated that people come to view the courts with suspicion as institutions that mete out unequal justice and the moral authority of not only the federal courts but all courts as diminished.

DURBIN: I might say for the record that this administration has said they want to change this and make it 1 to 1. We are working on legislation in a bipartisan basis to do so. You faced this as a judge, at least some aspect of it. You sentenced Louis Gomez, a nonviolent drug offender, to a five-year mandatory minimum. And you said when you sentenced him, you do not deserve this, sir. I am deeply sorry for you and your family, but I have no choice.

May I ask you to reflect for a moment if you can beyond this specific case or using this specific case on this question of race and justice in America today? It strikes me -- it goes to the heart of our future as a nation and whether we can finally come to grips and put behind us some of the terrible things that have happened in our history.

SOTOMAYOR: It's so unsatisfying, I know, for you and probably the other senators when a nominee to the court doesn't engage directly with the societal issues that are so important to you, both as citizens and senators. And I know they are important to you because this very question you just mentioned to me is part of bipartisan efforts that you're making.

And I respect that many have concerns on lots of different issues. For me as a judge, both on the circuit or potentially as a nominee to the Supreme Court, my role is a very different one. And in the Louise Gomez (ph) case, we weren't talking about the disparity. We were talking about the -- the quantity of drug and whether I had to follow the law on the statutory minimum that Congress required for the weight of drugs at issue.

In expressing a recognition of the family situation and the uniqueness of that case, it was at a time when Congress had not recognized the safety valve for first-time offenders under the drug laws. That situation had motivated many judges in many situations to comment on the question of whether the law should be changed to address the safety value question then make a statement making any suggestions to Congress.

I followed the law. But I know that the attorney general's office, many people spoke to Congress on this issue. And Congress passed a safety valve.

With respect to the crack cocaine disparity, as you may know, the guidelines are no longer mandatory as a result of a series of recent Supreme Court cases -- not so recent, but Supreme Court cases, probably almost in the last 10 years. I think the first one, Apprendi (ph), was in 2000, if my memory is serving me right -- or very close to that.

At any rate, that issue in -- was addressed recently by the Supreme Court in the case called U.S. vs. Kimbro (ph). And the court noted that the sentencing commission's recommendation of sentences was not based on its considered judgment that the 100-to-one ratio was an appropriate sentence for this conduct. And the court recognized that sentencing judges could take that fact into consideration in fashioning an individual sentence for a defendant.

And, in fact, the sentencing commission in very recent time has permitted defendants who have been serving prior sentences in certain situations to come back to court and have the courts reconsider whether their sentences should be reduced in a way specified under the procedures established by the sentencing commission.

This is an issue that I can't speak further about because it is an issue that's being so actively discussed by Congress and which is controlled by law. But as I said, I -- I can appreciate why not saying more would feel unsatisfying, but I am limited by the role I have.

DURBIN: One last question I'll ask you. I'd like to hear your perspective on our immigration courts. A few years ago, Judge Richard Posner from my home state of Illinois brought this problem to my attention. In 2005, he issued a scathing opinion criticizing our immigration courts in America. He wrote, and I quote, "The adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice," end of quote.

For those who don't know this Judge Posner, he is an extraordinary man. I wouldn't know where to put him exactly on the political spectrum, because I'm not sure what his next book will be. He has written so many books. He is a very gifted and thoughtful person.

In 2002, then-Attorney General John Ashcroft issued so-called streamlining regulations that made dramatic changes in our immigration courts, reducing the -- the size of the Board of Immigration Appeals from 23 to 11. This board stopped using three-member panels, and board members began deciding cases individually, often within minutes and without written opinions.

In response, immigrants began petitioning the federal appellate court in large numbers. In 2004, immigration cases constituted 17 percent of all federal appeals, up from 3 percent in 2001, the last year before the regulations under Attorney General Ashcroft.

I raised this issue with Justice Alito during his confirmation hearing, and he told me, and I quote, "I agree with Judge Posner that the way these cases are handled leaves an enormous amount to be desired. I've been troubled by this."

What has been your experience on the circuit court when it came to these cases? And what is your opinion of Judge Posner's observation in this 2005 case?

SOTOMAYOR: There's been four years since Judge Posner's comments, and they have to be placed somewhat in perspective. Attorney General Ashcroft's what you described as streamlining procedures have been by, I think, all of the circuit courts that have addressed the issue affirmed and given Chevron deference.

So the question is not whether the streamline procedures are constitutional or not, but what happened when he instituted that procedure is that, with all new things, there were many imperfections. New approaches to things create new challenges.

And there's no question that courts faced with large numbers of immigration cases, as was the Second Circuit -- I think we had the second-largest number of new cases that arrived at our doorsteps, the Ninth Circuit being the first, and I know the Seventh had a quite significantly large number, were reviewing processes that, as Justice Alito said, left something to be desired in a number of cases.

I will say that that onslaught of cases and the concerns expressed in the number of cases by the judges in the dialogue that goes on in court cases with administrative bodies, with Congress resulted in more cooperation between the courts and the immigration officials in how to handle these cases, how to ensure that the process would be improved. I know that the attorney general's office devoted more resources to the handling of these cases.

There is always room for improvement. The agency is handling so many matters, so many cases, has so many responsibilities making sure that it has adequate resources and training is an important consideration, again in the first instance by Congress because you set the budget.

In the end what we can only do is ensure that due process is applied in each case according to the law required for the review of these cases.

DURBIN: Do you feel that it's changed since 2005 when Judge Posner said the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice?

SOTOMAYOR: Well, I wouldn't -- I'm not endorsing his views because he can only speak for himself. I do know that in, I would say, the last two or three years the number of cases questioning the processes in published circuit court decisions has decreased.

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

LEAHY: Thank you very, very much, Senator Durbin. I have -- I have discussed this with Senator Sessions. And as I told him earlier, also with his -- at his request we would have a -- we haven't finished the first round. But once we finish the first round of questions, we'll have 20-minute rounds on the second. I'm going to urge senators that they don't feel the need to use the whole round, just as Senator Durbin just demonstrated, that they not. But here will be the schedule.

We will break for today. We will have -- we will begin at 9:30 in the morning. We will finish the first round of questions. I'll ask -- the last round will be asked by Senator Franken. And then we will break for the traditional closed door session with the -- with the nominee.

And so, for those who have not seen one of these before, we do this with all Supreme Court nominees. We have a closed session just for the nominee. We go over the FBI report. We do it with all of them. I think we generally say it's routine. And we did it with Justice Roberts and -- or Chief Justice Roberts and Justice Alito and Justice Breyer and everybody else.

Then we'll come back for a round of 20 minutes each. But during that round, I will encourage senators if they feel all questions have been asked -- I realize sometimes all questions may have been asked but not everybody has asked all of the questions -- that we try to ask, at least, something new so -- to keep up the interest.

And then -- and then we can determine whether we're prepared, depending on how late it is, whether we can do the panels or whether we have to do the panels on Thursday. Is that...

SESSIONS: Thank you, Chairman Leahy. And I do think that the scheme you arranged for this hearing is good the way we've gone forward. I thank you for that. We've done our best to be ready and in a short timeframe. And I believe the members on this side are ready.

Talking of questions, there ain't no harm in asking. Isn't that a legal rule, to get people to reduce their time? But there's still some important questions. And I think we will certainly want to use -- most members would want to use their 20 minutes. And then I appreciate that and look forward to being with you in the morning.

LEAHY: First when I asked the question I probably violated the first rule that I learned as a trial lawyer. You shouldn't ask a question if you don't know what the answer is going to be. But then I also have that other aspect where hope springs eternal. And as we have a whole lot of other things going on in the Senate, I would hope we might.

And, Senator Cardin and Senator Whitehouse and Senator Klobuchar, Senator Specter and Senator Franken, I am sorry that we didn't get to you yet. But we will before we do the closed session. Judge, thank you very much.

SOTOMAYOR: Thank you.

LEAHY: We stand in recess. ### (End of testimony, July 14, 2009)

Day 3 Part 1

SENATE COMMITTEE ON THE JUDICIARY HOLDS A HEARING ON THE NOMINATION OF JUDGE SONIA SOTOMAYOR TO BE AN ASSOCIATE JUSTICE OF THE U.S. SUPREME COURT  
JULY 15, 2009, SONIA SOTOMAYOR, NOMINATED TO BE AN ASSOCIATE JUSTICE OF THE U.S. SUPREME COURT

CHAIRMAN PATRICK LEAHY: Good morning, everyone. Judge, it's good to see you back and your -- and your family. Judge Sotomayor, yesterday you answered questions from 11 senators. Frankly, I freely demonstrated your commitment to the fair and impartial application of law. You certainly demonstrated your composure and patience and your extensive legal knowledge.

Today, we'll have questioning from the remaining eight members of the committee, and then just to set the schedule, once we have finished that questioning, we will arrange a time to go into the traditional -- something we do every time for the street nominee -- traditional closed-door session, which is usually not very lengthy, and then go back to others.

I've talked about senator sessions. We will then go to a second round of questions of no more...

...than 20 minutes each. I've talked with a number of senators who have told me they will not use anywhere near that 20 minutes, although every senator has the right to do it. And I would hope we might be able to wrap it up. But we're going to go to Senator Cornyn, himself a former member of the Texas Supreme Court and former attorney general. And, Senator Cornyn, it's yours.

JOHN CORNYN: Thank you, Mr. Chairman. Good morning, Judge.

SONIA SOTOMAYOR: Good morning, Senator. It's good to see you again.

CORNYN: Good to see you. I recall, when we met in my office, you told me how much you enjoy the back-and-forth that lawyers and judges do. And I appreciate the good humor and attitude that you've brought to this. And I very much appreciate your -- your willingness to serve on the highest court in the land.

I'm afraid that sometimes in the past these hearings have gotten so downright nasty and contentious that some people are dissuaded from willingness to serve, which I think is a great -- is a great tragedy. And, of course, some have been filibustered. They have been denied the opportunity to have an up-or-down vote on the Senate floor.

I told you, when we visited my office, that's not going to happen to you if I have anything to say about it. You will get that up-or-down vote on the Senate floor.

But I want to ask your assistance this morning to try to help us reconcile two pictures that I think have emerged during the course of this hearing. One is, of course, as Senator Schumer and others have talked about, your lengthy tenure on the federal bench as a trial judge and court of appeals judge. And then there's the other picture that has emerged that -- from your speeches and your other writings.

And I need your help trying to reconcile those two pictures, because I think a lot of people have -- have wondered about that.

And I guess the reason why it's even more important that we understand how you reconcile some of your other writings with your judicial experience and tenure as a fact that, of course, now you will not be a lower court

judge subject to the appeals to the Supreme Court. You will be free as a United States Supreme Court justice to basically do what you want with no court reviewing those decisions, harkening back to the quote we started with during my opening statement about the Supreme Court being infallible only because it's final.

So I want to just start with the comments that you made about the "wise Latina" speech that, by my count, you made at least five times between 1994 and 2003. You indicated that this was really -- and please correct me if I'm wrong, I'm trying to quote your words -- a, quote, "failed rhetorical flourish that fell flat." I believe at another time you said they were, quote, "words that don't make sense," close quote. And another time, I believe you said it was, quote, "a bad idea," close quote.

Am I accurately characterizing your thoughts about the use of that -- of that phrase that has been talked about so much?

SOTOMAYOR: Yes, generally. But the point I was making was that Justice O'Connor's words, the ones that I was using as a platform to make my point about the value of experience generally in the legal system, was that her words literally and mine literally made no sense, at least not in the context of what judges do or -- what judges do.

I didn't and don't believe that Justice O'Connor intended to suggest that, when two judges disagree, one of them has to be unwise. And if you read her literal words -- that wise old men and wise old women would come to the same decisions in cases -- that's what the words would mean, but that's clearly not what she meant. And if you listen to my words, it would have the same suggestion that only Latinos would come to wiser decisions.

But that wouldn't make sense in the context much my speech either because I pointed out in the speech that eight, nine white men had decided *Brown v. Board of Education*. And I know noted in a separate paragraph of the speech that -- that no one person speaks in the voice of any group. So my rhetorical flourish, just like hers, can't be read literally. It had a different meaning in the context of the entire speech

CORNYN: But, Judge, she said a wise man and a wise woman would reach the same conclusion. You said that a wise Latina woman would reach a better conclusion than a male counterpart. What I'm confused about, are you standing by that statement? Or are you saying that it was a bad idea and you - are you disavowing that statement?

SOTOMAYOR: It is clear from the attention that my words have gotten and the manner in which it has been understood by some people that my words failed. They didn't work. The message that the entire speech attempted to deliver, however, remains the message that I think Justice O'Connor meant, the message that higher nominees, including Justice Alito meant when he said that his Italian ancestry he considers when he's deciding discrimination cases.

I don't think he meant -- I don't think Justice O'Connor meant that personal experiences compel results in any way. I think life experiences generally, whether it's that I'm a Latina or was a state prosecutor or have been a commercial litigator or been a trial judge and an appellate judge, that the mixture of all of those things, the amalgam of them help me to listen and understand.

But all of us understand because that's the kind of judges we have proven ourselves to be; we rely on the law to command the results in the case. So when one talks about life experiences, and even in the context of my speech, my message was different than I understand my words have been understood by some.

CORNYN: So you -- do you stand by your words of yesterday when you said it was a failed rhetorical flourish that fell flat? That they are words that don't make sense and that they're a bad idea?

SOTOMAYOR: I stand by the words. It fell flat. And I understand that some people have understood them in a way that I never intended. And I would hope that, in the text of the speech, that they would be understood.

CORNYN: Well, you spoke about the law students to whom these comments from frequently directed and your desire to inspire them. If, in fact, the message that they heard was that the quality of justice depends on the sex, race, or ethnicity of the judge, is that an understanding that you would regret?

SOTOMAYOR: I would regret that because, for me, the work I do with students -- and it's just not in the context of those six speeches. As you know, I give dozens more speeches to students all the time and to lawyers of all backgrounds, and I give -- and have spoken to community groups of all type.

And what I do in each of those situations is to encourage both students and, as I did when I spoke to new immigrants that was admitting as students, to try to encourage them to participate on all levels of our society. I tell people that that's one of the great things about America, that we can do so many different things and participate so fully in all of the opportunities America presents.

And so the message that I deliver repeatedly and as the context of all of my speeches is, I've made it. So can you. Work hard at it. Pay attention to what you're doing, and participate.

CORNYN: Let me ask about another speech you gave in 1996 that was published in the Suffolk University Law Review, where you wrote what appears to be an endorsement of the idea that judges should change the law. You wrote, quote, "Change, sometimes radical change, can and does occur in a legal system that serves a society whose social policy itself changes." You noted, with apparent approval, that, quote, "A given judge or judges may develop a novel approach to a specific set of facts or legal framework that pushes the law in a new direction," close quote. Can you explain what you meant by those words?

SOTOMAYOR: The title of that speech was, "Returning Majesty to the Law." As I hope I communicated in my opening remarks, I'm passionate about the practice of law and judging, passionate in sense of respecting the rule of law so much. The speech was given in the context of talking to young lawyers and saying, "Don't participate in the cynicism that people express about our legal system."

CORNYN: What kind of ...

SOTOMAYOR: I ...

CORNYN: Excuse me. I'm sorry. I didn't mean to interrupt you.

SOTOMAYOR: And I was encouraging them not to fall into the trap of calling decisions that the public disagrees with, as they sometimes do, activism or using other labels, but to try to be more engaged in explaining the law and the process of law to the public. And in the context of the words that you quoted to me, I pointed out to them explicitly about evolving social changes, that what I was referring to is Congress is passing new laws all the time. And so whatever was viewed as settled law previously will often get changed because Congress has changed something.

I also spoke about the fact that society evolves in terms of technology and other developments, and so the law is being applied to a new set of facts. In terms of talking about different approaches in law, I was talking about the

fact that there are some cases that are viewed as radical, and I think I mentioned just one case, *Brown v. Board of Education*, and explaining and encouraging to -- them to explain that process, too.

SOTOMAYOR: And there are new directions in the law in terms of the court. The court -- Supreme Court is often looking at its precedents and considering whether, in certain circumstances whose precedent is owed deference for very important reasons, but the court takes a new direction. And those new directions rarely, if ever, come at the initiation of the court. They come because lawyers are encouraging the court to look at a situation in a new way, to consider it in a different way.

What I was telling those young lawyers is: Don't play into people's skepticism about the law. Look to explain to them the process.

I also, when I was talking about returning majesty to the law, I spoke to them about what judges can do. And I talked about, in the second half of that speech, that we had an obligation to ensure that we were monitoring the behavior of lawyers before us so that, when questionable, ethical, or other conduct could bring disrepute to the legal system, that we monitor our lawyers, because that would return a sense...

CORNYN: Judge, if you let me -- I think we're straying away from the question I had been talking about oversight of lawyers. Would you explain how, when you say judges should -- or, I'm sorry, let me just ask. Do you believe that judges ever change the law? I take it from your statement that you do.

SOTOMAYOR: They change -- they can't change law. We're not lawmakers. But we change our view of how to interpret certain laws based on new facts, new developments of doctrinal theory, considerations of whether -- what the reliance of society may be in an old rule.

We think about whether a rule of law has proven workable. We look at how often the court has affirmed a prior understanding of how to approach an issue. But in those senses, there's changes by judges in the popular perception that we're changing the law.

CORNYN: In another speech in 1996, you celebrated the uncertainty of the law. You wrote that the law is always in a quote, "necessary state of flux," close quote.

You wrote that the law judges declare is not, quote, "a definitive -- capital L -- Law that would make -- that may -- many would like to think exists," close quote, and, quote, "that the public fails to appreciate the importance of indefiniteness in the law." Can you explain those statements? And why do you think indefiniteness is so important to the law?

SOTOMAYOR: It's not that it's important to the law as much as it is that it's what legal cases are about. People bring cases to courts because they believe that precedents don't clearly answer the fact situation that they're presenting in their individual case. That creates uncertainty; that's why people bring cases.

And they say, "Look, the law says this, but I'm entitled to that." "I have this set of facts that entitle me to relief under the law." It's the entire process of law. If law was always clear, we wouldn't have judges. It's because there is indefiniteness not in what the law is, but its application to new facts that people sometimes feel it's unpredictable.

That speech, as others I've given, is an attempt to encourage judges to explain to the public more of the process. The role of judges is to ensure that they are applying the law to those new facts, that they're interpreting that law with Congress' intent, being informed by what precedents say about the law and Congress' intent and applying it to the new facts.



But that's what the role of the courts is. And, obviously, the public is going to become impatient with that if they don't that process. And I'm encouraging lawyers to do more work in explaining the system, in explaining what we are doing as courts.

CORNYN: In a 2001 speech at Berkeley, you wrote, quote, "whether born from experience or inherent physiological or cultural differences, a possibility I abhor less or discount less than my colleague, Judge Sederbaum, our gender and national origins may and will make a difference in our judging," close quote. The difference -- a difference is physiological if it relates to the mechanical, physical, or biochemical functions of the body, as I understand the word. What do you mean by that?

SOTOMAYOR: I was talking just about that. There are, in the law, there have been upheld, in certain situations, that certain job positions have a requirement for a certain amount of strength or other characteristics that may be the -- a person who fits that characteristic can have that job. But there are differences that may affect a particular type of work. We do that all the time.

CORNYN: We're talking about judging.

SOTOMAYOR: You need to be a pilot who has good eyesight.

CORNYN: We're not talking about pilots. We're talking about judging. Right?

SOTOMAYOR: No, no, no. But what I'm -- was talking about there because the context of that was talking about the difference in the process of judging. And the process of judging, for me, is what life experiences bring to the process. It helps you listen and understand. It doesn't change what the law is or what the law commands.

My life experience, as a prosecutor, may help me listen and understand an argument in a criminal case. It may have no relevancy to what happens in an antitrust suit. It's just a question of the process of judging. It improves both the public's confidence that there are judges from a variety of different backgrounds on the bench because they feel that all issues will be more -- better at least addressed. Not that it's better addressed, but that it helps that process of feeling confident that all of arguments are going to be listened to and understood.

CORNYN: So you stand by the comment or the statement that inherent physiological differences will make a difference in judging?

SOTOMAYOR: I'm not sure -- I'm not sure exactly where that would play out, but I was asking a hypothetical question in that paragraph. I was saying, look, we just don't know. If you read the entire part of that speech, what I was saying is let's ask the question. That's what all of these studies are doing. Ask the question if there's a difference.

Ignoring things and saying, you know, it doesn't happen, isn't an answer to a situation. It's consider it. Consider it as a possibility and think about it. But I certainly wasn't intending to suggest that there would be a difference that affected the outcome. I talked about there being a possibility that it could affect the process of judging.

CORNYN: As you can tell, I'm struggling a little bit to understand how your statement about physiological differences could affect the outcome or affect judging and your stated commitment to fidelity to the law as being your sole standard and how any litigant can -- can know where that will end.

But let me ask you on another topic. There was a Washington Post story on May the 29th, 2009, where — that starts out saying, "The White House scrambled yesterday to assuage worries from liberal groups about Judge Sonia Sotomayor's scant record on abortion rights." And White House -- it goes on to say, "White House press

secretary said the president did not ask Sotomayor specifically about abortion rights during their interview." Is that correct?

SOTOMAYOR: Yes, it's absolutely correct. I was asked no questions by anyone, including the president, about my views on any specific legal issue.

CORNYN: Do you know then on what basis, if that's the case -- and I accept your statement -- on what basis that White House officials would subsequently send a message that abortion rights groups do not need to worry about how you might rule in a challenge to *Roe v. Wade*?

SOTOMAYOR: No, sir, because you just have to look at my record to know that, in the cases that I addressed on all issues, I follow the law.

CORNYN: On what basis would George Pavia, who was apparently a senior partner in the law firm that hired you as a corporate litigator, on what basis would -- would he say that he thinks support of abortion rights would be in line with your generally liberal instincts?

He's -- he's quoted in his article saying, quote, "I can guarantee she'll be for abortion rights," close quote. On what basis would Mr. Pavia say that, if you know?

SOTOMAYOR: I have no idea, since I know for a fact I never spoke to him about my views on abortion, frankly, on my views on any social issue. George was the -- was the head partner of my firm, but our contact was not on a daily basis.

I have no idea why he's drawing that conclusion, because if he looked at my record, I have ruled according to the law in all cases addressed to the issue of termination of abortion rights -- of women's right to terminate their pregnancy. And I voted in cases in which I upheld the application of the Mexico City policy, which was a policy in which the government was not funding certain abortion-related activities.

CORNYN: Do you agree -- do you agree with his statement that you have generally liberal instincts?

SOTOMAYOR: If he was talking about the fact that I served on a particular board that promoted equal opportunity for people, the Puerto Rican Legal Defense and Education Fund, then you could talk about that being a liberal instinct in the sense that I promote equal opportunity in America and the attempts to assure that.

But he has not read my jurisprudence for 17 years, I can assure you. He's a corporate litigator. And my experience with corporate litigators is that they only look at the law when it affects the case before them.  
(LAUGHTER)

CORNYN: Well, I hope, as you suggested, not only liberals endorse the idea of equal opportunity in this country -- that's a -- that's a, I think, bedrock doctrine that undergirds all of our -- all of our law. But that brings me, in the short time I have left, to the New Haven firefighter case.

As you know, there are a number of the New Haven firefighters who are here today and will testify tomorrow. And I have to tell you, your Honor, as a former judge myself, I was shocked to see that the sort of treatment that the three-judge panel you served on gave to the claims of these firefighters by an unpublished summary order which has been pointed out in the press would not likely to be reviewed or even caught by other judges on the 2nd Circuit except for the fact that Judge Cabranes read about a comment made by the lawyer representing the firefighters in the press that the court gave short shrift to the claims of the firefighters.

Judge Cabranes said the core issue presented by this case, the scope of a municipal employer's authority to disregard examination results based solely on the successful applicant is not addressed by any precedent of the Supreme Court or our circuit.

And looking at the -- looking at the unpublished summary order, this three-judge panel of the Second Circuit doesn't cite any legal authority whatsoever to support its conclusion. Can you explain to me why — why you would deal with it in a way that appears to be so — well, dismissive may be too strong a word — but avoid the very important claims that the Supreme Court, ultimately, reversed you on that were raised by the firefighters appeal?

SOTOMAYOR: Senator, I can't speak to what brought this case to Judge Cabranes' attention. I can say the following, however. When parties are dissatisfied with a panel decision, they can file a petition for rehearing and bond. And, in fact, that's what happened in the Ricci case.

Those briefs are routinely reviewed by judges. And so publishing by summary order or addressing an issue by summary order or by published opinion doesn't hide the party's claims from other judges. They get the petitions for rehearing.

Similarly, parties, when they're dissatisfied with what a circuit has done, file petitions for certiorari, which is a request for the Supreme Court to review a case. And so the court looks at that as well. And so regardless of how a circuit decide a case, it's not a question of hiding it from others.

With respect to the broader question that you're raising, which is why do you do it by summary order or why do you do it in a published opinion or in a per curiam, the question or the practice is that about 75% of circuit court decisions are decided by summary order, in part, because we can't handle the volume of our work if we were writing long decisions in every case. But, more importantly, because not every case requires a long opinion if a district court opinion has been clear and thorough on an issue.

SOTOMAYOR: And in this case, there was a 78-page decision by the district court. It adequately explained the questions that the Supreme Court addressed and reviewed.

And so, to the extent that a particular panel considers that an issue has been decided by existing precedent, that's a question that the court above can obviously revisit, as it did in Ricci, where it looked at it and said, well, we understand what the circuit did, we understand what existing law is, but we should be looking at this question in a new way. That's the job of the Supreme Court.

CORNYN: But, Judge, even the district court admitted that a jury could rationally infer that city officials worked behind the scenes to sabotage the promotional examinations, because they knew that the exams -- they knew that, were the exams certified, the mayor would incur the wrath of Rev. Boise Kimber and other influential leaders of New Haven's African American community.

So you decided that, based on their claim of potential disparate impact liability, that there's no recourse — that the city was justified in disregarding the exams and thus denying these firefighters, many of whom suffered hardship in order to study and to prepare for these examinations and were successful, only to see that hard work and effort disregarded and not even acknowledged in the court's opinion.

And, ultimately, as you know, the Supreme Court said that you just can't claim potential disparate impact liability as a city and then deny someone a promotion based on the color of their skin. There has to be a strong basis in evidence.

But you didn't look to see whether there was a basis in evidence to the city's claim. Your summary opinion — unpublished summary order didn't even discuss that. Don't you think that these firefighters and other litigants deserve a more detailed analysis of their claims and an explanation for why you ultimately deny their claim?

SOTOMAYOR: As you know, the court's opinion issued after discussions en banc recognize, as I do, the hardship that the firefighters experienced. That's not been naysaid by anyone.

The issue before the court was a different one, and the one that the district court addressed was what decision the decision-makers made, not what people behind the scenes wanted the decision-makers to make, but what they were considering. And what they were considering was the state of the law at the time and in an attempt to comply with what they believe the law said and what the panel recognized as what the 2nd Circuit precedent said, that they made a choice under that existing law.

The Supreme Court in its decision set a new standard by which an employer and lower court should review what the employer is doing by the substantial evidence test. That test was not discussed with the -- with the panel. It wasn't part of the arguments below. That was a decision by the court borrowing from other areas of the law and saying, "We think this would work better in this situation."

CORNYN: My time's up. Thank you.

LEAHY: Thank you. Thank you very much. I note in the record -- we'll put in the record a letter of support for Judge Sotomayor's nomination from the United States Hispanic Chamber of Commerce on behalf of its 3 million Hispanic-owned business members, 60 undersigned organizations, including the El Paso Hispanic Chamber of Commerce, the Greater Dallas Hispanic Chamber of Commerce, the Houston Hispanic Chamber of Commerce, Odessa Hispanic Chamber of Commerce and a similar letter from the Arizona Hispanic Chamber of Commerce. I meant to put those in the record before. We'll put them in the record now.

SESSIONS: Mr. Chairman?

LEAHY: Yes?

SESSIONS: I would offer a letter for the record from the National Rifle Association in which they express serious concern about the nomination of Judge Sonia Sotomayor. Also, I notice that the head of that organization, Mr. LaPierre, wrote an article this morning on raising increased concern after yesterday's testimony.

Ask I would also offer for the record a letter from Mr. Richard Land, the Ethics and Religious Liberty Commission of the Southern Baptist Convention, also raising concerns.

LEAHY: And without objection, those will be made part of the record. And we will -- I yield to Senator Cardin.

CARDIN: Thank you, Mr. Chairman. And, Judge Sotomayor, good morning. Welcome back to our committee. I just want you to know that the baseball fans of Baltimore knew there was a judge somewhere that changed in a very favorable way the reputation of Baltimore forever. You are a hero, and they now know it's Judge Sotomayor. You're a hero to the Baltimore baseball fans. Let me explain.

The Major League Baseball strike -- you allowed the season to continue so Cal Ripkin could become the iron man of baseball in September 1995. (LAUGHTER) So we just want to invite you, as a baseball fan, we want to invite you to an Oriole game, and we promise it will not be when the Yankees are playing so you can root for the Baltimore Orioles. (LAUGHTER)

SOTOMAYOR: That's a great invitation. And good morning, Senator. You can assure your Baltimore fans that I have been to Camden Yards. It's a beautiful stadium.

CARDIN: Well, we think it's the best. Of course, it was the beginning of the new trends of the baseball stadiums. And you're certainly welcome.

Before this hearing, the people of this country knew that the president had selected someone with incredible credentials to be the Supreme Court member. Now, they know the person is able and is capable and understands the law and has been able to understand what the appropriate role is for a judge in interpreting the law and has done very well in responding to the members of the United States Senate, which I think bodes well for your interaction with attorneys and your colleagues on the bench in having a thorough discussion of the very important issues that will affect the lives of all people in our nation.

I do want to first start with the judicial temperament issue and the reference to the almanac on the federal judiciary. I just really want to quote from other statements that were included in that almanac where they were commenting about you and saying that she is very good. She is bright. She's a good judge. She is very smart. She is frighteningly smart. She is intellectually tough. She is very intelligent. She has a very good common-sense approach to the law. She looks at the practical issues. She is good. She's an exceptional judge overall. She's engaged in oral argument. She is well prepared. She participates actively in oral argument. She is extremely hard working and well prepared.

And I want to quote from one of the judges on your circuit, Judge Minor, who was appointed by President Reagan, when he said I don't think I go as far as to classify her in one camp or another. I think she just deserves the classification of an outstanding judge. I say that because maybe you would like to comment to these more favorable comments about...(LAUGHTER) .... how the bar feels about your service on the bench.

SOTOMAYOR: I thank those who have commented in the way they did. I think that most lawyers who participate in arguments before me know how engaged I become in their arguments in trying to understand them. And as I indicated yesterday, that can appear tough to some people, because active engagement can sometimes feel that way. But my style is to engage as much as I can so I can ensure myself that I understand what a party is intending to tell me.

I am, in terms of what I do, always interested in understanding, and so that will make me an active participant in -- in argument. As I noted yesterday, I have colleagues who never ask questions. There are some judges on the Supreme Court who rarely ask questions and others ask a lot of questions. Judges approach issues in different ways with different styles, and mine happens to be on one end of the style, and others choose others.

CARDIN: Well, I thank you for that response. I agree with you that the Constitution and Bill of Rights are timeless documents and has served our nation well for over 200 years and envy of many other nations.

There are many protections in the Constitution, but I would like to talk a little bit about the civil rights and the -- the basic protections in our Constitution and how we've seen a progression from the Constitution, Bill of Rights to constitutional amendments, including the 13th, 14th, 15th and 19th, through congressional action, through the passage of such bills as the Civil Rights Act of 1964, the Voting Rights Act of 1965, Supreme Court decisions that we've talked about that have changed civil rights in America, made it possible for many people to have the opportunities of this country that otherwise would have been denied.

And we made a lot of progress since the days of segregated schools and restrictions on people's opportunities to vote. But I think we would all do well to remember the advice given to us by our colleague, Senator Edward

Kennedy, the former chairman of this committee, as he talks about the civil rights struggle, when he says, and I quote, "The work goes on, the cause endures, the hope still lives, and the dream shall never die."

So I say that as -- as introduction to one area of civil rights, and that is the right to vote, fundamental right. My own experience, in 2006 -- that's just a few years ago -- causes me to be -- have concerns. In my own election, I found that there were lines longer in the African-American precincts to vote than in other precincts. And it was curious as to why this took place. They didn't have as many voting machines; there was a lot of irregularities. And it caused a lot of people who had to get back to work to be denied their right to participate.

We also found on Election Day fraudulent sample ballots that were targeted to minority voters in an effort to diminish their importance in the election. I mention that because that happened not 50 years ago, but happened just a few years ago.

Congress renewed the Voting Rights Act by rather large votes, 93- 0 in the United States Senate, 390-33 in the House of Representatives. There's clear intent of Congress to continue to protect voters in this country.

CARDIN: In the Northwest Austin Municipal Utility District No. 1 v. Holder, one justice on the court in dictum challenged Congress's authority to extend this civil rights case. Now, I say that knowing your view about giving due deference to Congress, particularly as it relates to expanding and extending civil rights protections.

So my question to you is, tell me a little bit about your passion for protecting the right of vote, to make sure that the laws are enforced as Congress intended to guarantee to every American the right to participate at the voting place.

SOTOMAYOR: When we speak about my passion, I don't think that the issue of guaranteeing each citizen the right to vote is unique to me or that it's different among any senator or among any group of people who are Americans. It is a fundamental right. And it is one that you've recognized, Congress has addressed for decades and has done an amazing job in passing a wide variety of statutes in an effort to protect that right.

The question that a court would face in any individual situation is whether an act of Congress conflicts with some right of either the state or an individual with respect to the issue of voting. There could be other challenges raised on a wide variety of different bases, but each case would present its own unique circumstance.

There is one case involving the Voting Rights Act where I address the issue of the right to vote. And in that case, I issued a dissent on an en banc ruling by my court. For the public who may not understand what en banc ruling means, when the whole court is considering an issue. In that case, if it wasn't 13, it may have been 12 members of the court, or a complement of 13 judges, but I right now can't remember if we were a full complement at the time of considering an issue.

The majority upheld a state regulation barring a group of people from voting. I dissented on a very short opinion, one paragraph opinion, saying, "These are the words of Congress in the statute it passed, and the words are that no state may impose a" -- and I'm paraphrasing it now. I'm not trying to read the statute, but no condition or restriction on voting that denies or abridges the right to vote on the basis of race.

I noted that, given the procedural posture of that case, that the plaintiff had alleged that that's exactly what the state was doing. And I said, "That's the allegation on the complaint." That's what a judge has to accept on the face of the complaint. We've got to give him a chance to prove that, and that to me was the end of the story.

To the extent that the majority believed that -- and there was a lot of discussion among the variety of different opinions in the case as to whether this individual could or could not prove his allegation, and there was a

suggestion by both sides that he might never be able to do it -- my point was a legal one. These are Congress' words. We have to take them at their word.

And if there's an end result of this process that we don't like, then we have to leave that to Congress to address that issue. We can't fix it by ruling against what I viewed as the expressed words of Congress.

CARDIN: Let me use your quote there because I thought it was particularly appropriate. You said, "I trust that Congress would prefer to make needed changes itself rather than to have the courts to do so for it." And I think the members of this committee would -- would agree with you. And as you responded to Senator Grassley in regards to the Riverkeeper case, you said you give deference to Congress. I think we all share that.

One of my concerns is that we are seeing judicial activism in restricting the clear intent of Congress in moving forward on fundamental protections. And let -- let me move, if I might, to the environment, which is an area that is of great concern to all of us.

In the past 50 years, Congress has passed important environmental laws, including the Clean Air Act, the Clean Water Act, the National Environmental Policy Act, the Endangered Species Act, the Safe Drinking Water Act and Superfund. Despite the progress we've made over the years, it's important that we keep advancing the protections in our environment.

During your testimony yesterday, you made it clear that you understand that senators and members of Congress elected by the people are the ones making policy by passing laws. And you also made it clear that judges apply the laws enacted and that they should do so or at least they should do so with deference to the intent of Congress.

Yet we've seen in recent decisions of the Supreme Court like the Solid Waste Agency of Northern Cook County v. U.S. Corps of Engineers and Rapanos v. United States that they have forced the EPA to drop more than 500 cases against alleged polluters. These decisions have impact.

And it -- it -- it is clear to many of us that they reject longstanding legal interpretations in the federal Clean Water Act -- was done by the Supreme Court in ignoring the science that served as the foundations for the laws passed by Congress and the intent of Congress to protect American people by providing them with clean water, clean air and a healthy environment. As the senator from Maryland I'm particularly concerned about that as it relates to the efforts that we're making on the Chesapeake Bay.

Now, I understand that these decisions are now precedent and they are binding and that it may very well require the Congress to pass laws further clarifying what we meant to say so that we can try to get us back on track. I understand that. But I would like you to comment and I hope reinforce the point that you have said that in reaching decisions that come to the bench, whether they're environmental laws or other laws that protect our society, you will follow the intent of Congress and will not try to supplant individual judgment that would restrict the protections that Congress has passed for our community.

SOTOMAYOR: Believe my case -- my cases, my entire record shows that I look at the acts of Congress, as I think the Supreme Court does, with deference because that is the bedrock of our constitutional system, which is that each branch has different set of constitutional powers, that deference must be given to the rights of each branch in each situation that is exercising its powers. And to the extent that the court has a role -- because it does have a role -- to ensuring that the Constitution is followed, it attempts to do that. When I say attempt -- but it always attempts it with a recognition of the deference it owes to the elected branches in terms of setting policy and making law.

CARDIN: Thank you for that -- for that response. Let me turn, if I might, to our personal backgrounds. There's been a lot of discussion here about what each of us bring to our position in public life.

CARDIN: Progress for women in this country has not come easily or quickly. At one time, women could not vote, could not serve on juries, could not hold property.

I sit here today wanting to feel confident that the Supreme Court and its justices who make key decisions on women's rights in society will act to ensure continued progress for equality with men and women.

Now, we all agree that, in rendering an individual decision, a gender or ethnic background should not affect your judgment. There is an importance to diversity which I think we've all talked about. Each of us bring our life experiences to our job.

Your life experience at Princeton, I think, serves as an example. You attended the school that F. Scott Fitzgerald, 90 years, called the "pleasantest country club in America," with very restrictive policies as to who could attend Princeton University. By 1972, your freshman class, it was a different place, but still far from where it should be.

And I admire your efforts to change that at Princeton. And you were actively involved in improving diversity of that school. And Princeton is a better place today because of your efforts. I think of my own experiences at law school, University of Maryland Law School, which denied admission to Thurgood Marshall and, in my class, had very few women. Times have changed.

Justice Ginsburg said, referring to the importance of women on the bench, says, "I think presence of women on the bench made it possible for the courts to appreciate earlier than they might otherwise that sexual harassment belongs under Title VII."

So on behalf of myself, on behalf of my daughter and two granddaughters, I want to hear from you the importance of different voices in our schools, in our Congress, and then on the Supreme Court of the United States as to how having diversity, the importance of diversity, your views as to what steps are appropriate for government to take in helping to improve diversity.

SOTOMAYOR: Your comment about your daughter and granddaughter makes me remember a letter I received when I was being nominated to the circuit court. It was from a woman who said she had 19 daughters and grandchildren and how much pride she took in knowing that a woman could serve on a court like the 2nd Circuit. And I realized then how important the diversity of the bench is to making people feel and understand the great opportunity America provides to all its citizens. And that has value; that's clear.

With respect to the issue of the question of what role diversity serves in the society, it harkens back almost directly to your previous question. I've been overusing that word, "hearken," sorry.

It almost comes around to your earlier question, which is that issue is one that starts with the legislative branches and the government, the executive body, and employers who look at their workforce, that look at the opportunities in society, and make policy decisions about what promotes that equal opportunity in the first instance.

The court then looks at what they have done and determines whether that action is constitutional or not. And with respect, that leads to the education field, in a very recent set of cases, the Supreme Court looked at the role of diversity in educational decisions as to which students they would admit, and the Court upheld the University of Michigan's Law School admissions policy, which -- because the school believed that it needed to promote as wide as body of and diverse a body of students to ensure that life perspectives, that the experience of students would be as fulsome as they wished.



And they used race there as one of many factors but not one that compelled individual choices of students. The Court upheld that. And Justice O'Connor, in the opinion she wrote -- authored — expressed the hope that, in 25 years, race wouldn't even need to be considered.

In a separate case, the University of Michigan's undergraduate admissions policy, the Court struck that down. And it struck it down because it viewed the use of race as a form of impermissible quota because it wasn't based on an individual assessment of the people applying but as an impermissible violation of the equal protection clause and of the law.

These situations are always looked at individually and, as I said, in the context of the choices that Congress, the executive branch, an employer is making and the interest that it's asserting and the remedy that it's creating to address the interest it's trying to protect. All of that is an individual question for the courts.

CARDIN: Well, and you need to look at all the facts in reaching those decisions, which you have stressed over and over again. I want to a justice who will continue to most of the court forward in protecting those important civil rights. I thought a justice who will fight for people like Lawrence King who, at the age of 15, was shot in a school because he was openly gay.

I want a justice who will fight for women like a 28-year-old Californian who was gang raped by four people because she was a lesbian. And I want a justice who will fight for people like James Byrd, who was beaten and dragged by a truck for two miles because he was black.

So we need to continue that -- that focus. And you talked about race. And I think about the Gann case that you ruled in, a 6-year-old black child who was removed from school and was treated rather harshly with racial harassment. And in your dissent, you stated that the treatment this lone black child encountered during his pre-time in Cooks Hills first grade to have been not merely arguable, unusual, indisputable discretion but unprecedented and contrary to the school's established policy.

Justice Blackmun spoke in order to get beyond race, we first must take race and account of race. And if you ignore race completely, aren't you ignoring facts that are important in a particular case?

SOTOMAYOR: Well, it depends on the context of the case that you're looking at. In the Gann, for example, there were a variety of different challenges brought by the plaintiff to the conduct that was alleged the school had engaged in. I joined the majority in dismissing some of the claims as not consistent with law.

But in that case, there was a disparate treatment element, and I pointed out to the set of facts that showed or presented evidence of that disparate treatment. That's the quote that you were reading from, that this was a sole child who was treated completely different than other children of -- of a different race in the services that he was provided with and in the opportunities he was given to remedy or to receive remedial help.

That is obviously different, because what you're looking at is the law as it exists and the promise that the law makes to every citizen of equal treatment in that situation.

CARDIN: Well, and I agree. I think you need to take a look at all the facts and the circumstances. And if you ignore race, you're ignoring an important point of the facts.

Let me talk a little bit about privacy, if I might. Justice Brandeis described privacy as the right to be left alone. In other words, if we must restrict this right, it must be minimal and protections must occur before any such action occurs.

The Supreme Court has advanced rights of privacy in the Meyer case, the Loving case, which established the fundamental rights of persons to raise families and to marry whom they please, regardless of race, the Lawrence case, that states could not criminalize homosexual conduct, Griswold, that allowed for family planning as a fundamental right, and, of course, Roe v. Wade, which gave women the right to control their own bodies.

I just would like to get your assessment of the role the court faces on privacy issues in the 21st century, recognizing that our Constitution was written in the 18th century and the challenges today are far different than they were when the Constitution was written as it relates to privacy. The technologies are different today, and the circumstances of life are different. How do you see privacy challenges being confronted in the 21st century in our Constitution and in the courts?

SOTOMAYOR: The right to privacy has been recognized, as you know, in a wide variety of circumstances for more than probably 90 years now, close to 100. That is a part of the court's precedents.

In applying the immutable principles of the Constitution, the liberty provision of the due process clause and recognizing that that provides a right to privacy in a variety of different settings, you've mentioned that line of cases, and there are many others in which the court has recognized that as a right.

In terms of the coming century, it's guided by those cases, because those cases provide the court's precedents and framework -- and with other cases -- to look at how we will consider a new challenge to a new law or to a new situation.

That's what precedents do. They provide a framework. The Constitution remains the same; society changes. The situations that brings before courts change, but the principles are in -- are the words of the Constitution, guided by how precedent gives or has applied those principles to each situation, and then you take that and you look at the new situation.

CARDIN: In the time that I have remaining, I'd like to talk about pro bono. I enjoyed our conversation when we -- when you were in my office talking about your commitment to pro bono. I think, as attorneys, we all have a special responsibility for equal justice, and that requires equal access.

It's not just those who can afford a lawyer. The legal aid lawyers per capita are about 61 per 6,800. For private attorneys, it's one per 525. This is not equal justice under the law as promised by the etching on the entrance to the United States Supreme Court.

Now, it makes a difference if you have a lawyer. If you have a lawyer, you're more likely to be able to save your home, to get the health care that you need, to be able to deal with consumer problems.

And I had the honor of chairing the Maryland Legal Services Corporation. I chaired a commission that looked at legal services in Maryland. I'm proud of the fact that we helped establish that University of Maryland Law School and University of Baltimore Law School, required clinical experiences for our law students so they not only get the experience of handling a case but understand the need to deal with people who otherwise could not afford an attorney.

Congress needs to do more in this area. There is no question about that. And I'm hopeful that we will reauthorize the Legal Service Act and provide additional resources.

But I would like to get your view as to what is the individual responsibility of a lawyer for equal justice under the law, including pro bono, and how you see the role of the courts in helping to establish the efforts among the legal community to carry out our responsibility.

SOTOMAYOR: I know that there's been a lot of attention paid to one speech and its variants that I've given. If you look at the body of my speeches, public service and pro bono work is probably the main topic I speak at -- I speak about.

Virtually every graduation speech I give to law students, speeches I've given to new immigrants being sworn in as citizens, to community groups of all type is the importance of participation in bettering the conditions of our society, active involvement in our communities.

And it doesn't have to be active involvement in politics. I tell people that. Just get involved in your community. Work on your school boards. Work in your churches. Work in your community to improve it.

The issue of public service is a requirement under the code of the American Bar Association. Virtually every state has a requirement that lawyers participate in public service in some way. I've given multiple speeches in which I've talked to law school bodies and said, "Make sure your students don't leave your school without understanding the critical importance of public service in what they do as lawyers."

In that we are in full agreement, Senator. To me, that's a core responsibility of lawyering.

Our Founding Fathers, they became what they became, our Founding Fathers, because of their fundamental belief of involvement in their society and public service, and it's a -- to me a spirit that is the charge of the legal profession, because that's what we do. We help people, in a different way than doctors do, but helping people receive justice under the law is a critical importance of our work.

CARDIN: Well, very, very well said. I look forward to working between Congress and the courts and advancing a strategy. Thank you, Mr. Chairman.

LEAHY: Thank you very much, Senator Cardin. And Senator Coburn?

Day 3 Part 2

TOM COBURN: Thank you, Mr. Chairman. I'd ask unanimous consent to put an article from the newspaper this morning, the Washington Times.

LEAHY: Without objection, it'll be placed in the record.

SOTOMAYOR: The law has answered a different question. It's talked about the constitutional right of women...

COBURN: I understand.

SOTOMAYOR: ... in certain circumstances. And as I indicated, the issue becomes one of, what's the state regulation in any particular circumstance?

COBURN: I understand. But all I'm asking is, should it have any bearing?

SOTOMAYOR: I can't answer that in the abstract, because the question, as it would come before me, wouldn't be in the way that you form it as a -- as a citizen. It would come to me as a....

...judge in the context of some action that someone's taking, whether if it's the state, the state, if it's a private citizen being controlled by the state challenging that action. Those issues are...

COBURN: But viability is a portion of a lot of that. And a lot of the decisions have been made based on viability. If we now have viability at 21 weeks, why would that not be something that should be considered as we look at the status of what can and cannot happen, in terms of this right to privacy that's been granted under Roe v. Wade in cases?

SOTOMAYOR: All I can say to you is what the court's done. And the standard that the court has applied -- what factors it may or may not look at within a particular factual situation -- can't be predicted in a way to say, yes, absolutely, that's going to be considered, no, this won't be considered.

COBURN: All I'm asking is whether it should.

SOTOMAYOR: That...

COBURN: Should viability, should technology at any time be considered as we discuss these very delicate issues that have such an impact on so many people? And your answer is that you can't answer it?

SOTOMAYOR: I can't, because that's not a question that the court reaches out to answer. That's a question that gets created by a state regulation of some sort or an action by the state that may or may not, according to some claimant, place an undue burden on her. We don't make policy choices in the court. We look at the case before us with the interests that are argued by the parties, look at our precedent, and try to apply its principles to the arguments parties are raising.

COBURN: I'm reminded of one of your quotes that says you do make policy, and I won't continue that. I'm -- I'm concerned, and I think many others are. Does a state legislature have the right under the Constitution to determine what is death? Have we statutory defined in -- and we have in 50 states and most of the territories -- what is the definition of death? You -- you think that's within the realm of the Constitution that states can do that?

SOTOMAYOR: Depends on what they're applying that definition to, and so there are situations in which they might and situations where that definition would or would not have applicability to the dispute before the court. All state action is looked at within the context of what the state is attempting to do and what liabilities it's imposing.

COBURN: But you would not deny the fact that states do have the right to set up statutes that define, to give guidance to their citizen what constitutes death?

SOTOMAYOR: As I said, it depends on -- in what context they're attempting to do that.

COBURN: They're doing it so they limit the liability of others with regard to that decision, which would inherently be the right of the state legislature, as I read the Constitution. You may have a different response to that. And -- which brings me back to technology again.

As recently as six months ago, we now record fetal heartbeats at 14 days post-conception. We record fetal brainwaves at 39 days post-conception. And I don't expect you to answer this, but I do expect you to pay attention to it as you contemplate these big issues as we have this schizophrenic rule of the law where we have defined death as the absence of those, but we refuse to define life as the presence of those.

And all of us are dependent at different levels on other people during all stages of our development from the very early in the womb, outside of the womb to the very late. And it concerns me that we are so inaccurate or -- inaccurate is an improper term -- inconsistent in terms of our application of the logic.

You said that *Roe v. Wade* is settled law yesterday. And I believe it's settled under the basis of the right to privacy, which has been there. So the -- the question I'd like to turn to next is in your ruling, the 2nd Circuit ruling on -- and I'm trying to remember the name of the case -- *Maloney*, the position was is that there's not an individual fundamental right to bear arms in this country. Is that -- is that a correct understanding of that?

SOTOMAYOR: No, sir.

COBURN: OK. Please educate me, if you would.

SOTOMAYOR: In the Supreme Court's decision in *Heller*, it recognized an individual rights to bear arms as a right guaranteed by the Second Amendment, an important right and one that limited the actions a federal -- the federal government could take with respect to the possession of firearms. In that case we're talking about handguns.

The *Maloney* case presented a different question. And that was whether that individual right would limit the activities that states could do to regulate the possession of firearms. That question is addressed by a legal doctrine. That legal doctrine uses the word fundamental, but it doesn't have the same meaning that common people understand that word to mean. To most people, the word by its dictionary term is critically important, central, fundamental. It's sort of rock basis.

Those meanings are not how the law uses that term when it comes to what the states can do or not do. The term has a very specific legal meaning, which means is that amendment of the Constitution incorporated against the states.

COBURN: Through the 14th Amendment.

SOTOMAYOR: Through -- and others. But the -- generally. I shouldn't say and others, through the 14th. The question becomes whether and how that amendment of the Constitution, that protection applies or limits the states to act. In Maloney, the issue with -- for us was a very narrow one. We recognized that Heller held -- and it is the law of the land right now in the sense of precedent, that there is an individual right to bear arms as it applies to government, federal government regulation.

The question in Maloney was different for us. Was that right incorporated against states? And we determined that, given Supreme Court precedent, the precedent that had addressed that precise question and said it's not, so it wasn't fundamental in that legal doctrine sense. That was the Court's holding.

COBURN: Did the Supreme Court say in Heller that it definitely was not? Or did they just fail to rule on it?

SOTOMAYOR: Well, they failed to rule on it. You're right.

COBURN: There's a...

SOTOMAYOR: But I...

COBURN: There's a very big difference there.

SOTOMAYOR: I agree.

COBURN: OK. Let me continue with that. So I sit in Oklahoma in my home, and what we have today as law in the land as you see it is I do not have a fundamental incorporated right to bear arms, as you see the law today?

SOTOMAYOR: It's not how I see the law.

COBURN: Well, as you see the interpretation of the law today? In your opinion of what the law is today, is my statement a correct statement?

SOTOMAYOR: No, that's not my interpretation. I was applying both Supreme Court precedent deciding that question and Second Circuit precedent that had directly answered that question and said it's not incorporated. The issue of whether or not it should be is different question, and that is the question that the Supreme Court may take up. In fact, in his -- in his opinion, Justice Scalia suggested it should. But it's not what I believe. It's what the law has said about it.

COBURN: So what does the law say today about the statement? Where do we stand today about my statement that I have -- I claim to have a fundamental, guaranteed, spelled-out right under the Constitution that is individual and applies to me the right to own and bear arms. Am I right or am I wrong?

SOTOMAYOR: I can't answer the question of incorporation other than to refer to precedent.

COBURN: OK.

SOTOMAYOR: Precedent says, as the Second Circuit interpreted the Supreme Court's precedent, that it's not -- it's not incorporated. It's also important to understand that the individual issue of a person bearing arms is raised before the court in a particular setting. And by that I mean, what the Court will look at is a state regulation of your right.

COBURN: Yes.

SOTOMAYOR: And then determine can the state do that or not. So even once you recognize a right, you're always considering what the state is doing to limit or expand that right and then decide is that OK constitutionally.

COBURN: You know, it's very interesting to me. I went back and read the history of debate on the 14th Amendment. For many of you who don't know, what generated much of the 14th Amendment was in reconstruction. Southern states were taken away the right to bear arms by freedmen -- recently freed slaves. And much of the discussion in the Congress was to restore that right of the Second Amendment through the 14th Amendment to restore an individual right that was guaranteed under the Constitution. So one of the purposes for the 14th Amendment, the reason -- one of the reasons it came about is because those rights were being abridged in the Southern states post-Civil War.

COBURN: Let me move on. In the Constitution, we have the right to bear arms. Whether it's incorporated or not, it's stated there. I'm having trouble understanding how we got to a point where a right to privacy, which is not explicitly spelled out but is spelled out to some degree in the Fourth Amendment, which has settled law and is fixed, and something such as the Second Amendment, which is spelled out in the Constitution, is not settled law and settled fixed.

I don't want you to answer that specifically. What I would like to hear you say is, how did we get there? How did we get to the point where something that's spelled out in our Constitution and guaranteed to us, but something that isn't spelled out specifically in our Constitution is? Would you give me your philosophical answer?

I don't want to tie you down on any future decisions, but how'd we get there when we can read this book, and it says certain things, and those aren't guaranteed, but the things that it doesn't say are?

SOTOMAYOR: One of the frustrations with judges and their decisions by citizens is that -- and this was an earlier response to Senator Cornyn -- what we do is different than the conversation that the public has about what it wants the law to do.

We don't, judges, make law. What we do is, we get a particular set of facts presented to us. We look at what those facts are, what in the case of different constitutional amendments is, what states are deciding to do or not do, and then look at the Constitution, and see what it says, and attempt to take its words and its -- the principles and the precedents that have described those principles, and apply them to the facts before you.

In discussing the Second Amendment as it applies to the federal government, Justice Scalia noted that there have been long regulation by many states on a variety of different issues related to possession of guns. And he wasn't suggesting that all regulation was unconstitutional; he was holding in that case that D.C.'s particular regulation was illegal.

As you know, there are many states that prohibit felons from possessing guns. So does the federal government.

And so it's not that we make a broad policy choice and say, "This is what we want -- what judges do." What we look at is what other actors in the system are doing, what their interest in doing it is, and how that fits to whatever situation they think they have to fix, what Congress or state legislature has to fix.

All of that is the court's function, so I can't explain it philosophically. I can only explain it by its setting and what -- what the function of judging is about.

COBURN: Thank you. Let me follow up with one other question. As a citizen of this country, do you believe innately in my ability to have self-defense of myself -- personal self-defense? Do I have a right to personal self-defense?

SOTOMAYOR: I'm trying to think if I remember a case where the Supreme Court has addressed that particular question. Is there a constitutional right to self-defense? And I can't think of one. I could be wrong, but I can't think of one.

SOTOMAYOR: Generally, as I understand, most criminal law statutes are passed by states. And I'm also trying to think if there's any federal law that includes a self-defense provision or not. I just can't. What I was attempting to explain is that the issue of self-defense is usually defined in criminal statutes by the state's laws. And I would think, although I haven't studied the -- all of the state's laws, I'm intimately familiar with New York.

COBURN: But do you have an opinion, or can you give me your opinion, of whether or not in this country I personally, as an individual citizen, have a right to self-defense?

SOTOMAYOR: I -- as I said, I don't know.

COBURN: I'm talking about your...

SOTOMAYOR: I don't know if that legal question has been ever presented.

COBURN: I wasn't asking about the legal question. I'm asking about your personal opinion.

SOTOMAYOR: But that is sort of an abstract question with no particular meaning to me outside of...

COBURN: Well, I think that's what American people want to hear, Your Honor, is they want to know. Do they have a right to personal self-defense?

Do -- does the Second Amendment mean something under the 14th Amendment? Does what the Constitution -- how they take the Constitution, not how our bright legal minds but what they think is important, is it OK to defend yourself in your home if you're under attack?

In other words, the general theory is do I have that right? And I understand if you don't want to answer that because it might influence your position that you might have in a case, and that's a fine answer with me. But I -- those are the kind of things people would like for us to answer and would like to know, not how you would rule or what you're going to rule, but -- and specifically what you think about, but just yes or no. Do we have that right?

SOTOMAYOR: I know it's difficult to deal with someone as a -- like a judge who's so sort of -- whose thinking is so cornered by law.

COBURN: I know. It's hard.

SOTOMAYOR: Could I...

COBURN: Kind of like a doctor. I can't quit using doctor terms.



SOTOMAYOR: Exactly. That's exactly right, but let me try to address what you're saying in the context that I can, OK, which is what I have experience with, all right, which is New York criminal law, because I was a former prosecutor. And I'm talking in very broad terms.

But, under New York law, if you're being threatened with eminent death or very serious injury, you can use force to repel that, and that would be legal. The question that would come up, and does come up before juries and judges, is how eminent is the threat. If the threat was in this room, "I'm going to come get you," and you go home and get -- or I go home. I don't want to suggest I am, by the way. Please, I'm not -- I don't want anybody to misunderstand what I'm trying to say. (LAUGHTER)

If I go home, get a gun, come back and shoot you, that may not be legal under New York law because you would have alternative ways to defend...

COBURN: You'll have lots of 'splainin' to do.

SOTOMAYOR: I'd be in a lot of trouble then. But I couldn't do that under a definition of self-defense. And so, that's what I was trying to explain in terms of why, in looking at this as a judge, I'm thinking about how that question comes up and how the answer can differ so radically, given the hypothetical facts before you.

COBURN: Yes. You know...

SOTOMAYOR: Or not the...

COBURN: The problem is is we think -- we doctors think like doctors. Hard to get out of the doctor skin. Judges thing like judges. Lawyers think like lawyers.

And what American people want to see is inside and what your gut says. And part of that's why we're having this hearing.

I want to move to one other area. You've been fairly critical of Justice Scalia's criticism of the use of foreign law in making decisions. And I would like for you to cite for me, either in the Constitution or in the oath that you took, outside of the treaties, the authority that you can have to utilize foreign law in deciding cases in the courts of law in this country.

SOTOMAYOR: I have actually agreed with Justice Scalia and Thomas on the point that one has to be very cautious even in using foreign law with respect to the things American law permits you to. And that's in treaty interpretation or in conflicts of law because it's a different system of law. I...

COBURN: But I accepted that. I said outside of those...

SOTOMAYOR: Well...

COBURN: In other areas where you will sit in judgment, can you cite for me the authority even given in your oath or the Constitution that allows you to utilize laws outside of this country to make decisions about laws inside this country?

SOTOMAYOR: My speech and my record on this issue is I've never used it to interpret the Constitution or to interpret American statutes is that there is none. My speech has made that very clear.

COBURN: So you stand by the -- there is no authority for a Supreme Court justice to utilize foreign law in terms of making decisions based on the Constitution or statutes?

SOTOMAYOR: Unless the statute requires or directs you to look at foreign law. And some do, by the way. The answer is no. Foreign law cannot be used as a holding or a precedent or to bind or to influence the outcome of a legal decision interpreting the Constitution or American law that doesn't direct you to that law.

COBURN: Well, let me give you one of your quotes. To suggest to anyone that you can outlaw the use of foreign or international law is a sentiment that's based on a fundamental misunderstanding. What you would be asking American judges to do is to close their mind to good ideas. Nothing in the American legal system prevents us from considering those ideas.

We don't want judges to have closed minds just as much as we don't want judges to consider legislation and foreign law that's developed through bodies, elected bodies outside of this country, to influence what, either rightly so or wrongly so, against what the elected representatives and Constitution of this country says. So would you kindly explain the difference that I perceive in both the statement versus the way you just answered?

SOTOMAYOR: There is none. If you look at my speech, you'll see that repeatedly I pointed out both that the American legal system that structured not to use foreign law. It repeatedly underscored that foreign law could not be used as a holding, as precedent, or to interpret the Constitution or the statutes.

What I pointed out to in that speech is that there's a public misunderstanding of the word "use." And what I was talking about, one doesn't use those things in the sense of coming to a legal conclusion in a case. What judges do -- and I cited Justice Ginsberg -- is educate themselves. They build up a story of knowledge about legal thinking, about approaches that one might consider.

But that's just thinking. It's an academic discussion when you're talking about -- thinking about ideas than it is how most people think about the citation of foreign law in a decision. They assume that a -- if -- if there's a citation to foreign law, that's driving the conclusion.

In my experience, when I've seen other judges cite to foreign law, they're not using it to drive the conclusion. They're using just to point something out about a comparison between American law or foreign law, but they're not using it in the sense of compelling a result.

COBURN: I'm not sure I agree with that on certain 8th Amendment and 14th Amendment cases. Let me -- let me go to another area. I have just a short period of time.

Do you -- do you feel -- it's been said that we should worry about what other people think about us in terms of how we interpret our own law. And I'm paraphrasing not very well, I believe.

Is it important that we look good to people outside of this country, or is it more important that we have a jurisprudence that is defined correctly and followed correctly according to our Constitution and, whatever the results may be, it's our result rather than a politically correct result that might please other people in the world?

SOTOMAYOR: We don't render decisions to -- we don't render decisions to please the home crowd or any other crowd. I know that, because I've heard speeches by a number of justices, that in the past justices have indicated that the Supreme Court hasn't taken many treaty cases and that maybe it should think about doing that, because we're not participating in the discussion among countries on treaty provisions that are ambiguous.

That may be of consideration in -- to some justices. Some have expressed that as a consideration. My point is, you don't rule to please any crowd. You rule to get the law right under its terms.

COBURN: All right. Thank you. Thank you, Mr. Chairman.

LEAHY: Thank you (OFF-MIKE) Coburn. Senator Whitehouse?

WHITEHOUSE: Thank you, Mr. Chairman. And welcome again, your honor. I have to say, before I get into the questions that I have for you, that I, like many, many, many Americans, feel enormous pride that you are here today.

And I was talking with some friends in Providence when I was home about your nomination, and I said it actually gives me goosebumps to think about the path that has brought you here today and, more importantly, to think about -- because it's not about you -- more important to think what that means about America, that path.

And they said, "No, no, no, no, you can't say 'goosebumps.' You have to say 'piel de gallina.'" And so I promised them that I would, so I'm keeping that promise right now.

WHITEHOUSE: But I want to tell you that I think in the way you've handled yourself in this committee so far you have done nothing but to vindicate and reinforce the pride that so many people feel in you. And I hope that as this process continues -- I know these days are long and it can be a bit of an ordeal -- I hope that you very much feel buoyed and sustained by that pride and that optimism and that confidence that people across this country feel for you and that so many people in this room feel for you. So I wanted to say that.

I also wanted to fulfill another promise, which was one I made to you, that in my opening statement I said I would ask you to make a simple pledge. And that simple pledge is that you will decide cases on the law and the facts before you, that you will respect the role of Congress as representatives of the American people, that you will not prejudge any case but will listen to every party that comes before you and that you will respect precedent and limit yourself to the issues that the court must decide.

May I ask you to make that pledge?

SOTOMAYOR: I can. That's the pledge I would take if I was -- that I took as a district court judge, as a circuit court judge. And if I am honored to be confirmed by this body, that I would take as a Supreme Court justice, yes.

WHITEHOUSE: Thank you. Some of my colleagues have raised questions about your role at the Puerto Rican Legal Defense and Education Fund many years ago before you left that organization to become a federal trial judge in 1992, I guess it was.

I just wanted to clarify. That was clearly a part of your history and your package that came to the Senate at the time of those confirmations, when you were confirmed both in 1992 and 1997. So this is nothing new to the Senate. Is that correct?

SOTOMAYOR: That's correct.

WHITEHOUSE: And in terms of the way that the Puerto Rican Legal Defense and Education Fund operated, you were a member of the board. Is that correct?

SOTOMAYOR: I was.

WHITEHOUSE: Did the attorneys for the Puerto Rican Legal Defense and Education Fund make it a practice to vet their legal filings with the board first? Did the board approve individual briefs and arguments that were made by attorneys in the -- for the organization?

SOTOMAYOR: No, because most of us on the board didn't have civil rights experience. I had actually when I was a prosecutor in -- in private practice, that wasn't my specialty of law. Even if they tried to show it to me, I don't know that I could have made a legal judgment, even if I tried. That was not our function.

WHITEHOUSE: And I think that's customary in charitable organizations for the board not to sign off specifically on briefs and other legal filings that the attorneys make. Certainly, in the years I've spent on the boards of charitable organizations never been something presented to me. So I appreciate that.

And in 1992 and in 1997 when the Senate was, again, fully aware of all that, was there, to your recollection, the objection made in those confirmations?

SOTOMAYOR: I don't believe any question was asked about my service on the Puerto Rican Legal Defense and Education Fund. It promotes the civil rights of its community.

WHITEHOUSE: Let me turn to some more general questions, if I may. And one has to do with the role of the jury, not just in trials. Obviously, you're eminently familiar with the role of juries in trials. I think you'll be the only member of the United States Supreme Court, if you are confirmed, to actually have had federal trial judge experience, which I think is a valuable attribute, but I'm not thinking so much about the role of the jury in the courtroom as I am about the role of the jury in the American system of government.

When the Constitution was set up, as you know so well, the founders made great efforts to disaggregate power, to create checks and balances, and the matrix of separated powers that they created has served us very, very well.

In the course of that or as a part of that, the founders also revealed some very strongly felt concerns about the hazards of both unchecked power and of the vulnerability of the legislative and executive branches to either corruption or to being consumed and overwhelmed by passing passions.

And I'd love to hear your thoughts on the importance of the jury in that American system of government and, if you could, with particular reference to the concerns of the founders about the vulnerabilities of the elected branches.

SOTOMAYOR: Like you, I am -- and perhaps because I was a state prosecutor and I have been a trial judge, and so I've had very extensive experience with jury trials in the American criminal law context. I have had less in the civil law context as a private practitioner, but much more as a district court judge.

I can understand why our founding fathers believed in the system of juries. I have found in my experience with juries that virtually every juror I have ever dealt with, after having experienced the process, came away heartened, more deeply committed to the fundamental importance of their role as citizens in that process. Every juror I ever dealt with showed great attention to what was going on, took their responsibilities very seriously.

SOTOMAYOR: I had a juror who was in the middle of deliberations on her way to my courtroom -- not on her way to my courtroom -- on her way home from court on the previous day, broke her leg, was in the hospital the entire night, came back the next morning on time, in a wheelchair, with a cast that went up to her hip.

What a testament both to that woman and to the importance of jury service to our citizens. I was very active in ensuring that her service was recognized by our court.

It has a central role. Its importance to remember is that it hasn't been fully incorporated against the states. Many states limit jury trials in different ways.

And so the question of in -- what cases require a jury trial and what don't is still somewhat within the discretion of states. But it is a very important part of a sense of protection for defendants accused in criminal cases, and one that I personally value from my experience with it.

WHITEHOUSE: And does -- do -- does the Founder's concern about the potential vulnerabilities, or liabilities, about the elected branch illuminate the importance of the jury system?

SOTOMAYOR: Senator, I -- as I see the jury system, I don't know exactly -- I don't actually -- and I've read the federal or state person. I've read other historical accounts.

The jury system was -- I thought the basic premise of it was to ensure that a person subject to criminal liability would have a group of his or her peers pass judgment on whether that individual had violated the law or not. To the extent that the Constitution looked to the courts to determine whether a particular act was or was not constitutional, it seems to me that that was a different function than what the jury was intended to serve. The jury, as I understood it, was to ensure that a person's guilt or innocence was determined by a group of peers.

To the extent that that has a limit on the elective branches, it's to ensure that someone is prosecuted under the law and that the law is applied to them in the way that the law is written and intended.

WHITEHOUSE: And where the jury requirement applies to civil trials, the argument would be the same, correct?

SOTOMAYOR: Yes.

WHITEHOUSE: Again on the question of the American system of government, how would you characterize the Founder's view of any exercises of unilateral or unchecked power by any of the three branches of government in the overall scheme?

SOTOMAYOR: The Constitution, by its terms, sets forth the powers and limits of each branch of government. And so, to the extent that there are limits recognized in the Constitution, that is clearly what the Constitution intends. The Bill of Rights, the Amendments, set forth there are often viewed as limits on government action. And so it's a question always of looking at what the Constitution says and how -- what kind of scope it gives for a government action at issue.

WHITEHOUSE: Would you feel, in light of all of the attention, very, very careful and thoroughly thought out attention that the Constitution gives to establishing and enforcing a whole variety of different checks and balances among the different powers of government, that a judge who is presented with an argument that a particular branch of government should exercise or have the authority to exercise unilateral, unchecked power in a particular area should approach that argument with a degree of heightened caution or attention?

SOTOMAYOR: The best framework that has been set out on this question of a unilateral act by one branch or another -- but usually it's a -- the challenge is raised when the executive is doing something, because the executive executes the law.

WHITEHOUSE: Yes.

SOTOMAYOR: It takes the action typically. The best description of how to approach those questions was done by Justice Jackson in his concurring opinion in the Youngstown case. And that opinion laid out a framework that generally is applied to all questions of executive action, which is that you have to look at the powers of each branch together, you have to start with, what has Congress said, expressed or implicitly?

And if it's authorized to do something to let the president do something, then the president's acting at the height of his powers. If Congress has implicitly prohibited -- expressly or implicitly prohibited something, then the president's acting at the lowest ebb of his powers.

There's a zone of twilight, which is the zone in between, which is, has Congress said something or not said something? In all of the situations, once you've looked at what Congress has done or not done, you then are directed to look at what the president's powers may be under the Constitution minus whatever powers Congress has in that area.

So the whole exercise is really, in terms of Congress and the executive, an exercise of the two working together. And, in fact, that's the basic structure of our system of government. That's why the Congress makes the law. The president can veto them, but he can't make them.

He can regulate, if Congress gives him the authority to do so and within other delegated authorities or -- or -- or -- I shouldn't use the word "delegated," because it has a legal meaning. But the point is that that question is always looked at in light of what Congress has said on the issue and in light of Congress's power, as specified in the Constitution.

WHITEHOUSE: Let me change to a more law enforcement-oriented topic. I appreciate, first of all, very much your service in District Attorney Morgenthau's office. It is an office that prosecutors around the country look at with great pride and a sense of its long tradition and of the very great capability of the prosecutors who serve in it. It's a very proud office, and I'm delighted that you served there, and I think it says a great deal about you that, coming out of law school and college with the stellar academic record that you had and an entire world of opportunities open to you, you chose that rather poorly paid office.

And since you've met 89 of us, I doubt you remember all of our conversations, but when you and I had the chance to meet, we compared who had the worst office as a new prosecutor. And I think you won.

And so it was a very important moment for a, at that point, quite new lawyer to make a very significant statement about who you were and what your purpose was. And so I very much appreciate that you made that choice, and I think prosecutors, like my colleague, Senator Klobuchar, and many others around this country, Senator -- our chairman, Senator Leahy, have made that choice over the years, and it's one that I think merits a salute.

One of the things that prosecutors have to deal with all the time is search and seizure and warrants. And my question has to do with the warrant requirement under the Constitution.

I see the Constitution as being changeless, timeless and immutable. What changes is society, as you pointed out in your testimony earlier, and technology. And so new questions arise.

And I'd be interested in your reaction to the difference between the experience of society and the technology of society when the founders set up the warrant requirement originally and today.

When the founders set up the warrant requirement originally, when the sheriff or somebody went to seize property to bring it in as evidence for a trial or to condemn it as contraband, that was sort of the end of it. If it was evidence, when it was done, it was returned, and it went back. Particularly, papers were returned, and that was the end of it.

Then came the Xerox machine. And now the government could make copies of what they took. And it was returned, as always, just as the founders had intended, but copies were sprinkled throughout government files, very often ones that ended up in archives, buildings in dusty boxes that would have taken enormous effort to locate, but nevertheless they remained available.

And nowadays, with electronic databases and electronic search functions, matters that once would have been returned to the individual and that envelope of privacy that was opened by the warrant would have been closed again are now potentially eternally available to government, eternally searchable.

And it raises some very interesting privacy questions that we will have to face in this Congress and in this Senate as we begin to take on issues particularly of cybersecurity, cyber-attacks, cyber- terrorism, and take advantage of what technology we can bring to bear in the continued struggle against terrorist extremists.

WHITEHOUSE: So I'd be interested in your thoughts on how the Constitution, which is unchanged through all of that, what analysis you would go through to see whether the change from a quickly opening and closing privacy envelope to one that is now essentially open season forever. How would you go about analyzing that as a judge, given that the Constitution is a fixed document?

SOTOMAYOR: I think, as I understand your question, Senator, that there are two issues, if not more, but the two that I note as more starkly for me in your question is the one of the search and seizure and the Fourth Amendment as it applies to taking evidence from an individual and use it against him or her in a current proceeding.

WHITEHOUSE: Yes, which is a constant. That stayed the same.

SOTOMAYOR: That (inaudible) the structure. In -- not so long ago, the Supreme Court dealt with a technologically new situation, which was whether an individual had a right to expect the warrant to be gotten before law enforcement flew over his or -- I think it was a "his" in that case -- his home and took readings of the thermal energy emanating from his home, and then going in to see if the person was growing marijuana.

WHITEHOUSE: The (inaudible) case.

SOTOMAYOR: Exactly. And in that case, the reason for that case is that, apparently -- I'm not an expert in marijuana growing -- but apparently, when you're growing marijuana, there's a -- certain heating lights that you need, at least that's what the case was describing, and it generates this enormous amount of heat that wouldn't generally come from a home unless you were doing something like this.

And what the court did there, in an opinion by Justice Scalia, I believe it was, is it looked at the embedded questions of privacy in the home that underlied the unreasonable search and seizure. And the court there, as I mentioned, determined that acts taken in the privacy of one's home would commonly not be expected to be intruded upon unless the police secured a warrant.

And to the extent that the law had generally recognized that, if you worked actively to keep people out of your home -- you locked your windows, you locked your doors, you didn't let people walk by and peek through, you

didn't stand at your front door and show people what you were doing, that you were exhibiting your expectation of privacy.

And to the extent that new technology had developed that you wouldn't expect to intrude on that privacy, then you were protected by the warrant clause. And the police had an obligation to go talk to a magistrate and explain to them what their evidence was and let the magistrate -- I use the magistrate in that more global sense. It would be a judge, but in the -- you would let a judge decide whether there was probable cause to issue the warrant, reasonable suspicion, probable cause -- probable cause to issue the warrant.

That's how the courts address the unreasonable -- or have addressed, the Supreme Court has, the unreasonable search and seizure and balance the new technology with the expectations of privacy that are recognized in the Fourth Amendment.

SOTOMAYOR: You asked, I thought, a separate question which, in my mind, is different than the right to privacy with respect to personal information that could be otherwise available to the public as a byproduct of a criminal action or as a byproduct of your participation in some regulated activity of the government.

There are situations in which, if your industry is regulated, you're going to make disclosures to the government. And then the question becomes, how much and what circumstances can then government make copies, put it in an electronic database, or use it in another situation?

So much of that gets controlled by the issues you're saying Congress is thinking about, which is, what are people's rights of privacy in their personal information? Should we as Congress, as a matter of policy, regulate that use?

The courts itself have been commanded by Congress to look at certain privacy information of individuals and guard it from public disclosure in the databases you're talking about.

So we've been told, "Don't go using somebody's Social Security number and putting it in a database." That's a part of a public document, but we've been told, "Don't do that," and there's a reason for that, because there is not only the issues of identity theft, but other harms that come to people from that situation.

So that broader question, as with many, is not one that one could talk about a philosophy about. As a judge, you have to look at the situation at issue, think about what Congress has said about that in the laws, and then consider what -- what the Constitution may or may not say on that question, depending on the nature of the claim before the court.

WHITEHOUSE: Your honor, I thank you. I wish you well.

SOTOMAYOR: Thank you.

WHITEHOUSE: And I congratulate you on your appearance before this committee so far.

SOTOMAYOR: Thank you, sir.

LEAHY: Senator Whitehouse, thank you. I appreciate the comments getting into the area of criminal law. Of course, Senator Whitehouse has served as both a U.S. attorney and as an attorney general and brings a great depth of knowledge, as do several on both the Republican and Democratic side to -- to this committee. Judge, we're -- and I also appreciate you taking less than your time. I hope maybe you'll be setting a standard as we go forward. We will take a 15-minute break.



SOTOMAYOR: Thank you.

(RECESS)

LEAHY: There's been an interest expressed by -- I was going to say by all of the senators, but most senators have left the hearing room, but don't think that doesn't mean that there's not going to be more questions, Judge, because there will be this round and another round.

And if it's the case of all of the questions having been asked, but not everybody has asked all of the questions, some will come back and ask them again.

What we're going to do -- we're going to have Senator Klobuchar and Senator Kaufman will ask questions. We'll then break for lunch. We'll then have Senator Specter and Senator Franken ask -- ask questions. And I'm saying this for the purposes also of those who have to -- have to schedule and plan.

We'll take -- we'll take a break for lunch after these two senators. We will then go into the traditional closed-door session, which will be held in the Senate Judiciary Committee room. So, Senator Klobuchar, we seem to be heavy on prosecutors here. She is also a former prosecutor, and I yield to you.

KLOBUCHAR: Thank you very much, Mr. Chairman. Good afternoon, Judge. Thank you again for all of your patience and your thoughtful answers. I really -- everyone has been focusing on you sitting there. I've been focusing on how patient your mother has been through this whole thing, because I ran into her in the restroom just now, and I can tell you, she has a lot she'd like to say. She has... (LAUGHTER) She has plenty of stories that she would like to share about you. I thought I might miss my questioning opportunity.

SOTOMAYOR: Senator, don't give her the chance.

KLOBUCHAR: But I was thinking she is much more...

LEAHY: The chairman is tempted, let me tell you.

KLOBUCHAR: She is much more patient than my mother has been, who has been waiting for this moment, for me to ask these questions, and leaving messages like, "How long do these guys have to go on?" (LAUGHTER) My favorite one, the recent one was, "I watched Senator Feinstein, and she was brilliant. What are you going to do?" (LAUGHTER) OK. So let's -- let's move on. I had some...

SOTOMAYOR: We should introduce our mothers, OK?

KLOBUCHAR: Yes, exactly. I have some quick questions here at the beginning just to follow up on some of the issues raised by my colleagues. Senator Coburn was asking you about the Heller case and Second Amendment issues. And I am -- personally agree with the Heller case.

But I remember that yesterday you said that, in Maloney, your Second Circuit case, that you were bound by precedent in your circuit, but that you would keep an open mind if the Supreme Court takes up the question of whether the Second Amendment can be incorporate against the states. Is that right?

SOTOMAYOR: Yes, Senator. I take every case, case by case, and my mind is always open, and I make no prejudgments as to conclusions.

KLOBUCHAR: OK. And then a follow-up question that Senator Whitehouse was asking you about the Puerto Rican legal defense fund. You were on that board. And one just minor follow-up, but isn't it true that the ABA, that their code of conduct, the American Bar Association code of conduct bars Board members from engaging in litigation because of a lack of an actual lawyer-client relationship?

SOTOMAYOR: Yes.

KLOBUCHAR: OK. And then, finally, just one point. We've heard so much about your speech in which you used the phrase, "Wise Latina," and I'm not going to go over that again.

But I did want to note, for the record, that you made a similar comment in another speech that you gave back in 1994, which you have provided not only in this proceeding but you also provided it when you came before the Senate for confirmation to the Circuit Court in 1997 and 1998. And no senator at that time -- do you remember them asking you about it or making any issue about it at the time?

SOTOMAYOR: No.

KLOBUCHAR: All right. Thank you. Now we can move on to what I want to talk about, which is your work as a criminal prosecutor. And Senator Whitehouse initially asked a few questions about that.

You were quoted in the New York Times a while back about your time there, and you said, "The one thing I have found is that, if you come into the criminal justice system on a prosecutorial or defense level thinking that you can change the ills of society, you're going to be sorely disappointed. This is not where those kinds of changes have to be made." Do you want to elaborate on that a little bit?

SOTOMAYOR: By the time a criminal defendant ends up in court, they've been shaped by their lives. If you want to give people the best opportunity at success at life -- it's a message I deliver frequently to my community -- it has to be through early childhood forward. If you're waiting to do that once they're before a judge in court, your chances of success have diminished dramatically. And so one of my messages in many of my speeches to my community groups is pay attention to education. It's the value mom taught me, but her lesson had -- was not lost on me when I became a prosecutor.

And it's a lesson that I continue to promote because I so fervently believe it. The success of our communities depends on us improving the quality of our education of our children and of parental participation in ensuring that that happens in our society.

KLOBUCHAR: It also reminded me of that comment about -- some of the comments you've made about the limited role that -- a prosecutor has one role, and the limited role that a judge may have to respect that judicial role of not making the laws but interpreting the laws. Would that be a correct summary?

SOTOMAYOR: That is. In the statement I made to the newspaper article, I was focusing on a different part of that, but it is. As a prosecutor, my role was not to look at what I thought the punishment should have been, because that was set in law. Sentences are set by Congress, which -- within statutory ranges.

And my role was to prosecute on behalf of the people of the State of New York. And that role is different than one that I would do if I were a defense attorney whose charge is to do something else, to ensure that a defendant is given a fair trial and that the government has proven its case beyond a reasonable doubt. But we cannot remedy the ills of society in a courtroom. We can only apply the law to the facts before us.

KLOBUCHAR: Yes. I think Justice Ginsburg made a similar comment in an article this weekend in an interview she did. And she was talking about -- this was her exact quote -- "The legislature can make the change, can facilitate the change, as laws like the Family Medical Leave Act do" -- she was talking about family arrangements -- "but it's not something a court can decree.

"A court can't tell the man," she said, "you've got to do more than carry out the garbage." I thought that was another way -- you don't have to comment on that -- but it was another way of making the same point. The other thing that I wanted to focus on was just that role as a prosecutor, some of the difficult decisions you have to make about charging cases, for instance.

Sometimes you have to make a difficult decision to charge a family member, maybe in a drunk driving case, where someone kills their own child because they were drunk, or you have to make a decision when the court of public opinion has already decided someone's guilty, but you realize you don't have enough evidence to charge the case.

Do you want to talk about any -- maybe a specific example of that in your own career as a prosecutor or what goes into your thinking on charging?

SOTOMAYOR: I was influenced so greatly by a television show in igniting the passion that I had as being a prosecutor, and it was "Perry Mason."

For the young people behind all of you, they may not even know who Perry Mason was, but Perry Mason was one of the first lawyers portrayed on television. And his storyline is that, in all of the cases he tried -- except one -- he -- he proved his client innocent and got the actual murderer to confess.

In one of the episodes, at the end of the episode, Perry Mason with the character who played the prosecutor in the case were meeting up after the case. And Perry said to the prosecutor, "It must cause you some pain having expended all that effort in your case to have the charges dismissed." And the prosecutor looked up and, "No, my job as a prosecutor is to do justice, and justice is served when a guilty man is convicted and when an innocent man is not." And I thought to myself, that's quite amazing to be able to serve that role, to be given a job, as I was by Mr. Morgenthau, a job I'm eternally grateful to him for, in which I could do what justice required in an individual case.

And it was not without bounds, because I served a role for society, and that role was to ensure that the public safety and public interests were fully represented. But prosecutors in each individual case, at least in my experience, particularly under the tutelage of Mr. Morgenthau, was, we did what the law required within the bounds of understanding that our job was not to play to the home crowd, not to look for public approval, but to look at each case, in some respects like a judge does, individually.

And that meant in some cases bringing them the top charge. And I was actually known in my office for doing that often, but that's because I determined it was appropriate often.

SOTOMAYOR: But, periodically, I would look at the quality of evidence and say, "There's just not enough." I had one case with a individual who was charged with committing a larceny from a woman.

And his defense attorney came to me and said, "I never, ever do this, but this kid is innocent. Please look at his background. He's a kid with a disability. Talk to his teachers. Look at his life. Look at his record. Here it is." And he gave me the file.

And everything he said was absolutely true. This was a kid with not a blemish in his life. And he said, "Please look at this case more closely."

And I went and talked to the victim, and she -- I had not spoken to her when the case was indicted. This -- this was one of those cases that was transferred to me, and so it was my first time in talking to her. And I let her tell me the story, and it turned out she had never seen who took her pocketbook.

In that case, she saw a young man that the police had stopped in a subway station with a black jacket, and she thought she had seen a black jacket, and identified the young man as the one who had stolen her property. The young man, when he was stopped, didn't run away. He was just sitting there. Her property wasn't on him, and he had the background that he did.

And I looked at that case and took it to my supervisor and said, "I don't think we can prove this case." And my supervisor agreed, and we dismissed the charges.

And yet there are others that I prosecuted, very close cases, where I thought a jury should decide if someone was guilty, and I prosecuted those cases and more often than not got convictions. My point is that that is such a wonderful part of being a prosecutor.

That TV character said something that motivated my choices in life and something that holds true, and that's not to say, by the way -- and I firmly, firmly believe this -- defense attorneys serve a noble role, as well. All participants in this process do: judges, juries, prosecutors, and defense attorneys. We are all implementing the protections of the Constitution.

KLOBUCHAR: Thank you. That was very well said. And I want take that pragmatic experience that you've had, not just as a civil litigator, but also as a prosecutor, a lot has been said about whether judges' biases or their gender or their race should enter into decision-making.

And I actually thought that Senator Schumer did a good job of asking you questions where, in fact, you might have been sympathetic to a particular victim or to a particular plaintiff, but you ruled against them. And it actually gave me some answers to give to this baggage carrier that came up to me at the airport in Minneapolis. It was about a month ago, after you had just been announced, and he came up and he said, "Are you going to vote for that woman?"

And at first, I didn't even know what he was talking about. I said, "What?" He said, "Are you going to vote for that woman?" And I said, "Well, I think so, but I want to ask her some questions." And he said, "Well, aren't you worried that her emotions get in front of the law?"

And I thought if anyone heard what the cases -- the TWA case, where you decided against -- had to make a decision from some very sympathetic victims, the families of people who had been killed in a plane crash, and a host of other cases where you put the law in front of where your sympathies lie, I think that would have been a very good answer to him.

KLOBUCHAR: But another piece of this that's a very different part of it is the practical experiences that you've had, the pragmatic work that you've done. And I just wanted to go through some of the cases that you've had, the criminal cases that you've handled as a judge, and talk to you a little bit about how that pragmatic experience might be helpful on the courts, not leading you to always side with the prosecution, obviously, or -- but helping you to maybe ferret through the facts, as you've been known to be someone that really focused on the facts.

One of them is this United States v. Falso case, and this was a case where child pornography was found in a guy's home and on his computer. And you ruled that, although the police officers didn't have probable cause for the search warrant, that the evidence obtained in the search, the child pornography on the computer, should still be considered under the good faith exception to the exclusionary rule, because the judge had not been knowingly misled. And in other words, it was a mistake.

And I -- could you talk about that case and how perhaps having that kind of experience on the front line helped you to reach that decision? Because there was someone, I believe, that dissented in that case.

SOTOMAYOR: That case presented a very complicated question in Second Circuit law. There had been two cases addressing how much information a warrant had to contain and what kind in order for the police to search a defendant's home or -- I shouldn't say a home -- a computer to see if the computer contained images of child pornography.

The two cases -- I should say the two panels -- I wasn't a member of either of those panels -- had very extensive discussions about the implications of the cases because they involved the use of the Internet and how much information the police should or should not have before they look to get a warrant to search someone's computer, because the computer does provide people with freedom of speech, at least with respect to accessing information and reading it and thinking about it.

In the case before me, I was looking at it in the backdrop of the conflict that it appeared to contain in our case law, and what our case law said was important for a police officer to share with a judge and examine the facts before my case, looking at -- that's the information that the police have before them and considering whether, in light of existing Second Circuit law as it addressed this issue, had the police actually violated the Constitution, but -- I hope I can continue.

LEAHY: You can continue. That was not a comment from above, (inaudible). I have certain powers as chairman, but not that much.

SOTOMAYOR: (Inaudible) whether they should get a warrant or not. And I -- and one member of the court said "yes," and -- they had violated the Constitution. And I joined that part of the opinion because I determined, examining all of the facts of that case, that -- and the law, that that was the way the law -- the result the law required.

SOTOMAYOR: But then, I looked at what the principles underlying the unreasonable search and seizures are without a warrant and looked at the question of what was the doctrine that underlay there. And it -- what doctrine it underlays is that you don't want the police violating your constitutional rights without a good-faith basis, without probable cause.

And that's why you have a judge make that determination. That's why you require them to go to a judge. And so what I had to look at was whether we should make the police responsible for what would have been otherwise a judge's error, not their error.

They gave everything they had to the judge. And they said to the judge, "I don't know." Even if they thought they knew, that isn't what commands the warrant. It's the judge's review.

So I was the judge in the middle. One judge joined one part of my opinion; the other judge joined the other part of the opinion. And so I held that the acts violated the Constitution, but that the evidence could still be used, because the officers had -- there was in law a good-faith exception to the error in the warrant.

KLOBUCHAR: And I think you made a similar finding with different underlying facts in *United States v. Santos* (ph), when that involved a clerical error, and then that was a case where the underlying arrest warrant, where someone had been arrested -- they found cocaine -- and you allowed that in on the basis that the underlying arrest warrant, even though it was false -- there hadn't been a warrant out there, it'd been removed -- that that was a clerical error and you could still -- they could still use the cocaine.

SOTOMAYOR: Well, in fact, it's a holding the Supreme Court -- an issue the Supreme Court addressed just this term...

KLOBUCHAR: Exactly.

SOTOMAYOR: ... and came out -- well, I came out the way the Supreme Court did on that.

KLOBUCHAR: The hearing (ph) case.

SOTOMAYOR: Yes.

KLOBUCHAR: Yes, very good. The -- the -- the piece about -- the case in the Supreme Court that's most interesting to me on terms of that issue we've been talking about, the practical knowledge and how that plays into decisions, is the *Melendez-Diaz* case, which you were not involved in. It was a U.S. Supreme Court case.

But this is just from my own practical work as a prosecutor. And it was a contested case with the Supreme Court. It doesn't divide ideologically. In fact, both Justice Breyer and Justice Roberts were in the dissent that Justice Kennedy wrote. It was a 5-4 decision.

And in that case, the issue was whether or not, with the confrontation clause, whether or not lab workers, crime lab workers should be called in to have to testify for drugs and what the test showed that was in the drugs and things like that.

And I just wondered what your reaction was to that case, how you would have analyzed it.

I -- I agree with the dissent in that case. I think that this could really -- it opens up 90 years of precedent. I think it's unreasonable for what we should expect of the criminal justice system. And there's been some pretty strong language in the dissent of the fear that this will create some very difficulties for prosecutors to follow through on their cases and get the evidence in.

SOTOMAYOR: It's always difficult to deal with people's disappointments about cases, particularly when they have personal experiences and have their own sense of the impact of a case.

I was a former prosecutor. And it's difficult proving cases as it is. Calling more witnesses adds some burdens to the process.

But, at the end, that case is a decided case. And so its holding now is its holding, and that's what guides the court in the future on similar issues to the extent there can be some.

SOTOMAYOR: As I said, I do recognize that there can be problems, as a former prosecutor, but that also can't compel a result. And all of those issues have to be looked at in the context of the court's evaluation of the case and the judge's view of what the law permits and doesn't permit.

KLOBUCHAR: I will say, I was -- there with an interesting story a few weeks ago about -- just that you've been tenacious about getting to the bottom of the facts when you have cases. And there were actually some experts

that criticized you for spending too much time trying to figure out the facts, which I thought was a pretty unique criticism in the -- in the -- in the halls of criticisms.

And, in fact, you were defended by a former clerk to Clarence Thomas, who said that you are extraordinarily thorough, and a judge would ordinarily be praised for writing thorough opinions.

So when we are talking about Melendez-Diaz and some of those issues, it seems to me that, when you have looked at cases involving criminal justice or really any issue. Whether it's that Vermont ferry case that you did or other ones, you really did delve into the facts. You want to talk a little bit about why that's important?

SOTOMAYOR: The facts are the basis for the legal decision. A judge deals with a particular factual setting and applying the law to those facts. To the extent that there's any criticism that I do that on the court of appeals, we're not fact-finders, but we have to ensure that we understand the facts of the case to know what legal principle we're applying it to.

A judge's job, whether it's on the trial level, the circuit court, or even the Supreme Court, is not to create hypothetical cases and answer the hypothetical case. It's to answer the case that exists.

And so in my -- my view -- and I'm not suggesting any justice does this or doesn't do it -- but I do think that my work as a state prosecutor and a trial judge sensitizes me to understanding and approaching cases starting from the facts and then applying the law to those facts as they exist.

And -- and, again, I don't want to suggest that not all judges do that, but because I -- because of my background, perhaps like Justice Souter, who also has the reputation of carefully looking at the facts and applying the law to the facts, it may be that background that people are noticing and noticing where we picked up that habit.

KLOBUCHAR: Very good. The -- and the report issued last week, the Transactional Records Access Clearinghouse -- I didn't know there was such a thing -- found that you sent more convicts to prison and handed out longer sentences than your colleagues did when you were a district court judge.

One statistic found that you handed out sentences greater than six months to 48 percent of convicted criminals in white-collar cases, while your colleagues gave out sentences of six months or more to just 36 percent. You were also twice as likely as your colleagues to send white-collar criminals to two years or more in prison.

I found the white-collar cases to be some of the most challenging cases that we had in our office when I was a prosecutor. They were challenging because there was oftentimes sympathy, and you don't maybe -- maybe this is dating myself -- 10 years ago, there used to be more sympathy, but there was sympathy to people who were pilots.

We had tax evasion cases with pilots or we had a judge that we prosecuted who had a half-day of his friends come and testify that he shouldn't go to jail, including the former Miss America.

KLOBUCHAR: And so we -- I have found those cases to be difficult. Could you talk a little bit about your view of sentencing in general and sentencing of white-collar defendants in particular?

SOTOMAYOR: It should be remembered that, when I was a district court judge, the sentencing laws were different than they had become during my 12 years on the Court of Appeals. That -- and it makes me sound ancient, but back in the days when I was a district court judge, the sentencing guidelines were focused on the amount of a fraud and didn't consider the number of victims or the consequences on the number of victims of a crime.

Perhaps because of my prosecutorial background, perhaps because I considered the perspective of prosecutors who came before me, that the guidelines and their arguments -- that the guidelines didn't adequately consider the number of victims, and that that should be a factor, because someone who commits 100,000 \$1 -- well, not \$1 -- \$1,000 crimes may be as culpable as the person who does a one-time act of \$100,000, and depending on the victims and their impact on the victims. Those are factors that one should consider.

And so many of the white collar sentences that you were talking about were focused on looking at the guidelines and what the guidelines were addressing and ensuring that I was considering as the sentencing statutes require the court to do at all of the circumstances of the crime. I suspect that may drive one of the reasons why I may have given higher white-collar crime sentences than some of my colleagues. It's not to suggest they didn't listen to the argument, but they may have had a different perspective on it.

I should tell you that the -- that my circuit endorsed that factor as a consideration under the guidelines somewhat after I had started imposing sentences on this view, but they also agreed that this was a factor the courts could consider in fashioning a sentence.

(Inaudible) crime, and to the extent that you're protecting the interests of society, you take your cues from the statute Congress gives and to -- and the sentencing range that Congress sets. And so, to the extent that in all my cases I balanced the individual sentence with, as I was directed to, the interest that society sought to protect, then I applied that evenly -- even-handedly to all cases.

And so, it's important to remember the guidelines were mandatory. And so I took my charge as a district court judge seriously at the time to only deviate in the very unusual case, which was permitted by the guidelines.

KLOBUCHAR: And what do you think about the change now that they are guidelines, and -- suggested guidelines and not mandatory?

SOTOMAYOR: As you know, there's been great number of cases in the Supreme Court. The Booker Fan Fan case determined they were guidelines. My own personal experience with that -- with -- as an appellate judge is that, because the Supreme Court has told the district courts to give serious consideration to the guidelines, there's been a little bit -- not a little bit. There's been discretion given to district courts, but they are basically still staying within the guidelines. And I think that's because the guidelines prove useful as a starting point to consider what an appropriate sentence may be.

KLOBUCHAR: Just one last question, Mr. Chairman. All these guys have been asking about your baseball case and they've been talking about umpires and judges as umpires. Did you have a chance to watch the All-Star game last night because most of American didn't watch the replay of your hearing? (LAUGHTER)

SOTOMAYOR: It might have been watching it. I haven't seen television...(LAUGHTER)  
... for a very long time. But I will admit that I turned it on for a little while.

KLOBUCHAR: OK. Because otherwise I will say, and maybe you didn't turn it on on this moment, but your Yankee, Derek Jeter tied it up, but you must know that he scored only because there was a hit by Joe Mauer of the Minnesota Twins. (LAUGHTER) I just want to point that out. All right. Thanks very much, Judge.

SOTOMAYOR: That's called teamwork.

KLOBUCHAR: All right. Thank you.

LEAHY: I'm resisting any Red Sox comments. (LAUGHTER)



SOTOMAYOR: (Inaudible) baseball (inaudible) not to hold that against me, OK?

LEAHY: I'm not going to hold that against you. I did -- I did see a photograph of the president throwing out the ball. I know the photographer well. And I thought he did a very, very good job -- or two pictures.

Senator Kaufman is probably as knowledgeable as anybody on this committee, having run it for years before becoming a senator. I said before, judge, that senators are merely constitutional requirements or impediments to the staff. We know who really runs the place. And, Senator Kaufman, it's over to you, sir.

KAUFMAN: Thank you, Mr. Chairman.

LEAHY: Oh, and I should make one announcement. You've been hearing from banging going on here. Apparently, the air conditioning went out which will probably come as welcome news to the -- some of the press who are freezing in the skyboxes up here. But it's not welcome news here with the crowd going on. And they are working on it, but I'm -- we're going to keep going as long as we can.  
Senator Kaufman?

KAUFMAN: Thank you, Mr. Chairman. I, you know, one of the toughest assignments. I've been here long enough to know the toughest assignment is to stand between the audience and lunch. So I'm going to try bear up better that. Good afternoon.

SOTOMAYOR: Good afternoon, Senator. It's good to be talking to you again.

KAUFMAN: It's good to see you. And I want to kind of take a different tack. I think Senator Whitehouse and Senator Klobuchar talked a lot about your time as a prosecutor. I'd like to move on to kind of your time as a commercial litigator. You were a prosecutor for five years, then you decided to go into commercial practice.

And I just -- what kind of where the thoughts behind you deciding when you left the D.A.'s office to go into commercial practice?

SOTOMAYOR: Well, actually, it's a continuation of what I explained to Senator Klobuchar. I had, in the D.A.'s office, realized that in the criminal law system, we couldn't affect changes of opportunity for people. We were dealing with a discreet issue and applying the law to the situation at hand. But if there was going to be an increase of opportunity for all people, that that had to involve an increase in economic opportunity and in economic development for different communities.

SOTOMAYOR: And so that, in combination with my desire to broaden my own personal understanding of as many aspects of law as I could, I decided that I should change my focus and concentrate on commercial matters rather than criminal matters.

It also guided some of the -- much of the pro bono work I did thereafter, which also involved questions of finances and economic opportunities.

And so I served on the New York State mortgage board, and that -- the New York state mortgage office was involved in giving individuals affordable housing or loans for affordable housing. I was a board member of the New York City Campaign Finance Board.

Those activities were motivated in large measure because of my growing belief that economic opportunities for people were the way to address many of the -- of the -- of the growth needs of communities.

KAUFMAN: Can you tell us a little bit about your commercial practice? What actually were you dealing with as a litigator?

SOTOMAYOR: It was a wonderful practice, because, unlike some of my law school friends, I very much wanted to go into a small law firm where I could have hands-on practice.

Having been a prosecutor and having made all of the decisions -- individual decisions I made, I thought to myself, as I was leaving the D.A.'s office, I don't think I can go to those firms where I would be the fifth guy on the totem pole, that I wanted to have more hands-on experience.

So I went to a much smaller firm where I actually, until I became a partner, tended to work directly with the partner and would often counsel businesses. And I did a wide variety of commercial issues.

I was involved in grain commodity trading, people buying homegrown U.S. grains of all kinds, wheat, oat -- you can name them all -- and including orange peels as feed for animals, OK, and the contracts that they were involved in, in doing those trades.

Our firm represented a very impressive list of clients, including Ferrari, the car manufacturer. And I did a great deal of their work as it related to their dealer relationships and to their customer relationships.

And so I involved myself in those commercial transactions, which were different, different focus, different emphasis. I also represented -- not me, but the firm, but I counseled the client on many of its dealer relations issue of Pirelli Tire Corporation. These are names I suspect many people know.

KAUFMAN: Yes.

SOTOMAYOR: And then the fashion designer -- and -- and I think there are many people who know how famous that fashion house design is -- had trademark questions. And I participated with the partner who founded that practice within the law firm, and she had a very untimely death.

Actually, she came from her home ill to vote on my partnership at the firm, and I became a partner. And a couple of months later, she passed away. But she had worked with me and -- and introduced me to the intellectual property area of law.

SOTOMAYOR: I worked on real estate matters. I worked on contract matters of all kinds, licensing agreements, financing agreements, banking questions. There was such a wide berth of issues that I dealt with.

KAUFMAN: And how did that practice help you on the district court and then on the court of appeals?

SOTOMAYOR: Actually, one of the lessons I learned from my commercial practice, I learned in the context, first, of my grain commodity training. But in my work, as it related to all commercial disputes, there were one main lesson. In business, the predictability of law may be the most necessary, in the sense that people organize their business relationships by how they understand the Court's interpret their contracts.

I remember being involved in any number of litigations, where, at the end of the litigation, as part of the settlement, I would draft up a settlement agreement between the parties. And quite often it involved creating an ongoing new business relationship; or a temporary continuation of a business relationship so they could wind down.

And I would draft up the agreement like a litigator, like the judge I try to be. "Say it in simple words", OK?

And I would give it to my corporate partners, and I shouldn't say it this way. And I would get back stuff that sometimes I would look at and say, "What does this gobbledegook mean?"

And they would laugh at me and say, "It has meaning. This is how the courts have interpreted. It's very important to the relationship of the parties that they know what the expectations are in law about their relationship"

And then I understood why it was important to phrase things in certain ways. And it made me very respectful about the importance of predictability in terms of courts' interpretation of business terms, because that was very, very critical to organizing business relationships in our country.

KAUFMAN: One of the jobs of district court judges is kind of to avoid trial, kind of get people to settle before they get to trial. How did your commercial experience help you deal with that?

SOTOMAYOR: It's interesting because I remember one case with, and I can't give you details because it would be breaching confidentiality. But I remember a client coming in to me with a fairly substantial litigation. And I looked at the client and I said -- I evaluated the case, and I said, "There's some novel theories here. I really think you can win, but there's a serious question about the cost to get there, because these are all the things that we would have to do to get there. And it's going to cost you..." It was millions of dollars that I estimated.

The client went to another lawyer who gave them a different evaluation, and they went with that other lawyer. My firm lost all that income, but the client came back afterwards, because the figure I put on the litigation was exactly what they spent, and more.

Settlements are, generally in the business world, economic decisions, balancing both the cost of litigation and the right of the issue, but it is, business has a different function than courts. Business function is to do business, to do their work, to sell products, to order relationships. And litigation are different.

SOTOMAYOR: As a judge, when I was a district court judge, most of my focus was on (inaudible) doing what I used to do as a lawyer, to talk to parties not about the merits of their case, but about the consideration of thinking about creative and new ways to approach a legal dispute so they could avoid the cost of litigation.

As a circuit court judge, I'm -- I'm very cognizant of the court -- of the costs of litigation and look at what parties are doing in the courts below with that -- bearing that in mind.

KAUFMAN: You know, you talked about your experience as a circuit court judge. How did your being a district court judge help you when you became a circuit court judge?

SOTOMAYOR: Well, no question that it made me more sensitive to the importance of facts, and looking at the facts the court has found and the facts that the parties are arguing, and looking at the record to understand what went on.

I often point to this example. When I sit on panels in our court, it's blessed by having judges with a wide variety of circumstances. And I know, for me, because I was a trial judge, I would read all the briefs in a case, I would read the district court decision, and the parties were arguing something and the district court didn't address it, my first question to my law clerks were, "You know, go back to the record and tell me why not."

Most judges address arguments that people are raising. And it would -- I would get to oral argument. And if I was the only judge with a trial experience, I would look at the parties and say, "Did you argue this before the district court?"

And I could see some of the antennas going up for those colleagues who hadn't had that experience, saying, "I hadn't thought of that. Let me go back to look, in fact, if that was the case," because there are all sorts of doctrines that don't permit parties to argue new things on appeal.

And so that is how the experience comes in, both the sensitivity to facts and the sensitivity to ensure that you're applying law to those facts.

KAUFMAN: I'm really glad you have this commercial experience, because, as I said in my opening statement, I'm concerned about business cases. I think they're really important. And I'm also concerned that the current court -- Supreme Court too often seems to disregard settled law and congressional policy choices when it comes to business cases.

And I think, in light of our economic crisis, Congress probably -- not probably -- will definitely pass a financial regulatory reform package. And I'd just like to make sure that the system is not undermined by the court, because they just don't -- they have a different view of what government regulation is all about. Do you believe the Congress has the constitutional authority to regulate financial markets?

SOTOMAYOR: You've just raised the very first question that will come up when Congress passes an act. Because I can assure you, knowing every time Congress passes an act, there's a challenge by somebody.

KAUFMAN: Right.

SOTOMAYOR: As soon as it's applied to someone and in a way that they don't like, they're going to come into court. So I -- I can't answer that question.

KAUFMAN: I'm sympathetic to that. And I really should have phrased it -- I mean, just in general, not with regard to any case, anything at all, about Congress's constitutional authority to regulate financial markets?

SOTOMAYOR: Well, I can't answer that question, because it invites an answer to a potential challenge. What I can say to you is that Congress has certain constitutional powers. One of them is to -- to pass laws affecting interstate commerce.

And so the question will be the nature of whatever statute Congress passes, what facts it relies upon, and the remedy that it -- that it institutes. And so each -- the question would depend on the nature of the statute and what it's doing.

KAUFMAN: But Congress does basically have the ability to regulate markets?

SOTOMAYOR: Well, it has the ability to -- the Constitution term are to make laws that involve commerce between the states. But those are the words and, generally, that's been interpreted to mean pass laws that affect commercial interstate transactions.

KAUFMAN: To get to a more broader question about laws enacted by Congress, what's your -- what should a judge's role be in viewing the wisdom of the statute play in interrupting it? When Congress passes a law, what's basically, whether the judge thinks it's a good law or a bad law, the wisdom in passing it, what role does that play in the law?

SOTOMAYOR: I'm trying to think if there's any situation in which a judge who have occasion to judge in that way. Policy making -- making of laws is up to Congress. A judge's personal views as whether that choice is good or bad has no role in evaluating Congress' choice.

The question for us is always a different one which is what has Congress done, is it constitutional in the manner in which it's done it. But policy choices are Congress' choices. In all areas, deference has to be given to that choice.

KAUFMAN: How about regulations adopted by regulatory agencies?

SOTOMAYOR: Deference has been given in that area by the courts as well. Generally, one look at what Congress has said about that question because executive agencies have to apply and talk about regulations in light of what Congress has commanded. But those are also tilted to deference in different factual situations.

KAUFMAN: Can I talk -- I'm going to talk a few minutes about securities law. What's the -- I mean, what kind of -- what characterizes securities law docket in the Southern District of New York in the Second Circuit?

SOTOMAYOR: Oh, everything. We are -- we are the home of New York City. Our jurisdiction is -- I'm sure that another state is going to complain, but we are the business capital of the world. That's how it's been described by others.

And so we deal with every variant of securities law as one could imagine from investment questions to misleading statements to investors to all -- whatever Congress has regulated, our circuit will have a case on it. Or I should say it usually starts with the district courts, and it'll perk up to the circuit court. But if you have a securities law, we'll likely eventually hear the arguments.

KAUFMAN: And this will be valuable when you're on the court -- when -- if you're confirmed.

SOTOMAYOR: I presume so because it has been a part of my work both as a district court and a circuit court judge.

KAUFMAN: You had a case with a suit against the New York Stock Exchange where the plaintiff sued the New York Stock Exchange for failure to effectively regulate the market. You ruled to give the New York Stock Exchange immunity from the suit even though you noted that the alleged misconduct appeared egregious.

In reaching that sort of decision, how do you reconcile the rationale for immunity with the fact that deprives plaintiffs of a remedy in situations where they've been wronged, as you said, egregiously wronged?

SOTOMAYOR: It is somewhat important to recognize the limited role that courts serve. And the issue of remedy also is one where one has to talk about remedy against whom and for what.

In the ways that these individuals were injured, they were injured by third parties who had done allegedly illegal acts against them. And the court's ruling did not affect their ability to take action against those individuals. And clearly, that's always difficult in some situations and the individual has been arrested, et cetera.

But there are still remedies that law provides in terms of whatever assets those individuals have, whatever criminal actions the government may take. Often, funds are created to reimburse victims.

The question here was whether an agency that in case law was seen to have a quasi-governmental function, whether you could sue that agency for conduct that -- for not regulating the other individuals adequately in helping to prevent the activity.

But regulation comes in different forms by the government or quasi-governmental agencies. And what they can do depends on the exercise of discretion under the laws as they exist at the time.

And so the immunity doctrine wasn't looking at the issue of how to recompense the individuals. It was looking at the functions -- quasi-functions of government. So there's a disparate (ph) perspective that was given to the judges in that case.

KAUFMAN: In another securities case that interests me, *Press v. Quick & Reilly*, in that case, you and your fellow panel members all deferred to the SEC's interpretation of its own regulation, even though you seemed somewhat skeptical of the interpretation. Tell us about how you came to the conclusion you did in that case?

SOTOMAYOR: Well, there is a doctrine of Chevron deference. And it goes to the issue of, who makes the decisions? And that goes to policy questions.

To the extent that an agency interpretation is not inconsistent with congressional commands, expressed commercial commands, a judge can't substitute their own judgment of what policies should be or regulations should be, and -- but is commanded to give deference.

There are obviously in every situation a set of exceptions to when you don't, but you have to then apply a consideration of each of those exceptions in the particular circumstance before you.

There have been other situations in which I have ruled and said, no, the agency is not interpreting the statute in accordance with what the panel viewed was Congress's intent. Yesterday, I believe one of the other senators asked me about the Riverkeeper case.

KAUFMAN: Yes.

SOTOMAYOR: And the Supreme Court came to a different view of -- of what the words Congress used meant. But the point is that the rule of courts is not to substitute their own judgments; it's to apply the principles of law in accordance with the acts that agencies are doing.

KAUFMAN: And one more securities question. In recent years, it seems like regulators were often too lax when it came to ferreting out securities fraud. What role to private rights of action -- that is, cases brought by investors, rather than the government -- have in enforcing our securities laws?

SOTOMAYOR: The right Congress has given, presumably because Congress has made a policy choice, that is a way to ensure that individuals' injuries are remedied. That is -- it's a part of many of our securities laws and our antitrust laws.

Government doesn't have unlimited resources to pursue all individual injuries. And so, in some situations, Congress makes a choice to grant the private cause of action and some it doesn't. That's a legislative choice.

KAUFMAN: Turning to the antitrust law, what was your experience in antitrust law?

SOTOMAYOR: As a...

KAUFMAN: Both in practice and a judge, both of them.

SOTOMAYOR: I'm trying to think -- I don't remember having direct experience in antitrust law when I was in private practice. I don't think I did. And so I had very little -- I'm trying to think of any of my cases on the district court, and Major League Baseball strike was one of them, and it's the one that I am -- that I can think of.

I had antitrust cases there, as well. Often, the cases settled, actually, and so managing those cases was the prime function I had as a district court judge. If you'd give me a chance to look at my district court decisions again to see if -- and what other cases in the antitrust area I may have ruled upon on the district court, I can get back to you, Senator...

KAUFMAN: Great.

SOTOMAYOR: ... either at the next round or in a written question. I just don't -- on the circuit court it's different. I have participated directly in writing opinions and joining panels on opinions, and so I've had at least two, if not three or four or five of those cases.

KAUFMAN: Yesterday, Senator Kohl asked about the Leegin case, which is striking in that it overturned 96 years of precedent and effectively legalized private agreements to prevent discount retailing. You said that both the majority and the dissent in that case had a reason to question the economic theory underlying the original precedent. I don't want you to contact -- comment on Leegin in particular. But what's the role of the court in using economic theory to interpret acts of Congress?

SOTOMAYOR: Well, you don't use economic theory to determine the constitutionality of congressional action. That is a different question, I think, than the one that Leegin addressed.

What Leegin addressed was how the court would apply congressional act, the antitrust laws, to a factual question before it. And that's a different issue, because that doesn't do with questioning the economic choices of Congress. That goes to whether or not, in reviewing the action of a particular defendant, what view the court is going to apply to that activity.

SOTOMAYOR: In the Leegin case, the court's decision was, "Look, we have prior case law that says that this type of activity is always anti-competitive," and the court, in reconsidering that issue in the Leegin case, said, "Well, there's been enough presented in the courts below to show that maybe it's not in -- some activities anti-competitive. And so we're not going to subject it to an absolute bar; we're going to subject it to a review under rule of reason."

That's why I said it's not a question of questioning Congress' economic choices or the economic theories that underlay its decisions in a legislation. They weren't striking down the antitrust laws. What the Court was trying to do was it figure out how it would apply that law to particular set of facts before it.

KAUFMAN: In Illinois, Brick, a Supreme Court case dealing with antitrust, one of the classic cases, Justice White wrote, and I quote, "in considering whether to overturn precedent, we must bear in mind the considerations of stare decisis weigh heavily in the area of statutory construction where Congress is free to change this court's interpretation of its legislation." Do you agree with Justice White?

SOTOMAYOR: I think that that, as you may know, the doctrine of stare decisis is not dependent on one fact.

KAUFMAN: Right.

SOTOMAYOR: The Court considers a variety of different factors including the administrative workability of a law, the reliance factor that society has put into that rule, that precedent, the cost to change it, whether the underlying doctrines in related areas -- the underlying framework of related areas would lead a court to question whether the prior precedent really has a framework that's consistent with an understanding in this area that has been developed in other cases.

And, finally, has there been a change in society that shows that the factual findings upon which the older case what premised may be wrong. And there's always the question, as part of that analysis and other factors the courts may think about as to whether the older rule has been affirmed by the court and how often, over what period of time.

To the extent that Justice White is talking about a factor that the court should put into that mix, the court has recognized in its stare decisis jurisprudence that all of the factors weigh into the decision. You think about why and under what circumstances you should alter the course of the court's interpretation as set forth in prior precedent.

KAUFMAN: You know, I'm concerned because recently there's been erosion in antitrust both in the courts and in enforcement. And it's made it much easier for financial institutions to become so massive they're, in effect, too big to fail. Should a court sitting in antitrust consider the systemic risks to the marketplace that is injected by a financial institution being too big to fail?

SOTOMAYOR: Well, the purpose is the -- of the antitrust theory is premised on ensuring competition in the marketplace. The question, like the one you pose, is one that would come to the court in the particular context and a challenge to some approach the court has used in this area. I, obviously, can't say absolutely yes...

KAUFMAN: No, no.

SOTOMAYOR: ... in a hypothetical. But obviously the court is always looking at what activity is claimed to be illegal under the antitrust laws and what effect it has to anti-competitive behavior. And the question frequently in antitrust is, is a particular area subject to per se barring (ph) or is it subject to the rule of reason? And -- and the two have different approaches to -- to the question.

KAUFMAN: Thank you, Judge. Thank you, Mr. Chairman.

LEAHY: Thank you very much, Senator Kaufman. And as I mentioned before, it's almost 1 o'clock. We will take a break until 2 o'clock. At 2 o'clock, we will recognize first Senator Specter and then Senator Franken. When their questions are finished, we will go into the traditional closed-door session, which will be held not in this room, but in the Senate Judiciary Committee room.

Following that, we will come back in here. And if there are questions -- if there are senators who have further questions, they'll be recognized not to exceed 20 minutes each.

I would hope that if the questions has already been asked and answered, they may want to resist the temptation to do it again, but they have that right to take the full 20 minutes if they do. I realize a lot of the questions have been asked, but not everybody has asked the same question, and so they may want to, but they have that right, and that's what we'll do.

And we'll stand in recess until then.



### Day 3 Part 3

CHAIRMAN PATRICK LEAHY: I just discussed this again with Sen. Sessions. We will go first to Sen. Specter, then to Sen. Franken. And then we will recess and go into the other — other room for the closed session. Sen. Specter, of course, is former chairman of this committee, one of the most senior members of the Senate and one of the most experienced. Senator — Sen. Specter?

SPECTER: Thank you, Mr. Chairman. Welcome back, Judge Sotomayor. You have held up very well. Of all of the proceedings in the Senate, this is the most exacting on the — on the witness. Years ago, as ...

... you know, in case of *Ashcroft v. Tennessee*, they said it was unconstitutional to subject a suspect to relay grilling, but that doesn't apply to nominees.

And your family has been here. My wife, Joan Specter, who's been an officeholder in her own right, says it's a lot harder to listen to me than it is to make a speech herself. And you are engaged.

I think, beyond doing very well on stamina, you have shown intellect, and humor, and charm, and pride, and also modesty, so it's been a very — a good hearing. Notwithstanding all of those qualities, the Constitution says we have to decide whether to consent, and that requires the hearing process and — and the questions.

Before going into a long list of issues which I have on the agenda -- separation of power, and wireless wiretaps, and secret CIA programs, and voting rights, and the Americans With Disabilities Act, and a woman's right to choose, and the Environmental Protection Agency, and Clean Water Act, and television, and the 2nd Amendment, I'd like to make an observation or two.

There has been a lot of talk about a wise Latina woman, and I think that this proceeding has tended to make a mountain out of a molehill. We have had a consistent line of people who are nominees who make references to their own backgrounds. We all have our perspective.

Justice O'Connor talked about her life experience. Justice Alito talked about his family suffering from ethnic slurs. Justice Thomas, Pin Point, Ga., emphasized, talked about putting himself in the shoes of other people. And Justice Scalia talked about being in -- in a racial minority.

The expectation would be that a woman would want to say something to assert her confidence in a country which denied women the right to vote for decades, where the glass ceiling has limited people, where there is still disparagement of people on ethnic background.

Just this month in a suburb of Philadelphia, Hispanic children were denied access to a pool for whites only, as were African American children. So I can see how someone would take pride in being a Latina woman and assert -- assert herself.

A lot has been made of the issue of empathy, but that characteristic is not exactly out of place in judicial determinations. We've come a long way on the expansion of constitutional rights.

Oliver Wendell Holmes' famous statement that the life of the law is experience, not logic. Justice Cardozo in *Palko v. Connecticut* talked about changing values.

The Warren court changed the Constitution practically every day of which I saw, being in the district attorney's office, with changes in search and seizure, confessions, *Miranda*, right to counsel. Who could have thought that it would take until 1963 to have the right to counsel in *Gideon v. Wainwright*?

We've heard a lot of talk about the nomination proceeding of Judge Bork. And they tried to make "Bork" into a verb. Somebody being Borked. Well, anybody who looks at that record will see that it's very, very different. We had a situation where Judge Bork was an advocate of original intent from his days writing the law review article in the Indiana Law Review.

And how can you have original intent when the 18th Amendment was written by a Senate on equal protection with the Senate galleries which were segregated? Or where you have Judge Bork, who believed that equal protection applied only to race and ethnicity? It didn't even apply to women.

But it was a very, very thorough hearing. I spent beyond the hearing days in three long sessions, five hours with Judge Bork. So it was his own approach to the law which resulted there. But you had an evolution of constitutional law, which I think puts empathy in a -- in an OK status, in an OK category.

Now, onto the issues. I begin with an area of cases which the court has decided not to decide. And those cases can be even more important than many of the cases which the court decides. The docket of the court at the present time is very different from what it was a century ago. In 1886, the docket had 1,396 cases, decided 451. A hundred years later, there were only 161 signed opinions in 1985. 2007, only 67 signed opinions.

During his confirmation hearings, Chief Justice Roberts said the court, quote, "could contribute more to the clarity and uniformity of the law by taking more cases." Judge Sotomayor, do you agree with that statement by Chief Justice Roberts?

SOTOMAYOR: I know, Sen. Specter, that there are questions by many people, including senators and yourself, of Justice Roberts and other nominees about this issue. Can the court take on more? To the extent that there's concern about it, not that public opinion should drive the justices to take more cases just to take them, but I think what Judge -- Justice Roberts was saying is the court needs to think about its processes to ensure that it's fulfilling...

SPECTER: Judge Sotomayor, how about more cases?

SOTOMAYOR: Well, perhaps I need to explain to you that I don't like making statements about what I think the court can do until I've experienced the process.

SPECTER: Then let me move on to another question. One case that the court did not [inaudible] involved a terrorist surveillance program which I think, arguably, posed the greatest conflict between congressional powers under Article I in enacting the Foreign Intelligence Surveillance Act, which provided for the exclusive way to get wiretaps.

The president disregarded that in a secret program called the Terrorist Surveillance Program, didn't even tell the chairman of the Judiciary Committee, which is the required practice, or accepted practice, didn't tell the Intelligence Committees, where the law mandates that they be told about such programs. It was only disclosed by the New York Times. Those practices confront us this day, with reports about many other secret cases not disclosed.

The federal District Court in Detroit found the Terrorist Surveillance Program unconstitutional. Sixth Circuit, in a two-to-one opinion, said there was no standing. The dissent, I think, pretty conclusively had the much better of the -- on asserting standing. The Supreme Court of the United States denied certiorari, didn't even take up the case to the extent of deciding whether it shouldn't take it because of lack of standing.

I wrote you a letter about this, wrote a series of letters, and gave you advance notice that I would ask you about this case. So I'm not asking you how you would decide the case, but wouldn't you agree that the Supreme Court should have taken that kind of a major conflict on separation of powers?

SOTOMAYOR: I know it must be very frustrating to you to...

SPECTER: It sure is. (LAUGHTER) I was the chairman who wasn't notified.

SOTOMAYOR: No. I'm sure...

SPECTER: And he was the ranking member who wasn't notified.

SOTOMAYOR: I can understand not only Congress's or your personal frustration, and sometimes the citizens when there are important issues that they would like the court to consider. The question becomes what do I do if you give me the honor to serve on the Court. If I say something today, is that going to make a statement about how I'm going to prejudge someone else's...

SPECTER: I'm not asking you to prejudge. I'd like to know your standards for taking the case. If you have that kind of a monumental historic conflict and the court is supposed to decide conflicts between the executive and legislative branches, how can it possibly be justified not to take that case?

SOTOMAYOR: There are often, from what I understand -- and that's from my review of Supreme Court actions and cases of situations in which they have or have not taken cases, and I've read some of their reasoning as to this. I know that with some important issues, they want to make sure that there isn't a procedural bar to the case of some type that would take away from whether they're, in fact, doing what they would want to do, which is to ...

SPECTER: Well, was there a procedural bar? You've had weeks to mull that over, because I gave you notice.

SOTOMAYOR: Senator, I'm sorry. I did mull this over. My problem is that, without looking at a particular issue and considering the cert briefs file, the discussion of potential colleagues as to the reasons why a particular issue should or should not be considered, the question about...

SPECTER: Well, I can tell you're not going to answer. Let me move on. On a woman's right to choose, Circuit Judge Luttig, in the case of Richmond Medical Center, said that "Casey v. Planned Parenthood was super stare decisis." Do you agree with Judge Luttig?

SOTOMAYOR: I don't use the word "super." I don't know how to take that word. All precedent of the court is entitled to the respect of the doctrine of stare decisis.

SPECTER: Do you think that Roe v. Wade has added weight on stare decisis to protect a woman's right to choose? By virtue of Casey v. Planned Parenthood, as Judge Luttig said?

SOTOMAYOR: That is one of the factors that I believe courts have used to consider the issue of whether or not a new direction should be taken into law. There is a variety of different factors the court uses, not just one...

SPECTER: But that is one, which will give it extra weight. How about the fact that the Supreme Court of the United States has had 38 cases after Roe v. Wade where it could have reversed Roe v. Wade? Would that add weight to the impact of Roe v. Wade to stare decisis to guarantee a woman's right to choose?

SOTOMAYOR: The history of a particular holding of the court and how the court has dealt with it in subsequent cases would be among one of the factors as many that a court would likely consider. Each situation, however, is considered in a variety of different view points and arguments and -- but most importantly, factors of the court applies to this question of should precedence be altered in a way.

SPECTER: Well, wouldn't 38 cases lend a little extra support to the impact of Roe and Casey, where the court had the issue before it, could have overruled it?

SOTOMAYOR: In Casey itself...

SPECTER: Just a little extra impact?

SOTOMAYOR: Casey itself applied, or by opinion offered by Justice Souter, talked about the factors that a court thinks about in -- whether to change precedent. And among them were issues of whether or not or how much reliance society has....

...placed in the prior precedents? What are the costs that would be occasioned by changing it? Was the rule workable or not? Have the -- either factual or doctrinal basis of the prior precedent altered, either from developments in related areas of law or not, to counsel a re- examination of the question.

SPECTER: I'm going to move off. Go ahead.

SOTOMAYOR: And the court has considered, in other cases, the number of times the issue has arisen and what actions the court has or not taken with respect to that. Roe is the -- Roe -- Casey did reaffirm the court holding of Roe and so my understanding would be that the issues would be addressed in light of Casey, on the stare decisis today.

SPECTER: Do I hear you saying it will be at least a little bit of that story? Let me move on. Let me move on to another separation of powers argument, and that is between Congress and the court.

In 1997, in the case called *Boerne*, suddenly the Supreme Court of the United States found a new test called congruence and proportionality. Up to that time, Judge Harlan's judgment on a rational basis for what Congress would decide would be sufficient. And here, for the benefit of our television audience, we're talking about a record that Congress maintains.

Take the Americans With Disabilities Act, for example, where there was a task force of field hearings in every state attended by more than 30,000 people, including thousands who had experienced discrimination, with roughly 300 examples of discrimination by state governments.

Notwithstanding that vast record, the Supreme Court of the United States in *Alabama v. Garrett* found Title II of the Americans With Disabilities Act unconstitutional.

Justice Scalia, in dissent, said that it was a, quote, "flabby test," that it was, quote, "an invitation to judicial arbitrariness and policy-driven decision-making."

The other, Title I of the Americans With Disabilities Act, in *Lane v. Tennessee*, the court found that constitutional on the same record. In the second round, if we have time, I will ask you -- give you some advance notice, although I wrote you about these cases -- if you can find a distinction on the Supreme Court's determination.

But my question to you is, looking at this brand-new standard of proportionality and congruence, for whatever those words mean -- and if we have time in the second round, I'll ask you to define them, but there are other questions I want to come to -- do you agree with Justice Scalia that it's a flabby test and that, with having such a vague standard, the court can do anything it wants and really engages in policy-driven decision-making, which means the court, in effect, legislates?

SOTOMAYOR: Senator, the question of whether I agree with a view of a particular justice or not is not something that I can -- I can say in terms of the next case. In the next case that the court will look at and a challenge to a particular congressional statute...

SPECTER: Well, not the next case. This case. You have these two cases. They have the same factual record. And the Supreme Court, in effect, legislates, tells us what is right and what is wrong on this standard that nobody can understand.

SOTOMAYOR: As I understand the congruence and proportionality test, it is the Supreme Court's holding on that test, as I understand it, that there is an obligation on the court to ensure that Congress is working -- working -- is legislating within its legislative powers.

The issue is not -- and these are Section 5 cases, essentially -- which are the clause of the Constitution under the 14th Amendment that permits Congress to legislate on issues involving violations of the 14th Amendment. The court in those cases has not said that Congress can't legislate. What it has looked at is the form of remedy Congress can order and what...

SPECTER: But it doesn't tell us how to legislate. Let -- let -- let me move on to the Voting Rights Act case and just pose the case. And I'll ask you about it in the next round.

When Chief Justice Roberts testified at his confirmation hearings, he was very differential to the Congress, not so, I might add, when he decided the voting rights case. But when he appeared here three years ago, he said this. And it's worth -- worth reading.

"I appreciate very much the differences in institutional competence between the judiciary and the Congress when it comes to basic questions of fact finding, development of a record and also the authority to make the policy decisions about how to act on the basis of a particular record."

"It's not just disagreement over a record. It's a question of whose job it is to make a determination based on their record. As a judge, you may have a beginning to transgress into the area of making a law is when you are in a position of reevaluating legislative findings because that doesn't look like a judicial function." Well, that's about as differential as you can be when you're a nominee.

But when Chief Justice Roberts presided over the voting rights case, he sounded very, very different. My question to you is do you agree with what Chief Justice Roberts said when he was just Judge Roberts, that it's an area of making laws to transgress into what Congress has done by way of finding the facts.

SOTOMAYOR: I would find it difficult to agree with someone else's words. I can tell you how much I understand the deference that Congress is owed. And I can point you at least to two cases -- and there are many, many more -- that shows how much I value the fact that we are courts that must give deference to Congress in the fields that are within its constitutional power.

SPECTER: Well, do you agree with Chief Justice Roberts? I sent you that quotation a long time ago and told you I'd ask you about it. Do you agree with him or not?

SOTOMAYOR: I agree to the extent that one's talking about the deference that Congress is owed. I can't speak for what he intended to say by that. I can speak to what I understand...

SPECTER: Well, not what he intended to say, what he did say.

SOTOMAYOR: I heard what he said, sir, but I don't know what he intended in that description. I do know what I -- what I can say, which is that I do understand the importance to Congress' factual findings, that my cases and my approach in my cases reflect that. I've had any number of cases where the question was deference to congressional findings. And I have upheld statutes because of that deference.

SPECTER: Is there anything the Senate or Congress can do if a nominee says one thing seated at that table and does something exactly the opposite once they walk across the street?

SOTOMAYOR: That, in fact, is one of the beauties of our constitutional system, which is we do have a separation of...

SPECTER: Beauty -- beauty in the eyes of the beholder. It's only Constitution Avenue there.

SOTOMAYOR: Well, the only advantage you have in my case is that I have a 17-year record that I think demonstrates how I approach the law and the deference with which -- or the deference I give to the other branches of government.

SPECTER: I think your record is exemplary, Judge Sotomayor, exemplary. I'm not commenting about your answers, but your record is exemplary. (LAUGHTER) Let me -- and you'll be judged more on your record than on your answers, Judge Sotomayor.

And for those who are uninitiated, your preparation, appropriately, is very careful. They call them murder boards at the White House. I don't know what you did, and I'm not asking. We've had a lot of commentary. And you've studied the question, and you've studied the record, and your qualifications as a witness is terrific in accordance with the precedents. You're following the precedents there very closely.

Let me move to television and the courts. And it's a question that many of us are interested in. I always ask it. I've introduced legislation twice -- come out of committee twice -- to require the court to televise. The court doesn't have to listen to Congress. The court can say separate powers precludes our saying anything.

But the Congress does have administrative, procedural jurisdiction. We decide the court convenes the first moment in October. We decide there are nine justices. We tried to make it 15 once in a court-packing era, six justices for a quorum, et cetera. Speedy trial act telling the courts how they have to move at a certain speed, habeas corpus, on time limits.

Justice Stevens has said that it's worth a try. Justice Ginsberg, at one time, said that if it was gavel to gavel, it would be fine. Justice Kennedy said it was inevitable. The record of the justices appearing on television is extensive. Chief Justice Roberts and Justice Stevens were on primetime ABC, Justice Ginsberg on CBS, Justice Breyer on Fox News, and so forth down the line.

We all know that the Senate and House are televised, and we all know the tremendous, tremendous interest in your nominating process. And it happens all the time. There's a lot of public interest. But the court is the last accountable. In fact, you might say the court is unaccountable.

When *Bush v. Gore* was decided, then-Sen. Biden and I wrote to Chief Justice Rehnquist asking that television be permitted and got back a prompt answer no. And that was quite a scene across the street. The television trucks were just enormous, all over the place.

You had to be at chairman of a committee to get a seat inside the -- inside the chamber. The Supreme Court decides all the cutting-edge questions of the day -- the right of a woman to choose, abortion, the death penalty, organized crime, every cutting-edge question.

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SPECTER (cont'd): And Bush v. Gore was probably the biggest -- one of the biggest cases, arguably, the biggest case. More than 100 million people voted in that election, and the presidency was decided by one vote. And Justice Scalia had this to say about irreparable harm: "The counting of votes that are of questionable legality does, in my view, threaten irreparable harm to" -- referring to President Bush or candidate Bush -- "and to the country by casting a cloud upon what he claims to be the legitimacy of the election.

"Permitting the court to proceed on that erroneous basis will prevent an account -- an accurate recount from being conducted on a proper basis later."

Hard to understand what recount there was going to be later. I wrote about it at the time, saying....

...that I thought it was an atrocious accounting of -- of irreparable harm, hard to calculate -- hard to calculate that.

And my question, Judge Sotomayor: Shouldn't the American people have access to what is happening in the Supreme Court, try to understand it, to have access to what the judges do by way of their workload, by way of their activities when they adjourn in June and reconvene in October, this year in September? Wouldn't it be more appropriate in a democracy to let the people take a look inside the court through television?

The Supreme Court said in the Richmond Newspapers case decades ago that it wasn't just the accused that had a right to a public trial; it was the press and the public, as well. And now it's more than newspapers. Television is really paramount. Why not televise the court?

SOTOMAYOR: As you know, when there have been options for me to participate in cameras in the courtroom, I have. And as I said to you when we met, Senator, I will certainly relay those positive experiences, if I become fortunate enough to -- to be there to discuss it with my colleagues, and that question is an important one, obviously.

There's legislation being considered both by -- or has been considered by Congress at various times. And there's much discussion between the branches on that issue.

It is an ongoing dialogue. It is important to remember that the court, because of this issue, has over time made public the transcripts of its hearings quicker and quicker. If I'm accurate now, it used to take a long time for them to make those transcripts available, and now they do it before the end of the day. It's an ongoing process of discussion.

SPECTER: Thank you, Judge Sotomayor. Thank you, Mr. Chairman.

LEAHY: (OFF-MIKE) Senator Specter. And in the last of our -- of this round of questioning will be Senator Franken, the newest member of the committee. Senator, I didn't officially welcome you the other day as I should have when we have new members, but welcome -- welcome to the committee. I offer you congratulations and condolences at the same time. (LAUGHTER)

FRANKEN: Well, I'll take the congratulations.

LEAHY: You come in with one of the -- OK, well, that was most heartfelt. I'm glad you're here. Please go ahead.



FRANKEN: Thank you, Mr. Chairman. And thank you, Judge Sotomayor, for sitting here so patiently and for all your thoughtful answers throughout the hearing. Before lunch, our senior senator from Minnesota, Amy Klobuchar, asked you why you became a prosecutor, and you mentioned "Perry Mason." I was a big fan of "Perry Mason." I watched "Perry Mason" every week with my dad and my mom and my brother. And we'd watch the clock. And when -- we knew when it was two minutes to the half-hour that the real murder would stand up and confess. It was a great show.

And it amazes me that you wanted to become a prosecutor based on that show because, in "Perry Mason," the prosecutor, Berger, lost every week, with one exception that we'll get to later.

But I think that says something about your determination to defy the odds. And while you were watching "Perry Mason" in the South Bronx with your mom and your brother, and I was watching "Perry Mason" in suburban Minneapolis with my folks and my brother, and here we are today. And I'm asking you questions because you have been nominated to be a justice of the United States Supreme Court. I think that's pretty cool.

As I said in my opening statement, I see these proceedings both as a way to take a judgment of you and of any nominee suitability for the high court, but also as a way for Americans to learn about the court and its impact on their lives.

Right now, people are getting more and more of their information on the Internet. We're getting newspapers and television and blogs and radio. Americans are getting all of it online.

It plays a central role in our democracy by allowing anyone with a computer connected to the Internet to publish their ideas, their thoughts, their opinions, and reach a worldwide audience of hundreds of millions of people in seconds. This is free speech, and this is essential to our democracy and to democracy. We saw this in Iran not long ago. Now, Judge, you're familiar with the Supreme Court's 2005 Brand X decision, are you?

SOTOMAYOR: I am.

FRANKEN: OK. Well, then you know that Brand X deregulated Internet access services, allowing service providers to act as gatekeepers to the Internet, even though the Internet was originally government funded and built on the notion of common carriage and openness. In fact, we've already seen examples of these companies blocking access to the Web and discriminating on certain uses of the Internet. This trend threatens to undermine the greatest engine of free speech and commerce since the printing press.

Let's say you're living in Duluth, Minnesota, and you only have one Internet service provider. It's a big mega-corporation, and not only are they the only Internet service provider, but they're also a content provider. They provide -- they own newspapers. They own TV networks. They -- or network. They have a movie studio.

They decide to speed up their own content and slow down other content. The Brand X decision by the Supreme Court allows them to do this. And this isn't just Duluth. It's Moorhead, Minnesota, it's Rochester, Minnesota, it's Youngstown, Ohio. It's Denver. It's San Francisco. And, yes, it's New York.

This frightening. It's frightening to me and to millions of my constituents or lots of my constituents. Internet connections use public resources; the public airwaves, the public rights of way. Doesn't the American public have a compelling First Amendment interest in ensuring that this can't happen and that the Internet stays open and accessible? In other words, that the Internet stays the Internet?

SOTOMAYOR: Many describe the telephone as a revolutionary invention, and it did change our country dramatically. So did television. And its regulation of television and the rules that would apply to it were

considered by Congress, and those regulations have -- because Congress is the policy chooser on how items related to interstate commerce and communications operate.

And that issue was reviewed by the courts in the context of the policy choices Congress made. There is no question in my mind as a citizen that the Internet has revolutionized communications in the United States. And there's no question that access to that is a question that society is -- that our citizens as well as yourself are concerned about.

But the role of the court is never to make the policy. It's to wait until Congress acts and then determine what Congress has done in its constitutionality in light of that ruling. Brand X, as I understood it, was a question of which government agency would regulate those providers.

And the court, looking at Congress' legislation in these two areas, determined that it thought it fit in one box not the other, one agency instead of another.

FRANKEN: Is this Title 1 and Title 2? Or as I understand it, Title 2 is very -- is subject to a lot of regulation and Title 1 isn't.

SOTOMAYOR: Exactly. But the question was not so much stronger regulation or not stronger regulation. It was which set of regulations, given Congress' choice, controlled. Obviously, Congress may think that the regulations the court has, in its holding interpreting Congress' intent and that Congress thinks the court got to wrong, we're talking about statutory interpretation and Congress' ability to alter the court's understanding by amending the statute if it chooses.

This is not to say that I minimize the concerns you express. Access to Internet, given its importance in everything today -- most businesses depend on it. Most individuals find their information. The children in my life virtually live on it now.

And so its importance implicates a lot of different questions: freedom of speech, freedom with respect to property rights, government regulation. There's just so many issues that get implicated by the Internet that what the court can do is not choose the policy. It just has to go by interpreting each statute and trying to figure out what Congress intends.

FRANKEN: I understand that. But isn't there a compelling First Amendment right here for people? No matter what Congress does -- and I would urge my colleagues to take this up and write legislation that I would like -- but isn't there a compelling, overriding First Amendment right here for Americans to have access to the Internet?

SOTOMAYOR: Rights by a court are not looked at as overriding in the sense that I think a citizen and not -- or a citizen would think about it. Should this go first or should a competing right go second? Rights are rights. And what the court looks at is how Congress balanced those rights in a particular situation and then judges whether that balance is within constitutional boundaries.

Calling one more compelling than the other suggests that there's sort of, you know, property interests are less important than First Amendment interests. That's not the comparison a court makes. The comparison a court makes starts with what balance did Congress choose first? And then we'll look at that and see if it's constitutional.

FRANKEN: OK, so we've got some work to do on this. I want to get into judicial activism. I brought this up in my opening statement. As I see it, there's kind of an impoverishment of our political discourse when it comes to the judiciary. I'm talking in politics.

When candidates or officeholders talk about the -- what kind of judge they want, it's very often just reduced to, "I don't want an activist judge. I don't want a judge that's going to legislate." And that's sort of it. That's it. It's a 30-second sound bite.

As I and a couple of other senators mentioned during our opening statements, judicial activism has become a codeword for judges that you just -- you don't agree with. Judge, what is your definition of judicial activism?

SOTOMAYOR: It's not a term I use. I don't use the term, because I don't describe the work that judges do in that way. I assume the good faith of judges in their approach to the law, which is that each one of us is attempting to interpret the law according to principles of statutory construction and other guiding legal principles, and to come in good faith to an outcome that we believe is directed by law.

When I say we believe, hopefully we all go through the process of reasoning it out and coming to a conclusion in accordance with the principles of law.

I think you're right that one of the problems with this process is that people think of activism as the wrong conclusion in light of policy. But hopefully judges -- and I know that I don't approach judging in this way at all -- are not imposing policy choices in -- or their views of the world or their views of how things should be done. That would be judicial activism, in my sense, if a judge was doing something improper like that.

But I don't use that word because that's something different than what I consider to be the process of judging, which is each judge coming to each situation trying to figure out what the law means, the applying it to the particular fact before that judge.

FRANKEN: OK, you don't use that -- that word or that phrase. But in political discourse about the role of the judiciary, that's almost the only phrase that's ever used. And I think that there has been an ominous increase in what I consider judicial activism of late. And I want to ask you about a few cases and see if you can shed some light on this for -- for us and for the people watching at home or in the office.

I want to talk about Northwest Austin utility district number one, the holder, the recent Voting Rights Act case. And Senator Cardin mentioned it, but he -- he didn't get out his pocket Constitution, as I -- I am. The 15th Amendment was passed after the Civil War. It specifically gave Congress the authority to pass laws to protect all citizens' right to vote.

And it said, Section 1, Amendment number 15, section one, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color or previous condition of servitude." Section two -- this one's important. "The Congress shall have power to enforce this article by appropriate legislation," -- the Congress.

Well, Congress used that power to -- the power vested in them under Section two -- when it passed the Voting Rights Act of 1965. Now, the Voting Rights Act has an especially strong provision, section five, that requires states with a history of discrimination to get preapproval from the Justice Department on any changes that they make in their voting regulations.

Congress has reauthorized this four times as recently as -- the last time was 2006. And the Senate supported it by a vote of 98 to zero. Every single senator from the state covered by Section 5 voted to reauthorize it. So now

it's 2009, and we have this case, the Northwest Austin Utility district number one. And Justice Thomas votes to hold Section 5 unconstitutional. He said it went beyond the mandate of the 15th Amendment because it wasn't necessary any more. That's what he said.

Now, when I read the 15th Amendment, it doesn't say -- it doesn't contain any limits on Congress' power. It just says that we have it. It doesn't say if necessary the Congress shall have power to enforce this article. It just says that we have the power.

So it is my understanding that the 15th Amendment contains a very strong, very explicit and unambiguous grant of power to the Congress. And because of that, the courts should pay greater deference to it. And my question is is that your view?

SOTOMAYOR: As you know, some of the justices in that recent decision expressed the view that the court should take up the constitutionality of the Voting Rights Act and review of its continuing necessity. Justice Thomas expressed his view.

That very question, given the decision and the fact that it left that issue open is a very clear indication that that's a question that the courts are going to be addressing, if not immediately the Supreme Court, certainly the lower courts. And so expressing a view -- agreeing with one person in that decision or another, would suggest that I have made a prejudgment on this question.

FRANKEN: So that means you're not going to tell us? (LAUGHTER) I didn't mean to finish your sentence.

SOTOMAYOR: No, no, no, no. All I can say to you is I have one decision, among many, but one decision on the Voting Rights Act (inaudible) the recent reauthorization by Congress but a prior amendment where I suggested that these issues needed -- issues of changes in the Voting Rights Act should be left to Congress in the first instance.

My jurisprudence shows the degree to which I give deference to Congress' findings whether in a particular situation that compel or doesn't or leads to a particular result is not something that I can opine on because, particularly, the issue you're addressing right now is likely to be considered by the courts.

The ABA rule says no judge should make comments on the merits of any pending or impending case. And this clearly would be an impending case.

FRANKEN: OK. It's fair to say, though, in your own decision, you gave deference to Congress just like you answered by neutrality thing saying it's up to Congress.

SOTOMAYOR: Well...

FRANKEN: It feels like this is very explicitly up to Congress.

SOTOMAYOR: I gave deference to the exact language that Congress had used in the Voting Rights Act and how it applied to a challenge in that case. FRANKEN: OK. Now, voting to overturn federal legislation, to me at least, seems to be one definition of what people understand as judicial activism. But I want to talk about some cases that I've seen that I think showed judicial activism functioning on a more pernicious level. First, let's take a look at a case called Gross v. FBL Financial Services that the street issued last month. Are you familiar with that?

SOTOMAYOR: I am.

FRANKEN: OK. Now, Gross involved the age discrimination and employment act or ADEA. And now, before Gross, you could bring an age discrimination suit whenever you could show that age was one of the factors an employer considered in choosing to fire you.

When the Supreme Court agreed to hear the case, it said it would consider just one question: Whether you needed direct evidence of age discrimination to bring this kind of lawsuit or whether indirect evidence would suffice.

That's the issue that they said that they would consider when they took the case. But when the Supreme Court handed out its decision, it ruled on a much larger matter: Whether a worker could bring a suit under ADEA if age was only one of several reasons for being demoted or fired.

FRANKEN: The Supreme Court barred these suits saying that only suits alleging that age was the determinative factor for the firing, only those could be brought under the ADEA.

This change has significantly eroded workers' rights, by making it much harder for workers to defend themselves from age discrimination, including any fired just before they would have seen a large increase in their pension. "You weren't fired because you were too old, you were fired because your pension is going to increase soon"

So this is a big deal. When you go to court to defend your rights, you have to know what rights you're defending. The parties in the Gross (ph) case thought they were talking about what kind of evidence was necessary in a discrimination suit, then the court just said, "No, we're banning that kind of suit altogether"

I think that's unfair to everyone involved. It's especially unfair to the man who is trying to bring the discrimination suit. So let me ask you a couple of questions on this. First, as an Appellate Court judge, how often have you decided a case on an argument or a question that the parties have not briefed?

SOTOMAYOR: I don't think I have, because, to the extent that the parties have not raised an issue, and the Circuit Court, for some reason, the panel has thought that it was pertinent. Most often that happens on questions of jurisdiction, can the court hear this case at all?

Then you issue, or we have issued a direction to the parties to brief that question. So it is briefed in part of the argument is raised. There are issues that the parties brief, that the briefing itself raises the issue for the court to consider.

So it's generally the practice, at least on the 2nd Circuit, is to give a party an opportunity to be heard on a question. And we also have a procedure on the circuit that would give a party to be heard that they can also file the petition for rehearing, which is the panel enters a decision that the party disagrees with and thinks the court has not given it an adequate opportunity to present its argument. Then it can file that at the circuit.

I don't have -- I am familiar with the Northwest (ph) case. I am familiar with the holding of that case. I'm a little less familiar and didn't pay as much attention...

FRANKEN: With Gross (ph).

SOTOMAYOR: ... to the briefing issue. I do know there, that like the Brand X case, what the court says it was attempting to do, is to discern what Congress' intent was under the ADA, whether it intended to consider mixed motive or not as a factor in applying the statute and the majority holding, as I understood it was, "Look, Congress, amended Title 7, to set forth the mixed motive framework and directed the courts to apply that

framework in the future, but having amended that, it didn't supply that amendment to the age discrimination statute."

SOTOMAYOR: And so that would end up in a similar situation to the Brand X Case, which is, to the extent that Congress determines that it does want mixed motive to be a part of that analysis, that it would have the opportunity, and does have the opportunity to do what it did in Title VII, which is to amend the act.

FRANKEN: Well, in Title VII, they amended the act because they had to. They were forced to, right? Congress was impelled to, in the sense, but not on -- not on ADEA?

SOTOMAYOR: I -- I don't like characterizing the reasons for why Congress acts or doesn't act.

FRANKEN: OK. I got you. Let me jump ahead to something. Yesterday, a member of this committee asked you a few times whether the word "abortion" appears in the Constitution, and you agreed that, no, the word "abortion" is not in the Constitution. Are the words "birth control" in the Constitution?

SOTOMAYOR: No, sir.

FRANKEN: Are -- are you sure?

SOTOMAYOR: Yes.

FRANKEN: OK. (LAUGHTER) Are the words "privacy" in the Constitution or the word?

SOTOMAYOR: The word "privacy" is not.

FRANKEN: Senators Kohl, Feinstein, and Cardin all raised the issue of privacy, but I want to hit this head on. Do you believe that the Constitution contains a fundamental right to privacy?

SOTOMAYOR: It contains, as has been recognized by the courts for over 90 years, certain rights under the liberty provision of the due process clause that extend to the right to privacy in certain situations.

This line of cases started with a recognition that parents have a right to direct the education of their children and that the state could not force parents to send their children to public schools or to bar their children from being educated in ways a state found objectionable.

Obviously, states do regulate the content of education, at least in terms of requiring certain things with respect to education that I don't think the Supreme Court has considered, but the basic -- that basic right to privacy has been recognized and was recognized. And there have been other decisions.

FRANKEN: So the issue of whether a word actually appears in the Constitution is not really relevant, is it?

SOTOMAYOR: Certainly, there are very specific words in the Constitution that have to be given direct application. There are some direct commands by the Constitution. You know, senators have to be a certain age to be senators. And so you've got to do what those words say.

But the Constitution is written in broad terms. And what a court does is then look at how those terms apply to a particular factual setting before it.

FRANKEN: OK. In *Roe v. Wade*, the Supreme Court found that the fundamental right to privacy included the right to decide whether or not to have an abortion. And as Senator Specter said, that's been upheld or ruled on many times. Do you believe that this right to privacy includes the right to have an abortion?

SOTOMAYOR: The court has said in many cases -- and as I think has been repeated in the court's jurisprudence in *Casey* -- that there is a right to privacy that women have with respect to the termination of their pregnancies in certain situations.

FRANKEN: OK. I -- we're going to have a round two, so I'll ask you some more questions there. What was the one case in "Perry Mason" that Berger won?

SOTOMAYOR: There -- I wish I remembered the name of the episode, but I don't. I just was always struck that there was only one case where his client was actually guilty.

FRANKEN: And you don't remember that case?

SOTOMAYOR: I know that I should remember the name of it, but I haven't looked at the episode. I...

FRANKEN: Didn't the White House prepare you for that?

SOTOMAYOR: You're right, but I was spending a lot of time on reviewing cases. No, sir. But I do have that stark memory because, like you, I watched it all of the time, every week as well. I just couldn't interest my mother, the nurse, and my brother, the doctor, to do it with me.

FRANKEN: Oh. Oh, OK. Well, I -- we -- our whole family watched it, and -- because there was no Internet at the time, you and I were watching at the same time. And I thank you, and I guess I'll talk to you in the follow-up.

SOTOMAYOR: Thank you.

LEAHY: Is the senator from Minnesota going to tell us which episode that was?

FRANKEN: I don't know. That's why I was asking. If I knew, I wouldn't have asked her.

LEAHY: All right. Well -- so, because of that, Judge, we will not hold your inability to answer the question against you.

Now, on one of the -- I just discussed this with Senator Sessions, but I'll make the formal request: is there any objection for the committee now proceeding to a closed session, which is a routine practice we've followed for every nominee since back when Senator Biden was chairman of this committee?

SESSIONS: Mr. Chairman, thank you. I think that's the right thing to do, and there'll be no objection that I know of.

LEAHY: Thank you very much. I appreciate the comments. So, hearing none, the committee will proceed to a closed session, and we will resume public hearings later this afternoon. And for the sake of those who have to handle all the electronic kind of things, we'll try to give you enough of a heads-up.

We'll stand in recess.

(RECESS)

LEAHY: Welcome back, judge. We will skip over one, go to Senator Feingold. You are recognized for up to 20 minutes. I keep adding the "up to" hoping somebody will follow my example. But I do mean nobody will be cut off before 20 minutes.

FEINGOLD: Thank you, Mr. Chairman. I understand, and I'd like to begin using my time by asking that a letter from former members of PRLDEF board describing the role of board members, which does not include choosing or controlling litigation. I'd ask unanimous consent.

LEAHY: Without objection, it will be part of the record.

FEINGOLD: Thank you, Mr. Chairman. Judge, again, of course, thanks for your tremendous patience. I'd like to start by talking for a moment about the recent Supreme Court decision in Caperton versus Massey. I consider this a significant case that bears upon the flood of special interest money that threatens to undermine public confidence in our justice system.

The facts of this case are notorious. John Grisham used them as an inspiration for his novel "The Appeal." A jury in West Virginia returned a \$50 million verdict for a large coal company. And pending the appeal, the company's CEO spent \$3 million to elect an attorney named Brent Benjamin to the state supreme court. That was a huge amount of money, relatively speaking, more than the amounts spent by all of Benjamin's other financial supporters combined. Benjamin won the election, because a West Virginia Supreme Court justice, and lo and behold, he voted to overturn that \$50 million verdict against his main campaign contributor.

Twice he refused to recuse himself in the case despite his obvious conflict of interest. And last month the Supreme Court held that Benjamin's failure to recuse himself was intolerable under our Constitution's guarantee of due process of law.

The court also noted approvingly that most states have adopted codes of judicial conduct that prevent this kind of conflict. And to that end, I commend the Wisconsin Supreme Court's plan to revise its recusal rules to provide additional safeguards that protect judicial impartiality.

You've been a judge for many years and you many have seen examples when you thought a judge should have withdrawn, although hopefully none were as egregious as this case.

In your opinion, what additional steps should judges and legislators take to ensure that the judiciary is held to the highest ethical standards and that litigants can be confident that their cases will be handled impartially?

SOTOMAYOR: Senator, I would find it inappropriate to make suggestions to Congress about what standards it should hold judges to or litigants. That's a policy choice that Congress will consider.

I note that the American Bar Association has a code of conduct that applies to litigants. The judicial code has a code of conduct for judges. And as you noted in the state system where judges are elected, many states are doing what I just spoke about, making -- passing regulations.

Caperton was a case that was taken under the local rules of the Supreme Court presumably that exercises supervisory powers over the functions of the courts. And it presented obviously a significant issue because the court took it and decided the case.

At issue fundamentally is that judges, lawyers, all professionals must on their own abide by the highest standards of conduct. And I have given a speech on this topic to students at Yale at one point where I said, the law is only the minimum one must do, personally one must act in a way in cases to ensure that you're acting consistent with your sense of meeting the highest standards of the profession.



FEINGOLD: Thank you, Judge. As I'm sure you know, on the last day of the term, the Supreme Court ordered that a pending case involving federal election law called Citizens United versus FEC be reargued in September.

It's quite possible that you will be a member of the court by then. I do not intend to ask you how you'd rule in that case, but I do want to express my very deep concern about where the Supreme Court may be heading and then pose a general question to you.

In 2003, the court in a 5-4 ruling upheld the McCain-Feingold bill against constitutional challenge. I believe that ruling accurately applied the court's previous precedents and recognized that Congress must have the power to regulate campaign finance to address serious problems of corruption and the appearance of corruption.

Since the arrival on the court of its two newest members, the court seems to have started in another direction on these issues, striking down or significantly narrowing two provisions of the law, the millionaires' (ph) amendment to the Davis case and the issue ad provision in Wisconsin Right to Life.

Several justices have even argued that corporations and living persons should have the same constitutional rights to support their chosen candidates and that *Austin v. Michigan Chamber of Commerce*, a case rejecting that idea, should be overruled.

*Austin* is premised on what I believe is an absolutely reasonable conclusion that the political activities of corporations may be subjected to greater regulation because of the legal advantages given to them by the states that allow them to amass great wealth.

In scheduling reargument in the *Citizen United* case, the court specifically asked the parties to address whether *Austin* should be overruled. If the court does that and depending on how exactly it rules, Judge, it may usher in an era of unlimited corporate spending on elections that the nation has not seen since the 19th century. Without addressing the specifics of the *Citizen United* case, I'd like to ask you what the Constitution and the Supreme Court's precedents generally provide about the rights of corporations and what the current state of the law as far as corporate participation in elections is, as you understand it.

SOTOMAYOR: Senator, I have attempted to answer every question that's been posed to me. You have noted that *Citizens United* is on the court's docket for September. I think it's September 9th. If I were confirmed for the court -- to the court, it would be the first case that I would participate in.

Given that existence of that case, the very first one, I think it would be inappropriate for me to do anything to speak about that area of the law because it would suggest that I'm going into that process with some prejudice about what precedent says and what it doesn't say and how to apply it in the open question the court is considering. I appreciate what you have said to me. But this is a special circumstance, given the pendency of that particular case.

FEINGOLD: And, frankly, Judge, I -- I probably would say the same thing if I were in your shoes, given -- given -- given the -- the facts as -- as they are. I appreciate the opportunity to express what I wanted to say about that. And with that, Mr. Chairman, I am going to use up less than half of my time.

LEAHY: I thank you. I think you have set a fantastic example. I commend you. I say that in a totally non-partisan fashion. Senator Grassley?

GRASSLEY: I assume that I get the time that he didn't use.

LEAHY: No, no. After you demonstrated -- was it yesterday you demonstrated that you intend to turn people on. We don't need any more -- we don't need any more excitement, Senator Grassley. We want it as low key as possible. But you -- you do have up to 20 minutes. The operative word is up to 20 minutes.

GRASSLEY: Now, I believe that I'm going to ask you something you never been asked before during this hearing, I hope. I'd like to be original on something.

I want to say to you that there's a Supreme Court decision called Baker v. Nelson, 1972. It says that the federal courts lack jurisdiction to hear due process and equal protection challenges to state marriage laws, quote, "for one of substantial federal question," which obviously is an issue the courts deal with quite regularly. I mean, the issue of is it a federal question or not a federal question. So do you agree that marriage is a question reserved for the states to decide based on Baker v. Nelson?

SOTOMAYOR: That also is a question that's...

GRASSLEY: I thought I was asking...

SOTOMAYOR: ... pending and impending in many courts. As you know, the issue of marriage and what constitutes it is a subject of much public discussion. And there's a number of cases in state courts addressing the issue of what -- who regulates it, under what terms.

GRASSLEY: Can I please interrupt you? I thought I was asking a very simple question based upon a precedent that Baker v. Nelson is based on the proposition that yesterday in so many cases, whether it was Griswold (ph), whether it was Roe v. Wade, whether it was Chevron, whether it's a whole bunch of other cases that you made reference to, the Casey (ph) case, the Gonzalez (ph) case, the Leegin Creative Leather Products case, the Kelo case. You made that case to me. You said these are precedents. Now, are you saying to me that Baker v. Nelson is not a precedent?

SOTOMAYOR: No, sir. I just haven't reviewed Baker in a while. And so, I actually don't know what the status is. If it is the court's precedent, as I've indicated in all of my answers, I will apply that precedent to the facts of any new situation that implicates it.

GRASSLEY: Well...

SOTOMAYOR: What was the first question (inaudible)...

GRASSLEY: ... then, tell me -- tell me what sort of a process you might go through if a case -- a marriage case came to the Supreme Court of whether Baker v. Nelson is precedent or not. Because I assume if it is precedent, based on everything you told us yesterday, you're going to follow it.

SOTOMAYOR: The question on a marriage issue will be two sides will come in. One will say Baker applies. Another will say this court's precedent applies to this factual situation, whatever the factual situation is before the court. They'll argue about what the meaning of that precedent is, how it applies to the regulation that's at issue. And then the court will look at whatever it is that the state has done, what law it has passed on this issue of marriage and decide, OK, which precedent controls this outcome.

It's not that I'm attempting not to answer your question, Senator Grassley. I'm trying to explain the process that would be used. Again, this question of how and what is constitutional or not or how a court will approach a case and what precedent to apply to it is going to depend on what's at issue before the court. Could the state do what it did?

GRASSLEY: Can I interrupt you again? Following what you said yesterday, that certain things are precedent, I assume that you've answered a lot of questions before this committee about, even after you said that certain things are precedent, of things that are going to come before the court down the road when -- if you're on the Supreme Court. You didn't seem to compromise or hedge on those things being precedent. Why are you hedging on this?

SOTOMAYOR: I'm not on this because the holding of Baker v. Nelson, as it's holding. As a holding, it would control any similar issue that came up.

It's been a while since I've looked at that case, so I can't, as I could with some of the more recent precedent of the court or the more core holdings of the court on a variety of different issues, answer exactly what the holding was and what the situation that it apply to.

I would be happy, Senator, as a follow up to a written letter or to give me the opportunity to come back tomorrow and just address that issue. I'd have to look at Baker again.

GRASSLEY: I would appreciate it.

SOTOMAYOR: It's been too long since I've looked at it. And so -- it may have been, sir, as far back as law school, which was...

GRASSLEY: Oh, you were probably...

SOTOMAYOR: ... 30 years...

GRASSLEY: ... probably in grade school, you were, at that time.

SOTOMAYOR: It was -- that I looked at it, sir.

LEAHY: It's one line. It's just one line. You could read it (OFF-MIKE)

GRASSLEY: OK. I want to go on and -- but I would like to have you do that, what you suggested, you'd answer me further after you studied it.

I have a question that kind of relates to the first question. In 1996, Congress passed and President Clinton signed into law the Defense of Marriage Act, which defined marriage for the purpose of federal law as between one man and one woman. It also prevents a state or territory from giving effect to another state that recognized same-sex marriages.

Both provisions have been challenged as unconstitutional, and federal courts have upheld both cases. One is a Wilson (ph) case; one is a Bishop (ph) case. A district court -- yes, a district court. Do you agree with federal courts, which have held that the Defense of Marriage Act does not violate the full faith and credit clause and is an appropriate exercise of Congress's power to regulate conflicts between laws of different states?

SOTOMAYOR: That's very similar to the Austin (ph) situation, but the ABA rules would not permit me to comment on the merits of a case that's pending or impending before the Supreme Court. The Supreme Court has not addressed the constitutionality of that statute. And to the extent that lower courts have addressed it and made holdings, it is an impending case that could come before the Supreme Court, so I can't comment on the merits of that case.

GRASSLEY: Have you ever made any rulings on the full faith and credit clause?

SOTOMAYOR: I may have, but if your specific question is, have I done it with respect to a marriage-related issue, no.

GRASSLEY: Well, not -- on -- on anything on the full faith and credit clause.

SOTOMAYOR: I actually have no memory of doing so. GRASSLEY: OK. That's OK. No, you can stop there. That's OK. Now, I'm going to go to a place where Senator Hatch left off, but I'm not going to repeat any of the questions that he asked. But there's one that I want to ask. And I feel a little bit guilty of this. My dad used to have a saying to us kids that we're harping on something. He says, "When are you going to quit beating a dead horse?" But I want to ask you anyway.

You also wrote, quote, "I wonder whether achieving that goal is possible in all or even in most cases. And I wonder whether by ignoring our differences as women and men of color, we do a disservice both to the law and to society," end of quote.

So the certain I have about the statement is indicating that you believe judges should and must take into account gender, ethnic background, or other personal preferences in their decision-making process. Is that what you meant?

And I want to follow it up so I don't have to ask two questions. How is being impartial a disservice to the law and society? Isn't justice supposed to be blind?

SOTOMAYOR: No, I do not believe that judges should use their personal feelings, beliefs or value systems, or make -- to influence their outcomes, and neither do I believe that they should consider the gender, race or ethnicity of any group that's before them. I absolutely do not believe that.

With respect to -- yes, is the -- is the goal of justice to be impartial? That is the central role of a judge. The judge is the impartial decision-maker before parties who come before them.

My speech was on something else, but I have no quarrel with the basic principles that you have asked me to recognize. No quarrel sounds equivocal. I do believe in those things absolutely, and that's what I have proven I do as a judge.

GRASSLEY: OK. Then the last one on this point of another remark you made. You also stated that you, quote, "further accept that our experiences as women and people of color affect our decisions," end of quote, and then, further quote, "that personal experiences affect the facts that judges choose to see" and that, further quote, "there will be some differences in my judging" -- "differences in judging" is in parentheses -- "based on my gender and Latina heritage." Do you believe that it is ever appropriate for judges to allow their own identity politics to influence their judgment?

SOTOMAYOR: No, sir, absolutely not.

GRASSLEY: OK. Then I want to move on to another area. This question comes from your 1992 Senate questionnaire. You wrote in response to a question about judicial activism that, quote, "intrusions by a judge upon the functions of other branches of government should only be done as a last resort and limitedly." Is this still your position? And let me follow up. When would such an intrusion be justified? For example, what is an example of last resort? What is an example of limitedly?

SOTOMAYOR: The answer is, judges -- and the manner in which that question was responded to -- was, to the extent that there has been a violation of the Constitution in whatever manner a court identifies in a particular case, it has to try to remedy that situation in the most narrow way in order not to intrude on the functions of other branches or actors in the process.

The case that I -- was discussed in my history has been the Doe case, in which I joined the panel decision where the district court had invalidated a statute that -- found unconstitutional a statute that the legislature had passed on national security letters.

Our panel reviewed that situation and attempted to discern and did discern Congress's intent to be that despite a -- isolated provisions that might have to be narrowly construed to survive constitutional review, it held that the other provisions of the act were constitutional.

So the vast majority, contrary to what the district court -- and I'm not suggesting it was intending to violate what I'm describing, but the court took a different view than the circuit did, we upheld the statute in large measure. To the extent that we thought there were and found that there were two provisions that were unconstitutional, we narrowly construed them in order to assist in effecting Congress's intent. That's what I talked about limitedly in that answer.

GRASSLEY: OK. A little bit along the same line in your law review articles you wrote that, quote: "Our society would be straight-jacketed were not the courts, with the able assistance of the lawyers, constantly overhauling," and I don't know whether that's your emphasis or mine, but I've got it underlined, "overhauling the law and adapt" -- maybe I had better start over again.

Quote: "Our society would be straight-jacketed were not the courts, with the able assistance of the lawyers, constantly overhauling the law and adapting it to the realities of ever-changing social, industrial, and political changes."

Explanation of the statement from you. I think you're saying that judges can twist the law regardless of what the legislature, the elected branch of government has enacted into law. It's kind of my interpretation of that. Now obviously I think you're going to tell me you don't mean that, but at least you know where I'm coming from.

SOTOMAYOR: No, that interpretation was clearly not my intent. And I don't actually remember those particular words. But I do remember the speech. I'm assuming you're talking about "Returning Majesty to the Law." And there I was talking about a broader set of questions which was how to bring the public's respect back to the function of judges. And I was talking about the judges that lawyers have an obligation to explain to the public the reasons why what seems unpredictable in the law has reasons.

And I mentioned in that speech that one of the big reasons is that Congress makes new laws. That was the very first reason I discussed. And also that there is new technology, there is new developments in society.

And what lawyers do is come in and talk to you about, OK, we've got these laws, how do you apply them to this new situation? And what judges do -- and that's why I was talking about the assistance of judges, is -- of lawyers, is what you do is you look at the court's precedents, you look at what a statute says, and you try to understand the principles that are at issue and apply them to what the society is doing.

And that was the focus of my speech which was, talk to the public about the process. Don't feed into their cynicism that judges are activists, that judges are making law. Working at explaining to the -- to the public what

the process is. I also talked to -- part of my speech is what judges can do to help improve respect of the public in the legal process.

GRASSLEY: So the use of the word overhaul does not in any -- overhaul the law does not in any way imply usurpation of legislative power by the courts?

SOTOMAYOR: Right. No. And if you look at what I was talking about, it was the society develops. We are not today what we were a hundred years ago in terms of technology, medicine, so many different areas.

GRASSLEY: Yes.

SOTOMAYOR: There are new situations that arise and new facts that courts look at. You apply the law to those situations, but that is the process of judging, which is sort of trying to figure out what does the law say about a set of facts that may not have been imagined at the time of the founding of the Constitution but it's what the judge is facing then. How do you apply it to that?

GRASSLEY: I want to go back to Didden (ph) based upon my opportunity to reflect on some things you said yesterday. The -- the time limit to file a case in Didden (ph) was three years. Mr. Didden (ph) was approached for what he classified as extortion in November 2003. Two months later in January of 2004, he filed his lawsuit.

But under your ruling, Mr. Didden (ph) was required to file his lawsuit in July 2002, close to a year and-a-half before he was actually extorted. So that doesn't make sense to require someone to file a lawsuit on a perceived chance that an order might occur.

You also testified that the Supreme Court's Kelo decision was not relevant to the Didden (ph) holding. But your opinion in cursory fashion, which is a problem that we've addressed yesterday, states that if there was no statute of limitation issue, Kelo would have permitted Mr. Didden's (ph) property to be taken.

It's hard to believe that an individual's property can be seized when he refuses to be extorted without any Constitution violation taking place. It's even hard to believe that under these circumstances Mr. Didden (ph) did not deserve his day in court or at least some additional legal analysis.

Could you please explain how Mr. Didden (ph) could have filed his lawsuit July 2002 before he was extorted in November 2003? And also please explain why a July 2002 filing would not have been dismissed because there was no proof that Mr. Didden (ph) had suffered an injury, only an allegation that he might be injured in the future.

SOTOMAYOR: The basis of Mr. Didden's (ph) lawsuit was the state can't take my property and give it to a private developer and because that is not consistent with the takings clause of the Constitution. To the extent he knew the state -- and there's no dispute about this, that the state had found a public use for his property, that it had a public purpose, that it had an agreement with a private developer to let that developer take the property -- he knew that he was injured because his basic argument was, "The state can't do this. It can't take my property and give it to a private developer"

The Supreme Court in Kelo (ph) addressed that question and said, "Under certain circumstances, the state can do that if it's for a public use and for a public purpose" And so his lawsuit, essentially addressing that question, came five years after he knew what the state was doing.

The issue of extortion was a question of whether the private developer, in settling a lawsuit with them, was engaging in extortion and extortion is an unlawful asking of money with no basis. But the private developer had

a basis. He had an agreement with the state. And so that is a different issue than the timeliness of Mr. Didden's (ph) complaint.

CHAIRMAN: Thank you. Senator Cornyn, we'll recognize Senator Cornyn and then for those out to plan, we will recess until 9:30 tomorrow morning. Senator Cornyn.

CORNYN: Well, judge, let me first say that since this will be my last time in this hearing to address you, to say this has been my first confirmation hearing for a Supreme Court justice. And you have set a very high standard for me, for those I might have to consider, because there's always a possibility of future vacancies on the Supreme Court, as to responding to our questions, being very open with us. And I think really demonstrating the type of respect for the process that has really shown dignity to you and to our committee and we -- I thank you for that.

I thanked you in the beginning for your willingness to serve the public, as a prosecutor and as a judge and now willing to take on this really incredible responsibility. And I just really want to emphasize that again. I don't know if you thought, when you were being considered for this, what you would have to go through as far as the appearance before the Judiciary Committee, but it gets better after our hearings, I believe, so let me ask you one or two questions, if I might.

I want to follow-up on Senator Kyl's question on the selection of cases, under sure shurary (ph). As has been pointed out, there's maybe 1 percent of the cases that are petitioned for the Supreme Court actually will get an opinion from the Supreme Court and will be decided.

Now, Senator Kyl asked you what standards you would use and I just really want to concentrate on the impact that a Supreme Court case can have. I want to refer to one of your cases, the Boykin case, which was the housing case where a borrower -- you allowed that borrower to go forward, African-American, on a discrimination issue. And we've seen, throughout history, discrimination against minorities in housing, with red-lining and predatory lending, that led to the fair housing act, enacted by Congress, the Supreme Court has long recognized Title VII and VIII of the Federal Housing Act. So part of the coordinated scheme of federal civil rights laws enacted to end discrimination.

But there's still major challenges that are out there. The predatory lending still takes place. It's happened during this housing crisis, with the subprime mortgage market, targeted towards minority communities. I say that in great relationship to the Boykin case, which I agreed with your conclusions. It not only could affect the litigants that were before you, but could have an impact on industry practice, if in fact there was discrimination, and the case was decided by your court.

CARDIN: And the same thing is true in the Supreme Court, more so in the Supreme Court. It is the highest judgment of our land. And, yes, you have to be mindful when you take a case on cert as to the impact it will have on the litigants. Certainly, you have to take into consideration if there's been different, inconsistent rulings in the different circuits.

But it seems to me that one of the standards I would hope you would use is the importance of deciding this case for the impact it has on a broader group of people in our nation, whether it's a housing case that could affect a community's ability to get fair access to mortgages for homeownership or whether it's a case that could have an impact on a class of people, on -- on environmental or economic issues.

And I just would like to get from you whether this, in fact, is a reasonable request, as you consider certiorari requests, that one of the factors that is considered is the impact it has on the community at large.

SOTOMAYOR: As I indicated earlier, we don't make policy choices. That means that I would think it inappropriate for a court to choose a case because -- or a court -- a judge to choose a case based on some sense of, "I want this result on society." A judge takes a case to decide a legal issue, understanding its importance to an area of law and to arguments that parties are making about why it's important.

The question of impact is different than what a judge looks at, which is what's the state of the law in this question, and how and what clarity is needed and other factors.

But as I said, there's a subtle but important difference in separating out and making choices based on policy and how you would like an issue to come out than a question that a judge looks at, in terms of assessing the time at which a legal argument should be addressed.

CARDIN: And I respect that difference, and I don't want you to be taking a case to try to make policy, but I do think the need for clarity for the community as to what is appropriate conduct well beyond the litigants of a particular case is a factor where clarification is needed should weigh heavily on whether the court takes that type of case or not.

SOTOMAYOR: There's just no one factor that controls the choice where you say, "I'm going to look at every case this way." As I said, judges in -- well, I shouldn't talk, because I haven't -- I'm not there. But my understanding of the process is that it's not based on those policy implications of an outcome; it's based on a different question than that.

CARDIN: Well, let me conclude on one other case that you ruled on, where I also agree with your decision. That's the *Ford v. McGinnis*, where you wrote a unanimous panel opinion overturning a district court summary judgment finding in favor of the Muslim inmate who was denied by prison officials access to his religious meals marking the end of Ramadan.

You held that the inmate's fundamental rights were violated and that the opinions of the department of correction and religious authorities cannot trump the plaintiff's sincere and religious beliefs.

The freedom of religion is one of the basic principles in our Constitution, as I said in my opening comments. It was one of the reasons why my grandparents came to America. The freedom of religion, expression is truly a fundamental American right.

Please share with us your philosophy as to -- maybe it's a wrong use of terms -- but the importance of that provision in the Constitution and how you would go about dealing with cases that could affect that fundamental right in our Constitution.

SOTOMAYOR: I don't mean to be funny, but the court has held that it's fundamental in the sense of incorporation against the state. But it is a very important and central part of our democratic society that we do give freedom of religion, the practice of religion, that the Constitution restricts the -- the state from establishing a religion, and that we have freedom of expression in speech, as well.

Those freedoms are central to our Constitution. The *Ford* case, as others that I had rendered in this area, recognize the importance of that in terms of one's consideration of actions that are being taken to restrict it in a particular circumstance.

Speaking further is difficult to do. Again, because of the role of a judge, to say it's important, that it's fundamental, and it's legal and common meaning is always looked at in the context of a particular case. What's the state doing?



In the Ford case that you just mentioned, the question there before the court was, did the district court err in considering whether or not the religious belief that this prisoner had was consistent with the established traditional interpretation of a meal at issue, OK?

And what I was doing was applying very important Supreme Court precedent that said, it's the subjective belief of the individual. Is it really motivated by a religious belief?

It's one of the reasons we recognize conscientious objectors, because we're asking a court not to look at whether this is orthodox or not, but to look at the sincerity of the individual's religious belief and then look at what the state is doing in light of that. So that was what the issue was in Ford.

CARDIN: Well, thank you for that answer. And, again, thank you very much for the manner in which you have responded to our questions. Thank you, Mr. Chairman.

LEAHY: Thank you. Thank you very much, Senator Cardin. As I noted earlier, we will now recess until 9:30 tomorrow morning and wish you all a pleasant evening. Thank you.

Day 4 Part 1

SCHEDULED WITNESSES: JUDGE SONIA SOTOMAYOR, NOMINATED TO BE AN ASSOCIATE JUSTICE OF THE U.S. SUPREME COURT; REP. NYDIA M. VELAZQUEZ, D-N.Y.; REP. JOSE SERRANO, D-N.Y.;

MAYOR MICHAEL BLOOMBERG, I-NEW YORK CITY; KIM ASKEW, CHAIR, STANDING COMMITTEE, AMERICAN BAR ASSOCIATION; MARY BOIES, PRIMARY REVIEWER, AMERICAN BAR ASSOCIATION; CHUCK CANTERBURY, NATIONAL PRESIDENT, FRATERNAL ORDER OF POLICE; DAVID CONE, FORMER MAJOR LEAGUE BASEBALL PITCHER; JOANNE EPPS, DEAN, BEASLEY SCHOOL OF LAW, TEMPLE UNIVERSITY; LOUIS FREEH, FORMER DIRECTOR, FBI;

MICHAEL GARCIA, FORMER U.S. ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK; WADE HENDERSON, PRESIDENT AND CEO, LEADERSHIP CONFERENCE ON CIVIL RIGHTS; PATRICIA HYNES, PRESIDENT, NEW YORK CITY BAR ASSOCIATION; DUSTIN MCDANIEL, ATTORNEY GENERAL, STATE OF ARKANSAS; ROBERT MORGENTHAU, FORMER DISTRICT ATTORNEY FOR NEW YORK COUNTY;

RAMONA ROMERO, NATIONAL PRESIDENT, HISPANIC NATIONAL BAR ASSOCIATION; THEODORE SHAW, PROFESSOR, COLUMBIA LAW SCHOOL; KATE STITH, PROFESSOR OF LAW, YALE LAW SCHOOL; LINDA CHAVEZ, PRESIDENT, CENTER FOR EQUAL OPPORTUNITY; SANDY FROMAN, FORMER PRESIDENT, NATIONAL RIFLE ASSOCIATION OF AMERICA; STEPHEN HALBROOK, ATTORNEY;

TIM JEFFRIES, FOUNDER, P7 ENTERPRISES; PETER KIRSANOW, COMMISSIONER, U.S. COMMISSION ON CIVIL RIGHTS; DAVID KOPEL, INDEPENDENCE INSTITUTE; JOHN MCGINNIS, PROFESSOR, NORTHWESTERN UNIVERSITY SCHOOL OF LAW; NEOMI RAO, PROFESSOR, GEORGE MASON UNIVERSITY SCHOOL OF LAW; FRANK RICCI, DIRECTOR, FIRE SERVICES FOR THE CONNECTICUT COUNCIL ON OCCUPATIONAL SAFETY AND HEALTH;

DAVID RIVKIN, PARTNER, BAKER HOSTETLER; NICK ROSENKRANZ, PROFESSOR, GEORGETOWN UNIVERSITY SCHOOL OF LAW; ILYA SOMIN, PROFESSOR, GEORGE MASON UNIVERSITY SCHOOL OF LAW; LIEUTENANT BEN VARGAS, NEW HAVEN FIRE DEPARTMENT; CHARMAINE YOEST, AMERICANS UNITED FOR LIFE.

CHAIRMAN PATRICK LEAHY: Judge, thank you. Judge Sotomayor, welcome back to the committee for a fourth day. If this seems long, it is a day more than either Chief Justice Roberts or Justice Alito was called upon to testify, but you seem to have weathered it well, and I hope the senators have too.

Yesterday, we completed the extended first round of questions for an additional eight senators that are approximately halfway through a follow-up round. This morning, we can continue and, hopefully . . .

. . . conclude. Senator Kyl is recognized next for 20 minutes. And -- or as I say with hope springing eternal -- I keep saying up to 20 minutes. Nobody is required to use the full 20 minutes, but they -- I would hasten to add if everybody is certainly entitled to it. Senator Kyl?

KYL: Mr. Chairman, before I begin, for those who are watching this on television, I would just note that I don't think we put Judge Sotomayor on the hot seat with our questions, but we certainly did with the temperature in this room yesterday. (LAUGHTER) And for that, I apologize. And I note that it could get a little steamy this morning too. I know it's cold back there, but it's not at all cool where we are.

LEAHY: If I can respond to--

KYL: If there's ever a question about Judge Sotomayor's stamina in a very hot room, that question has been dispelled without any doubt whatsoever. (LAUGHTER)

LEAHY: If I might -- and I'll have to set the clock back for 20 minutes so this doesn't go into your time -- but it -- it is really an interesting thing because anybody that's gone up where the press are, it's like an icebox up there. And I'm hoping we can get this -- at least the microphone is working. I want to thank Senator Sessions for offering me his microphone yesterday, but that didn't work.

And I want to thank Senator Franken for letting me use his. So if we start clock back over so I don't take this out of Senator Kyl's time. Senator Kyl, please go ahead.

KYL: Thank you, and good morning, Judge.

SOTOMAYOR: Good morning.

KYL: If response to one of Senator Sessions' questions on Tuesday about the Ricci case, you stated that your actions in the case were controlled by established Supreme Court precedent. You also said that a variety of different judges on the appellate court were looking at the case in light of established Supreme Court and 2nd Circuit precedent.

And you said that the Supreme Court was the only body that had the discretion and the power to decide how these tough issues should be decided. Those are all quotations from you.

Now, I've carefully reviewed the decision, and I think the reality is different. No Supreme Court case had decided whether rejecting an employment test because of its racial results would violate the civil rights laws.

Neither the Supreme Court's majority in Ricci nor the four dissenting judges discussed or even cited any cases that addressed the question. In fact, the court, in its opinion, even noted -- and I'm quoting here -- that this action presents two provisions of Title 7 to be interpreted and reconciled with few, if any, precedents in the court of appeals discussing the issue.

In other words, not only did the Supreme Court not identify any Supreme Court cases that were on point, it found few, if any, lower court opinions that even addressed the issue. Isn't it true that you were incorrect in your earlier statement that you were bound by established Supreme Court and 2nd Circuit precedent when you voted each time to reject the firefighters' civil rights complaint?

SOTOMAYOR: Senator, I was -- let me place the Ricci decision back in context. The issue was whether or not employees who had -- were a member of a disparately impacted group had a right under existing precedent to bring a lawsuit, that they have a right to bring a lawsuit on the basis of a prima facie case, and what would that consist of?

That was established 2nd Circuit precedent and had been -- at least up to that point -- been concluded from Supreme Court precedents describing the initial burden that employees had.

KYL: Well--...

SOTOMAYOR: That was...

KYL: Are you speaking here now -- I mean, you said the right to bring the lawsuit. It's not a question of standing. There was a question of summary judgment.

SOTOMAYOR: Exactly. Of -- exactly, which is when you speak about a right to bring a lawsuit, I mean, what's the minimum amount of good-faith evidence do they have to actually file the complaint?

An established precedent said, you can make out an employee a prima facie case of a violation of Title VII under just merely by -- not merely -- that's denigrating it -- by showing a disparate impact. Then, the city was faced with the choice of, OK, we're now facing two claims, one...

KYL: If I could just interrupt, we only have 20 minutes here, and I'm aware of the facts of the case. I know what the claims were. The question I asked was very simple. You said that you were bound by Supreme Court and 2nd Circuit precedent. What was it? There is no Supreme Court precedent. And as the court itself noted, they could find few, if any, 2nd Circuit precedents.

SOTOMAYOR: The question was, the precedent that existed and whether viewing it, one would view this as the city discriminating on the basis of race or the city concluding that because it was unsure that its test actually avoided disparate impact, but still tested for necessary qualifications, was it discriminating on the basis of race by not certifying the test?

KYL: Well, so you disagree with the Supreme Court's characterization of the precedents available to decide the case?

SOTOMAYOR: It's not that I disagree. The question was a more focused one that the court was looking at, which was saying -- not more focused. It was a different look. It was saying, OK, you got these precedents. It says employees can sue the city. The city -- the city is now facing liability. It's unsure whether it can defeat that liability. It's -- and so it decides not to certify the test and see if it could come up with one that would still measure the necessary qualifications.

KYL: Let me interrupt again, because you're not getting to the point of my question. And I know, as a good judge, if I were arguing a case before you, you would say, "That's all fine and dandy, counsel, but answer my question."

Isn't it true that -- two things -- first, the result of your decision was to grant summary judgment against these parties? In other words, it wasn't just a question of whether they had the right to sue; you actually granted a summary judgment against the parties.

KYL: And, secondly, that there was no Supreme Court precedent that required that result. And I'm not sure what the 2nd Circuit precedent is. The Supreme Court said few, if any. And I -- I -- I don't know what the precedent would be. I mean, I'm not necessarily going to ask you to cite the case. But was there a case? And if so, what is it?

SOTOMAYOR: It was the ones that we discussed yesterday, the bushy line of cases that talked about the prima facie case and the obligations of the city in terms of defending lawsuits claiming disparate impact. And so, the question then became how do you view the city's action. Was it a -- and that's what the District Court had done in its 78-page opinion to say you've got a city facing liability --

KYL: OK, all right. So, so you contend that there was 2nd Circuit precedent. Now, on the en banc review, of course, the question there is different because you're not bound by any three- judge panel decision in your circuit. So what precedent would have bound -- and yet, you took the same position in the en banc review.

For -- for those who aren't familiar, a three-judge court decides the case in the first instance. In some situations, if the case is important enough, judges on -- the other judges on the circuit -- there may be nine or 10 or 20. I think in the 9th Circuit there are like 28 judges in the circuit. And you can request an en banc review. The entire circuit would sit.

And in that case, of course, they're not bound by a three-judge decision because it's the entire circuit sitting of 10 or 12 or 20 judges. So what precedent then would have bound in -- bound the court in the en banc review?

SOTOMAYOR: The panel acted in accordance with its views by setting forth and incorporating the District Court's analysis of the case. Those who disagreed with the opinion made their arguments. Those who agreed that en banc certification wasn't necessary voted their way. And the majority of the court decided not to hear the case en banc.

I can't speak for why the others did or did not take the positions they did. They -- some of them have issued opinions. Others joined opinions.

KYL: But you felt you were bound by precedent?

SOTOMAYOR: That was what we did in terms of the decision, which was to accept the rule -- the -- not accept, but incorporate the District Court's decision analyzing the case and saying we agreed with it.

KYL: Understood. But the District Court's decision is not binding on the circuit court. And the en banc review means that the court should look at it in light of precedents that are stronger than a three-judge decision. So I'm still baffled as to what precedent you're -- you're -- you're speaking of.

SOTOMAYOR: Perhaps it's -- just one bit of background needs to be explained. When a court incorporates as we did in a per curiam, a district court decision below, it does become the court's precedent. And, in fact, the --

KYL: The three judges?

SOTOMAYOR: Yes, but when I was on the District Court, I issued also a lengthy decision on an issue, a constitutional issue, direct constitutional issue that the circuit had not addressed and very other few courts had addressed on the question of whether etbus (ph) statute of limitations on habeas (ph)...

KYL: OK. If you excuse me, we're -- I apologize for interrupting, but I've now used half of my time. And you -- you will not acknowledge that even though the Supreme Court said there was no precedent, even though the District Court judgment and a three-judge panel judgment cannot be considered precedent binding the en banc panel of the court, you still insist that somehow there was precedent there that you were bound by.

SOTOMAYOR: As I explained, when the circuit court incorporated the District Court's opinion, that became the court's holding.

KYL: Of course.

SOTOMAYOR: So, it did become circuit holding. With respect --

KYL: By three judges.

SOTOMAYOR: With respect -- yes, sir. I'm sorry. With respect to the question of precedent, it must be remembered that what the Supreme Court did in Ricci was say, "There isn't much law on how to approach this

should we adopt a standard different than the circuit did," because it is a question that we must decide how to approach this issue to ensure that two provisions of Title VII are consistent with each other.

That argument of adopting a different test was not the one that was raised before us, but that was raised clearly before the Supreme Court. And so that approach is different than saying that the outcome that we came to was not based on our understanding of what it make out a prima facie case.

KYL: Well, if it's a matter of first impression, do judges on the 2nd Circuit typically disposed of important cases of first impression by a summary one-paragraph order per curiam opinion?

SOTOMAYOR: Actually, they did in one case I handled when I was a District Court judge.

KYL: Would that be typical?

SOTOMAYOR: I don't know how you define typical, but if the District Court opinion, in the judgment of the panel, is adequate and fulsome and persuasive, they do. In my *Rodriguez v. Artus* (ph) case, when I was at District Court on the constitutionality of an act by Congress with respect to the suspension clause of the habeas provision, the court did it in less than a paragraph. They just incorporated my decision as the law of the circuit, or the holding of the circuit.

KYL: Well, let me quote from Judge Cabranas' dissent. He said, "The use of pro curiam opinions of this sort, adopting in full the reasoning of a district court without further elaboration, is normally reserved for cases that present straightforward questions that do not require exploration or elaboration by the court of appeals. The questions raised in this appeal cannot be classified as such, as they are indisputably complex and far from well settled."

I guess legal analysis -- analysts are simply going to have to research and debate the question of whether or not the cases of first impression or complex important cases are ordinarily dispensed of that way.

Let me just say that the implications -- the reason I address this is the implications of the decision are far-reaching. I think we would all agree with that. It's an important decision, and it can have far-reaching implications.

Let me tell you what three writers, in effect, said about it and get your reaction to it. Here is what the Supreme Court said in *Ricci* about the decision, about the rule that the -- that your court endorsed.

It said that the rule that you endorsed, and I'm quoting now, "Allowing employers to violate the disparate treatment prohibition based on a mere good-faith fear of disparate impact liability would encourage race-based action at the slightest hint of disparate impact." This is the Supreme Court. "Such a rule," it said, "would amount to a de facto quota system in which a focus on statistics could put undue pressure on employers to make hiring decisions on the basis of race. Even worse, an employer could discard test results or other employment practices with the intent of obtaining the employer's preferred racial balance."

Your colleague on the 2nd Circuit, Judge Cabranas, said, that, under the logic of your decision -- I quote again - - "municipal employers could reject the results of an employment examination whenever those results failed to yield a desirable racial income." In other words, failed to satisfy a racial quota.

That's why the case is so important. I mean, I would imagine you would hope that that result would not pertain. I guess I can just ask you that, that you would not have rendered this decision if you felt that that would be the result.

SOTOMAYOR: As I argued -- argued -- as I stated earlier, the issue for us, no, we weren't endorsing that result. We were just talking about what the Supreme Court recognized, which was that there was a good-faith basis for the city to act. It set a standard that was new, not argued before us below, and that set forth how to balance those considerations.

That is part of what the court does is in the absence of a case previously decided that sets forth the test. And what the court there said is good faith is not enough.

KYL: Understood.

SOTOMAYOR: Substantial evidence is what the city has to rely on. Those are different types of questions.

KYL: Of course. And the point is you don't endorse the result that either Judge Cabranes or the Supreme Court predicted would occur had your decision remained in effect. I'm sure that you would hope that result would not pertain.

SOTOMAYOR: Yes. But I didn't -- that wasn't the question we were looking at. We were looking at a more narrow question which was, could a city, in good faith, say we're trying to comply with the law. We don't know what standard to use. We have good faith for believing that we should not certify. Now, the Supreme Court has made clear what standard they should apply. Those are different issues.

KYL: Well, I'm just quoting from the Supreme Court about the rule that was -- that you endorsed in your decision and, again, it said the Supreme Court said about your rule that such a rule would amount to a de facto quote system in which a focus on statistics could put undue pressure on employers to make hiring decisions on the basis of race. Even worse, an employer could disregard test results or other employment practices with the intent of obtaining an employer's preferred racial balance.

I guess we both agree that that is not a good result. Let me ask you about a comment you made about the dissent in the case. A lot of legal commentators have noted that, while the basic decision was 5 to 4, that all nine of the justices disagreed with your panel's decision to grant some rejudgment; that all nine of the judges believed that the court should have been -- that the district court should have found the facts in the case that would allow it to apply a test. Your panel had one test. The Supreme Court had a different test. The dissent had yet a different test.

But in any case, whatever the test was, all nine of the justices believed that the lower court should have heard the facts of the case before some rejudgment was granted. I heard you to say that you disagreed with that assessment. Do you agree that the way I stated it is essentially correct?

SOTOMAYOR: It's difficult because there were a lot of opinions in that case. But the engagement among the judges was varied on different levels. And the first engagement that the dissent did with the majority was saying if you're going to apply this new test, this new standard, then you should give the circuit court an opportunity to evaluate the evidence --

KYL: Judge, I have to interrupt you there. The court didn't say, "If you're going to apply a new standard, you need to send it back." All nine justices said that summary judgment was inappropriate, that the case should have been decided on the facts.

There were three different tests: the test from your court, the test of the majority of the Supreme Court, and the test of the dissent. Irrespective of what test it was, they said that the case should not have been decided on summary judgment. All nine justices agreed with that, did they not?

SOTOMAYOR: I don't believe that's how I read the dissent. It may have to speak for itself, but I -- Justice Ginsburg took the position that the 2nd Circuit's panel opinion should be affirmed. And she took it by saying that, no matter how you looked at this case, it should be affirmed. And so I don't believe that that was my conclusion reading the dissent, but obviously, it will speak for itself.

KYL: Well, it -- it -- it will. And I guess commentators can -- can opine on it.

I could read commentary from people like Stuart Taylor, for example, who have an opinion different from yours. But let me ask you one final question in the minute and a half that I have remaining.

I was struck by your response to a question that Senator Hatch asked you about yet another speech that you gave in which you made a distinction between the justice of a district court and the justice of a circuit court, saying that the district court provides justice for the parties, the circuit court provides justice for society.

Now, for a couple of days here, you've testified to us that you believe that not only do district and circuit courts have to follow precedent, but that the Supreme Court should follow precedent.

So it's striking to me that you would suggest -- and this goes back to another comment you made perhaps flippantly about courts of appeals making law -- but it -- it would lead one to believe that you think the circuit court has some higher calling to create precedent for society.

In all of my experience, you have Smith v. Jones in a district court. The court says, "The way we read the law, Smith wins." It goes to the court of appeals. The court has only one job to decide: Does Smith win or does Jones win?

It doesn't matter what the effect of the case is on society; that's for legislators to decide. You have one job: Who wins, Smith or Jones, based on the law? And you decide, "Yes, lower court was right. Smith wins."

You're applying precedent, and you're deciding the case between those parties. You're not creating justice for society, except in the most indirect sense, that any court that follows precedent and follows the rule of law helps to build on this country's reliance on the rule of law.

SOTOMAYOR: I think we're in full agreement. When precedent is set, it's set -- it follows the rule of law. And in all of the speeches where I've discussed this issue, I've described the differences between the two courts as one where precedents are set, that those precedents have policy ramifications, but not in the meaning that the legislature gives to it.

The legislature gives it a meaning in terms of making law. When I'm using that term, it's very clear that I'm talking about having a holding, it becomes precedent, and it binds other courts. You're following the rule of law when you're doing that.

KYL: Mr. Chairman, I'm over the time, but just a final follow-up question, if I could.

You yourself noted that you have created precedent as a district court judge. Both district courts and circuit courts create precedent simply by deciding a case, but they're both required to follow precedent, isn't that correct?

SOTOMAYOR: Yes.



Day 4 Part 2

CHAIRMAN PATRICK LEAHY: Only because the — the senator went over I would note the district court in that case did cite the Rees case, which is 2000 Supreme Court -- year 2000 Supreme Court case as -- as precedent and a binding 2nd Circuit court case, the Hayden case as precedent. And as the judge has noted, she incorporated the district court, as they often do in per curiam decision, incorporated the district court decision. Sen. Feinstein?

DIANNE FEINSTEIN: Thank you very much, Mr. Chairman. I have great respect for Sen. Kyl. I've worked with him, I guess, for about 12 years now on the subcommittee of this committee. But I think there is a fundamental misreading of the Supreme Court decision, if I understand it. It's my understanding that the court was five-to-four. Is that correct?

JUDGE SONIA SOTOMAYOR: It was.

FEINSTEIN: And that the four dissenters indicated that they would have reached the same conclusion as the 2nd Circuit did. Is that correct?

SOTOMAYOR: That was my understanding.

FEINSTEIN: Thank you. Let me clear one thing up. I'm not a lawyer. And I've had a lot of ...

... people ask me, particularly from the West Coast who are watching this, what is per curiam. Would you please, in common, everyday English, explain what "through the court" means?

SOTOMAYOR: It's essentially a unanimous opinion where the court is taking an act that -- where it's not saying more than what either incorporating a decision by the court below because it's not adding anything to it.

FEINSTEIN: Right.

SOTOMAYOR: In some cases, it's when there's, as Judge Cabranes in his dissent pointed out, in some cases, it's simply used to denote that an issue is so clear and unambiguous that we're just going to state the rule of law. It can be used in a variety of different ways. But it's generally where some -- where you're doing something fairly -- in a very cursory fashion, either because a district court judge has done a thorough job...

FEINSTEIN: Which was the case in this case.

SOTOMAYOR: Yes.

FEINSTEIN: It was a very voluminous opinion that, I believe, was over 50 pages long. Is that correct?

SOTOMAYOR: I keep saying 78 because that's what I reviewed.

FEINSTEIN: Right, well, over 50, in any event.

SOTOMAYOR: But -- and as I said, my circuit did that in a case where I addressed as a district court judge a case of first impression on a constitutional, direct constitutional issue, the suspension clause. Or it can have -- one of the meanings can be that given by Judge Cabranes.

FEINSTEIN: Right. Now, my understanding also is that there is precedent in other courts. I'm looking at a decision, *Oakley v. the City of Memphis*, written by the circuit court. And essentially what it does is uphold the lower court that did exactly the same thing. Are you familiar with that case?

SOTOMAYOR: I am.

FEINSTEIN: It's an unpublished opinion, I believe. Is that correct?

SOTOMAYOR: Yes.

FEINSTEIN: And it was a racially mixed group of male and female lieutenants, took the test. The results came in. The test was canceled. And the court upheld the cancellation.

SOTOMAYOR: Yes.

FEINSTEIN: So this -- your case is not starkly out of the mainstream. And the reason I say this is going back to my days as mayor, particularly in the 1980s when there were many courts and many decisions involving both our police and fire departments. And it was a very controversial area of the law.

But the point I wanted to make is there is precedent, and this is certainly one of them.

SOTOMAYOR: I would agree that it was precedent. I won't choose to quarrel with the Supreme Court's decision.

FEINSTEIN: Right. I'm not asking you to. Right. Now, many have made comments regarding your Latina — "wise Latina" comment. And I'd like to just take a moment to put your comments in the context of the experiences of women. And this country is built on very great accomplishments. We forged a new country. We broke away from the British. We wrote documents that have stood the test of time. The Declaration of Independence, the Constitution, the Bill of Rights.

But we also have a history of slavery, segregated schools, of employment discrimination, of hate crimes, and unspoken prejudices that can make it very hard for individuals to be treated fairly or even to believe that they can do well in this society.

So I understand empowerment and the role that it plays. And everything has been hard fought. We, as women, didn't have the right to vote until 1920. And that was after a tremendous battle waged by a group of very brave women called Suffragettes. And when you graduated law school in 1979, there had never been a woman on the Supreme Court.

Today, women represent 50.7% of the population, 47% of law school graduates, and 30% of American lawyers. But there are only 17 women senators, and only one woman is currently serving on the Supreme Court, and we still make only \$0.78 on the dollar that a man makes.

So we're making progress, but we're not there yet, and we should not lose sight of that. My question is, as you have seen this — and you must have seen how widely broadcast this is — that you become an instant role model for women. And how do you look at this — your appointment to the court — affecting empowerment for women? And I'd be very interested in any comments you might make. And this has nothing to do with the law.

SOTOMAYOR: I chose the law because it's more suited to that part of me that's never sought the kind of attention that public figures — other public figures — get. When I was in law school, some of my friends

thought I would go into the political arena, not knowing that what I sought was more the life of a judge, thinking, involved in that and the process of the rule of law.

My career as a judge has shown me that, regardless of what my desires were, that my life, what I have accomplished, does serve as an inspiration for others. It's a sort of awesome sense of responsibility. It's one of the reasons that I do so many activities with people in the community, not just Latinos but all groups, because I understand that it is women. It's Latinos. It's immigrants. It's Americans of all kinds and all backgrounds.

Each one of us faces challenges in our life. Whether you were born rich or poor, of any color or background, life's challenges place hurdles every day. And one of the wonderful parts of the courage of America is that we overcome them. And I think that people have taken that sense that, on some levels, I've done some of that at various stages in my life.

And so, for me, I understand my responsibility. That's why I understand and have tried as much as I can to reach out to all different kinds of groups and to make myself as available as much as I can. Often I have to say no; otherwise I'd never work. But I meet my responsibilities and work very hard at my job, but I also know I have a responsibility to reach out.

FEINSTEIN: Well, for whatever it's worth, I think you're a walking, talking example of the best part of the United States of America. And I just want to say how very proud I am that you are here today. And it is my belief that you are going to be a great Supreme Court justice. And I just wanted to say that to you directly and publicly.  
Thank you. Thank you, Mr. Chairman.

LEAHY: Thank you. That was great.

FEINSTEIN: Thank you.

LEAHY: Sen. Graham?

SEN. LINDSEY GRAHAM: Thank you, Mr. Chairman.  
And something I would like to say to you directly and publicly and with admiration for -- for your life's story is that a lot of the wrongs that have been mentioned, some have been righted, some have yet to come, Judge. I hope you understand the difference between petitioning one's government and having a say in the electoral process, and voting for people that if you don't like you can get rid of, and the difference of society being changed by nine unelected people who have a lifetime appointment.  
Do you understand the difference in how those two systems work?

SOTOMAYOR: Absolutely, sir. I understand the Constitution.

GRAHAM: And the one thing I can tell you -- this will probably be the last time we get to talk in this fashion. I hope to have a chance to get to know you better, and we'll see what your future holds, but I think it's going to be pretty bright.

The bottom line is, one of the problems the court has now is that Mr. Ricci has a story to tell, too. There are all kinds of stories to tell in this country, and the court has, in the opinion of many of us, gone into the business of societal change not based on the plain language of the Constitution, but based on motivations that can never be checked at the ballot box.

Brown v. Board of Education is instructive in the sense that the court pushed the country to do something politicians were not brave enough to do, certainly were not brave enough in my state. And if I had been elected as a senator from South Carolina in 1955, the year I was born, I would be amazed if I would have had the courage of a Judge Johnson in the political arena.

But the court went through an analysis that separate was not equal. It had a basis in the Constitution after fact-finding to reach a reasoned conclusion in the law and the courage to implement that decision. And society had the wisdom to accept the court's opinion, even though it was contentious and literally people died.

We're going to talk about some very difficult societal changes that are percolating in America today, like who should get married, and what boundaries are on the definition of marriage, and who's best able or the most capable of making those fundamental decisions?

GRAHAM: The full faith and credit clause, in essence, says that when a valid enactment of one state is entered into, the sister states have to accept it. But there's a public policy exception in the full faith and credit clause. Are you aware of that?

SOTOMAYOR: I am. Applied in different situations.

GRAHAM: Some states have different age limits for marriage. Some states treat marriage differently than others. And the court defer based on public policy. The reason these speeches matter and the reasons elections matter is because people now understand the role of the court in modern society when it comes to social change.

That's why we fight so hard to put on the court people who see the world like us. That's true from the left, and that's true from the right. And let me give you an example of why that's important.

We've talked a lot about the Second Amendment, whether or not it is a fundamental right. We all know agree it is an individual right. Is that correct?

SOTOMAYOR: Correct.

GRAHAM: Well, that's groundbreaking precedent in the sense that just until a few months ago, or last year I guess, that was not the case. But it is today. It is the law of the land by the Supreme Court that the Second Amendment is an individual right. And you acknowledge that, that's correct?

SOTOMAYOR: That was...

GRAHAM: The Heller case.

SOTOMAYOR: ... the decision. And it is what the court has held, and so it is unquestionably an individual right.

GRAHAM: But here's the next step for the court. You will have to, if you get on the court, with your fellow justices, sit down and discuss whether or not it is a fundamental right to the point that it is incorporated through the due process clause of the 14th Amendment and applied to every state.

Isn't it fair to say, Judge, that when you do that, not only will you listen to your colleagues, you will read whatever case law is available, you're going to come down based on what you think America is all about?

SOTOMAYOR: No, sir.

GRAHAM: So what binds you when it comes to a fundamental right?

SOTOMAYOR: The rule of law. And...

GRAHAM: Isn't the rule of law, when it comes to what you consider to be a fundamental right, your opinion as to what is fundamental among all of us?

SOTOMAYOR: No. In fact the question that you raise is it fundamental in the sense of the law.

GRAHAM: Right.

SOTOMAYOR: That's a legal term. It's very different. And it is important to remember that the Supreme Court's precedent on the Second Amendment predated its...

GRAHAM: I hate to interrupt, but we have -- is there sort of a legal cookbook that you can go to and say this is a fundamental right, A, and B is not?

SOTOMAYOR: Well, there's not a cookbook, but there's precedent that was established after the older precedent that has talked and described that doctrine of incorporation. That's a set of precedents that...

GRAHAM: Are you talking about the 1890 case?

SOTOMAYOR: Yes. Well, no. The 1890 case was the Supreme Court's holding on this issue. But since that time, there has been a number of decisions discussing the incorporation doctrine applying it to different provisions of the Constitution.

GRAHAM: Is there any personal judgment to be relied upon by a Supreme Court justice in deciding whether or not the 2nd Amendment is a fundamental right?

SOTOMAYOR: Well, you hire judges for their judgment, not their personal views or what their sense of what the outcome should be. You hire your point judges for the purpose of understanding whether they respect law, whether they respect precedent and apply it in a ...

GRAHAM: I don't doubt that you respect the law, but you're going to be asked, along with eight other colleagues, if you get on the court, to render a decision as to whether or not the 2nd Amendment is a fundamental right shared by the American people. There is no subjective judgment there?

SOTOMAYOR: The issue will be controlled by the court's analysis of that question in the case, fundamental as defined by incorporation in -- likely will be looked at by the court in a case that challenges a state regulation. At that ...

GRAHAM: I have -- go ahead.

SOTOMAYOR: I'm sorry. At that point, I would presume that the court will look at its older precedent in the way it did in *Heller*, consider whether it controls the issue or not. It will decide, even if it controls it, whether it should be revisited under the doctrine of *stare decisis*. It could decide it doesn't control it, and that would be its decision. It could decide it does control, but it should revisit it.

In revisiting it, it will look at a variety of different factors, among them have there been changes in related areas of law that would counsel questioning this. As I've indicated, there was a lot of law after the older cases on incorporation. I suspect, but I don't know, because I can't prejudge the issue that the court will consider that with all of the other arguments that the parties will make.

GRAHAM: Well, maybe I've got it wrong, then. Maybe I'm off base here. Maybe you've got the 7th Circuit talking about the Heller case did not decide the issue of whether it should be incorporated to the states, because it's only dealt with the District of Columbia.

You've got the 9th Circuit -- and I never thought I'd live to hear myself say this -- look at the 9th Circuit. They have a pretty good rationale as to why the 2nd Amendment should be considered a fundamental right. And they talked about the longstanding relationship of the English man -- and they should have put woman. At least in South Carolina that would have applied -- to gun ownership. They talked about it was this right to bear arms that led to our independence. It was this right to bear arms that put down a rebellion in this country. And they talked about who we are as a people and our history as a people.

And Judge, that's why the Supreme Court matters. I do believe, at the end of the day, you're not going to find a law book that tells you whether or not a fundamental right exists vis-a-vis the 2nd Amendment, that you're going to have to rely upon your view of America, who we are, how far we've come and where we're going to go in our relationship to gun ownership. That's why these choices are so important.

And here's what I'll say about you. And you may not agree with that, but I believe that's what you're going to do, and I believe that's what every other justice is going to do.

And here's what I will say about you. I don't know how you're going to come out on that case, because I think fundamentally, Judge, you're able, after all these years of being a judge, to embrace a right that you may not want for yourself, to allow others to do things that are not comfortable to you, but for the group, they're necessary. That is my hope for you.

That's what makes you, to me, more acceptable as a judge and not a activist, because an activist would be a judge who would be champing at the bit to use this wonderful opportunity to change America through the Supreme Court by taking their view of life and imposing it on the rest of us.

I think and believe, based on what I know about you so far, that you're broad-minded enough to understand that America is bigger than the Bronx, it's bigger than South Carolina. Now, during your time as an advocate, do you understand identity politics? What is identity politics?

SOTOMAYOR: Politics based simply on a person's characteristics, generally referred to either race or ethnicity or gender, religion. It is politics based on...

GRAHAM: Do you embrace identity politics personally?

SOTOMAYOR: Personally, I don't as a judge in any way embrace it with respect to judging. As a person, I do believe that certain groups have and should express their views on whatever social issues may be out there. But as I understand the word "identity politics," it's usually denigrated because it suggests that individuals are not considering what's best for America.

GRAHAM: Do you think...

SOTOMAYOR: That's my -- and that I don't believe in. I think that whatever a group advocates, obviously, it advocates on behalf of its interests and what the group thinks it needs, but I would never endorse a group advocating something that was contrary to some basic constitutional right as it was known at the time...

GRAHAM: Do you...

SOTOMAYOR: ... although people advocate changes in the law all the time.

GRAHAM: Do you believe that your speeches properly read embrace identity politics?

SOTOMAYOR: I think my speeches embrace the concept that I just described, which is, groups, you have interests that you should seek to promote, what you're doing is important in helping the community develop, participate, participate in the process of your community, participate in the process of helping to change the conditions you live in.

I don't describe it as identity policies, because -- politics -- because it's not that I'm advocating the groups do something illegal.

GRAHAM: Well, Judge, to be honest with you, your record as a judge has not been radical by any means. It's, to me, left of center. But your speeches are disturbing, particularly to -- to conservatives, quite frankly, because they don't talk about, "Get involved. Go to the ballot box. Make sure you understand that America can be whatever you'd like it to be. There's a place for all of us."

It really did, to suggest -- those speeches to me suggested gender and racial affiliations in a way that a lot of us wonder, will you take that line of thinking to the Supreme Court in these cases of first precedent?

GRAHAM: You have been very reassuring here today and throughout this hearing that you're going to try to understand the difference between judging and whatever political feelings you have about groups or gender.

Now, when you were a lawyer, what was the mission statement of the Puerto Rican Legal Defense Fund?

SOTOMAYOR: To promote the civil rights and equal opportunity of Hispanics in the United States.

GRAHAM: During your time on the board -- and you had about every job a board member could have -- is it a fair statement to say that all of the cases embraced by this group on abortion advocated the woman's right to choose and argued against restrictions by state and federal government on abortion rights?

SOTOMAYOR: I didn't -- I can't answer that question because I didn't review the briefs. I did know that the fund had a healthcare docket...

GRAHAM: Judge?

SOTOMAYOR: ... that included challenges to certain limitations on a woman's right to terminate her pregnancy under certain circumstances.

GRAHAM: Judge, I -- I may be wrong, but every case I've seen by the Puerto Rican Legal Defense Fund advocated against restrictions on abortion, advocated federal taxpayer funding of abortion for low-income women. Across the board when it came to the death penalty, it advocated against the death penalty. When it came to employment law, it advocated against testing and for quotas.

I mean, that's just the record of this organization. And the point I'm trying to make is that whether or not you advocate those positions and how you will judge can be two different things. I haven't seen in your judging this advocate that I saw or this board member. But when it came to the death penalty, you filed a memorandum with the Puerto Rican Legal Defense Fund in 1981 -- and I would like to submit this to the record -- where you signed this memorandum.

LEAHY: Without objection.

GRAHAM: And you basically said that the death penalty should not be allowed in America because it created a racial bias and it was undue burden on the perpetrator and their family. What led you to that conclusion in 1981?

SOTOMAYOR: The question in 1991...

GRAHAM: '81.

SOTOMAYOR: I misspoke about the year -- was an advocacy by the fund taking a position on whether legislation by the state of New York outlawing or permitting the death penalty should be adopted by the state. I thank you for recognizing that my decisions have not shown me to be an advocate on behalf of any group. That's a different, dramatically different question than what -- whether I follow the law. And in the one case I had as a district court judge, I followed the law completely.

GRAHAM: The only reason we -- I mention this is when Alito and Roberts were before this panel, they were asked about memos they wrote in the Reagan administration, clients they represented. A lot to try to suggest that if you wrote a memo about this area of the law to your boss, Ronald Reagan, you must not be fit to judge. Well, they were able to explain the difference between being a lawyer in the Reagan administration and being a judge. And to the credit of many of my Democratic colleagues, they understood that.

GRAHAM: I'm just trying to make the point that when you are an advocate, when you are on this board, the board took positions that I think are left of center. And you have every right to do it. Have you ever known a low-income Latina woman who was devoutly pro-life?

SOTOMAYOR: Yes.

GRAHAM: Have you ever known a low-income Latina family who supported the death penalty?

SOTOMAYOR: Yes.

GRAHAM: So the point is there are many points of view within groups based on income. You have, I think, consistently, as an advocate, took a point of view that was left of center. You have, as a judge, been generally in the mainstream.

The Ricci case, you missed one of the biggest issues in the country or you took a pass. I don't know what it is. But I am going to say this, that, as Senator Feinstein said, you have come a long way. You have worked very hard. You have earned the respect of Ken Starr. And I would like to put his statement in the record. And you have said some things that just bugged the hell out of me.

SOTOMAYOR: May I...

GRAHAM: The last question on the "wise Latina woman" comment. To those who may be bothered by that, what do you say?

SOTOMAYOR: I regret that I have offended some people. I believe that my life demonstrates that that was not my intent to leave the impression that some have taken from my words.

GRAHAM: You know what, Judge? I agree with you. Good luck.



LEAHY: Thank you. Sen. Durbin has actually responded to my so-far-vain request that senators may want to pass on the basis that all questions may have been asked, not everybody has asked them, but Sen. Klobuchar yesterday had some very serious and succinct areas that she was asking. I know time ran out, and I'd like to yield to Sen. Klobuchar because she may want to follow on those.

SEN. AMY KLOBUCHAR: Thank you very much, Mr. Chair.

And thank you again, Judge. I think they've turned the air conditioning on, so this is good. (LAUGHTER) I just had two quick follow-ups following Sen. Graham's question. The first is that the only death penalty case that I know of -- there may be another one that you ruled on -- the Heatley case -- you, in fact, sustained the death penalty in that case. Is that correct?

SOTOMAYOR: I sustained -- or a rejected the challenges of the defendant that the application of the death penalty to him was based on race, yes.

KLOBUCHAR: OK. Thank you. And then just the second one, Sen. Graham mentioned the issues of Justice Roberts and the difference between an advocate and a judge. And I just came across the quote that Justice Roberts gave about his work during the Reagan administration.

And he said I can give the commitment that I appreciate that my role as a judge is different than my role as a staff lawyer for an administration. As a judge, I have no agenda. I have a guide in the Constitution and the laws and the precedents of the court. And those are what I would apply with an open mind after fully and fairly considering the arguments and assessing the considered views of my colleagues on the bench. Would you agree with that statement?

SOTOMAYOR: Wholeheartedly.

KLOBUCHAR: All right. Thank you. There were some letters that have not yet been put on the record, and there are quite a collection of letters. I considered reading them all on the record but thought better of that.

I thought I would ask the chair if I could put these letters on the record. And these are letters of support for you from, first of all, the National Fraternal Order of Police, in support of your nomination, the Police Executive Research Forum, the national enforcement of black law enforcement executives, the National Latino Peace Officers Association, the New York State Law Enforcement Council, the National District Attorneys Association, the Association of Prosecuting Attorneys, the National Association of Police Organizations, the National Sheriffs' Association, the Major City Chiefs Association, the Detectives Endowment Association, and then also a letter from 40 of your past colleagues in the Manhattan D.A.'s office, former district attorney colleagues.

And all of these groups have given you their support. And I did want to note just two very brief portions from the letter.

The one from the Police Executive Research Forum reads, "Sonia Sotomayor went out of her way to stand shoulder to shoulder with those of us in public safety at a time when New York City needed strong, tough and fair prosecutors."

And then, also, the letter from your colleagues I found very enlightening. It was much more personal. It said that, "She began as a rookie in 1979, working long hours, prosecuting an enormous caseload of misdemeanors before judges managing overwhelming dockets. Sonia so distinguished herself in this challenging assignment that she was among the very first in her starting class to be selected to handle felonies."

"She prosecuted a wide variety of felony cases, including serving as co-counsel at a notorious murder trial. She developed a specialty in the investigation and prosecution of child pornography case. Throughout all of this, she impressed us as one who was singularly determined in fighting crime and violence."

"For Sonia, service as a prosecutor was a way to bring order to the streets of a city she dearly loved. We are proud to have served with Sonia Sotomayor. She solemnly adheres to the rule of law and believes that it should be applied equally and fairly to all Americans."

"As a group," your former colleagues say, "we have different world views, and political affiliations, but our support for Sonia is entirely nonpartisan. And the fact that so many of us have remained friends with Sonia over three decades speaks well, we think, of her warmth and collegiality." Pretty nice letter.

In reading these letters from these law enforcement groups, there was just one follow-up case that you had that I wanted to allow you to enlighten the country about. And this is one that a former New York police detective, Chris Monino spoke about recently in an article, and he spoke about a case you worked on as district attorney.

He talked about the child pornography case, how he had gone to various prosecutors to try to get them interested in the case, and he couldn't get them interested. And I have some guesses. Some of these cases, as you know, can be very involved with a lot of evidence and sometimes computer forensics and things like that. But he wasn't able to interest them in taking on the case.

But you were the one that was willing to take on the case, and it led to the prosecution of two perpetrators. Could you talk a little bit about that case, why you think others didn't and why you decided to take on the case?

SOTOMAYOR: Well, I can't speak to why others decided to pass on the case. I can talk to you about my views at the time.

The New York Court of Appeals had invalidated the New York statute on child pornography on the grounds of a constitutional violation, federal constitutional violation, that the statute did not comport with the federal Constitution. Supreme Court took that case directly from the Court of Appeals, as is its right to review all issues of federal constitutional law, and reversed the New York Court of Appeals and reinstated the statute.

My sense is, because there were still so many open questions about both the legality of the statute and the question of the difficulty in proving the particular crime at issue, that involved two men who worked in a change of -- chain of adult bookstores in the then-Times Square area. Times Square has changed dramatically since that time.

It was mostly circumstantial. We had some tapes, but their knowledge of what those tapes contained, their intent to sell and distribute child pornography involving children below a certain age, it was a difficult, difficult legal and factual case, but it was clear that it was a serious case. We're talking about the distribution of films that show children who were anywhere from 8 years old to 12 years old being explicitly sexually abused.

And it seemed to me that, regardless of the outcome of the case, whether I secured the convictions or not, whether it was held up on appeal or not, that the issues it raised had to be presented in court because of the importance of the crime.

And so I brought the prosecution. I had a co-counsel in that case who was second-seating me in that case, meaning she was assisting me. And the case took a while at trial, because, as I said, it was circumstantial. The jury returned a verdict against both defendants. They were sentenced quite severely, and the cases held up on appeal.

It was an enormously complicated case. I assisted in the appeal because it was so complicated that one of the heads of the Appeals division of the New York County District Attorney's Office had to become involved in it. But the convictions were sustained.

And so the effort resulted in a conviction of two men who were distributing films that had the vilest of sexual acts portrayed against children.

KLOBUCHAR: And one last case I wanted to ask you about, which the chairman had briefly mentioned in his opening, and it was a troubling case because it involved an elected official. It was U.S. v. Giordano, and this case when you -- happened when you were a judge.

And it involved very troubling facts with the mayor of Waterbury, Conn., in a variety of crimes stemming from his repeated sexual abuse of a minor daughter and a niece and of a prostitute. And you wrote for the majority in that case. There was actually a dissent from one of your fellow judges on the 2nd Circuit.

And you held, in part, that the mayor could, in fact, be charged with the separate crime of violating the young girl's civil rights under color of state law. And I think -- and I don't want to put words in your mouth, but the reason you were able to use that theory is that you note how frequently the mayor reiterated to his young victims that they would be in trouble with law enforcement if they didn't submit to what he wanted them to do. Could you talk about how that case fits in to your overall approach to judging?

SOTOMAYOR: As I have indicated, the role of a judge is to look at Congress' words in a statute and discern its intent. And in cases that present you facts, you must take existing precedents and apply the teachings of those precedents to those new facts.

In the Giordano case, that had been another situation quite like this one. This was a mayor who, working through a woman, secured sexual acts by very young girls that were taking place in his office. And through the woman he was working with and also through his own exhortations, don't tell anybody or you'll get into trouble, and the woman's exhortations to the child, the person he was conspiring with, that they would get in trouble with the police because the police wouldn't believe them. They would believe him because he was a mayor.

The question for the court became is that acting under color the state law. Is he using his office to promote this illegal activity against these young girls? The majority viewing these facts said yes, that's the principles we discern from precedent about what the use of state law -- of acting color of state law means.

The dissent disagreed, and it disagreed using its own rationale about why the law should not be read that way. But these are cases that rely upon an understanding both of what the words say and how precedent has interpreted them. And that's what the majority of the panel did in that case.

KLOBUCHAR: Thank you very much. And I think it's been enlightening for people to hear about some of your views on these criminal cases. And I'd just like to ask one last question then. It's the exact question that my friend and colleague, Senator Graham, asked Chief Justice Roberts as his confirmation hearing. And he asked: What would be like history to say about you when all is said and done?

SOTOMAYOR: I can't live my life to write history's story. That will be the job of historians long after I'm going. Some of them start now, but long after I'm gone. (LAUGHTER) In the end, I hope it will say I'm a fair judge, that I was a caring person, and that I lived my life serving my country.

KLOBUCHAR: I think you can't say much more than thank you. Thank you very much, Judge.

LEAHY: Thank you, Judge. I appreciate that. Thank you, Sen. Klobuchar. Sen. Cornyn, who, as I mentioned yesterday, is a former Supreme Court justice of Texas as well as former attorney general, a valued member of this committee. Sen. Cornyn?

SEN. JOHN CORNYN: Thank you, Mr. Chairman. Good morning, judge.

SOTOMAYOR: Good morning, senator.

CORNYN: Judge, when we met the first time, as I believe I recounted earlier, I made a pledge to you that I would do my best to make sure you were treated respectfully and this would be a fair process. I just want to ask you upfront: Do you feel like you've been given a chance to explain your record and your judicial philosophy to the American people?

SOTOMAYOR: I have, sir. And every senator on both sides of the aisle that have made that promise to me have kept it fully.

CORNYN: And, Judge, you know, the test is not whether Judge Sonia Sotomayor is intelligent. You are. The test is not whether we like you. I think, speaking personally, I think we all do. The test is not even whether we admire you or we respect you, although we do admire you and respect what you've accomplished.

The test is really, what kind of justice will you be if confirmed to the Supreme Court of the United States? Will you be one that adheres to a written Constitution and written laws, that -- and respect the right of the people to make their laws through their elected representatives, or will you pursue a -- some other agenda, personal, political, ideological, that is something other than enforcing the law?

I think those are the -- that is really the question. And, of course, the purpose of these hearings is -- as you've gone through these tedious rounds of questioning, is to allow us to clear up any confusion about your record and about your judicial philosophy, yet so far I find there's still some confusion.

For example, in 1996, you said the idea of a stable, quote, "capital L Law" was a public myth. This week, you said that fidelity to the law is your only concern.

In 1996, you argued that indefiniteness in the law was a good thing because it allowed judges to change the law. Today you characterized that argument as being only that ambiguity can't exist and that it is Congress's job to change the law.

In 2001, you said that innate physiological differences of judges would or could impact their decisions. Yesterday, you characterized that argument as being only that innate physiological differences of litigants could change decisions. In 2001, you disagreed explicitly with Justice O'Connor's view of whether a wise man and wise woman would reach the same decision. Yet, during these hearings, you characterized your argument as being that you agreed with her.

A few weeks ago, in your speech on foreign law to the American Civil Liberties Union, you rejected the approach of Justices Alito and Thomas with regard to foreign law, and yet it seems to me, during these hearings, you have agreed with them.

So, Judge, what should I tell my constituents who are watching these hearings and saying to themselves, "In Berkeley and other places around the country, she says one thing, but at these hearings, you are saying something which sounds contradictory, if not diametrically opposed, to some of the things you've said in speeches around the country"?

SOTOMAYOR: I would tell them to look at my decisions for 17 years and note that, in every one of them, I have done what I say that I so firmly believe in. I prove my fidelity to the law, the fact that I do not permit personal views, sympathies or prejudices to influence the outcome of cases, rejecting the challenges of numerous plaintiffs with undisputably sympathetic claims, but ruling the way I have on the basis of law rejecting those claims, I would ask them to look at the speeches completely, to read what their context was and to understand the background of those issues that are being discussed.

I didn't disagree with what I understood was the basic premise that Justice O'Connor was making, which was that being a man or a woman doesn't affect the capacity of someone to judge fairly or wisely. What I disagreed was with the literal meaning of her words because neither of us meant the literal meaning of our words. My use of her words was pretty bad in terms of leaving a bad impression. But both of us were talking about the value of experience and the fact that it gives you equal capacity.

In the end, I would tell your constituents, senators, look at my record and understand that my record talks about who I am as a person, what I believe in and my judgment and my opinion. But following the rule of law is the foundation of our system of justice.

CORNYN: Thank you for that -- for your answer, judge. You know, I actually agree that your judicial record strikes me as pretty much in the mainstream of -- of judicial decision making by district court judges and by court of appeals judges on the federal bench. And while I think what is creating this cognitive dissidence for many of us and for many of my constituents who I've been hearing from is that you appear to be a different person almost in your speeches and in some of the comments that you've made. So I guess part of what we need to do is to try to reconcile those, as I said earlier.

You said that -- I want to pivot to a slightly different subject and go back to your statement that the courts should not make law. You've also said that the Supreme Court decisions that a lot of us believe made law actually were an interpretation of the law.

So I'm -- I would like for you to clarify that. If the Supreme Court in the next few years holds that there is a constitutional right to same-sex marriage, would that be making the law? Or would that be interpreting the law? I'm not asking you to classify -- excuse me. I'm not asking you to prejudge that case or the merits of the arguments, but just to characterize whether that would be interpreting the law or whether that would be making the law.

SOTOMAYOR: Senator, that question is so embedded with its answer, isn't it? Meaning if the court rules one way and I say that's making law, then it forecasts that I have a particular view of whatever arguments may be made on this issue, suggesting that it's interpreting the Constitution. I understand the seriousness of this question. I understand the seriousness of same-sex marriage.

But I also know, as I think all America knows, that this issue is being hotly debated on every level of our three branches of government. It's being debated in Congress. And Congress has passed an act relating to same-sex marriage. It's being debated in various courts on the state level. Certain higher courts have made rulings.

This is the type of situation where even the characterizing of whatever the court may do as one way or another suggests that I have both prejudged an issue and that I come to that issue with my own personal views suggesting an outcome. And neither is true. I would look at that issue in the context of the case that came before me with a completely open mind.

CORNYN: Forget the same-sex marriage hypothetical. Is there a difference, in your mind, between making the law and interpreting the law? Or is this a distinction without a difference?

SOTOMAYOR: Oh, no. It's a very important distinction. Laws are written by Congress. It has -- it makes factual findings. In determines, in its judgment, what the fit is between the law it's passing and the remedy. It's -- that it's giving as a right.

The courts, when they're interpreting, always have to start with what does the Constitution say, what is the words of the Constitution, how has precedent interpreting those, what are the principles that it has discussed govern a particular situation.

CORNYN: How do you reconcile that answer with your statement that courts of appeals make policy?

SOTOMAYOR: In both cases in which I've used that word in two different speeches -- one was a speech, one was a remark to students -- this is almost like the discussion fundamental -- what does it mean to a non-lawyer and fundamental, what it means in the context of Supreme Court legal theory.

CORNYN: Are you saying it's only a discussion that lawyers could lot of?

SOTOMAYOR: Not love. But in the context in both contexts, it's very, very clear that I'm talking about completely the difference between the two judgments and that circuit courts, when they issue a holding, it becomes precedent on all similar cases.

In both comments, those -- that statement was made absolutely expressly that that was the context of the kind of policy I was talking about, which is the ramifications of a precedent on all similar cases. When Congress talks about policy, it's talking about someone totally different. It's talking about making law, what are the choices that I'm going to make in law -- in making the law.

Those are two different things. I wasn't talking about courts making law. In fact, in the Duke speech, I said -- I used making policy in terms of its ramifications on existing cases. But I never said in either speech we make law in the sense that Congress would.

CORNYN: Let me turn to another topic. In 1996, when you -- after you'd been on the federal bench for four years, you wrote a law review article -- the Suffolk University Law Review. And this pertains to campaign financing.

You said, quote, "Our system of election financing permits extensive private, including corporate, financing of candidates' campaigns raising again and again the question of whether -- of what the difference is between contributions and bribes and how legislators or other officials can operate objectively on behalf of the electorate."

CORNYN: You said, "Can elected officials say with credibility that they're carrying out the mandate of a democratic society representing only the generally public good when private money plays such a large role in their campaigns?" Judge Sotomayor, what is the difference, to your mind, between a political contribution and a bribe?

SOTOMAYOR: The context of that statement was a question about what was perking through the legal system at the time and has been, as you know, before the Supreme Court since *Buckley v. Vallejo*. In *Buckley*...

CORNYN: I -- I agree, your honor. But what -- my question is, what, in your mind, is the difference between a political contribution and a bribe?

SOTOMAYOR: The question is, is a contributor seeking to influence or to buy someone's vote? And there are situations in which elected officials have been convicted of taking a bribe because they have agreed in exchange for a sum of money to vote on a particular legislation in a particular way. That is -- violates the federal law.

The question that was discussed there was a much broader question as to, where do you draw that line as a society? What choices do you think about in terms of what -- what Congress will do, what politicians will do?

I've often spoken about the difference between what the law permits and what individuals should use to guide their conduct. The fact that the law says you can do this doesn't always mean that you as a person should choose to do this.

And, in fact, we operate within the law. You don't -- you should not be a lawbreaker. But you should act in situations according to that sense of what's right or wrong.

We had the recent case that the Supreme Court considered of the judge who was given an extraordinary amount of money by a campaign contributor, dwarfing everything else in his campaign in terms of contributions, funding a very expensive campaign.

CORNYN: In fact -- in fact -- in fact, that was not a direct contribution to the judge, was it?

SOTOMAYOR: Well, it wasn't a direct contribution, but it was a question there where the Supreme Court said, the appearance of impropriety in this case would have counseled the judge to get off, because...

CORNYN: Let's get back to my question, if I can, and let me ask you this. Last year, President Obama set a record in fundraising from private sources, raising an unprecedented amount of campaign contributions. Do you think, given your law review article, that President Obama can say with credibility that he's carrying out the mandate of a democratic society?

SOTOMAYOR: That wasn't what I was talking about in that speech. I don't -- I don't know...

CORNYN: Well, I realize he wasn't elected in 1996, but what I'm -- what I'm getting at is, are you basically painting with such a broad brush when it comes to people's rights under the First Amendment to participate in the political process, either to volunteer their time, make in-kind contributions, make financial contributions? Do you consider that a form of bribery or in any way improper?

SOTOMAYOR: No, sir.

CORNYN: OK. Thank you.

SOTOMAYOR: No, sir.

CORNYN: Thank you for your answer.

In the short time we have remaining, let me return to -- to the New Haven firefighter case briefly. As you know, two witnesses, I believe, will testify after you're through, and I'm sure you will welcome being finished with this period of questioning.

A lot of attention has been given to the lead plaintiff, Frank Ricci, who is a dyslexic and the hardship he's endured in order to prepare for this competitive examination only to see the competitive examination results thrown out.

But I was struck on July the 3rd in the New York Times, when they featured another firefighter, who will testify here today, and that was Benjamin Vargas. Benjamin Vargas is the son of Puerto Rican parents, as you probably know, and he found himself in the odd position, to say the least, of being discriminated against based on his race, based on the decisions by the circuit court panel that you sat on.

The closing of the article, because Lieutenant Vargas -- who hopes to be Captain Vargas as a result of the Supreme Court decision because he scored sixth on the comprehensive examination -- at the very last paragraph in this article, he -- it says, "Gesturing toward his three sons, Lieutenant Vargas explained why he had no regrets. He said, 'I want to give them a fair shake. To get a job on the merits, not because they're Hispanic or to fill a quota.' He said, 'What a lousy way to live.'" That's his testimony.

So I want to ask you, in conclusion, do you agree with Chief Justice John Roberts when he says, "The best way to stop discriminating based on race is to stop discriminating based on race"?

SOTOMAYOR: The best way to live in our society is to follow the command of the Constitution, provide equal opportunity for all. And I follow what the Constitution says, that is, how the law should be structured and how it should be applied to whatever individual circumstances come before the court.

CORNYN: With respect, Judge, my question was do you agree with Chief Justice John Roberts's statement, or do you disagree?

SOTOMAYOR: The question of agreeing or disagreeing suggests an opinion on what the ruling was in the case he used it in, and I accept the court's ruling in that case. And that was a very recent case. There is no quarrel that I have, no disagreement. I don't accept that, in that situation, that statement the court found applied. I just said the issue is a constitutional one - equal opportunity for all under the law.

CORNYN: I understand that you might not want to comment on what Chief Justice John Roberts wrote in an opinion, even though I don't think he was speaking of a specific case but rather an approach to the law which would treat us all as individuals with equal dignity and equal rights. But let me ask you whether you agree with Martin Luther King when he said he dreamed of a day when his children would be judged not by the color of their skin, but by the content of their character. Do you agree with that?

SOTOMAYOR: I think every American agrees with that (inaudible).

CORNYN: Amen. Yield back, Mr. Chairman.

LEAHY: Thank you, Sen. Cornyn. Just so we'll note for the schedule, we're going to go to Sen. Specter, who is a long-time member of this committee and one of the most senior members here. And I would, once Sen. Specter's questions are finished, we will take a very short break. And does that work for you, judge? I...

SOTOMAYOR: It most certainly does.

LEAHY: OK. So...

SOTOMAYOR: Thank you.



Day 4 Part 3

LEAHY: Senator Specter is recognized for up to 20 minutes.

SPECTER: Thank you, Mr. Chairman. Judge Sotomayor, you have been characterized as running a hot courtroom, asking tough questions. What we see popping out of the Supreme Court opinions from....

...time to time, statements about pretty tough ideological battles in their conference room. Justice Scalia was quoted as saying, "The court must be living in another world. Day by day, case by case it is busy designing a Constitution for a country I do not recognize."

to a woman's right to choose in *Roe v. Wade*, he said this, quote, "Justice O'Connor's assertion that a fundamental rule of judicial restraint requires us to avoid reconsidering *Roe* to not be taken seriously." Do you think it possible that, if confirmed, you will be a litigator in that conference room, take on the ideological battles which pop out from time to time from what we read in their opinions?

SOTOMAYOR: I don't judge on the basis of ideology. I judge on the basis of the law and my reasoning. That's how I have comported myself in the circuit court. When my colleagues and I, in many cases, have initially come to disagreeing positions, we've discussed them and either persuaded each other, changed each other's minds and worked from the starting point of arguing, discussing, exchanging perspectives on what the law commands.

SPECTER: Well, perhaps you'll be tempted to be a tough litigator in the court. Time will tell, if you are confirmed, if you have some of those provocative statements.

Let me move on to a case which you have decided. You have been reluctant to make comments about what other people have said. But I want to ask you about your view as to what you have said. In the case of *Entergy v. Riverkeeper*, which involved the question which is very important to matters now being considered by Congress on climate control and global warming, you ruled in the 2nd Circuit that the best technology should be employed, not the cost-benefit.

The Supreme Court reversed five-to-four saying it was cost benefit. Could we expect you to stand by your interpretation of the Clean Water Act when, if confirmed, you get to the Supreme Court and could make that kind of a judgment because you're not bound by precedent?

SOTOMAYOR: Well, I am bound by precedent to the extent that all precedents is entitled to the respect it -- to respect under the doctrine of *stare decisis*. And to the extent that the Supreme Court has addressed this issue of cost benefit and its permissibility under the Clean Water Act, that's the holding I would apply to any new case that came. And the framework it established is the framework I would employ to new cases.

SPECTER: Let me return to a subject I raised yesterday but from a different perspective. And that is the issue of the Supreme Court taking on more cases. In 1886, there were 451 cases decided by the Supreme Court, in 1985, 161 signed opinion, in 2007, only 67 signed opinions. The court has not undertaken cases involving circuit splits.

In the letter I wrote to you, which will be made a part of the record, listing a great many circuit splits and the problems that that brings when one circuit decides one day, another circuit another, and the other circuits are undecided and the Supreme Court declines to take cases.

Do you agree with what Justice Scalia said, dissenting in (inaudible), where the court refers to take a key circuit split that when the court decides not to, quote, "it seems to me, quite irresponsible to let the current chaos

prevail with other courts not knowing what to do"? Or stated differently, do you think the Supreme Court has time to and should take up more circuit splits?

SOTOMAYOR: It does appear that the Supreme Court's docket has lessened over time, its decisions that it's addressing. Because of that, it certainly does appear that it has the capacity to accept more cases. And the issue of circuit splits is one of the factors that the court's own local rules set out as a consideration for justices to think about in the cert process. So in answer to your question, the direct answer is, yes, it does appear that it has the capacity.

SPECTER: The current rule in the Supreme Court is that petition for certiorari are applied, and there is a so-called cert pool where the -- seven of the nine justices, excluding only Justice Stevens and Justice Alito, do not participate in the cert pool so that they -- people applying for cert don't have the independent judgments.

When Chief Justice Roberts was -- before he became chief justice, he said that the cert pool's powers of little disquieting. Would you join the cert pool? Or would you maintain an independent status as Justice Stevens and Justice Alito do in having their own clerks and their own individual review as to whether cert ought to be granted?

SOTOMAYOR: I would probably do what Justice Alito did, although, I haven't decided if I'm given the honor of becoming a member of the Supreme Court. I haven't decided anything. I'm not even sure where I would live in New York if this were to happen -- in Washington.

But putting that aside, Senator, my approach would probably be similar to Justice Alito, which is experience the process, take, for a period of time, consider its costs and benefits, and then decide whether to try the alternative or not and figure out what I think works best in terms of the functioning my chambers and the court.

I can't give a definitive answer because I generally try to keep an open mind until I experience something and can then speak from knowledge about whether to change it or not.

SPECTER: Judge Sotomayor, you have had some experience on the pilot program conducted by the judicial -- federal judicial conference. And these were the conclusions reached by the pilot program. They said, quote, "Attitudes of judges toward electronic media coverage of civil proceedings were initially neutral and became more favorable after experience under the pilot program."

Quote, "Judges and attorneys who had experience with electronic media coverage under the program generally reported observing a small or no effects of the camera presence on participants in the proceedings, courtroom decorum, or the administration of justice." Would you agree with that based on your own personal experience having television in your courtroom?

SOTOMAYOR: My experience was limited, so I can't speak to the more broad conclusion of that report. I can say that as I -- as we discussed when I met with you, Senator, mine was positive.

In the two cases -- I believe I only had two cases where the camera -- where the media asked to record a proceeding. I may not remember others, but I do remember two. And on the circuit court, we do provide tapes upon request, and some -- some media have asked to record our oral arguments.

But my experience has generally been positive, and I would certainly be able to recount that.

SPECTER: C-SPAN has conducted a survey which shows that 61 percent of the American people would like to see the Supreme Court televised. And in the survey, it disclosed how little the American public knows about the Supreme Court. Mr. Chairman, I'd ask consent this be included in the record.

LEAHY: Without objection, it will be included in the record.

SPECTER: The interest that has been generated by this confirmation proceeding, encouraged by the television, shows the enormous interest that people have in what the court does. And there has been a fair amount of coverage by the justices on television, as I cited yesterday. Many have appeared on television. Justice Kennedy says he believes the television is inevitable.

Everybody has said who's testified that there's a grave concern about the collegiality, and people do not want to make a judgment before talking to their colleagues. And the sense has been derived that if anybody really has a strong objection -- and Justice Souter has expressed that view, as noted on his widespread comment that if cameras -- if TV cameras were to come to the court, they'd have to come in over his dead body.

And if confirmed, Justice Souter's body won't be there at all. Would you tell your colleagues the favorable expression -- experience that you've had with television in your courtroom and perhaps take a role in encouraging your colleagues to follow that experience for the Supreme Court?

SOTOMAYOR: I would certainly relay my experiences. To the extent some of them may not know about the pilot study in many courts, I would share that with them, although I do suspect they do know, and will participate in discussions with them on this issue. And those things I would do, Senator.

SPECTER: Some of my colleagues have questioned whether, as you stated, your panel in the Maloney case was really bound by Supreme Court precedent. The Seventh Circuit reached the same decision your panel did.

And in that opinion written by a highly respected Republican judge, Frank Easterbrook, the Seventh Circuit pointed out that Heller specifically declined to reconsider older Supreme Court cases which have held that the Second Amendment applies only to the federal government. Judge Easterbrook wrote, quote, "That does not license the inferior courts to go their own way. It just notes that the older precedent is open to reexamination by the justices themselves when the time comes." That was your court's conclusion also, wasn't it?

SOTOMAYOR: It was. And I understand, having reviews Justice Easterbrook's opinion, that he agreed with the reasoning of Maloney on that point.

SPECTER: I want to return to the issue of basic authority, responsibility of the Supreme Court to decide the major cases on separation of power. There was a case which the Supreme Court denied certiorari just a couple of weeks ago involving claims for damages brought by survivors of victims of September 11th against certain individuals in Saudi Arabia. And this case posed a classical conflict between executive and legislative responsibilities.

Congress had legislated under sovereign immunity in 1976 that tort claims like flying an airplane into the World Trade Center were an exception of sovereign immunity, and the executive branch interposed objections to having that case decided because of the sensitivity of matters with Saudi Arabia. And the case involved circuit splits and very, very important matters in that tragedy which you've commented reached you, being very close to the incident.

Don't you think that that's the kind of a case the Supreme Court should have heard to decide that kind of a very basic conflict between Article I powers of the Congress and Article II powers of the executive?

SOTOMAYOR: Senator, obviously issues related to September 11th and national security are very important issues to the country as a whole. For the reasons I mentioned earlier, I lived through September 11th, so I understand its great tragedy and effect on America. The question you ask me, though, is one that asks me to make judgment about an act the Supreme Court has done. And I didn't participate in their discussions. I didn't review the cert petitions. I didn't talk about with them their reasons. It would seem, and is, inappropriate to me to comment on a question that I wasn't a party to in making the decision.

SPECTER: Well, wouldn't you at least agree with the proposition that conflicts between the Congress and the executive branch are of the highest duty for the Supreme Court to consider and to decide?

SOTOMAYOR: The -- all conflicts under the Constitution, all issues arising from the Constitution are important.

SPECTER: Well, I know that, but that's a pretty easy question to answer. I'm not asking you to agree with Justice Roberts that the court ought to take more cases, which seemed to me to be pretty easy, or a question about Justice Scalia saying that there's turmoil when the circuit split.

And you don't have the Supreme Court taking cert, but isn't that of the highest magnitude? Our discussions here have involved a great many issues, but I would suggest to you that, on separation of powers and when you undertake the role of the Congress contrasting with the role of the president, Congress is Article I. It was placed with primacy, because we're closest to the people.

And when you have a question which you wouldn't comment on yesterday, like the terrorist surveillance program, which flatly contradicts the congressional enactment on Foreign Intelligence Surveillance Act, that the only way you'd get a wiretap is with court approval, and the case is declared unconstitutional in the Detroit district court, and the Sixth Circuit dodges the case on standing with very questionable grounds, and the Supreme Court won't even hear it, and you have a case involving September 11th and a very blatant conflict between Congress powers expressed under Article I with the sovereign immunities act, and the president is stepping in under foreign powers, isn't -- isn't that a category of the highest magnitude?

SOTOMAYOR: It is so difficult to answer that question in the abstract. For the reason I've just explained, the issue is much, much more complicated than an absolute that says, if a case presents this question, I'm always going to take it.

That's not how a judge looks at the issue of granting or not granting certiorari, I assume, because the fact is weighing so many different factors at the time that decision is made. I...

SPECTER: Judge, I don't want to interrupt you, but I've got a minute-and-a-half left and a couple of comments I want to make in conclusion.

I would ask you to rethink that. And I would also ask you to rethink the issues you didn't want to answer yesterday about conflict between the Congress and the court.

Even though the Constitution made Congress Article I and the president Article II, the Supreme Court has really reversed the order. The judiciary is now really in Article I, if the powers were to be redefined.

And I'd ask you to take a look -- you have said repeatedly that the job of the court is to apply the law, not to make the law. And take a look again at the standard of proportional and congruent and see if you don't agree with Justice Scalia that that's another way for the court to make law.

And take a look, too, at what Justice Roberts said here in the confirmation hearings, that there would be deference and respect for congressional fact-finding, how that is not done in the Garrett case and in the voting rights case.

SPECTER: And out of consideration for the people who are going to appear here later on, I'm not prepared yet to announce my own vote, but it is my hope that -- and the conventional wisdom is very strong for your confirmation -- that you'll use some of those characteristics of your litigation experience to battle out the ideas that you believe in, because I have a strong hunch that they're closer to the ones that I would like to see adopted to the court.

And don't let the issues of separation of powers skip by. The Congress is entitled to deference on these big issues, and at least they ought to be decided by the court. Thank you very much, Judge Sotomayor. You've done quite an outstanding job as a witness. Thank you, Mr. Chairman.

LEAHY: Thank you, Senator Specter. And, Judge, we're going to take a -- we're going to take a short break. And thank you for all this. When we come back, we'll go to -- we'll recognize Senator Coburn, who's next. Thank you.

(RECESS)

LEAHY: Judge, thank you. And I do want to -- I do want to thank the press for cooperating. We've tried to make it as possible for TV and print and Congress. And, Your Honor, you've been very gracious in that regard. And now I think we're coming close to the end of this round.

it will be the last round or not will be up to the Republican side. But I would yield now to Senator Coburn, who's been waiting patiently. Senator Coburn?

COBURN: Thank you, Mr. Chairman, and good morning again.

SOTOMAYOR: Good morning, sir.

COBURN: Yesterday, you -- when I was asking you about foreign law, you said I should read your speech, so I did. I read your speech. So I want to come back to that for a minute, because I want to ask you the same question I've asked the only other two Supreme Court nominees that have come before the committee while I've sat on this committee.

And I want to ask you the same question. I -- my first statements yesterday was asking about whether you disagreed with Alito and Thomas, and you said basically you agree. So on the basis of that agreement, will you affirm to this committee and the American public that, outside of where you are directed to do so through statute or through treaty, refrain from using foreign law in making the decisions that you make that affect this country and the opinions that you write?

SOTOMAYOR: I will not use foreign law to interpret the Constitution or American statutes. I will use American law, constitutional law to interpret those laws except in the situations where American law directs the court.

COBURN: Thank you. I want to ask you, also, another question that I asked both Justice Alito and Justice Thomas, and it's a problem I have with my colleagues here in the Senate. You've written extensively about some of the ambiguity that is in law. Would it be your opinion that we could do a much better job, maybe much

clearer about what our intent is, when we write statutes? And feel free to offend us all, because we sorely need it. (LAUGHTER)

(UNKNOWN): Senator Coburn, speak for yourself. (LAUGHTER)

COBURN: I'm speaking for the vast majority of American people. We do not do a thorough job in making clear our intent or the background of our intent when we send it.

And I'll give you an example, then. Two hundred and twenty times in the bill that just came out of the HELP Committee, we gave full shrift to the Secretary of HHS to write all the regulations without our intent, none of our intent. So you're -- as you sit -- if you sit -- on the Supreme Court, I'm sure many of those are going to come before you without our intent, but with a bureaucracy's intent or an executive branch intent.

So the question I'm -- ask you, in your experience, since you've noted the ambiguity that's in the law, would you make it a recommendation to your friends you've now established, all 19 of us on the Judiciary Committee, that we might do a better job of being much more clear in what we intend?

SOTOMAYOR: It would be presumptuous of me to tell you how to do your job, but I do know, in my conversations virtually with all 89 senators, perhaps not all of them, but the vast majority of them, somewhere in the conversation, there was reference to their feelings like yours that a better job could be done by Congress in making its intent clearer.

I think that that's a question that senators think about, or at least the ones that I've spoken to. And I think that the process is always bettered for a court when Congress's intent is more clearly stated.

COBURN: Yes. And there's no doubt in your mind that, if we were much more clear, guidance would be better given to the Supreme Court as conflicts over the statutes and laws come forward.

SOTOMAYOR: When Congress's intent is clear, the court applies that clear intent.

COBURN: Thank you. I want to go back to a couple of other areas that we talked about. One is -- is some answers to questions that you gave to -- questions from Senator Hatch.

Senator Hatch asked you to describe your understanding of the test or standard that the Supreme Court uses to determine whether a right should be considered fundamental. Specifically, he noted that, when determining whether a right is fundamental, the Supreme Court determined whether the right is deeply rooted in our nation's history and tradition, that it is necessary to an Anglo-American regime of ordered liberty, or that it is an enduring American tradition.

You refused to answer him, asserting that you responded that you haven't examined that framework in a while to know if that language is precise or not. "I'm not suggesting it's not," you said, "Senator. I just can't affirm that description."

Similarly, you refused to describe to me the test the court used to determine whether a right is a fundamental right.

But in contrast to that, when Senator Kaufman asked you to give a very detailed description of the factor the courts consider when determining the doctrines of stare decisis, you stated and went through a long litany of the items with which the court uses with which to determine stare decisis. And you gave a fairly detailed analysis of that process and the doctrine of stare decisis.

And so I ask you again: Why can't you give us your description of what you think the parameters are that the court uses to determine a fundamental right, in light of the 14th Amendment, incorporation right?

SOTOMAYOR: All right. That language has been used in certain cases respecting the question of the incorporation of certain amendments. The question of -- and the general framework will be used with respect to any consideration of -- of incorporation.

That wasn't, I thought, the question that was being asked of me. I don't remember that being the specific question. All I'm saying to you is that the framework has been discussed by the court. In jurisprudence, it's developed over the last hundred years, subsequent to its established precedents on the Second Circuit.

One of the questions that the court will address, if it decides to address the incorporation of the Second Amendment, is whether, in those related areas, it will use or not use the doctrines or framework of that precedent. There may be arguments on one side why, on another side why not. What I'm trying to do is not prejudge an issue...

COBURN: Well, I'm not...

SOTOMAYOR: ... that is still pending before the court.

COBURN: ... asking you to prejudge the issue. I'm asking you under what basis -- what is the -- what are the steps and the considerations, not the details of the case -- but, in other words, you can describe that for us in terms of stare decisis, but you can't describe that for us in terms of a fundamental right. And to me, that's concerning, because we should understand -- and that should be transparent to the people in this country, how that works.

SOTOMAYOR: Because that's the very issue the court's going to look at. The question of stare decisis is a general framework that one uses not in a particular context of a case I'm going to choose always to look at the outcome of the case in this way. It's...

COBURN: Your Honor, I understand that. If I can't get you to go there, I want to quit and go on to something else, if I can. I also asked you yesterday -- I want you to understand. You were raised in the Bronx. I was born in Wyoming and raised in Oklahoma. They're really geographically and culturally. Different areas. And so I want you to understand why I'm spending so much time talking with you about the Second Amendment.

My constituents in Oklahoma understand, as do most Americans, that the right to own guns hangs in the balance. It may very well hang in the balance with your ascendancy to the Supreme Court. For us, one wrong vote on what we consider -- regardless of what you consider -- but what we consider a fundamental right could get the holding of Heller.

And I have some serious concerns on that issue. And I want to ask you a few more questions. Yesterday, you said that, clearly, a constitutional right only works if you can enforce it. And I agree. Tell me how American citizens would be able to enforce their individual constitutional right to bear arms if you're holding that it does not apply to the states in your previous case as the appellate level becomes the law of the land?

SOTOMAYOR: The only statement I can start with is Maloney was decided on the basis of precedent. It was decided on precedent the Supreme Court, in Heller, recognized as its precedent. It was based on Second Circuit precedent that had interpreted the constitutional -- the Supreme Court's prior precedent. It may well be, may not

be, that Senator Hatch was right that the old precedent should be distinguished in a certain way. Others may be right that it shouldn't.

That issue was not the one the Maloney court decided Maloney on. It decided it on the rule of law. It was the rule of law that led Judge Easterbrook in the Seventh Circuit decision to say not what we should be doing, it's what the Supreme Court should do is to reexamine a precedent that's directly on point.

I can assure your constituents that I have a completely open mind on this question. I do not close my mind to the fact and the understanding that there were developments after the Supreme Court's rulings on incorporation that will apply to this question or be considered. I have a completely open mind.

COBURN: Do you not consider it ironic that the majority of the debate about the 14th Amendment in this country was about the taking of guns from freed slaves? Is that not ironic that we now have some kind of conflict that we're going to say that the whole reason in the debate about the 14th Amendment originated from states taking away the rights of people's fundamental right to defend themselves? Is that not an irony to you?

SOTOMAYOR: Senator, would you want a judge or a nominee who came in here and said, I agree with you; this is unconstitutional before I had a case before me, before I had both sides discussing the issues with me, before I spent the time that the Supreme Court spent on the Heller decision -- and that decision was mighty long. It went through two years of history, did a very thorough analysis and discussion back and forth on the prior opinions of the court. I don't know that that's a justice that I can be.

COBURN: Well...

SOTOMAYOR: I can only come to this...

COBURN: I agree with you, your honor. I don't want you to tell us how you're going to rule. But I asked you, isn't it ironic that in this country where our law comes from Blackstone forward, comes from English law, which our founding was perpetrated and carried out under this fundamental right, and that we have the 14th Amendment right, and that we have through legal -- what I would consider as a physician -- schizophrenia have decided that we can't decide whether this is a fundamental right.

I'll finish with that point, other than to note the Presser reference was to privilege and immunity, not due process.

SOTOMAYOR: I understand the importance of the right. It was recognized in Heller. And all I can continue to say, Senator, is I keep an open mind on the incorporation doctrine.

COBURN: I appreciate that, your honor. Thank you very much. Let me go back to an area that I know is -- not everybody wants to hear about, but I think it's important. I asked you about where we were in terms of settled law on Roe and Doe, and -- and today I only want to focus on Roe and Doe, not Casey.

What was the state the law, say, in 1974, one year after Roe? What was -- where did we stand in that issue?

SOTOMAYOR: That women have the right to terminate their pregnancy in some situations without government regulation, and in others there would be permissible government regulation.

COBURN: Let me -- did any of the...

SOTOMAYOR: That's generally, because the court did look at other questions in terms of government regulation.



COBURN: Then let me ask you this. Did any of the laws of the 50 states regulating abortion survive the decision in Roe?

SOTOMAYOR: I don't know that I could answer that question, because I don't...

COBURN: OK. That's -- that's fair. They didn't. Was there any limit to the right to abortion either in the age of the child in the womb or the reasons for electing that surgery? And if so, what are those limits, according to Roe and Doe?

SOTOMAYOR: I -- Senator, I don't actually remember the court addressing that, because my studies have been on the undue burden test established in Casey. So my experience in this area or my knowledge, really, has been most particularly concentrated on the Casey standard, which is...

COBURN: I understand that.

SOTOMAYOR: ... what Casey did was change the Roe standard.

COBURN: Which goes back to why I asked you those two hypothetical -- not abstract, but hypothetical cases yesterday, the 28-week and a 38-week infant, for the -- the truth is, ever since January 22, 1973, you can have an abortion for any reason you want in this country. And even though Carhart II has now been ruled, that's -- a procedure that will eliminate that pregnancy is still legal and viable everywhere in this country.

COBURN: And so what I was trying to draw out to you is, where do we stand in this country, when 80 percent of the rest of the world allows abortion only before 12 weeks, only before 12 weeks? And yet we allow it for any reason at any time for any inconvenience under the health-of-the-woman aspect.

And that's the other reason why I raised the viability because technology and the state's interest under the Supreme Court ruling starts with viability. That's when a state can have interest. It's guaranteed, and there's limited ability states can have to control that after that.

Is the Casey ruling, the undue burden ruling test, is that a policy choice? I know it's the supreme law of the land today, but in your mind, would that represent a policy choice?

SOTOMAYOR: I understood that that was the court's framework for addressing both the woman's right to terminate her pregnancy under the Constitution and the state's rights to legislate and regulate in areas within its jurisdiction. So it was the court's way of attempting to address those two interests.

COBURN: And Justice Ginsberg's not real happy with those tests and neither was -- neither are several other members on the court.

I want to end up. Our conversation, when we had a private conversation, I approached you about the importance of the cases that you decide to take if you're on the court. Let me ask you a few questions, and I just want your opinion, and I'm not trying -- this is not to put you in any box, and if you think it is, please say so -- you're trying to put me in a box.

Do you believe that the court's abortion rulings have ended the national controversy over this issue?

SOTOMAYOR: No.

COBURN: OK. You don't have to name them, but do you think there are other similarly divisive issues that could be decided by the court in the future?

SOTOMAYOR: That, I can't answer.

COBURN: I don't want you to name any. I'm just saying, as you think through your mind, do you think there are other similarly divisive issues that are -- that we could have that would divide the country so remarkably? You know, assisted suicide, euthanasia...

SOTOMAYOR: I can only answer what exists. People are very passionate about the issues they believe in. And so almost any issue could find an audience or a part of our population that's fervent about it.

COBURN: Which is a great answer because, on these divisive issues, is it better that the court decides them or elected representatives? If you find a preference, if you were king tomorrow and you said we're going to decide this either in the Supreme Court or make -- force Congress to make the decision, which would you think would be better for us?

SOTOMAYOR: In the first instance, it's always Congress or a state passing regulation that the court is reviewing and determining whether it complies with constitutional limits. So it's not a choice of either or. It's always Congress' first interest or the state legislators' first interest with the non-veto of a...

COBURN: I've got 30 seconds left. I want to ask you another question. You said just a minute ago people are passionate about what they believe in. And I've read your speeches and your publications, and I believe you're passionate. And I believe your speeches reflect your passions. I look at myself. And when I give a speech, you know, I let it all go, what I really believe. I'm more measured -- some people wouldn't believe that -- up here, but I am more measured when I'm here, but when I give a speech.

And the problem I'm having is, I really see a dissonance about what you said outside of your jurisprudence. And the only thing -- the only -- the only ability we have to judge is what that passion has relayed in the past and your statements here, in combination with your judicial practice.

And so you are an admirable judge, an admirable woman. You have very high esteem in my eyes for both your accomplishments and your intellect. I have yet to decide where I'm going on this, because I am still deeply troubled because of the answers that I couldn't get in the 50 minutes that I've been able to ask and also deeply troubled because I believe what you've spoken to the law students, what you've spoken in your writings truly reflect your real passions, which I sometimes find run in conflict with what I think the Constitution has to say.

But I thank you for giving us such a cordial response, and I am mightily impressed. Thank you, Mr. Chairman.

LEAHY: Thank you, Senator.

SOTOMAYOR: Thank you, Senator.

LEAHY: Senator Coburn, the Republican side has asked for a third round of those who want to have another 10 minutes, and so you will have a chance for more questions if you wish, because I'm trying to be fair to both sides, and I'll allow that.

Before we go to Senator Franken, though, and -- and while you're still here, Senator Coburn, I had reserved about 10 minutes of my time, just used a minute or so of it.

You spoke about the Second Amendment, which is a significant issue. And it is one people care about. You spoke about gun owners out west and your life in both Wyoming and in Oklahoma.

I look at that, of course, because both Wyoming and Oklahoma have more restrictive gun laws than my own state of Vermont. I could say that virtually every state has more restrictive gun laws than we do in Vermont. I've been a gun owner since my early teens. I have -- I target shoot at my home in Vermont as a way of relaxation all the time, own numerous weapons, handguns and long guns.

I have not heard anything or read anything in the judge's writings or speeches that would indicate to me that in any way I have to worry that Vermont gun owners -- and many Vermonters are gun owners, it's just a way of life -- that that's going to change.

It's not going to change for me. It's not going to change for weapons my two sons, one a former Marine, own. And I will still be -- if Judge Sotomayor is on the Supreme Court, I expect I'll still be back at my home, and you're welcome any time you'd like to come, and go target shooting -- and go target shooting with me there.

SESSIONS: Mr. Chairman, I would just say briefly that -- but it is a real pivotal time we are in, because if the decision by Judge Sotomayor becomes law, any city -- maybe not Vermont -- but any city or state in America could virtually, I believe, fully ban all firearms, and that's just the way we are, and you may -- we can discuss how much precedent had to bound you to reach that conclusion.

But this is not a little bitty issue. It's very important right now.

LEAHY: But states made laws that they've gone along. Vermont has decided not to have the restrictive laws that you have in Alabama, and -- but states have made up their mind. Senator Franken?

FRANKEN: Thank you, Mr. Chairman. I have a letter here from several former U.S. attorneys from the Southern District of New York, some of them Republican-appointed and supporting the Judge's confirmation, and I'll read a little bit from it.

She -- says that each had personal experience, including appearing before Judge Sotomayor. "She came to our cases without any apparent bias, probed counsel actively with insightful and, at times, tough questions, and demonstrated time and again that she not only listens but is often persuaded by counsel. In our matters, Judge Sotomayor's opinions reflect clear discipline and" -- you know, it's great. It's a great letter. And I would ask that it be entered into the record. Sir, can I enter into the record?

LEAHY: (OFF-MIKE)

FRANKEN: OK. Thank you. Thank you, Judge Sotomayor, for your patience and your terrific answers. We've heard a lot about your thoughts on specific cases and on principles of jurisprudence. I'd like to ask a much more general question, and one that I think is a really good question in job interviews. And that is, "Why do you want to be a Supreme Court justice?"

SOTOMAYOR: You're going to hate me for taking a few minutes, but can I tell you a story?

FRANKEN: I would love it.

SOTOMAYOR: Because it will explain who I am and why.

When Senator Moynihan first told me that he would consider sending my name to Senator D'Amato for consideration as a district court judge, he asked me to keep it quiet for a little bit of time, and I asked permission to tell my mom and Omar. He said, "Sure."

So, they were visiting, and I told them, and mom was very, very excited. And she then said, "How much more money are you going to earn?" And I stopped and I said, "I'm going to take a big pay cut."

Then, she stopped and she stopped, and she said, "Are you going to do as much foreign travel as you do now," because I was flying all over the U.S. and abroad as part of my private practice work. And I said, "Probably not, because I'm going to live in a courthouse in Lower Manhattan near where I used to work as a Manhattan D.A."

Now, the pause was a little longer, and she said, "OK." Then, she said, "Now, all the fascinating clients that you work with," and you may have heard yesterday I had some fairly well known clients, "You're going to be able to go traveling with them and with the new people you meet, right?" And I said, "No. Most of them are going to come before me as litigants to the cases I'm hearing, and I can't become friends with them."

SOTOMAYOR: Now the pause was really long, and she finally looked and she says, "Why do you want this job?" And Omar, who was sitting next to her, said, "Celina, you know your daughter"-- this is in Spanish -- "You know your daughter." This is in Spanish. "You know your daughter and her stuff with public service." That really has always been the answer.

Given who I am, my love of the law, my sense of importance about the rule of law, how central it is to the functioning of our society, how it sets us apart, as many senators have noted, from the rest of the world, have always created a passion in me, and that passion led me to want to be a -- a lawyer first and now to be a judge, because I can't think of any greater service that I can give to the country than to be permitted the privilege of being a justice of the Supreme Court.

FRANKEN: Thank you. Well, I, for one, have been very impressed with you, Judge. And I certainly intend to support your confirmation for the court. I guess there is another round. I thought I was going to be the only thing between you and the door, so I -- I -- I plan to just yield my -- all the rest of my time. But since I'm not, I'd like to ask you some -- no, I'm going to yield the rest of my time, if that's OK.

LEAHY: Thank you. Thank you very much, Senator Franken. I will reserve my time. We'll have -- as Senator Sessions has asked us -- 10-minute rounds. I think they'll be primarily on the Republican side. I may speak again when they finish. But we'll begin with you, Senator Sessions.

SESSIONS: Thank you. Thank you, Chairman Leahy. I believe we've tried to meet our goal. I had a goal at the beginning that people would say this is one of the most fair and effective hearings we've ever had. I hope that has been the case.

It's a great issue, the choice of putting someone on the United States Supreme Court. And our nominee has a wonderful group of friends and a long and distinguished record, but a number of questions arose that are important.

The American people rightly are concerned that on important social issues that are not clearly stated in the Constitution, on important legal issues not clearly stated in our law, seem to be decided by unelected, lifetime-appointed courts. Those are big, big issues that we've discussed here today I hope in a way that's healthy and positive.

Judge, one thing I will ask you -- I asked Justice Roberts. I'm not sure how much good it did, because he came back asking for a pay raise the next week, I think. But can you live on that salary that you're paid? We have the largest deficit in the history of the republic. A lot of people are going to have to tighten their belts. And are you prepared to do so, also?

SOTOMAYOR: I've been living on the salary for 17 years, so I -- I will suffer through more of it. It is difficult for many judges. The pay question is a significant one for judges who haven't received pay raises -- I think it's more than 20 years now, if I'm not mistaken.

SESSIONS: Well, you're saying pay raises based on -- they're getting pay raises almost every year, really, and the cost of living and that kind of thing. There was a big pay raise about 20 years ago. I think that it's about four times the average family income in America. I hope that you can live on it. If not, you probably shouldn't take the job.

All judges, whether they're activists or not, if asked, are going to say they follow the law. They just have a different view of the law; they just have a little -- a more looser interpretation of the law. So that's why we've pressed some of these issues. We want to determine as best we can just how tightly you believe you're bound by the law and how much flexibility you might think that you have as a judge to expand the law to suit, perhaps, a predilection in some policy area or another.

Attorney General Holder recently said that he thought we lacked courage in discussing the race issue, and I think that's something that we should take seriously. That was a valid comment.

In my opinion, we've had a higher level of discussion of that issue than -- since I've been in this committee. And I hope we've done it in a way that's correct, because this is so sensitive, and it's so important, and we need to get it right, and we must be fair to everybody.

We know that there are cases when people have been discriminated against. They are entitled to a remedy. And the Supreme Court has been quite clear that, when you can show a history of discrimination -- and we've had that not just in the South, but in the South -- the jurisprudence has developed that it's appropriate for a judge to have a remedy that would encourage a move forward to a better opportunity those who've been held back. So that's good.

But the Supreme Court has also said that this is a dangerous philosophy, because, when you do that, you've identified one racial group and you've given them a preference over another. So it can be done in a legitimate way that's remedial.

And we still have vestiges of discrimination still in our society, and there will still be needs for remedial remedies. But I do think, as Justice Roberts said, the best way to end discrimination is quit doing it, and a lot of our orders in court decisions are such that they benefit one race over another solely because of their race. And it has to be tied to a remedy.

And that's why the Supreme Court has made clear that, when you do that, it must meet the highest scrutiny. The courts are supposed to review that very carefully, and the language they use is strict scrutiny. You don't favor one group over another without meeting that high standard.

So I'm -- I'm glad we've begun to discuss that, and we'll have the firefighters, and they'll be able to express their view on it in a little bit.

And, Judge, let me just say, before I go forward, that you've done a good job. You've had a good humor. You've been direct in your answers, and we appreciate that. I will not support and I don't think any member of this side will support a filibuster or any attempt to block a vote on your nomination. It's a very important vote. We all need to take our time and think it through and cast it honestly, as the occasion demands. But I look forward to you getting that vote before we recess in August.

Let me discuss -- Judge, I'll just express this as we go forward. In your handling of the Ricci case, I think it's fair to say that it was not handled in the regular order. You said in your opening statement that the "process of judging is enhanced when the arguments and concerns of the parties to the litigation are understood and acknowledged. That is why I generally structure my opinions by setting out what the law requires and then by

explaining why a contrary position sympathetic or not is accepted or rejected. And that is how I seek to strengthen both the rule of law and faith in the impartiality of our justice system," close quote.

I think that's a good statement, but I think what the panel did in this case did not meet that standard. I think it was action -- I would conclude, fairly I think -- contrary to the rules of the Second Circuit. Rule 32.1 says that summary orders are only appropriate where, quote, "a decision is unanimous and each judge of the panel believes no jurisprudential purpose would be served by an opinion."

And your clerk of your court there to the New York Times said this order, quote, "ordinarily issues when determination of the case revolves around well-settled principles of law."

And I would note that it was not a per curiam opinion at first. It was a summary order, which is even less of an impactful decision than the other.

But I think the Supreme Court made clear and I think most Americans understand that the firefighters case was more than that. It was a -- it had tremendous jurisprudential impact. And I think you were wrong to attempt to use the summary order, which, because it was objected to within your circuit, which resulted in a pretty roaring debate and discussion, and that you went forward, that you then did it in a per curiam way, which at least gave it a little higher credence, but you did not write the -- an in-depth opinion at all. In fact, it was still a per curiam and short opinion.

And I understand, according to some of the writers, that Judge Sack, New York Times, I believe, quoted by Stuart Taylor in National Journal, that -- that he was the most reluctant to join the opinion. Judge Pooler was in the middle. And I guess it didn't reference the third judge, but apparently you were the third judge they were pushing for this kind of result.

Did you fail to show the courage that Attorney General Holder has asked us to show and discuss this issue openly with an in-depth opinion? And wouldn't we have been better off if the case had been handled in that fashion?

SOTOMAYOR: Sir, no, I didn't show a lack of courage. The court's decision was clear in both instances on the basis for the decision. It was a thorough, complete discussion of the issues as presented to the district court. The circuit court's ruling was clear in both instances. No, I did not lack courage.

SESSIONS: Well, I don't think it was a great district court opinion, but it was -- so I would disagree on that. But, Mr. Chairman, you have been fair to us throughout. I don't know that every member of our side would use the time that they are allotted, and -- but I'm glad that you're allowing them the opportunity to do so.

LEAHY: Well, thank you. Thank you for that compliment, Senator. I -- and I should compliment Senator Specter here. When he was chairman, I was ranking member, and we had to Supreme Court nominations.

We tried to work out a time to (inaudible) everybody, and we did, and it was -- we were told by both Republicans and Democrats that nobody had complained about the amount of time. I've tried to do the same thing. It is a lifetime appointment. Been very impressed, of course, with our nominee, and that's been obvious.

Incidentally, she was originally nominated by President George H.W. Bush, and then by President Bill Clinton, now by President Barack Obama. President Clinton nominated her to the Second Circuit, and I have a letter addressed to the members of the committee -- well, actually to you and I, Senator Sessions, from former President Clinton.

And he speaks of her being able to make a unique contribution through her experience as a prosecutor and trial judge to the bench and hopes that we will have a speedy confirmation for her. And I will put that in the record.

One of the things is in -- also in trying to make sure everybody gets balanced time, but we've had -- a lot of us have served as either chairmen and ranking member of this committee. We know how important that is. And I use that to yield to Senator Hatch, who has had also the problem of having to schedule how things go. And I'll yield to you. But thank you, Jeff. I appreciate that.

HATCH: Well, thank you, Mr. Chairman, and I echo Jeff's statement here. Judge, you've been great throughout this process, and I appreciate it. But I have some questions I'd like to ask, but I think you can answer yes or no. Of course, you can qualify if you feel like it. But I would like to get through these, because they're important questions to me and millions of other people that I represent.

Judge, from 1980 to 1992, you were actively involved with the Puerto Rican Legal Defense and Education Fund. That's a well-known civil rights organization in our country.

Among many other activities, this group files briefs in Supreme Court cases. You served in nearly a dozen different leadership positions there, including serving on and chairing the Litigation Committee.

The New York Times has described you as a, quote, "Top policymaker," unquote, with the group, and said that you would meet frequently with the legal staff, review the status of cases, and played an active role in the fund's litigation. Lawyers at the fund described you as, quote, "An involved and ardent supporter of their various legal efforts during your time with the group," unquote.

The Associated Press looked at documents from your service with the fund that showed that you were, quote, "Involved in making sure that the cases, the fund's cases, handled were in keeping with its mission statement and were having an impact."

And when Senator Gillibrand introduced you to this committee on Monday, she compared your leadership role with the fund to Justice Ruth Bader Ginsburg's participation in the ACLU Women's Rights project or Justice Thurgood Marshall's participation on behalf of the NAACP Legal Defense and Education Fund.

So let me ask you just about a few abortion cases in which the fund filed briefs. And I do believe you're going to answer these yes or no, but again, certainly qualify if you feel like it.

I'm not asking for your present views, either personal or legal, let's get that straight, on these issues, nor am I asking how you might rule on these issues in the future. I just want to make that clear.

I might say that -- like I say, these are important issues. In one case, *Williams v. Zbaraz* and *Harris v. McRae*, the fund joined an amicus brief asking the Supreme Court to overturn restrictions on taxpayer funding for abortions.

The brief compared refusing to use Medicaid funds to pay for abortions to the *Dred Scott* case, the *Dred Scott v. Sandford* decision that refused citizenship to black people in our society and -- and treated them terribly. At the time, did you know that the fund was filing this brief? At the time, did you -- well, let me ask you each one. At the time, did you know the fund was filing this brief?

SOTOMAYOR: No, sir.

HATCH: OK. At the time, did you know that the brief made this argument?

SOTOMAYOR: No, sir.

HATCH: At the time, did you support the fund filing this brief that made this argument?

SOTOMAYOR: No.

HATCH: At the time, did you voice any concern, objection, disagreement or doubt about the fund filing this brief or making this argument?

SOTOMAYOR: I was not like Justice Ginsburg or Justice Marshall. I was not a lawyer on the fund as they were, with respect to the organizations they belonged to. I was a board member.

And it was not my practice and not that I know of, of any board member, although maybe one with civil rights experience would have. I didn't have any in this area, so I never reviewed the briefs.

HATCH: All right. In another case, *Ohio v. Akron Center for Reproductive Health*, the fund argued that the First Amendment right to freely exercise religion undermines laws requiring parental notification for minors getting abortions. Now, at the time, did you know that the fund was filing this brief?

SOTOMAYOR: No, no specific brief. Obviously, it was involved in litigation, so I knew generally they were filing briefs, but I wouldn't know until after the fact that a brief was actually filed. But I wouldn't review it.

HATCH: The same questions on this. At the time, did you know that the brief made this argument? At the time, did you support the fund filing this brief that made this argument? And at the time, did you voice any concern, objection, disagreement, or doubt about the fund filing this brief or making this argument?

SOTOMAYOR: No, because I never reviewed the brief.

HATCH: That's fine. I'm just going to establish this. In another case, *Planned Parenthood v. Casey*, the fund argued against a 24-hour waiting period for obtaining an abortion. So, again, those questions. At the time, did you know that the fund was filing this brief? Did you know that the brief made this argument? Did you support the fund filing this brief that made this argument? And did you voice any concern, objection, disagreement or doubt about the fund filing this brief or making this argument?

SOTOMAYOR: For the same reason, no.

HATCH: OK. Now, Judge, I'm going to be very easy on you now, because I -- I invited constituents in Utah to submit questions and got an overwhelming response. Many of them submitted questions about the Second Amendment and other issues that have already been discussed.

But one constituent asked whether you see the courts, especially the Supreme Court, as an institution for resolving perceived social injustices, inequities and disadvantages. Now, please address this both in terms of the justices' intention and the effect of their decisions. That was the question. And I thought it was an interesting question.

SOTOMAYOR: No, that's not the role of the courts. The role of the courts is to interpret the law as Congress writes it. It may be the effect in a particular situation that, in the court doing that, in giving effect to Congress's intent, it has that outcome, but it's not the role of the judge to create that outcome. It's to interpret what Congress is doing and do what Congress wants.



HATCH: Great. One final question, Judge. You have described your judicial philosophy in terms of the phrase "fidelity to the law." Would you agree with me that both majority and dissenting justices in last year's gun rights decision in *District of Columbia v. Heller* were doing -- doing their best to be faithful to the text and history of the Second Amendment?

SOTOMAYOR: Text and history, how precedent had analyzed it, yes.

HATCH: OK. In other words, do you believe that they were exhibiting fidelity to the law as they understood it?

SOTOMAYOR: Yes. Yes.

HATCH: OK. Then I take it that you would agree that the justices in the majority were not engaging in some kind of right-wing judicial activism that some have characterized the decision? Is that fair to say?

SOTOMAYOR: It is fair for me to say that I don't view what a court does as activism. I view it as each judge principally interpreting the issue before them on the basis of the law.

HATCH: Great. Well, let me just ask you one other constituent question. It's a short one. Another constituent asked, which is more important or deserves more weight, the Constitution as it was originally intended or newer legal precedent?

SOTOMAYOR: What governs always is the Constitution...

HATCH: Yes, which -- which -- which is more important or deserves more weight, the actual wording of the Constitution as it was originally intended or newer legal precedent? That's a tough question.

SOTOMAYOR: The intent of the founders was set forth in the Constitution. They created the words; they created the document. It is their words that is the most important aspect of judging. You follow what they said in their words, and you apply it to the facts you're looking at.

HATCH: Well, thank you, Judge. I'll give back the remainder of my time, Mr. Chairman. LEAHY: Thank you. Thank you, Senator Hatch.

And I just would note, we do have this letter in the -- in the record from PRLDEF, the Puerto Rican Legal Defense and Education Fund, in which they say, "Neither the board as a whole nor any individual member selects litigation to be undertaken or controls ongoing litigation." I just think that should be very, very clear here. Probably why they get support from the United Way and a number of other organizations. Senator Grassley?

GRASSLEY: Good morning, Justice -- Judge Sotomayor. Yesterday, you said you would take a look at *Baker v. Nelson*, so I ask this question. You said you hadn't read *Baker* in a long time and would report back. You added that if *Baker* was precedent, you would uphold it based upon *stare decisis*, consistent with your stance in cases like *Keyhole* (ph), *Roe v. Wade*, *Griswold*, many others that you mentioned this week. *Baker* involved an appeal from the Minnesota Supreme Court which held that a Minnesota law prohibiting same-sex marriage did not violate the 1st, the 8th, the 9th or the 14th Amendment to the Constitution. The Supreme Court, in a very short ruling, concluded on its merits that, quote, "The appeal is dismissed for want of substantial federal question."

*Baker* remains on the books as precedent. Will you respect the court's decision in *Baker* based upon *stare decisis*? And if not, why not?

SOTOMAYOR: As I indicated yesterday, I didn't remember Baker. And if I had studied it, it would have been in law school. You raised the question, and I did go back to look at Baker. In fact, I don't think I ever read it, even in law school.

Baker was decided at the time where jurisdiction over federal questions was mandatory before the Supreme Court. And the disposition by the Supreme Court, I believe, was what you related, Senator, which is a dismissal of the appeal raised on the Minnesota statute.

What I have learned is the question of -- it's what the meaning of that dismissal is actually an issue that's being debated in existing litigation. As I indicated yesterday, I will follow precedent according to the doctrine of stare decisis. I can't prejudge what the precedent means in the issue comes before -- what a prior decision of the court means and its applicability to a particular issue is until that question is before me as a judge or a justice, if that should happen.

So at bottom, because the question is pending before a number of courts, the ABA would not permit me to comment on the merits of that. But as I indicated, I affirm that, with each holding of the court to the extent it is pertinent to the issues before the court, it has to be given the effects of stare decisis.

GRASSLEY: Am I supposed to interpret what you just said as anything different than what you said over the last three days in regard to Kelo or Roe or Griswold or any other precedents you said or precedents? Or would it be exactly in the same tone as you mentioned in previous days are previous precedents under stare decisis?

SOTOMAYOR: Well, those cases have holdings that are not open to dispute. The holdings are what they are. Their application to a particular situation will differ on what facts those situations present.

The same thing with the Nelson case which is what does the holding mean. And that's what I understand is being litigated because it was a one-line decision by the Supreme Court and how it applies to a new situation is what's also -- would come before a court.

GRASSLEY: OK. My last question for your appearance before your committee involves a word I don't think that's showed up here yet -- vacuums. And it's a question that I asked Judge Roberts and Justice Alito. And it comes from a conversation I had -- a dialogue I had at a December hearing when Judge Souter was before us, now Justice Souter, involving the term "vacuums in law."

And I think the term "vacuums in law" comes from Souter himself as I'll read to you in just a moment. I probed Judge Souter about how he would interpret the Constitution and statutory law. In his response,

Justice Souter talked about the court filling vacuums left by Congress. And there's several quotes that I can give you from 19 -- I guess it was 1990. But I will just read four or five lines of Judge Souter speaking to this committee.

GRASSLEY: Because if, in fact, the Congress will face the responsibility that goes with the 14th Amendment powers, then by definition, there, to that extent, not going to be a kind of vacuum of responsibility created in which the courts are going to be forced to take on problems which sometimes in the first instance might be better addressed by the political branches of government.

Both prior to that and after that, Judge Souter talked a lot about maybe the courts needed to fill vacuums. Do you agree with Justice Souter? Is it appropriate for the courts to fill vacuums in the law?

And let me quickly follow it up. Do you expect that you will fill in vacuums in the law left by Congress if you're confirmed to be an associate justice?

SOTOMAYOR: Senator Grassley, one of the things I say to my students when I'm teaching, brief writing, I start by saying to them, it's very dangerous to use analogies, because they're always imperfect. I wouldn't ever use Justice Souter's words, because they are his words, not mine.

I try always to use -- and this is what I tell my students to do -- is use simple words. Explain what you're doing without analogy. Just tell them what you're doing. And what I do is not described in the way -- or I wouldn't describe it in the way Justice Souter did. Judges apply the law. They apply the holdings of precedent. And they look at how that fits into the new facts before them.

But you're not creating law. If that was an intent that Justice Souter was expressing -- and I doubt it -- that's not what judges do. Judges do what I just described, and that's not, in my mind, acting for Congress. It is interpreting Congress's intent as expressed in a statute and applying it to the new situation.

GRASSLEY: Thank you. I'm done, Mr. Chairman.

LEAHY: Thank you very much, Senator Grassley. Senator Kyl, did you want another round?

KYL: Yes, thank you, Mr. Chairman. I'm not sure how long this will take. But, Judge, I think maybe we're, to use the president's analogy that we talked about in my very first question to you, we may be in about the 25th mile of the marathon, and I might even be persuaded to have a little empathy for this last mile here. I think you're just about done.

I wanted to go over three quick things, if I could. The first is the exchange that we had this morning regarding the decision in Ricci in which you insisted that you were bound by Supreme Court and Second Circuit precedent. I quoted from the Supreme Court decision to the effect that I -- I believe that that contradicted your answer.

If you have anything different to say than what you said this morning, I wanted to give you another opportunity to say it. We don't need to re-plow the same ground. But is there anything different that you would like to offer on that?

SOTOMAYOR: Senator, after each round, I go to the next moment. Without actually looking at the transcript, I couldn't answer that question. It's just impossible to right now. I'm glad you're giving me the opportunity, but I would need a specific question as to something I said and what I meant before I could respond.

KYL: All right. Since we will probably have a few questions as follow up in writing and you'll be providing us answers to those, maybe the best thing is just to ask a general question or, if there is something specific that I can relate it to, and then you can respond in that way.

SOTOMAYOR: Thank you, sir.

KYL: You're very welcome. Now, the second question has to do with the Second Amendment. In the Maloney case, you held that it was not incorporated into the 14th Amendment. And what -- well, maybe I should ask you what that means. Let me ask you in two separate situations, as a practical matter.

If the Supreme Court does not review that issue, then is it the case that, at least in the Second Circuit and the Seventh Circuit, the states that are in the Seventh and Second Circuit, those states could pass laws that restrict, or even prohibit, people from owning firearms?

SOTOMAYOR: I do not hold -- it was not incorporated. I was on a panel that viewed Supreme Court precedent and Second Circuit precedent as holding that fact.

KYL: Right.

SOTOMAYOR: You can't talk in an absolute. There always has to be a reason for why a state acts. And you -- also has to be a reason for the extent of the regulation the state passes.

And so the question in *Maloney* for us was a very narrow question, which was are these nunchuck sticks, and I have described them previously as these martial arts sticks tied together by a belt that, when you swing them, if somebody comes by, there could be -- it's not serious deadly force in some situations -- whether the state had a reason recognized in law for determining that it was illegal to own those sticks.

The next issue that would come up by someone who challenged the regulation would be what's the nature of the regulation, and how does it comport with the reason the state gives for the actions it did. So it -- absolute regulation, it's not what I would answer. I would answer with the regulation...

KYL: Let me -- I -- excuse me. I appreciate your answer. What would be the test that would be applied by a court in the event that a state said because of the danger that firearms to present to others, we're going to require that only law enforcement personnel can own firearms in our state, and someone challenged that as an affront to their rights, they would say the federal government can't take that right away from us because of the Second Amendment.

What would the test be that the court would apply to analyze the regulation of the state?

SOTOMAYOR: Well, that's very similar, although not exactly, if I understood it, to the *Heller*, the facts in *Heller*. And the court there said that the regulation in D.C. was broader than the interest asserted. That question in a different state would depend on the circumstances of it's barring...

KYL: Well, is -- excuse me for interrupting. Is there no standard to -- I mean, we're familiar with strict scrutiny, the reasonable basis test, and so on. Is there a standard of which you're aware that the court would use to examine the state's right to impose such a restriction, given that the Second Amendment would be deemed not incorporated?

SOTOMAYOR: In *Maloney*, the court addressed whether there was a violation of the equal protection statute of -- equal protection of the 14th Amendment and determined that rational basis review. Now that I understand that you were asking about a standard...

KYL: Sure. I'm sorry. I didn't (inaudible)...

SOTOMAYOR: Of review that's...

KYL: Now, of the tests that the court applies traditionally, the rational basis is the least difficult of states to meet in justifying a regulation, is it not?

SOTOMAYOR: I'm not going to be difficult with you. It's the one where you don't need a -- an exact fit between the exact injury that you're seeking to remedy in the legislation...

KYL: Could I...

SOTOMAYOR: So it does have more...

KYL: Flexibility for the...

SOTOMAYOR: Well, flexibility is the wrong -- more a deference to congressional findings about what...

KYL: Or -- or state law.

SOTOMAYOR: Exactly.

KYL: Right. You -- you know that the -- the general rule that the rational basis test is the least intrusive on a state's ability to regulate, whereas strict scrutiny is -- is the most intrusive on the state's ability. Is that a fair characterization?

SOTOMAYOR: It's a fair characterization that when you have strict scrutiny, the government's legislation must be very narrowly tailored.

KYL: Right. So...

SOTOMAYOR: When a rational basis, there is a broader breadth for the states to act.

KYL: So wouldn't it be correct to say that as between the application of the Second Amendment to the District of Columbia, for example, compared to a situation in which a state or city imposed a regulation on the control of firearms, that it would be much more likely that the court would uphold the state's ability or the city's ability to regulate that than it would -- in the abstract, I'm talking about here -- than it would a federal attempt to regulate it under the Second Amendment?

SOTOMAYOR: That's a problem within the abstract, because what the court would look at is whatever legislatures -- state legislative findings there are and the fit -- I'm -- fit between those findings and the legislation.

KYL: Right. And -- and I appreciate that you're not going to -- without knowing the facts of every case, you can't opine. But just as a general proposition, obviously, if the amendment is incorporated, it will be much more difficult for a government to impose a standard than if it is not incorporated.

SOTOMAYOR: Well, the standard of review, even under the incorporation doctrine, was actually not decided in Heller. And that issue wasn't resolved, so what that answer will be is actually an open question that I couldn't even discuss in a broad term, other than to just explain that...

KYL: All right. Let -- let me ask you -- again to interrupt, because we're less than two minutes now -- if Senator Leahy says, gee, in Vermont he's not worried about the fact that the Second Amendment isn't incorporated. Maybe if I lived in New York or Massachusetts or some other state, I would be worried.

The question, I do, I would ask here is can you understand why someone who would like to own a gun would be concerned that if the amendment is not deemed incorporated into the 14th Amendment as a fundamental right, that it would be much more likely that the state or the city in which that individual lived could regulate his right to own a firearm?

SOTOMAYOR: Very clear to me from the public discussions on this issue that that is a concern for many people.

KYL: Final question. You're familiar -- this goes to the foreign law issue -- you're familiar with the difference in the treatment of foreign law by the U.S. Supreme Court in *Kennedy v. Louisiana* on the one hand and in *Roper v. Simmons* on the other.

In *Roper* the court ruled it was cruel and unusual to apply the death penalty and drew substantially on foreign law. In *Kennedy v. Louisiana*, an adult was convicted of raping an 8-year-old child, and the same five justices who wrote the opinion in *Roper* ruled that it was cruel and unusual to sentence the individual to death, but cited no foreign law whatsoever.

Some have said that a discussion of foreign law was left out of the *Kennedy* case because it actually cut against the majority's opinion. What do you think?

SOTOMAYOR: I can't speak for why they did. I can only do what you did, which is to describe what the courts did in what they said. It's impossible for me to speak about why a particular court acted in a particular way or why a particular justice analyzed an issue outside of what the opinion says.

KYL: I'll just tell you, my view is it kind of tells me that if the court can find some foreign law that supports its opinion, it might use it. If the opinion is on the other side, then it doesn't.

In my view, that's one of the problems with using foreign law. And I gather from what you said earlier, you don't think the court should use foreign law, either, except in cases of treaty and other similarly appropriate cases.

SOTOMAYOR: I do not believe that foreign law should be used to -- to determine the result under constitutional law or American law, except where American law directs.

KYL: Thank you very much. Thank you, Judge.

LEAHY: Thank you. Senator Graham?

GRAHAM: Thank you, Judge. I guess we do get to talk again. When you look at the fundamental right aspect of the Second Amendment, you'll be looking at precedent, you will be looking in our history, you will be looking at a lot of things. Hopefully, you've talked to your godchild, who's an NRA member. You can be -- you can assimilate your view of what America is all about when it comes to Second Amendment.

But one thing I want you to know, that Russ Feingold and Lindsey Graham have reached the same conclusion, so that speaks strong of the Second Amendment, because we don't reach the same conclusion a lot. So I just want you to realize that this fundamental right issue of the Second Amendment is very important to people throughout the country, whether you own a gun or not, and it's one of those things that I think, when you look at, you'll find that America, unlike other countries, has a unique relationship to the Second Amendment.

Today, Khalid Sheikh Mohammed is appearing in a military tribunal at Guantanamo Bay, Cuba. He will be appearing before a military judge, and he'll be represented by military lawyers and there will be a military prosecutor.

And the one thing I want to -- to say here, that I've been a judge advocate, a member of the military legal community for well over 25 years. And to America and the world who may be watching this, I have nothing but

great admiration and respect for those men and women who serve in our Judge Advocate Corps who will be given the obligation by our nation to render justice against people like Khalid Sheikh Mohammed.

And I just want to say this, also, on this historic day. To those who wonder why we do this, why do we give him a trial? Why are we so concerned about him having his day in court? Why do we give him a lawyer when we know what he would do to our people in his hands?

I would just like to say that it makes us better than him. It makes us stronger for us to give the mastermind of 9/11 his day in court, represented by counsel. And any verdict that comes his way won't be based on prejudice or passion or religious bigotry; it will be based on facts.

Now, let's talk about what this nation is facing. This Congress, Judge, is trying to reauthorize the Military Commission Act, trying to find a way to bring justice to the enemies of this country in a way that will make us better in the eyes of the world and also make us safer here at home. Have you had an opportunity to look at the Boumediene, Hamdan, Hamdi decisions at the Supreme -- Rasul cases?

SOTOMAYOR: I have, sir.

GRAHAM: OK. You will be called upon in the future, if you get on the court, to pass some judgment over the enactments of the Congress. When it comes to civilian criminal law, do you know of any concept in civilian law that would allow someone be held in criminal law indefinitely without trial?

SOTOMAYOR: When you're talking about civilian criminal law, you're talking about...

GRAHAM: Domestic criminal law.

SOTOMAYOR: Domestic criminal prosecutions.

GRAHAM: Right.

SOTOMAYOR: After conviction, defendants are often sentenced...

GRAHAM: I'm talking about you're held in jail without a trial.

SOTOMAYOR: The speedy trial act, and there are constitutional principles that require a speedy trial, so in answer to -- no, there is no...

GRAHAM: That is a correct statement of the law, Judge, in my opinion. You cannot hold someone in domestic criminal settings indefinitely without trial.

Under military law, the law of armed conflict, is there any requirement to try in a court of law every enemy prisoner?

SOTOMAYOR: There, you have an advantage on me.

GRAHAM: Well, I...

SOTOMAYOR: Because I -- I -- I'm sorry.

GRAHAM: Fair enough. The point I'm trying to make, and check if I'm wrong. You'll have some time to do this. As I understand military law, if we, as a nation, one of our airmen is downed in a foreign land, held by an adversary, it's my understanding we can't demand under the Geneva Convention that that airman or American soldier go to a civilian port.

That's not the law. If we have a pilot in the hands of the enemy, there is no requirement of the detaining force to take that airman before a civilian judge. I think that's the law. There is no requirement under military or the law of armed conflict to have civilian judges review the status of our prisoner. That's a right that we do not possess.

The question for the country and the world, if people who operate outside the law of armed conflict that don't wear uniforms, are they going to a better deal than people that play by the rules? And as we discuss these matters, I hope you take into account that there is no requirement to try everyone held as an enemy prisoner, and do you believe that there's a requirement in the law that, as a certain point in time, that a prisoner has to be released -- an enemy prisoner -- just through the passage of time?

SOTOMAYOR: I can only answer that question narrowly. And narrowly because the court's holdings have been narrow in this area. First, military commissions and proceedings under them have been a part of the country's history.

GRAHAM: Right.

SOTOMAYOR: And so there's no question that they are appropriate in certain circumstances.

GRAHAM: And, Judge, they will have to render justice, they will have to meet the standards of who we are. My point to some critics on the right who've objected to my view that we ought to provide more capacity is that whatever the flag flies and whatever courtroom, there's something attached to that flag. So we're going to work hard to create a military commission consistent with the values of this country.

But I just want to let you know that, under traditional military law, it is not required to let someone go who is properly detained as part of the enemy force because of the passage of time. Judge, it would be crazy for us to capture someone, give them adequate due process, independent judicial review, and the judges agree with the military you're part of Al Qaida, you represent a danger, and say at a magic point in time, "Good luck. You can go now."

The people that we're fighting, if some of them are let go, they're going to try to kill us all. And it doesn't make us a better nation to put a burden upon ourselves that no one else has ever accepted.

So what my goal, working with my colleagues, is to have a rational system of justice that will make sure that every detainee has a chance to make the argument, "I'm being improperly held," have a day in court, have a review by an independent judiciary, but we do not take it so far as that we can't keep an Al Qaida member in jail until they die, because some of them deserve to be in jail until they die.

And I want the world to understand that America is not a bad place because we will hold Al Qaida members under a process that is fair, transparent until they die.

My message to those who want to join this organization or are thinking about joining it is that you can get killed if you join and you may wind up dying in jail.

As this country and this Congress comes to grips with how to deal with an enemy that doesn't wear a uniform, that doesn't follow any rules, that would kill everybody they could get their hands on in the name of religion,



that not only we focus, Senator Whitehouse, on upholding our values, that we focus on the threat that this country faces in an unprecedented manner.

So, Judge, my last words to you will be: If you get on this court and you look at the Military Commission Act that the Congress is about to pass, when you look at whether or not habeas should be applied to a wartime battle-filled prison, please remember, Judge, that we're not talking about domestic criminals who robbed a liquor store.

We're talking about people who have signed up for a cause that's every bit as dangerous as any enemy this country has ever faced and that this Congress, the voice of the American people who stand for re- election, has a very difficult assignment on its hands.

There are lanes for the executive branch, the judicial brand, and the congressional branch, even in a time of war. Please, Judge, understand that 535 members of Congress cannot be the commander-in- chief and that unelected judges can't run the war. Thank you, and Godspeed.

SOTOMAYOR: Thank you, Senator.

LEAHY: Senator Cornyn?

CORNYN: You're almost through, Judge. I just want to ask three relatively quick items just to -- that I was not able to get to earlier just for your brief comment.

You wrote in 2001 that neutrality and objectivity in the law are a myth. You said that you agreed that, quote, "there is no objective stance, but only a series of perspectives, no neutrality, no escape from choice in judging." Would you explain what that means?

SOTOMAYOR: In every single case, and Senator Graham gave the example in his opening statement, there are two parties arguing different perspectives on what the law means. That's what litigation is about. And what the judge has to do is choose the perspective that's going to apply to that outcome.

So there is a choice. You're going to rule in someone's favor. You're going to rule against someone's favor. That's the perspective of the lack of neutrality. It's that you can't just throw up your hands and say, "I'm not going to rule." Judges have to choose the answer to the question presented to them.

And so that's what that part of my talking was about, that there is choice in judging. You have to rule.

CORNYN: You characterized in your opening statement that your judicial philosophy is one of fidelity to the law. Would you agree that both the majority and the dissenting justices in last year's landmark gun rights case, the D.C. v. Heller case, were each doing their best to be faithful to the text and the history of the Second Amendment? In other words, do you believe that they were exhibiting fidelity to the law?

SOTOMAYOR: I think both were looking at the legal issue before them, looking at the text of the Second Amendment, looking at its history, looking at the court's precedent over time and trying to answer the question that was before them.

CORNYN: Do you think it's fair to characterize the five justices who affirmed the right to keep and bear arms as engaged in right-wing judicial activism?

SOTOMAYOR: It's -- that -- I don't use that word for judging. I eschew labels of any kind. That's why I don't like analogies and why I prefer, in brief writing, to talk about judges interpreting the law. CORNYN: What about the 10 Democratic senators, including Senator Feingold, who's been mentioned earlier, who joined the brief, the amicus brief to the U.S. Supreme Court urging the court to recognize the individual right to keep and bear arms? Do you think, by encouraging an individual right to keep and bear arms, that somehow these senators were encouraging the court to engage in right-wing judicial activism?

SOTOMAYOR: I don't describe people's actions with those labels.

CORNYN: I appreciate that. You testified earlier today that you would not use foreign law in interpreting the Constitution statues. I'd like to contrast that statement with an earlier statement that you made back in April. And I quote, "International law and foreign law will be very important in the discussion of how to think about unsettled issues in our legal system. It is my hope that judges everywhere will continue to do this," close quote.

Let me repeat the words that you used three months ago. You said, "Very important," and you said, "Judges everywhere." This suggests to me that you consider the use of foreign law to be broader than you indicated in your testimony earlier today. Do you stand by the testimony you gave earlier today? Is it -- or do you stand by the speech you gave three months ago, or can you reconcile those for us?

SOTOMAYOR: Stand by both, because the speech made very clear in any number of places where I said you can't use it to interpret the Constitution or American law, and I went through -- not a lengthy because it was a shorter speech -- but I described the situations in which American law looks to foreign law by its terms, meaning, it's counseled by American law.

My part of the speech said people misunderstand what the word "use" means. And I noted that use appears to be -- to people to mean if you cite a foreign decision, that's means it's controlling an outcome or that you are using it to control an outcome. And I said, no. You think about foreign law as a -- and I believe my words said this -- you think about a foreign law the way judges think about all sources of information, ideas. And you think about them as ideas both from law review articles and from state court decisions and from all the sources, including, Wikipedia, that people think about ideas. OK?

They don't control the outcome of the case. The law compels that outcome. And you have to follow the law.

But judges think. We engage in academic discussions. We talk about ideas. Sometimes, you'll see judges who choose -- I haven't -- it's not my style, OK? But there are judges who will drop a footnote and talk about an idea. I'm not thinking that they're using that idea to compel a result. It's an engagement of thought.

But the outcome, as in, you know, you could always find an exception, I assume if I looked hard enough. But in my review, judges are applying American law.

CORNYN: Well, Your Honor, why would a judge cite foreign law unless it somehow had an impact on their decision on their decision making process?

SOTOMAYOR: I don't know why other judges do it. As I explained, I haven't. But I look at the structure of what the judge has done and explained and go by what that judge tells me. There are situations -- that's as far as I can go.

CORNYN: You said at another occasion that you find foreign law useful because it, quote, "gets the creative juices flowing," close quote. What does that mean?

SOTOMAYOR: To me, I am a part academic. Please don't forget that I taught at two law schools. I do speak more than I should. (LAUGHTER) And I think about ideas all the time. And so, for me, it's fun to think about ideas. You sit at a lunchroom among judges, and you'll often hear them saying, did you see what that law school professor said. Or did you see what some other judge wrote and what do you think about it and -- but it's just talking. It's just sharing ideas.

What you're doing in each case -- and that's what my speech said, you can't use foreign law to determine the American Constitution. It can't be used neither as a holding or precedent.

CORNYN: Do you agree with me that if the American people want to change the Constitution, that is a right reserved to them under the Constitution to amend it and change it rather than to have judges, under the guise of interpreting the law, in effect, change the Constitution by judicial fiat?

SOTOMAYOR: In that regard, the Constitution is abundantly clear. There is amendment process set forth there. It controls how you change the Constitution.

CORNYN: And I would just say, if academics or legislators or anybody else who's got creative juices flowing from the invocation of foreign law, if they want to change the Constitution, my contention is the most appropriate way to do that is for the American people to do it through the amendment process, rather than for judges to do it by relying on foreign law.

SOTOMAYOR: We have no disagreement.

CORNYN: Thank you very much, your honor.

LEAHY: Thank you. Senator Coburn?

COBURN: Thank you, Mr. Chairman. I'm going to go into an area that we have not covered, no one has covered yet. And I'm reminded of Senator Sessions talking to you about pay. You know, I would predict to you, in about 15 -- 15 or 18 years -- I'm sorry?

(UNKNOWN): (OFF-MIKE)

COBURN: ... pay, in 10 or 15 years -- judicial pay -- we may not be able to pay your salary, if you look -- 9 years from now, we're going to have \$1 trillion worth of interest on the national debt. It's not very funny. What it does is it undermines the freedom and security of our children and our grandchildren.

And I want to go to -- to Madison. Madison's the father of our Constitution, and I want to get your take on three issues: one, the commerce clause; two, the general welfare clause; and, number three, the 10th Amendment.

And I don't know if you've read the Federalist Papers, but I find them very interesting to give insight into what our founders meant, what they said when they wrote our Constitution.

In Federalist 51, Madison expressed the importance of a restrained government by stating, "In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed and, in the next place, oblige it to control itself."

Do you believe that our federal courts enable the federal government to exceed its intended boundaries by interpreting Article I's commerce clause and necessary and proper clause to delicate virtual unlimited authority to the federal government?

SOTOMAYOR: The Supreme Court, in at least two rules or one, has said there are limits to all powers set forth in the Constitution. And -- and the question for the court in any particular situation is -- is to determine whether whatever branch of government or state is acting within the limits of the Constitution.

COBURN: So you would say -- but let me read you another Madison quote, again, the father of our Constitution. "If Congress can employ money indefinitely to the general welfare and are the sole and supreme judges of general welfare, they may take the care of religion into their own hands. They may appoint teachers in every state, county and parish and pay them out of the public treasury."

"They may take into their hands -- their own hands the education of our children, establishing like-manner schools throughout the union. They may assume the provision for the poor. They may undertake the regulation of all roads other than post roads. In short, everything from the highest object of state legislation down to the most minute object of police would be thrown under the power of Congress."

"Were the power of Congress to be established in the latitude contended for, it would subvert the very foundations and transmute the very nature of the limited government established by this Constitution and the American people."

Day 4 Part 4

SEN. TOM COBURN: I guess my question to you is, do -- do you have any concerns, as we now have a \$3.6-trillion budget, \$11.4 trillion worth of debt, \$90 trillion worth of unfunded obligations that are going to be placed on the back of our children, that maybe some reining in of Congress in terms of the general welfare clause, the commerce clause, and reinforcement of the 10th Amendment under its intended purposes by our founders, which said that everything that was not specifically listed in the enumerated powers was left to the states and the people -- do you have any concerns about where we're heading in this nation and the obligations of the Supreme Court may be to re-look at what Madison and our founders intended as they wrote these clauses into our Constitution?

SOTOMAYOR: One of the beauties of our Constitution is the very question that you asked me: Is the dialogue that's left in the first instance to this body and the House of Representatives?

The answer to that question is not mine in the abstract. The answer to that question is a discussion that this legislative body will come to an answer about as reflected in the laws it will pass. And once it passes those laws, there may be individuals who have rights to challenge those laws and will come to us and ask us to examine what the Constitution says about what Congress did.

But it is the great beauty of this nation that we do leave those lawmaking to our elected branches and that we expect our courts to understand its limited role, but important role, in ensuring that the Constitution is upheld in every situation...

COBURN: So...

SOTOMAYOR: ... that's presented to it.

COBURN: I believe our founders thought that the Supreme Court would be the check and balance on the commerce clause, the general welfare clause, and the insurance of the 10th Amendment, and that's the reason I raised those issues with you.

I wonder if you think we've honored the plain language of the Constitution and the intent of the founders with regard to the limited power granted to the federal government.

SOTOMAYOR: That's almost a judgment call. I don't know how to answer your question, because it would seem like it would lead to the natural question: Did the courts do this in this case? And that would be opining on a particular view of a case, and that case would have a holding, and I would have to look at that holding in the context of another case.

I'm attempting to answer your question, Senator, but our roles and the ones we choose to serve -- your job is wonderful. It is so, so important. But I love that you're doing your job, and I love that I'm doing my job as a judge. I like mine better.

COBURN: I think I would like yours better as well, although I doubt that I could ever get to the stage of a confirmation process. Well, let me just end up with this. (CROSSTALK) (LAUGHTER) It would be entertaining, wouldn't it?

(UNKNOWN): (OFF-MIKE), I'll preside over it.

COBURN: Well, now, it's not likely to happen. Let me -- let me just end with this. You know, I -- people call me simple, because I really believe this document is the genesis of our success as a country. And I believe these words are plainly written, and I believe we ignore them at our peril. And my hope is that the Supreme Court will re-look at the intent of our founders and the 10th Amendment, where they guaranteed that everything that wasn't spelled out specifically for the Congress to do was explicitly reserved to the states and to the people. To do less than that undermines our future.

And all we have to do is take a little snapshot of where we are today, economically, financially and leadership-wise, to understand we ignored their plain words. And we find ourselves near bankruptcy because of them. I thank you, Mr. Chairman.

LEAHY: Thank you. When I -- and this -- it is almost over -- there was one question, and I've withheld the balance of my time before, and I want to make sure I ask this question, because I asked it of Chief Justice Roberts and Justice Alito when they were before this committee.

As you know, in death penalty cases, it takes five justices to stay an execution but only four to grant certiorari to hear a case. You could grant certiorari to hear a case, but the execution is not stayed. It could become a moot point. The person could be executed in between.

So usually, if those four justices wanted to hear a case, somebody agrees to the fifth vote to stay an execution just as a matter of courtesy, so the cert does not become moot, so the person is not executed in the few weeks that might be between granting a cert and the hearing of the case.

Both Chief Justice Roberts and Justice Alito agreed that this was -- rule was sensible, the rule of five, or a courtesy fifth. It appears, according to a study done by the New York Times, that very reasonable rule and the rule that both Chief Justice Roberts and Justice Alito said it was very reasonable, and I think the majority of us on the committee thought it was reasonable.

They said that -- suggest that that rule has not been adhered to, the rule of four, because there have been number of cases where four justices voted to the -- for cert, but -- and wanted to stay the execution, but the fifth would not, and the person was executed before the case was heard.

If you were on the Supreme Court, and this is basically the same thing I asked Justice Roberts and Justice Alito, if you were on the Supreme Court, four of your fellow justices said they'd like to consider a death penalty case, and they asked you to be a fifth vote to stay the execution, even though you didn't necessarily plan to vote for cert, how would you approach that issue?

SOTOMAYOR: I answer the way that those two justices did, which is I would consider the rule of the fifth route vote in the way it has been practiced by the court. It has a sensible basis, which is that, if you don't grant the stay, an execution can happen before you reach the question of whether to grant certiorari or not.

LEAHY: Well, I thank you. And I applauded both Chief Justice Roberts and Justice Alito for their answer. It appears that perhaps somewhere between the hearing room and the Supreme Court their minds changed.

Now, in 2007, Christopher Scott Emmett was executed, even when four justices had voted for stay of execution. Justice Stevens wrote a statement and joined by Justice Ginsberg calling for a routine practice of staying executions scheduled in advance of our review of the denial of a capital defendant's first application -- first application for a federal writ of habeas corpus.

I'm not asking for a commitment on what Justices Stevens and Ginsburg said, but is that something that ought to at least be considered?

SOTOMAYOR: Unquestionably. As I said, there is an underlying reason for that practice.

LEAHY: And there's an understanding that the -- when the case is reviewed, it may very well end up -- the sentence below may well be upheld and the execution will go forward, but this is on the various steps for that hearing.

SOTOMAYOR: Yes, sir.

LEAHY: Thank you. Senator Sessions, did you want to...

SESSIONS: Well, just briefly, I'd thank you again for your testimony. And I know judges come before these committees, and they make promises, and they mean those things, and then they're lucky. They get a lifetime appointment.

And I think most likely the judicial philosophy will take over as the years go by, the 10, 20, 30 years on the bench. And so it's an important decision for to us reach and to consider. And we'll all do our best. I hope you've felt that it's been a fairly conducted hearing. That's been my goal.

SOTOMAYOR: Thank you, Senators, to all senators. I have received all the graciousness and fair hearing that I could have asked for. And I thank you, Senator, for your participation in this process and in ensuring that.

SESSIONS: Thank you. You're very courteous. I think, for the record, a number of significant articles should be in the record. One...

LEAHY: Without objection.

SESSIONS: ... the Washington Post on July 9th, "Uncommon Detail"; Wall Street Journal, "Defining Activism Down"; July 15th, New York Times, "New Scrutiny of Judge's Most Controversial Case" by Adam Liptak; New York Times, "Nominee's Rulings are Exhaustive but Often Narrow"; Ninth Justice, "How Ricci Almost Disappeared"; the Ninth Justice, "Justices Reject Sotomayor Position 9-0"; and the Wall Street Journal, "The Wise Latina" article of June 15th, which is an important analysis.

Mr. Chairman, for the record, I'd also offer a letter from Sandra Froman, former president of the National Rifle Association, and a series of other people who co-signed that letter making this point. I think it's important, Sandra Froman herself a lawyer.

"Surprisingly, Heller was a 5-4 decision with some justices arguing that the 2nd Amendment does not apply to private citizens or, if it does, even a total gun ban could be upheld if a legitimate government interest could be found."

"The dissenting justices also found D.C.'s absolute ban on handguns within the home to be a reasonable restriction. In this -- if this had been the majority view, then any gun ban could be upheld and the 2nd Amendment would be meaningless."

SESSIONS: It goes on to say, "The 2nd Amendment survives today by a single vote in the Supreme Court. Both its application to the states and whether there will be a meaningful strict standard of review remain to be decided. Justice Sotomayor has revealed her views on these issues, and we believe they are contrary to the

intent and purposes of the 2nd Amendment and the Bill of Rights. As 2nd Amendment leaders, we are deeply concerned about preserving all fundamental rights for current and future generations. We strongly oppose this nominee."

I offer that and a letter from Americans United for Life, the 60- Plus Association North Carolina Property Association.

LEAHY: We will hold the record open to the -- to 5 o'clock tonight for any other materials people wish to submit to the record.

SESSIONS: Thank you, Mr. Chairman. And thank you for your courtesy throughout.

LEAHY: Thank you. We will also hold the record open until 5 o'clock tomorrow for additional questions that senators wish to ask. And now, Judge Sotomayor, this hearing has extended over four days. And the first day you listened to our opening statements rather extensively. You shared with us a very concise statement about your own fidelity to the law. I suspect it will be in law school text in years to come.

The last three days, you've answered our questions from senators on both sides of the aisle. And I hope I speak for all the senators, both Republican and Democratic, on this committee when I thank you for answering with such intelligence, grace and patience.

I also thank the members of your family for sitting here also for such intelligence, grace, and especially patience. During the course of this week, almost 2,000 people have attended this hearing in person -- 2,000. Millions more have seen it, heard it, or read about it, thanks to newspapers, blogs, television, cable, webcasting.

I think through these proceedings, the American people have gotten to know you. Even though I sat on two different confirmation hearings for you over the past 17 years, I feel I've gotten to know you even better.

The president told the American people in his Internet address back in May as a justice of the Supreme Court, you would, quote, "bring not only the experience acquired over the course of a brilliant legal career, but the wisdom accumulated over the course of an extraordinary journey, a journey defined by hard work, fierce intelligence and enduring faith in America. All things are possible."

We bore witness of that this week. Experience and wisdom will benefit all Americans. And when you walk under that piece of Vermont marble over the door of the Supreme Court, speaking of equal justice under law, I know that will guide you. Judge Sotomayor, thank you. Godspeed.

SOTOMAYOR: Thank you all.

(UNKNOWN): Thank you.

LEAHY: We stand recessed for 10 minutes.

(RECESS)

ACTING CHAIRMAN: Good afternoon, everyone. The ranking member has joined us, and the hearing will now come to order.

We have a considerable number of witnesses to get through today, so I would ask Ms. Askew and Ms. Boies and the witnesses who will follow them to please be scrupulous about keeping your oral statements to five



minutes or under. Your full written statement will be put in the record, and senators will each have five minutes to ask questions of each panel.

Along with Ranking Member Sessions, I am very glad to welcome ABA witnesses Kim Askew and Mary Boies. Kim Askew is the chair of the ABA Standing Committee on the Federal Judiciary, and Mary Boies the ABA Standing Committee's lead evaluator on its investigation into Judge Sotomayor's qualifications to be an associate justice on the Supreme Court of the United States.

The ranking member and I both look forward to their testimony. And if I could ask them please to stand and be sworn, we will begin.

Do you affirm that the testimony you are about to bring before the committee will be the truth, the whole truth and nothing but the truth, so help you God?

Please be seated. You may proceed with your statements.

ASKEW: Thank you. Good afternoon and thank you for having us. I'm Kim Askew of Dallas, Texas, chair of the Standing Committee on the Federal Judiciary. This is Mary Boies. Mary Boies is our 2nd Circuit representative, and as you mentioned, she was the lead evaluator on the investigation of Judge Sonia Sotomayor.

We are honored to appear here today to explain the Standing Committee's evaluation of this nominee. The Standing Committee gave her its highest rating and unanimously found that she was well qualified. For 60 years the Standing Committee has conducted a thorough, nonpartisan peer review in which we did not consider the ideology of the nominee, and we have done that with every federal judicial nominee. We evaluate the integrity, the professional competence of the judicial temperament of the nominee.

ASKEW: The Standing Committee does not proposal, endorse or recommend nominees. Our sole function is to evaluate the professional qualifications of a nominee and then rate the nominee either well qualified, qualified or not qualified.

A nominee to the Supreme Court of the United States must possess exceptional professional qualifications. That is, a high degree of scholarship, academic talent, analytical and writing ability, and overall excellence. And because of that, our investigations of Supreme Court nominees is more extensive than the nominations to the lower federal courts.

And they're procedurally different in two ways. First, all circuit members participate in the evaluations. An investigation is conducted in every circuit, not just the circuit in which the nominee resides. Second, in addition to the Standing Committee reading the writings of the nominee, we commission three reading groups of distinguished scholars and practitioners who also review the nominee's legal writings and advise the Standing Committee.

Georgetown University Law Center and Syracuse University School of Law formed reading groups this year, and these groups were comprised of professors who are all recognized experts in their substantive areas of law. A practitioner's reading group was also formed, and that group was also comprised of nationally recognized lawyers with substantial trial and appellate practices. All of them are familiar with Supreme Court practices, and many have clerked for justices on the U.S. Supreme Court.

In connection with Judge Sotomayor's evaluation, we initially contacted some 2,600 persons who were likely to have relevant knowledge of her professional qualifications. This included every United States federal judge,

state judges, lawyers, law professors and deans, and, of course, members of the community and bar representatives. We received 850 responses to our contracts, and we personally interviewed or received detailed letters or e-mails from over 500 judges, lawyers, and others in the community who knew Judge Sotomayor or who had appeared before her.

We also analyzed transcripts, speeches, other materials, and, of course, Ms. Boies and I interviewed her, and it is on that basis that we reached the unanimous conclusion as a Standing Committee that she was well qualified.

Her record is known to this distinguished committee. She has been successful as a prosecutor, a lawyer in private practice, judge, a legal lecturer. She has served with distinction for almost 17 years on a federal bench both as a trial court judge and an appellate judge. She has taught in two of the nation's leading law schools, and her work in the community is well known.

She has a reputation for integrity and outstanding character. She is universally praised for her diligence in industry. She has an outstanding intellect, strong analytical abilities, sound judgment, an exceptional work ethic, and is known for her courtroom preparation.

Her judicial temperament meets the high standards for appointment to the court. The Standing Committee fully addressed the concerns raised regarding her writings and some aspect of her judicial temperament. Those are set forth in detail in our correspondence on this committee, and we ask that they be made a part of the record.

In determining that these concerns did not detract from the highest rating of well qualified for the judge, the Standing Committee was persuaded by the overwhelming responses of lawyers and judges who praised her writings and overall temperament.

ASKEW: On behalf of the Standing Committee, Ms. Boies and I thank you for the opportunity to be present today and present these remarks, and we are certainly available to answer any questions you may have.

ACTING CHAIRMAN: Thank you so much.

Ms. Boies, do you have a separate statement you wish to make?

BOIES: I do not, Senator. We're happy to answer your questions.

ACTING CHAIRMAN: Very good. I appreciate it.

I just want to summarize a few conclusions from the report, and then ask you a little bit about the scope of the effort that went into it in terms of the numbers of people who were interviewed and the duration and nonpartisan nature of the effort, if you would.

On page six, you conclude that, "Judge Sotomayor has earned and enjoys an excellent reputation for integrity and outstanding character. Lawyers and judges uniformly praised the nominee's integrity."

On page 11, you report that, "Judge Sotomayor's opinions show an adherence to precedent and an absence of attempts to set policy based on the Judge's personal views. Her opinions are narrow in scope, address only the issues presented, do no revisit settled areas of law, and are devoid of broad or sweeping pronouncements."

On page 13, you report that, "The overwhelming weight of opinion shared by judges, lawyers, courtroom observers and former law clerks is that Judge Sotomayor's style on the bench is, A consistent with the active questioning style that is well known on the Second Circuit" -- and which, on a personal aside, I will say I liked

as a practitioner -- B, directed at the weak points in the arguments of parties to the case, even though it may not always seem that way to the lawyer then being questioned; C designed to ferret out relative strengths and shortcomings of the arguments presented; and, D, within the appropriate bounds of judging."

And finally, "The committee unanimously found an absence of any bias in the nominee's extensive work. Lawyers and judges overwhelmingly agree" -- this is your quote -- "that she is an absolutely fair judge. None, including those many lawyers who lost cases before her, reported to the Standing Committee that they have ever discerned any racial, gender, cultural or other bias in her opinions or in any aspect of her judicial performance. Lawyers and judges commented that she is open-minded, thoroughly examines a record in far more detail than many circuit judges, and listens to all sides of the argument."

Could you tell us a little bit about the scope of the review that took place that enabled you to reach those firm conclusions?

BOIES: Unlike with most federal judicial nominees, in the case of a Supreme Court nominee, the entire 15-member committee writes letters to the entire judiciary throughout the country, and also to lawyers throughout the country. We go through her opinions, and we look to see what lawyers appeared in front of her, and we write many letters to those people.

In addition, we write to -- as Chair Askew said, to law school deans and law professors. And as she mentioned, we commissioned three reading groups of professors and practitioners. There were 25 law professors from Syracuse Law School and from Georgetown Law Center who read her opinions, as did 11 practitioners, many of whom themselves were former Supreme Court law clerks.

And the standards that we look at, and the only standards, are the professional competence, judicial temperament, and integrity. And each circuit member interviews all of the judges and lawyers who respond to our letters or whom they identify as someone who knows, or has worked with, Judge Sotomayor.

BOIES: Those interviews are then collected. I review them. The chair and I had a personal interview with Judge Sotomayor in her chambers in New York. We met for over three hours, and we discussed with her in detail every criticism that we had heard of her judging and the factors that we look at.

And following that, we received the reading group reports which were each one hundreds and hundreds of page that went through her opinions one by one. They didn't merely give an overall summary. We read those. In addition, I read every opinion that she wrote on the Second Circuit and many that she wrote on the district court.

In addition, we took many of her leave of Standing Committee, took many of her opinions, and we divided them up among themselves so that we, too, read those opinions not merely the reading groups.

And I think that is a snapshot of the scope of our review, but I'll give you one example, if I may, of how we operate. And that is, we received a critical review from a lawyer about her conduct at a particular oral argument. We identified the date of that argument and the case. We then went through the court records and the opinions that were written, and we identified all of the lawyers who were involved in that case. We identified the docket street from the Second Circuit for that date so that we could identify any other lawyers who might have been present in the courtroom even though they were not there for that particular case. And we identified all of the lawyers who had any argument that day because maybe they would have a view of the panel.

And then, finally, we talked to the other members of the panel to ask what their view was on her judicial temperament because we had received a fairly important criticism. And so we not only reviewed that criticism, but we look to see how others viewed the same conduct.

Now, you may say that this is stacking the deck against her because we know we have a critical comment and maybe she was having a very bad day and maybe she wasn't up to her -- the way she normally would be on the bench.

But we talked to at least 10 other lawyers and another member of the panel.

(UNKNOWN): And that's what the peer review process is. Much of what you will read anecdotally, if you talk to, you know, the legal press, you may not have personal knowledge necessarily of what the judge does or you may not have been the lawyer who actually participated in that argument.

The reason we talk to lawyers is because we examine whether you have personal knowledge of what you're telling us. We will ask you about the case that you are in because then we can go forward and investigate. So we talked to all the lawyers. We talked to the judges. In some instances, we even had the pleasure of listening to the transcript because one of the allegations here was a lack of temperament.

That cannot always be picked up from the written record. Luckily, we were able to find out there so we could hear the tone and the tenor of the hot courtroom that has been described before this committee.

And so when we come to this distinguished committee and say that this was in keeping with the practice of the Second Circuit, we have looked at it in every way that we possibly can to ensure what took place.

ACTING CHAIRMAN: Well, let me conclude by thanking you for the thoroughness of your evaluation. And as I understand it, the ultimate conclusion was to evaluate her as well qualified, which is the highest available ranking, which was unanimous, and you considered her conduct as a judge over 17 years to be -- and I quote -- "exemplary"?

(UNKNOWN): That's correct.

ACTING CHAIRMAN: Thank you very much.

The ranking member?

SESSIONS: Thank you. Thank you, Mr. New Chairman. Good to be with you.

The American Bar Association was critical of former President Bush -- well, former former President Bush -- for not asking for evaluations before the nomination was made. President Obama followed that same process.

Since that time, have you changed your view about the viability or the advisability of conducting or asking the president to give the names -- name or names that -- before final decision is made?

ASKEW: As chair of the committee, let me answer that. The committee does not take a stand on that. The ABA may take a stand on whether it thinks it is a better idea for a president to nominate on a pre- or post-nomination basis, but the Standing Committee is divorced of the policy side of the ABA.

It is our position, and always has been, that we will conduct a neutral, nonpartisan peer review whenever the president gives us that information.

SESSIONS: With regard to the temperament question, there were some questions here asked about that, and they add to the almanac on whatever had the chief -- Judge Sotomayor -- turned out they have quite a much more negative feedback from lawyers -- a terror on the bench, a bit of a bully, a lot of statements like that.

And yet you still gave her the highest rating. You -- so you talked to those people, and you -- you're OK with that?

ASKEW: We absolutely are. And just to give you a sense, we talked to over 500 lawyers. And not to minimize any comments, because sometimes one criticism can be the most important comment that we get on a nominee, but of the 500 lawyers that we spoke to, we received comment on the temperament issue from less than 10 lawyers.

They were mostly lawyers and judges who were outside of the 2nd Circuit and were not as familiar with 2nd Circuit precedent.

SESSIONS: Well, you know, I hope the 2nd Circuit doesn't approve of beating up lawyers too much.

ASKEW: Well, they do not.

SESSIONS: They like...

(UNKNOWN): Just enough.

SESSIONS: Let me ask you. Did you -- I was troubled by the handling of the Ricci case. That was a summary order at first, until other judges on the panel objected, and then was a pro curiam opinion. But I think the -- the process of making that a summary opinion was to me pretty much takes you back. Did -- how did you conclude? Did you look at that precisely?

ASKEW: We did look at that case, Senator. We do not take a position on whether an opinion is right or is wrong. That's not what our function is.

However, we did look at the procedure that was followed in the Ricci case. And that is the case in which the 2nd Circuit panel heard full briefing and oral argument, and following which the panel, which was not presided over by Judge Sotomayor, but the panel decided to adopt in effect the District Court ruling, because they affirmed the ruling, and they agreed with its reasoning.

SESSIONS: Well, that's...

ASKEW: And they did not...

SESSIONS: ... basically true. However, one judge was quite reluctant, and another one moderated, and a judge apparently wanted to do it this way and -- and prevail. But the only thing I was asking about, and if you're prepared to make an expression of opinion, is the decision to decide it as a summary matter, not even a per curiam opinion. Did you deal with that issue?

(UNKNOWN): We are aware of how the Second Circuit handles summary opinions. We did not talk to her about that. We did not believe that was within the criteria that we evaluate with judges.

We did read the opinion in great detail. Members of the reading groups, all three reading groups, indeed. We were very lucky to receive the Supreme Court opinion on this before our report was finalized. So we got a complete briefing on that case.

SESSIONS: Well, one more thing. A recent group of political scientists did a study of the ABA nomination process from '85 to 2008 and found that the ABA must take affirmative steps to change its system for rating nominees to avoid favor and bias in favor of liberal nominees.

Do you take that seriously? Will you willing to look at how you handle these things?

(UNKNOWN): We take any critique of our process seriously. I can tell you that we judge every nominee based on the record that is presented to us and the background and experience of a nominee.

SESSIONS: Well, let me just say this. I think it is a valuable contribution to the process.

(UNKNOWN): Thank you.

SESSIONS: It is -- when you talk to lawyers and sometimes -- most people are very -- tend very much to be supportive of any nominee, especially if -- you know, they just tend to be supportive and minimize problems.

But sometimes, I think so, you could pick up things that other people wouldn't, and it would be valuable to this process. And I thank you.

(UNKNOWN): Thank you.

BOIES: Senator, if I may, I'd like just to go back briefly to the Ricci decision. And one thing that I did look at is that, in calendar year 2008, the 2nd Circuit issued 1,482 opinions not counting the non-argued asylum cases. And of those 1,482, the 1,081 were decided by summary order.

Only 401 full opinions were issued. And as I read the record, the -- one of the reasons the panel believed it could proceed by summary order is because it believed that there was controlling 2nd Circuit precedent, which a panel is not in a position to change.

So I don't mean to open the issue, but I would like to put it into some context as to how the 2nd Circuit normally operates.

SESSIONS: That's a nice way to say it. But this is a -- the rules said if it has jurisprudential importance, you should have an opinion. I think it was in violation of the rules. I don't know why they did it, but it was in violation of the rule, in my judgment, as a practicing lawyer.

I would have thought you would have agreed, Ms. Boies.

ACTING CHAIRMAN: We will hear next from the distinguished senator from Pennsylvania, Senator Specter.

SPECTER: Thank you, Mr. Chairman.

No questions. Just a comment to thank you for your service. There have been occasions when the American Bar Association was not consulted, and I think that the ABA has a special status.

SPECTER: The Judiciary Committee is hearing from all interested parties, not possible to invite all interested parties to appear in person, but we welcome comments from anyone in a free society to tell us what they think of the nominee, but the ABA performs this function with -- regularly with all federal judges, and you interview

a lot of people who are knowledgeable and have had contact, and I think it is very, very useful. So thank you for your service.

I have no questions, Mr. Chairman, on the substance.

(UNKNOWN): Thank you.

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ACTING CHAIRMAN: And we will turn to Senator Cardin of Maryland. (Talking to representatives of the American Bar Assn.)

CARDIN: I also do not have any questions, but I do want to make an observation, because I very much respect the opinions of the American Bar Association and fellow lawyers. I think it's the highest....

...compliment when your peers give you the highest rating. They're your toughest critics. I know that lawyers who are selecting a jury will almost always strike lawyers from that jury list because they're the toughest audience that you have. And so this is -- I think speaks to the nominee.

And as I understand it, the manner in which you go about rating a judge is not only her experience, but also the way that she's gone about reaching her decisions from the point of view of the appropriate role of a judge, her judicial temperament, and the absence of biased in rendering those decisions. And they're exactly what we are looking for for the next justice on the Supreme Court.

So I just really wanted to thank you for giving us this information and participating in the process.

(UNKNOWN): Thank you, Senator.

ACTING CHAIRMAN: Senator Cornyn?

CORNYN: Thank you, Mr. Chairman. I just want to welcome our two witnesses and thank you for your assistance to the committee, and particularly to say how good it is to see Kim Askew, my constituent from Dallas, Texas, and she does great work as chair of the committee, and welcome. Thank you for your assistance to the committee and performing its constitutional function.

ASKEW: Thank you.

ACTING CHAIRMAN: There being no further questions, the panel is excused with our gratitude for a commendable and very diligent effort.

SESSIONS: Thank you very much.

ASKEW: Thank you.

ACTING CHAIRMAN: We will take a five-minute recess while the next panel assembles.

(RECESS)

ACTING CHAIRMAN: The hearing of the Judiciary Committee will come back to order. We are awaiting the arrival of Mayor Bloomberg and District Attorney Morgenthau, who are coming down from New York. I am told that they are five minutes away, but the five minutes that people are away can be a longer five minutes than a regular five minutes. So in the interest of the time of the proceeding and of the other witnesses, we will proceed and come to them when they arrive and have a chance to take their seats.

SESSIONS: Well, in -- in the mayor's defense, he probably thought we would be operating under Senate time, and we would certainly be late, and he could have a little extra time.



ACTING CHAIRMAN: That is our custom.

SESSIONS: We're moving along well. Thank you, Mr. Chairman.

ACTING CHAIRMAN: Our first witness, then, will be Dustin McDaniel. He is the attorney general for the state of Arkansas and the southern chair of the National Association of Attorneys General. Previous to his election as attorney general, he worked in private practice in Jonesboro, Arkansas. Prior to taking office, Mr. McDaniel also served as a uniform patrol officer in his hometown of Jonesboro, Arkansas. He is a graduate of the University of Arkansas Little Rock Law School.

Attorney General McDaniel, would you please stand to be sworn? Do you affirm that the testimony you're about to give before the committee will be the truth, the whole truth and nothing but the truth, so help you God?

MCDANIEL: I do.

ACTING CHAIRMAN: Please be seated. Attorney General McDaniel, please proceed with your statement

MCDANIEL: Thank you, Mr. Chairman and Ranking Member Sessions. My name is Dustin McDaniel, and I'm the attorney general of the state of Arkansas. I am here today to speak in support of the nomination of Judge Sonia Sotomayor to the Supreme Court of the United States.

You've all heard all week about her compelling life story and impressive accomplishment. I have the highest respect and admiration for her, and I'm proud to testify on behalf of this person, who was first appointed by President George H.W. Bush, and then by my most famous predecessor in the Arkansas attorney general's office, President Bill Clinton.

More specifically, I'm here to rebut any assertion that her participation in the matter of Ricci v. DeStefano in any way reflects upon her qualifications or abilities to serve as a justice of the United States Supreme Court. When the Supreme Court granted certiorari in the Ricci case, I, on behalf of the state of Arkansas, joined with five other attorneys general in support of the Second Circuit. Before I address the case in the brief, let me adjust the parties and their issues.

I entered the world of public service long before I became an elected official. After college I turned down my admission into law school and took a civil service exam in my hometown of Jonesboro, Arkansas. I became a police officer, and I saw firsthand the heroism and dedication of the men and women who protect and serve our communities every day.

Firefighters like Frank Ricci and his colleagues run into homes and buildings when everyone else is running out. I have the highest respect and gratitude for all who serve our communities, states and nation. They are heroes among us, and they deserve to be treated fairly by our system.

My personal experience with a civil service exam was a favorable one, but not all are so lucky. I understand the frustration that the firefighters felt with this process. I also understand the cities fear of litigation and unfair results. I am for a process that is fair. No one should be given an unfair advantage, but no one should be subject to an unfair disadvantage either.

As attorney general, I represent hundreds of state agencies, boards and commissions in matters of employment law. My job is to allow my clients to do their job without fear of unreasonable litigation. The law had, until recently, allowed for flexibility necessary for public employers. The Supreme Court's ruling in this case will likely increase costly litigation, and the taxpayers will ultimately pay the bill.

All who have commented on the nomination process in recent years have been critical of those who have been labeled an activist judge. It's important to note that the Second Circuit's ruling in this case was not judicial activism at work. To the contrary, they followed existing law.

MCDANIEL: In *Ricci*, the panel adopted the lengthy analysis of the district courts, which they called "thorough," "thoughtful," and "well-reasoned." The district court cited cases dating back some 28 years. The ruling was consistent with the law, and the doctrine of *stare decisis*.

Granted, the Supreme Court, in a closely divided opinion, ruled differently. But in doing so, it set new precedent.

It's also important to note that the 2nd Circuit's ruling was supported by many prestigious groups, including the EEOC, the Department of Justice, the National League of Cities, the National Association of Counties, International Municipal Lawyers Association and the Republican and Democratic attorneys general of Alaska, Iowa, Arkansas, Maryland, Nevada and Utah.

There's a large body of research available on Judge Sotomayor's record. No allegation that she rules based on anything other than the law can stand, when cast in the light of her actual record.

The Congressional Research Service concluded, quote, "Perhaps the most consistent characteristic of her approach as an appellate judge could be described as an adherence to the doctrine of *stare decisis*, that is upholding of past judicial precedents."

One only has to look so far as to her own words. In *Hayden v. Pataki* she wrote in a dissent, quote, "It is the duty of a judge to follow the law, not question its plain terms." She concluded by saying, quote, "Congress would prefer to make any needed changes itself, rather than have courts do so for it."

In my opinion, Judge Sotomayor is abundantly qualified and is an excellent nominee. I believe that the people of the United States would be well-served by her presence on the court. It is my great honor and privilege to be here at this committee, and I thank you ever so much for the opportunity to appear here today.

ACTING CHAIRMAN: Thank you ever so much, Attorney General McDaniel. We will do a round of questions for the attorney general, and then once the panel is completely assembled, I will have all the witnesses sworn. And then we will proceed to Mayor Bloomberg, to District Attorney Morgenthau and on across the panel, with one brief interruption to allow the distinguished senator from the state of New York, Senator Schumer, to introduce Mayor Bloomberg.

Attorney General McDaniel, as a -- as an experienced lawyer, let me ask you, is it not the case that it's the Supreme Court's task very frequently to resolve conflicts between the circuit courts of appeal?

MCDANIEL: Yes, of course it is, Senator.

ACTING CHAIRMAN: And if a circuit court is bound by its own prior precedent and therefore the doctrine of *stare decisis* controls a particular decision, that does not in any way inhibit the Supreme Court from reviewing that second decision against conflicting decisions from other circuits in its task in resolving those conflicts. Correct?

MCDANIEL: That is correct.

ACTING CHAIRMAN: Is it your sense that that is what occurred in this case, that the 2nd Circuit in Ricci felt itself bound by stare decisis, as a result of its prior precedent, but that the Supreme Court took the case to resolve issues of conflict with other circuits?

MCDANIEL: Well, it certainly seems clear that the -- the binding law from the Supreme Court, which dated back up to 28 years, made it clear that remedial actions, although race-conscious but race-neutral, were permissible.

I think that that is precisely what the case demonstrated and how the court ruled and why the states that participated, Arkansas included, thought that it was important to preserve for our clients the ability to try to avoid litigation, if they think they cannot defend an existing practice. If they cannot defend it, no lawyer would tell their client, "Oh, go do it, anyway."

MCDANIEL: But clearly the Supreme Court thought that it was ripe for review, and they also thought that it was ripe to change the law, which is their purview.

WHITEHOUSE: That's an interesting point, and many observers, including prominent observers who have had their views expressed in the public media about this, have indicated that that decision changed the landscape of civil rights law.

If a judge is a cautious and small "c" conservative jurist on a circuit court, do you believe it's appropriate for the circuit court to change the landscape of civil rights law?

MCDANIEL: Absolutely not. I don't think that the 2nd Circuit did anything short of what it had to do, which was to apply the existing law.

The fact that the majority, a bare majority in the United States Supreme Court decided to change existing law, frankly, that would have been inappropriate for the 2nd Circuit to take that responsibility on itself.

WHITEHOUSE: Thank you, Attorney General.

SESSIONS: Thank you. Mr. McDaniel (inaudible) attorney general, and it was a great honor. With regard to the Ricci case, are you aware that the panel attempted to decide this case on a summary order, writing no opinion, not even a per curiam opinion?

MCDANIEL: I am aware of that.

SESSIONS: And are you aware that, by chance, one of the other members of the circuit found out about that and an uproar of sorts occurred because the people -- the other members -- other members of the circuit were very concerned about the opinion and thought it was an important opinion? Are you aware of that?

MCDANIEL: I know that the -- I know that the panel, or at least the body of judges chose to review the matter and they voted not to meet en banc and that there was a per curiam that was issued. (CROSSTALK)

SESSIONS: That's correct. That's correct. Now, you say that there was 2nd Circuit opinion and authority to uphold this case. But -- but on rehearing, the slate is wiped clean and the panel can develop or formulate new authority or determine clearly whether or not that previous case may have applied.

And are you aware that when they voted, the vote was 6-6, and Judge Sotomayor was the key vote in deciding not to rehear the case? And therefore we can conclude that not only did she decide this case, but it's really not

accurate to say she was just following authority since it was her vote that didn't allow that authority to be reevaluated.

MCDANIEL: Well, Senator, she was in the majority, so it's fair to say that any one of those judges could be the deciding vote...(CROSSTALK)

SESSIONS: That is correct. But it's not fair, I think, to say that she didn't have an opportunity to reevaluate it. She was simply applying law that she was bound to follow when she could have, if she felt differently, she could have allowed it to have been rediscussed.

MCDANIEL: I also think that there were Supreme Court cases, not just 2nd Circuit cases.

SESSIONS: Well, are you aware the Supreme Court says there were not? Are you aware the Supreme Court, in their opinion, said there was no Supreme Court authority on this matter?

MCDANIEL: I have read their opinion, and I tend to agree with the minority that this was, in fact, squarely within the...(CROSSTALK)

SESSIONS: Now, you filed, which I give you credit for, and I did some of these things when I was attorney general, you -- you joined with 32 other state attorneys general in submitting an amicus brief to the U.S. Supreme Court on the Heller case.

GRAHAM: You took the provision -- the brief argues that the right to keep and bear arms is among the most fundamental of rights because it is essential to securing all other liberties, close quote. I see the mayor not happily listening to that. (LAUGHTER)

You -- but -- so you believe that the Second Amendment is a fundamental right. Are you aware that Sandy Froman, the former president of the NRA -- you're probably not familiar with this letter, but she's a lawyer and pointed out that Heller was just a 5-4 opinion, with some justices arguing that the Second Amendment does not apply to private citizens or that, if it does, even a total gun ban would be upheld if a legitimate government interest could be found.

The dissenting justices also found that D.C.'s absolute gun ban on handguns within the home a reasonable restriction. That wouldn't play too well in Alabama; probably not Arkansas, Oklahoma or Texas. But most places.

So I guess I'm saying, are you concerned that -- and are you aware, of course, the Maloney case, in which Judge Sotomayor -- and I think she can contend there was authority in that case that justified her concluding the Second Amendment does not apply to the states. But I was disappointed in the -- and the way she wrote it gave me concern.

So are you aware that one vote on the Supreme Court could make the difference on the question of whether or not the right to keep and bear arms is protected against mayors or legislatures of states who disagree?

MCDANIEL: Well, I was proud to join Arkansas into the brief on Heller v. The District of Columbia. I intend to join again in the NRA v. Chicago in the attempt to have the Supreme Court review and take up the question, which I believe is ripe, as to whether or not the Second Amendment is applied to the states, as incorporated by the Fourteenth Amendment.

I do believe that the Second Amendment is a fundamental right, and I do believe that it is an individual right, not one tied to participation in a militia.

The attorney general -- the current attorney general in Texas, Senator Cornyn's successor and I have spent some time on that issue, even recently, and I am not, nonetheless, concerned with Judge Sotomayor's position. I am confident that her answers that she's provided to this committee and her record are consistent with one another, and I do not believe that the right to keep and bear arms is at risk with this nominee or, frankly, I wouldn't testify for her.

SESSIONS: Well, thank you. And I think it is.

WHITEHOUSE: Now that the panel is assembled, I will swear the entire panel in. We will return to regular order. You can all give your opening statements, and then questioning will begin at the conclusion of those opening statements. Would you please stand to be sworn?

Do you affirm that the testimony you're about to give before the committee will be the truth, the whole truth and nothing but the truth, so help you God? Please be seated. I will recognize Senator Schumer for a moment to welcome his constituent and the mayor of New York City, Michael Bloomberg.

SCHUMER: Well, it's my honor to welcome two very distinguished constituents here. I want to thank every witness for coming, but particularly extend a welcome to two of New York's greatest public servants, Mayor Bloomberg and District Attorney Morgenthau.

SCHUMER: As you know, this nomination is a source of enormous pride to all New Yorkers. And your support for Judge Sotomayor has been extremely helpful to this committee, to the Senate as a whole, and to the nation, in understanding what kind of justice she will be, and very much appreciate your being here. Thank you, Mr. Chairman. Welcome.

(UNKNOWN): Mayor Bloomberg is the mayor of New York City. He is currently serving in his third term as mayor. He founded Bloomberg, L.P., a New York City company that now has employees in more than 100 cities. Mayor Bloomberg's a graduate of Johns Hopkins University, located in Baltimore, Maryland, and Harvard Business School. We look forward to your testimony.

BLOOMBERG: Mr. Chairman, thank you. Ranking Member Sessions, thank you very much. Senator, Senator, Senator. Senator Sessions, I must say, as a former gun owner, a former member of the NRA, and also a staunch defender of the 2nd amendment, we probably don't disagree very much, if we really had a chance to talk.

In any case, I wanted to thank everyone for the opportunity to testify before you today. I'm Mike Bloomberg, and I'm here not only as the mayor of New York City, the city where Judge Sonia Sotomayor has spent her entire career, but also as someone who has appointed or reappointed more than 140 judges to New York City's criminal and family courts. So I do appreciate the job before you.

About three months ago, when President Obama invited Governor Schwarzenegger and Rendell and me to the White House to discuss infrastructure policy, I did find an opportunity to tell him what many of the best legal minds in New York were telling me: Judge Sonia Sotomayor would be a superb Supreme Court justice. I strongly believe that she should be supported by Republicans, Democrats and independents. And I should know because I've been all three. (LAUGHTER)

Judge Sotomayor has all of the key qualities that I look for when I appoint a judge. First, she is someone with a sharp and agile mind, as he distinguished record and her testimony, I think, made clear.

And as a former prosecutor, commercial litigator, district court judge and appellate judge, she certainly brings a wealth of unique experience.

Second, she is an independent jurist who does not fit squarely into an ideological box. A review of her rulings by New York University's Brennan Center found that judges on the 2nd circuit court who were appointed by Republicans agreed with her more than 90 percent of the time when overruling a lower court decision and when ruling a governmental action unconstitutional.

So this is clearly someone whose decisions have cut across party lines, which is something I think the Supreme Court could use more of.

And, third, whether you agree or disagree with her on particular cases, she has a record of sound reasoning.

In interviewing judicial candidates, I like to ask questions that have no easy answers and then listen to how they develop their responses. I want to know that they are open-minded enough to change their views if they hear compelling evidence and to see if they can provide a strong rationale for their legal conclusions, even if I disagree with it.

The fact is, you are never going to agree with a judicial candidate on every issue. I have appointed plenty of judges whose answers I don't agree with at all. And I should point out that includes times when Judge Sotomayor has ruled against New York City, as she has done on a number of cases. So I'm not here as someone who agrees with the outcome of her decisions 100 percent of the time. And I don't think that that should be the standard.

Now, I'm not a lawyer or a constitutional scholar, but I think the standard should be, does she apply the law based on rational legal reasoning, and is she within the bounds of mainstream thinking on issues of basic civil rights?

And on both questions, I think the answer is unequivocally yes. It's impossible to know how she will rule on cases in the future, or even what those cases might be. Given that a Supreme Court judge is likely to serve for decades, focusing on the issues du jour rather than intellectual capacity, analytical ability and just plain common sense would miss what this country clearly needs -- someone who has the ability to provide us with the legal reasoning and guidance that will be necessary to navigate the uncharted waters of tomorrow's great debate. And I'm very confident that Judge Sotomayor has that ability.

Finally, as the mayor of her hometown, I would just like to make two brief points. First, on the issue of diversity, the Supreme Court currently includes one member who grew up in Brooklyn and one who grew up in Queens. And so there's no doubt that having someone who comes from the Bronx would improve the diversity of this court. (LAUGHTER) And if you disagree with me, you haven't been to Brooklyn, Queens and the Bronx. (LAUGHTER)

But seriously, Sonia Sotomayor is the quintessential New York success story. She has beaten all the odds and rose to the top. If that's not the American dream, I don't know what is. And however, I don't believe she should be confirmed on the strength of her biography, but I do think that her life story tells an awful lot about her character and ability.

And second, I just want to add a caution against those who would suggest that Judge Sotomayor's service to the Puerto Rican Legal Defense and Education Fund is somehow a negative.

That's an organization that is well respected for its civil rights work in New York City, and although I certainly have not always seen eye-to-eye on every issue with them, there is no question that they make countless contributions to our city. And Judge Sotomayor should be based solely on her record, and not on the record of -- of others in the group.

So thank you very much for the opportunity to testify. And I urge you to confirm Sonia Sotomayor as a justice of the United States Supreme Court.

ACTING CHAIRMAN: Mayor Bloomberg, thank you very much for your testimony.

We'll now hear from Robert Morgenthau. Mr. Morgenthau has been the district attorney of New York County since 1975 and is the longest-serving incumbent of that position. During his nine terms in office, his staff has conducted about 3.5 million criminal prosecutions in homicides in Manhattan and has been -- and has a rate of 90 percent success. A graduate of Yale Law School, District Attorney Morgenthau served aboard a naval destroyer through World War II. It's a real pleasure to have you before our committee.

MORGENTHAU: Thank you, Mr. Chairman. I appreciate the opportunity of testifying today. I am pleased to join those who endorse the nomination of Judge Sotomayor to the United States Supreme Court. I first came to know Judge Sotomayor when I was on a recruiting trip for the Yale Law School. At that time, Jose Febrenes was Yale's general counsel, and he also tailored the law school.

I asked him if he knew anyone special I should speak with, and he said, yes. He said the remarkable student named Sonia Sotomayor was deciding where to work. And while he did not know whether she'd given any thought to being a prosecutor, it would be well worth my while to meet her. He was decidedly correct. I'm happy to be able to say that the judge joined my office and remained with us for five years. In my conversations with her, I learned about the compelling story of her life, with which you are now familiar.

In a nutshell, she was raised by a mother in a working-class home in South Bronx and as a teenager worked the evening shift in a garment factory to help make ends meet. She went on through hard work, force of will to overcome her initial difficulties with English composition to win Princeton University's highest undergraduate honor, the Pine Prize and to graduate with honors from the Yale Law School.

In the district attorney's office, the judge was immediately recognized by trial (inaudible) supervisors as someone a step ahead of her colleagues, one of the brightest and most mature, hard-working, standout who was marked for rapid advancement. Ultimately, she took on every kind of criminal case that comes into an urban courthouse, from turnstile-jumping to homicide.

One of those cases, the Tarzan murder case, involved an addicted burglar named Richard Maddicks, who would terrorize the neighborhood during a crime spree that left three dead and involved his swinging into apartment windows from rooftops, shooting anyone in his way. He is now serving 137 years to life sentence.

Another case prosecuted by Assistant D.A. Sotomayor in 1983 involved a Times Square child pornography operation.

That was the first child prosecution in New York after a landmark 1982 Supreme Court decision, *People v. Ferber*, upholding New York's new child pornography laws. Assistant D.A. Sotomayor left the jurors in tears over what the defendants had done to child victims.

These cases happened to grab the public's attention. But Judge Sotomayor -- Assistant D.A. Sotomayor understood that every case is important to the victim and appropriately gave undivided attention to the proper disposition of all of them.

Assistant District Attorney Sotomayor soon developed a reputation. Unlike many prosecutors, she simply would not be pushed around by judges or by attorneys. Some judges were eager to dispose of cases cheaply to clear their calendars. ADA Sotomayor instead fought for the right conclusion in each case. Maybe that experience from the criminal court in New York City helped her prepare for these hearings.

After leaving my office, Judge Sotomayor joined a prominent law firm and also accepted a part-time appointment as a member of the New York City Campaign Finance. While there, she continued to earn a reputation for being tough, fair, non-political in an arena where those characteristics were sorely needed. And she has taken those characteristics with her to the federal bench, where they are equally important.

Judge Sotomayor's career in the law spans three decades, and she has worked in almost every level of our judicial system -- prosecutor, private litigator, trial court judge, and an appellate court judge, and what I think is the second-most important court in the world. She has been an able champion of the law, and her depth of experience will be invaluable on our highest court.

Judge Sotomayor is highly qualified for any position in which a first-rate intellect, common sense, collegiality and good character would be assets. I might add that the judge will be the only member of the Supreme Court with experience trying criminal cases in the state courts. The overwhelming majority of American prosecutions occur in state courts.

Judge Sotomayor will bring to the court a full understanding of the problems faced by prosecutors in those cases as well as a firsthand knowledge of the trauma faced by victims and of the legitimate needs of police officials that work in the state law enforcement system.

She will also understand the impact of federal judicial decisions on state prosecutions. In short, the judge is uniquely qualified by until that, experience and commitment to the rule of law to be an outstanding -- and I repeat outstanding -- member of the court.

President Obama, and for that matter the United States, should be proud to see once more the realization of that central American credo that in this country a hard-working person with talent can rise from humble beginnings to one of the highest positions in the land. Thank you, Mr. Chairman, for the opportunity to testify today.

ACTING CHAIRMAN: Thank you very much for your testimony. We'll now hear from Wade Henderson, a familiar person to this committee. Wade Henderson is the president and CEO of the Leadership Conference on Civil Rights and counsel to the Leadership Conference Education Fund. He is a professor of public interest law at the University of the District of Columbia. Prior to his role with the Leadership Conference, Mr. Henderson was the Washington Bureau director of the NAACP. Mr. Henderson is a graduate from Rutgers University School of Law. Mr. Henderson?

HENDERSON: Thank you, Mr. Chairman, Ranking Member Sessions, members of the committee. I have the privilege of representing the views of the Leadership Conference, the nation's leading civil and human rights coalition, consisting of more than 200 organizations working to build an America that's as good as its ideals.

This afternoon I will briefly address four of the points that have figured in the debate about Judge Sotomayor's nomination: first, her qualifications for serving on the nation's highest court; second, her personal background



and her empathy for others who have had to work hard to succeed; third, her role in the unanimous ruling by a three-judge panel in the case of Ricci vs. DeStefano; and fourth, her past membership on the board of one of the Leadership Conference's member organizations, the Puerto Rico Legal Defense and Education Fund.

First, let me rejoice in what is self-evident. The nomination of Judge Sotomayor to be an associate justice on our nation's highest court is a milestone by many standards. The nation's first African- American president has nominated the first Hispanic American, only the third woman, and only the third person of color to serve on the Supreme Court.

While great challenges remain on our nation's quest for equal opportunity, we have truly reached an historic marker on the journey toward our goal of equal justice for all, the phrase inscribed not far from here on the front of the Supreme Court building.

But hopeful and historic as her nomination has been, Judge Sotomayor should herself be judged not by who she is, but by what she has done. Now, let me be as clear as I can. There is no question that she is qualified.

Judge Sotomayor's eloquent and thoughtful testimony before this committee speaks for itself. Her distinguished career at Princeton and Yale Law School have been much stated.

She then spent five years as a prosecutor, as we've heard, in Manhattan, working for the legendary district attorney, Robert Morgenthau -- pleased to have him here today -- and eight years as a corporate litigator, 17 years as a federal district court judge and appellate court judge add up to an individual who was one of the most qualified to have overcome before this committee.

Second, as with other nominees across the philosophical spectrum, including Justices Thomas and Alito, Judge Sotomayor has spoken of her family history and her personal struggles. These experiences help her to understand others and to do justice. They further qualify her for the highest court, and she has said and done nothing that could reasonably be understood otherwise.

Third, Judge Sotomayor has participated in thousands of cases and authored hundreds of opinions, but much of the debate about her nomination has concentrated on the difficult case of Ricci v. Destefano.

Whatever one may feel about the facts of this case, we all agree that the Supreme Court, in its Ricci decision, set a new standard for interpreting Title VII of the '64 Civil Rights Act. Using this one decision to negate Judge Sotomayor's 17 years on the bench does a disservice to her record and to this country.

Fourth, I must speak to the attacks on Judge Sotomayor because of her service on the board of one of our nation's leading civil rights organizations. These attacks do an injustice not only to Judge Sotomayor and to the Puerto Rican Legal Defense and Education Fund, but also to the entire civil rights community and to all those who look to us for a measure of justice.

Make no mistake -- legal defense funds play an indispensable role in American life. They are private attorneys general that assist individuals, often those with few resources and no other representation, to become full shareholders in the American dream. When Justice Thurgood Marshall was nominated, there were those who questioned his role with the NAACP Legal Defense Fund. But history does not remember their quibbles kindly.

Judge Sotomayor has lived the American dream, and she understands all who aspire to it. Her qualifications are unquestioned, and the lessons that she has learned in her life, as well as in libraries, will serve her and our country well in the years ahead. All those who walk through the entrance to the Supreme Court seeking what is inscribed above its door, "Equal Justice Under Law," can be confident that a Justice Sotomayor will continue to do her part to keep the promise of our courts and our country. Thank you very much.

ACTING CHAIR: Well, thank you very much for your testimony. We'll now hear from Frank Ricci, a name that's been mentioned second only to Sotomayor during this hearing. Frank Ricci has over a decade of experience as a firefighter with the New Haven Fire Department, and was the plaintiff in the case of Ricci v. Destefano. He's a contributing author of two books on firefighting. It's a pleasure to have you before the committee.

RICCI: Thank you, Senator. Thank you for the opportunity to appear before this distinguished committee. I accepted, with honor, the invitation to tell my story. Many others have a similar story, and I feel I'm speaking for them, as well.

The New Haven firefighters were not alone in their struggle. Firefighters across the country have had to resort to the federal courts to vindicate their civil rights.

Technology and modern threats have challenged our profession. We have become more effective and efficient, but not safer. The structures we respond to today are more dangerous, constructed with lightweight components that are prone to early collapse, and we face fires that can double in size every 30 to 60 seconds.

Too many think that firefighters just fight fires. Officers are also responsible for mitigating vehicle accidents, hazardous material incidents, and handling complicated rescues.

Rescue works can be very technical. All of these things require a great deal of knowledge and skill. Lieutenants and captains must understand the dynamic fire environment and the critical boundaries we operate in. They are forced to make stressful decisions based on imperfect information and coordinate tactics that support our operational objectives.

Almost all our tasks are time-sensitive. When your house is on fire or your life is in jeopardy, there are no time for do-overs.

The lieutenant's test that I took was without a doubt a job-related exam that was based on skills, knowledge and abilities needed to ensure public and the firefighters' safety. We all had an equal opportunity to succeed as individuals, and we were all provided a road map to prepare for the exam.

Achievement is neither limited nor determined by one's race but by one's skills, dedication, commitment and character. Ours is not a job that can be handed out without regard to merit and qualifications.

For this reason, I and many others prepared for these positions throughout our careers. I studied harder than I ever had before, reading, making flash cards, highlighting, reading again, all while listening to prepared tapes.

I went before numerous panels to prepare for the oral assessment. I was a virtual absentee father and husband for months because of it.

In 2004 the city of New Haven felt not enough minorities would be promoted and that the political price for complying with Title VII, the city civil service rules, and the charter, would be too high. Therefore they chose not to fill the vacancies. Such action deprived all of us the process set forth by the rule of law. Firefighters who earned promotions were denied them.

Despite the important civil rights and constitutional claims we raised, the Court of Appeals panel disposed of our case in an unsigned, unpublished summary order that consisted of a single paragraph that made mention of my dyslexia and thus led many to think that this was a case about me and a disability.

This case had nothing to do with that. It had everything to do with ensuring our command officers were competent to answer the call and our right to advance in our profession based on merit, regardless of race. Americans have the right to go into our federal courts and have their cases judged based on the Constitution and our laws, not on politics or personal feelings.

The lower court's belief that citizens should be reduced to racial statistics is flawed. It only divides people who don't wish to be divided along racial lines. The very reason we have civil service rules is to root out politics, discrimination and nepotism.

Our case demonstrates that these ills will exist if the rules of merit and the law are not followed. Our courts are the last resorts for Americans whose rights are violated. Making decisions on who should have command positions solely based on statistics and politics, where the outcome of the decision could result in injury or death, is contrary to sound public policy.

The more attention our case got, the more some people tried to distort it. It bothered us greatly that some perceived this case as involving a testing process that resulted in minorities being completely excluded from promotions.

That was entirely false, as minority firefighters were victimized by the city's decision as well. As a result of our case, they should now enjoy the career advancement that they've earned and deserve. Enduring over five years of court proceedings took its toll on us and our families. That case was longer -- was no longer just about us, but about so many Americans who have lost faith in the court system. When we finally won our case and saw the messages we received from every corner of the country, we understood that we did something important together. We sought basic fairness and evenhanded enforcement of the laws, something all Americans believe in. Again, thank you for the honor and privilege of speaking to you today.

ACTING CHAIRMAN: Mr. Ricci, thank you very much for your testimony. We'll now hear from Lieutenant Ben Vargas. Ben -- Benjamin Vargas is a lieutenant in the New Haven Fire Department and was a plaintiff in the case of Ricci vs. DeStefano. He also worked part-time as a consultant for a company that sells equipment to firefighters. Mr. Vargas?

VARGAS: Thank you. Members of this committee, it is truly an honor to be invited here today. Notably, since our case was summarily dismissed by both the District Court and the Court of Appeals panel, this is the first time I am being given the opportunity to sit and testify before a body and tell my story. I thank for this -- thank you to this committee for the opportunity.

Senators of both parties have noted the importance of this proceeding, because decisions of the United States Supreme Court greatly impact the everyday lives of ordinary Americans. I suppose that I and my fellow plaintiffs have shown how true that is. I never envisioned being a plaintiff in a Supreme Court case, much less one that generated so much media and public interest.

I am Hispanic and proud of their heritage and background that Judge Sotomayor and I share. And I congratulate Judge Sotomayor on her nomination.

But the focus should not have been on me being Hispanic. The focus should have been on what I did to earn a promotion to captain and how my own government and some courts responded to that. In short, they didn't care. I think it important for you to know what I did, that I played by the rules and then endured a long process of asking the courts to enforce those rules.

I am the proud father of three young sons. For them I sought to better my life, and so I spent three months in daily study, preparing for an exam that was unquestionably job-related. My wife, a special education teacher, took time off from work to see me and our children through this process.

I knew we would see little of my sons during these months, when I studied every day at a desk in our basement, so I placed photographs of my boys in front of me. When I would get tired and wanted to stop -- wanted to stop, I would look at the pictures, realize that their own future depended on mine, and I would keep going. At one point I packed up and went to a hotel for a day to avoid any distractions, and those pictures came with me.

I was shocked when I was not rewarded for this hard work and sacrifice, but I actually was penalized for it. I became not Ben Vargas, the fire lieutenant who proved themselves qualified to be captain, but a racist statistic. I had to make decisions whether to join those who wanted promotions to be based on race and ethnicity or join those who would insist on being judged solely on their qualifications and the content of their character.

Day 4 Part 6

ACXTING CHAIRMAN: Thank you for your testimony. We'll now hear from Peter Kirsanow. Peter Kirsanow serves on the U.S. Commission on Civil Rights. He's a member of the National Labor Relations Board where he received a recess appointment from President George W. Bush. Previously, he was a partner with the Cleveland law firm of Benesch, Friedlander, Coplan and Aronoff. Mr. Kirsanow received his law degree from Cleveland State University.

KIRSANOW: Thank you, Mr. Chairman, Senator Sessions, members of the committee, I am Peter Kirsanow, a member of the U.S. Commission on Civil rights. I am currently back at Benesch, Friedlander in the legal employment practice group. I am here in my personal capacity. The U.S. Commission on Civil Rights was established...

SESSIONS (?): Is that microphone on?

KIRSANOW: The U.S. Commission on Civil Rights was established by the 1957 Civil Rights Act to, among other things, act as a national clearinghouse for information related to denials of equal...

...protection and discrimination, and in furtherance of the clearinghouse process, my assistant and I reviewed the opinions in civil rights cases in which Judge Sotomayor participated while on the 2nd Circuit in the context of prevailing civil rights jurisprudence and with particular attention to the case of Ricci v. DiStefano.

Our review revealed at least three significant concerns with respect to the manner in which the three-judge panel that included Judge Sotomayor handled the case. The first concern was, as you've heard, the summary disposition of this particular case. The Ricci case contained constitutional issues of extraordinary importance and impact. For example, the issues of -- that are very controversial and volatile -- racial quotas and racial discrimination.

This was a case of first impression. No 2nd Circuit or Supreme Court precedent on point.

KIRSANOW: Indeed, to the extent there were any cases that could provide guidance, such as Wigant (ph), Crosen (ph), Aderant (ph), even private sector cases, such as Johnson (ph) Transportation, Frank v. Xerox, Weather (ph) v. Steelworkers (ph), would dictate or suggest a result opposite of that reached by the Sotomayor panel.

The case contained a host of critical issues for review, yet the three-judge panel summarily disposed of the case, as you've heard, in an unpublished, one-paragraph, per curium opinion that's usually reserved for cases that are relatively simple, straightforward and inconsequential.

The second concern is that the Sotomayor panel's order would inevitably result in the proliferation of de facto racial and ethnic quotas. The standard endorsed by the Sotomayor panel was lower than that adopted by the Supreme Court's test of strong basis in evidence.

Essentially, any race-based employment decision invoked to avoid a disparate impact lawsuit would provide immunity from Title VII review. Under this standard, employers who fear the prospect or expense of litigation, regardless of the merits of the case, would have a green light to resort to racial quotas.

But even more invidious is the use of quotas due to racial politics, and, as Judge Alito's concurrence showed, there was glaringly abundant evidence of racial politics in the Ricci case.

Had the Sotomayor panel decision prevailed, employers would have license to use racial preferences and quotas on an expansive scale. Evidence adduced before the Civil Rights Committee shows that when courts open the door to preferences just a crack, preferences expand exponentially.

For example, evidence adduced before hearings of the Civil Rights Commission in 2005 and 2006 show that despite the fact that Aderant (ph) was passed more than -- or decided more than 10 years ago, federal agencies persist in using race conscious programs in federal contracting, governmental contracting, as opposed to race-neutral alternatives.

Moreover, even though the Supreme Court had struck down the use of raw numerical weighting in college admissions in *Gratz v. Bollinger*, thereby requiring that race be only a mere plus factor, a thumb on the scale in the admissions process, powerful preferences show no signs of abating.

A study by the Center for Equal Opportunity showed that in a major university preferences were so great that the odds that a minority applicant would be admitted over a similarly situated white comparative were 250-1. At another major university, 1,115-1. That's not a thumb on the scale, that's an anvil.

And had the reasoning of the Ricci case in the lower court prevailed, what happened to Firefighter Ricci and Lieutenant Vargas would happen to innumerable more Americans of every race throughout the country.

The third concern is that the lower court's decision that would permit racial engineering by employers would actually harm minorities who were the purported beneficiaries of that particular decision. Evidence adduced at a 2006 Civil Rights Commission hearing shows that there's increasing data that preferences create mismatch effects that actually increase the probabilities that minorities will fail if they receive beneficial treatment or preferential treatment.

For example, black law students who were admitted in preferences are two and a half times more likely not to graduate than their similarly situated white or Asian comparatives; four times as likely not to pass the bar exam on the first try; and six times as likely never to pass the bar exam, despite multiple attempts.

Mr. Chairman, it's respectfully submitted that, if a nominee's interpretative factoring permits an employer to treat one group preferentially today, there's nothing that prevents them from treating another group or shifting their preferences to another group tomorrow.

And it's contrary to the color-blind ideal contemplated by the 1964 Civil Rights Act, Title VII, which was the issue decided in the Ricci case. Thank you, Mr. Chairman.

WHITEHOUSE: And thank you for your testimony. We'll now from Linda Chavez, who's chairman of the Center for Equal Opportunity and a political analyst for Fox News Channel. She's held a number of appointed positions, among them White House director of public liaison and staff director of U.S. Commission on Civil Rights.

CHAVEZ: Thank you, Mr. Chairman and members of the committee. I testify today not as a wise Latina woman but an American who believes that skin color and national origin should not determine who gets a job, a promotion or a public contract or who gets into college or receives a fellowship.

My message today is straightforward. Mr. Chairman, do not vote to confirm this nominee. I say this with some regret, because I believe Judge Sotomayor's personal story is an inspiring one, which proves that this is truly a land of opportunity, where circumstances of birth and class do not determine whether you can succeed.

Unfortunately, based on her statements both on and off the bench, I do not believe Judge Sotomayor shares that view. It is clear from her record that she has drunk deep from the well of identity politics.

I know a lot about that well, and I can tell you that it is dark and poisonous. It is, in my view, impossible to be a fair judge and also believe that one's race, ethnicity and sex should determine how someone will rule as a judge.

Despite her assurances to this committee over the last few days that her "wise Latina woman" statement was simply a, quote, "rhetorical flourish fell flat," nothing could be further from the truth.

All of us in public life have, at one time or another, misspoken. But Judge Sotomayor's words weren't uttered off the cuff. They were carefully crafted, repeated, not just once or twice, but at least seven times over several years.

As others have pointed out, if Judge Sotomayor were a white man who suggested that whites or males made better judges, again, to use Judge Sotomayor's words, quote, "Whether born from experience or inherent physiological or cultural differences," end quote, "we would not be having this discussion. Because the nominee would have been forced to withdraw once those words became public."

But, of course, Judge Sotomayor's offensive words are just a reflection of her much greater body of work as an ethnic activist and judge.

Identity politics is at the core of who this woman is. And let me be clear here. I'm not talking about the understandable pride in one's ancestry or ethnic roots, which is both common and natural in a country as diverse and pluralistic as ours.

Identity politics involves a sense of grievance against the majority, a feeling that racism permeates American society and its institutions and the belief that members of one's own group are victims in a perpetual power struggle with the majority.

From her earliest days at Princeton University, and later, Yale Law School, to her 12-year involvement with the Puerto Rican Legal Defense and Education Fund, to her speeches and writings, including her jurisprudence, Judge Sotomayor has consistently displayed an affinity for such views.

I have outlined at much greater length in my prepared testimony, which I ask permission be included in the record in full, the way in which I believe identity politics has permeated Judge Sotomayor's life's work. But let me briefly outline a few examples.

As an undergraduate, she actively pushed for race-based goals and timetables for faculty hiring. In a much-praised senior thesis, she refused to identify the United States Congress by its proper name, instead referring to it as the North American Congress or the Mainland Congress.

During her tenure as chair of the Puerto Rican Legal Defense and Education Fund's Director Litigation Committee, she urged (inaudible) seeking lawsuits challenging the civil service exams, seeking race-conscious decision-making similar to that used by the city of New Haven in Ricci.

She opposed the death penalty as racist. She supported race-based government contracting. She made dubious arguments in support of bilingual education and more broadly in trying to equate English language requirements as a form of national origin discrimination. As a judge she dissented from an opinion that the Voting Rights Act does not give prison inmates the right to vote.

And she has said that as a witness -- eyewitnesses' identification of an assailant may be unconstitutional racial profiling in violation of the equal protection clause, if race is an element of that identification. Finally, she has shown a willingness to let her policy preferences guide her in the Ricci case.

Although she has attempted this week to back away from some of her own intemperate words and has accused her critics of taking them out of context, the record is clear. Identity politics is at the core of Judge Sotomayor's self-definition. It has guided her involvement in advocacy groups, been the topic of much of our public writing and speeches, and influenced her interpretation of law.

There is no reason to believe that her elevation to the Supreme Court will temper this inclination, and much reason to fear that it will play an important role in how she approaches the cases that will come before her, if she is confirmed.

I therefore respectfully urge you not to confirm Judge Sotomayor as an associate Justice of the Supreme Court. Thank you.

CARDIN: Thank you for your testimony. Let me first recognize our chairman, Chairman Leahy, who I understand wants to reserve his place.

LEAHY: Thank you, Senator Cardin. I wanted to thank you and the other senators who have filled in on this prior to -- I was here throughout the -- throughout all the testimony by Judge Sotomayor, and the questions asked by both Republicans and Democrats are reserved by time.

I do welcome all the witnesses, who are both for and against the nominee. They -- Senator Sessions and I joined together to make sure that everybody was invited, everybody was given a chance to testify. And if any of you wish to add to your testimony, the record will be open for -- for 24 hours for you to do that. Thank you very much.

CARDIN: Thank you, Mr. Chairman. Mayor Bloomberg, let me start with you, if I might, in my questioning. There's been a lot of discussion about the Puerto Rican Legal Defense and Education Fund, including during this panel discussion. And Judge Sotomayor served on the board and had nothing to do with the selection of individual cases from the point of view of its content, but served in a voluntary capacity with that board.

And first I'm going to quote from you, and then give you a chance perhaps to expand upon it, where you have been quoted as saying, "Only in Washington could someone's many years of volunteer service to a highly regarded nonprofit organization that has done so much good for so many, be twisted into a negative, and that group has made countless important contributions to New York City."

I just want to give you a chance to respond to Judge Sotomayor's service on the Puerto Rican Legal Defense and Education Fund.

(UNKNOWN): Well, this is an organization that has defended people who don't have the wherewithal to get private counsel or don't have traditions of understanding the law, and it happens to focus on people mainly who come from Puerto Rico and have language problems, in addition to a lack of perhaps understanding of how our court system works.

And it provides the kind of representation that we all, I think, believe that everybody that appears before a judge and before the law deserves. They raise money privately to pay lawyers to defend. I don't agree with some of their positions and I agree with other ones. But having more of these organizations is a lot better than having less. At least people do have the option of getting good representation.



CARDIN: Thank you. Mr. Henderson, during the hearing of Judge Sotomayor, we had a chance to talk a little bit about the voting rights and the recent case before the Supreme Court, and the fact that one justice questioned the constitutionality, in fact pretty well determined the constitutionality of the -- of the Voting Rights Renewal Act, saying it was no longer relevant.

Judge Sotomayor, during her testimony, talked about deference to Congress, the fact that it was passed by a 93 to 0 vote in the United States Senate and by a lopsided vote in the House of Representatives, the 25-year extension. I just want to get your comments as to whether the Voting Rights Act is relevant today and your confidence level of Judge Sotomayor as it relates to advancing civil rights for the people of our nation.

HENDERSON: Thank you, Mr. Chairman, for your question. Let me back up for just a minute and say that these hearings have really been a testament to the wisdom of the founding fathers in setting up a three-part system of government, with the president making a nomination for an associate justice on the Supreme Court, and the Senate Judiciary Committee providing its advice and consent.

Under our system of government, the Senate and the House have a particular responsibility to delve deeply into the constitutional rights of all Americans, particularly around the right to vote. Voting really is the language of democracy. If you can't vote, you don't count. And the truth is that notwithstanding the 15th Amendment to the Constitution, the 13th and 14th Amendments, African Americans, Latinos, women, other people of color were often denied their right to vote well into the 20th century.

It took not just those amendments, but actually a statute enacted by this Congress to ensure that the rights of Americans to vote indeed could be preserved, and it was only in the aftermath of the '65 Voting Rights Act that we have seen the expansion of the franchise and democratization -- small "d" -- of our, you know, republic in a way that serves the interests of the founders.

Having said that, Congress reached a decision in reauthorizing the Voting Rights Act in 2006 that this law was necessary. Sixteen- thousand pages of the Congressional Record speak eloquently to that important interest. The fact that this issue was held both with congressional review and also a national commission set up by the Lawyers Committee for Civil Rights and others in the civil rights community, holding hearings around the country added to the record that was created.

The fact that this bill passed -- rather the reauthorization of the Voting Rights Act -- 390-33 in the House and 98-0 in the Senate, speaks eloquently about the important need of this act and the continuing need for it.

So the fact that some on the Supreme Court found otherwise doesn't disturb me at all. There is a need for it; that need continues, and notwithstanding evidence.

CARDIN: Well, thank you for correcting my numbers on the number that had voted. I appreciate that. I just want to ask Mr. McDaniel a quick question, and that is, during the confirmation hearings both Democratic and Republican senators have been urging from our nominee that you need to look at what the law is, and you can't judge based upon emotion. You have to do -- you have to follow the precedents of the court.

And I have a simple question to you in the Ricci case. Do you believe that the Sotomayor decision with the three-judge panel was within the mainstream of judicial decision-making when that decision was reached?

MCDANIEL: Senator, I do believe that. And to hear the stories of these firefighters in person, I -- I don't have any reason not to use the word empathy. I have a great deal of empathy for the circumstances that they have described, and I don't know that I have a great deal for how the city fathers handled the matter.

But by the time it made it to the 2nd Circuit I believe that the panel did what the law required, and I don't think that there is a just legal criticism for the way that the panel handled the matter. And the fact that the Supreme Court chose to change the law in a bare majority also is their prerogative.

CARDIN: Thank you very much. Senator Sessions?

SESSIONS: Thank you. Thank all of you. It's a very important panel. And actually much of your testimony was moving, and I appreciate it. And I think you're calling us to a higher level of discussion on these issues because they go to the core of who we are as Americans. And I just want to share that. We are worried about the Second Amendment.

I will just ask the mayor that you signed a brief in favor of the D.C. gun ban, which would bar even a handgun in someone's home. So I would assume you would be agreeable with the opinion of Judge Sotomayor and her view. We've got different views about these things.

Mayor, I want to tell you, I appreciate your leadership. It's a tough job to be mayor of New York. You're showing strength and integrity. Mr. Morgenthau, you're the dean of prosecutors. I hear many people over the years that have worked for you and they're very complimentary of you, and I know you're proud of this protegee of yours who's moved forward.

MORGENTHAU: Senator, may I tell you that my grandmother was born in Montgomery, Alabama.

SESSIONS: I am impressed to hear that. (LAUGHTER) I feel better already. That's good. (LAUGHTER) Mr. Attorney General, thank you for your able comments. And, Mr. Henderson, it's good to work with you. Senator Leahy and I are talking, during these hearing, we're going to do that crack cocaine thing that you and I have talked about before. We got to...(LAUGHTER)

HENDERSON: Thank you, Senator. I appreciate it. (CROSSTALK)

SESSIONS: Let me correct the record.

(UNKNOWN): You need to rephrase it, Senator. (LAUGHTER) Please rephrase.

SESSIONS: I misspoke.

HENDERSON: No. Quite all right.

SESSIONS: We're going to reduce the burden of penalties in some of the crack cocaine cases and make them fair. So, Mr. Ricci, thank you for your work.

I would say, Mr. Henderson, that I said the PRLDEF legal defense fund is a good organization in my opening statement. And I think it has -- it has every right to advocate those positions that it does, but the nominee was on the board for a long time, and I did take some positions that she rightly was asked about, whether or not she agreed to it, especially during some of those times she was chairman of the litigation committee.

But I value the -- these -- I value that groups can come together and file lawsuits and take the matter to the court. Just briefly, Mr. Kirsanow, on a slightly different subject than you started -- I think you probably know this answer -- but could tell us for the purpose of this hearing, as briefly as you can, what the concern is in the Voting Rights Act?

It's not that we're against -- anybody's against the voting act. I -- I voted for it. But there are some constitutional concerns. Could you share precisely what that is?

KIRSANOW: Sure. And specifically, with respect to the latest Supreme Court decision related to that, what was articulated is that the pre-clearance provisions of the Voting Rights Act pertain to a legacy of discrimination that occurred in many states where poll taxes and literacy tests were being imposed on black citizens.

However, in this particular case, the often critical subdivision came into existence after all of the -- the legacy of this administration had actually occurred or even after the Voting Rights Act itself had been passed. And the question is, how could it be that you've got a pre-existing law that is almost -- for lack of a better term -- ex post facto applying to an organization that came into existence after the law was in effect.

There was no history of discrimination or denials of equal protection or denial of voter rights by this particular political subdivision. So it was peculiar in that regard, and I think there were several justices who evinced some concern about the approach in that particular case. SESSIONS: Thank you. It's just -- there are two sides to that story. And we passed the bill, and we extended it, and all of it had some angst and worry.

I'd said I wanted to vote for it, and we did. We extended it for probably longer than we should have, and not that it would ever end. Huge portions of it may never end, but some portions of it may not be needed to continue.

Let's -- Lieutenant Vargas, that was a moving story you gave us. Let me just ask you this. Do you think that other members of the fire department, had they studied as hard as you and mastered the subject matter as well as you did, could have passed the test -- more of them would have passed if they'd studied as hard as you?

VARGAS: Absolutely.

SESSIONS: You think you...

VARGAS: Absolutely. I studied with a group of them, and they all supported me and what I was doing, because they knew the effort that I put in. And -- and they were right there. We really weren't all that far behind.

And, you know, minorities would have been promoted. That's something that -- that continues to get left out. There would have been minorities promoted to captain, minorities promoted to -- to lieutenant, as well. And, you know, when you take these exams, sometimes you have winners and sometimes -- you know, but you go into that situation knowing that that's going to be the case.

SESSIONS: Mr. Kirsanow, you indicated that all the judges -- I believe your phrase was -- on the Supreme Court rejected the standard of review that the panel -- Judge Sotomayor's panel set for the firefighter exam. Is that right?

KIRSANOW: Senator, even the dissent had a different standard. It was good cause standard, which was given a little bit more definitiveness to the approach that defendants could take in defending.

As you know, Title VII has a safe harbor of job-related consistent with business necessity. If you can establish that, in fact, the -- that the firefighters took were job-related, consistent with business necessity, then only under those -- the only way you could show a disparate impact is if those tests weren't made. Even the dissent said it should have been sent back on remand.

SESSIONS: Thank you. And, Ms. Chavez, I noticed one thing. According to the ABA statistics, only 3.5 percent of lawyers in America in 2000 were Hispanic, yet they -- Hispanics make up 5 percent of the federal district court judges and 6 percent of circuit court judges. Would you comment on that?

CHAVEZ: Well, first of all, I think it's important -- you know, there's been a lot of attention focused on the phrase a "wise, Latina woman." I used it myself, obviously, ironically, in testifying today.

But I think it's important to read Judge Sotomayor's entire speech, because, in fact, it wasn't just that she was saying a wise, Latina woman would make a better judge. What she was saying was that the race, ethnicity and gender of judges would and should make a difference in their judging.

And she says in the speech itself -- she says she doesn't know always how that's going to happen, but she even cites some studies, sociological studies that take a look at the way in which women judges have handed down decisions and makes the case that women judges decide cases differently than men do, and she speaks of this approvingly.

And she talks about statistics and how few Latinos there are on the bench. And the statistics that you just cited come from an article that I wrote in retort (ph) to the -- the statistics that she used.

I bring that up because inherent in that analysis of hers is the notion that there ought to be proportional representation on judicial panels, that we ought to be selecting judges based on race, ethnicity and gender, and that we ought to have more or less proportional representation.

And I have to say that, you know, that really, I think, comes very close to arguing for quotas, a position, by the way, that she has taken with -- when she was with the Puerto Rican Legal Defense and Education Fund. By the way, she was not just on the board; she actually signed some memorandum. Those are in the record, and I've cited some instances of that in my written testimony.

And the point is that, if there is so-called under-representation of some groups, it means there's over-representation of others. And I said in my testimony that, if we are concerned about the number of Latino judges, first thing you need to be a judge is a college degree and a law degree.

And, in fact, if just using Judge Sotomayor's own statistics, if anything, if you look at the number of attorneys who are Latino at the time that she was writing, Hispanics were actually somewhat over-represented on the judicial bench.

I reject all of that. That doesn't bother me in the least that they are over-represented. I think we should not be making ethnicity and race or gender a qualification for sitting on the bench or being a firefighter or being a captain or lieutenant on a firefighting team. I think we ought to take race, ethnicity and gender out of the equation.

SESSIONS: Thank you.

WHITEHOUSE: Senator Durbin?

DURBIN: Ms. Chavez, do you think that Judge Sotomayor's being awarded the Pyne award at Princeton for high academic achievement and good character being summa cum laude and Phi Beta Kappa was because it was a quota, that they wanted to make sure there was a Latina who received that?

CHAVEZ: No, I don't. And in fact, what is interesting about Judge Sotomayor's tenure at Princeton University is that she has said that she was admitted as an affirmative action admittee because her test scores were not comparable to that of her peers.

But she has also has talked about what happened to her when she got there, and that she recognized that, in fact, she was not particularly well-prepared, that she did not write well and that one of her professors pulled her aside and said she had to work on her writing skills.

(UNKNOWN): So that would...

CHAVEZ: I admire...

(UNKNOWN): Excuse me. That would make it a pretty amazing story, then...

CHAVEZ: That's right. And I wish that that was the story that she was telling Latinos, that she...

(UNKNOWN): I think the story of her life that I'm describing...

CHAVEZ: Well, I wish that what she was telling Latinos is that, if you do what Ben Vargas has done; if you do what Frank Ricci has done; if you take home the books and you study them, and you memorize what you need to know so that you can pass the test like I did when I took home grammar books and learned how to write standard English, that that should be the story, not that she should be insisting on racial quotas and racial preferences.

(UNKNOWN): Ms. Chavez, I think that the story of her life is one of achievement, overcoming some odds that many people have never faced, in her family life and personal life.

Mr. Morgenthau, when you were alerted about her skills in law school, did they tell you that they had an opportunity, here, for you to hire a "wise Latina lawyer"?  
Is that what you were the market for?

MORGENTHAU: Absolutely not. I mean, I took one look at her resume, you know, summa cum laude at Princeton, Yale Law Journal, and I said -- and then I talked to her, and I thought she was common-sense and judgment and willingness to work. The fact that was Latina or Latino had absolutely nothing to do with it. And may I just use this opportunity to say that I was one of the founding directors of the Puerto Rican Legal Defense Fund.

And the reason I did that was I thought it was important for what was then a way-underrepresented minority. You know, you're looking back 35, 40 years -- to have an organization which was dedicated to help people in housing court, discrimination cases.

So I urged her to join the Puerto Rican Legal Defense Fund. And, I mean, I had become a life member of the NAACP in 1951. I'd been on the National Commission of the Anti-Defamation League.

I think that, you know, one of the great strengths of the United States is its diversity. And -- but we've got to help people from the various minority groups make their way and advance.

And I must say I'm very critical of some of my friends and relatives who want to forget where they came from. And it's to her credit that she remembers where she came from.

(UNKNOWN): And, Mayor Bloomberg, I believe you had a quote that I read about Washington being, maybe, the only place -- would you recall that quote on the Puerto Rican Legal Defense Fund?

BLOOMBERG: Yes, I think that public service is something that, certainly, you, Senator, know the value of and the satisfaction when you do it. And in New York City, we value those who are willing to give their time and help others. They walk away, in many cases, from lucrative careers to serve as public defenders or outside of the legal profession in myriad other ways.

And the fact that the organizations that they work for sometimes do things that you or I disagree with doesn't take away from the value that they provide in other things that they do.

(UNKNOWN): I just made a note the other day. This is my third nomination for the Supreme Court. I've been honored to serve on this committee and consider three nominees. The two previous nominees, Chief Justice Roberts, Justice Alito, both white males, and the questioning really came to this central point. "Do you as a white male," to each of these nominees we asked, "have sensitivity to those unlike yourself"?

Minorities, disadvantaged people. And those questions were asked over and over again.

In this case where we have a minority woman seeking a position on the Supreme Court it seems the question is, are you going to go too far on the side of minorities and not really use the law in a fair fashion?

BLOOMBERG: Senator, isn't the reason that the founding fathers, at least I assume the reason the founding fathers said nine justices is that they wanted a diverse group of people with different life experiences who could work collaboratively and collectively to understand what the founding fathers meant generations later on.

And so the fact that I said before in my testimony I do not think that no matter how compelling Justice Sotomayor's life experience and biography is, that's not the reason to appoint her. Certainly we benefit from having a diverse group of people on the Court in the same way as my city benefits from a diverse group of citizens.

(UNKNOWN): Mr. Chairman, if I could ask one last question. I might say, Mr. Mayor, you're getting dangerously close to empathy. But I happen to agree with you.

Mr. Morgenthau, when Judge Sotomayor worked in your office did you notice whether or not she treated minorities any differently in...

MORGENTHAU: She was right down the middle, Senator. She didn't treat minorities any differently than she treated anybody else. Right down the middle. Looked at the law. Tough but fair. (UNKNOWN): Thank you very much. Thank you, Mr. Chairman.

LEAHY: Thank you. Senator Sessions indicated that Senator Graham will be next to inquire.

GRAHAM: I'd like to thank my colleagues for the courtesy here. I've got to run back and do some things. This has been a very good panel by the way. I think we're sort of grappling with issues right here in the Senate the country is grappling with, and I'll try to put it in perspective the best I can.

Now Ms. Chavez, identity politics I think I know what you're talking about. I asked the Judge about it. It's a -- a practice of politics I don't agree with and I think overall is not the right way to go. But having said that I've tried to look at the Judge in totality.

The well-qualified and ready from the ABA when it was given to Judge Alito and Roberts, we all embraced it, and I used it a couple of times to say that if you thought this person had a rigid view of life or the law it'd been

very hard for the ABA to give them a well- qualified rating. Does that impress you at all that the ABA had a different view in terms of how she might use identity politics on the bench?

CHAVEZ: Well I'm not sure they dealt with that question. I think they did deal with her record as a judge and the decisions that she has made as a judge. The ABA and I often disagree on...

GRAHAM: Ma'am, I totally understand. (CROSSTALK)

CHAVEZ: (inaudible).

GRAHAM: I totally understand, but I guess the point I'm making, I don't want to sit here and try to have it both ways. You know say the ABA's a great thing one day and means nothing the next.

Have you ever known a Republican political leader to actively try to seek putting a minority in a position of responsibility to help the party?

CHAVEZ: I think that the idea of giving due deference to making sure that people are representative in -- in diverse ways is a standard way of operating -- in political circles. I don't...

(UNKNOWN): Well, the only reason I mentioned that is the statement you made, the way we pick our judges should be based on merit, the way we pick our firefighters. I totally agree with that. I mean, it's -- but politics is politics in the sense that I know that Republicans sit down and think, OK, we've got some power now. Let's make sure that we let the whole country know the Republican Party is just not a party of short white guys.

(UNKNOWN): I think that's different, though, Senator, then, as she suggested in her speech that there are to be some sort of proportion...

(UNKNOWN): Yes, that's right. You can go -- that's right. I -- I totally agree.

(UNKNOWN): I -- I -- and I think that's farther. And I also think it matters that we're not just doing that because we want to see diverse opinions. But it seems to me that what she was saying in her speech was that we do that because blacks, Latinos and women are different, think differently, and will behave differently. I mean, she said that explicitly, that it...

(UNKNOWN): Yes, I...

(UNKNOWN): ... maybe as a result of physiological differences. I think any white man that said such a thing about minorities or women would be laughed out of this room.

(UNKNOWN): Well, since I'm the white guy that said that, I agree with you. (LAUGHTER) But the point is that I'm trying to get the country in a spot where you're not judged by one thing, that we just can't look at her and say that's it. You know, when I looked at her, I'd see speeches that bugged the hell out of me, as I said before, but I'll also see something that very much impresses me.

And the ADA apparently sees something, and Louis Freeh sees something, and Ken Starr sees something. And, you know, what I want to tell the country is that Republicans very much do sit down and think about political picks and appointments in a political sense to try to show that we're a party that looks at all Americans and intends to give an opportunity. And that's just life, and that's not a bad thing.

Now, Mr. Ricci, I would want you to come to my house, if it was on fire. (LAUGHTER)

And I appreciate how difficult this must have been for you to bust your ass and to study so hard and -- and to have it all stripped at the end. I just want you to know if the country that we're probably one generation removed to where no matter how hard you study, based on your last name or the color of your skin, you'd have no -- no shot. And we're trying to find some balance.

And in your case I think you were poorly treated, and you did not get the day in court you deserve, but all turned out well. It was a five-four decision, and maybe we can learn something through your experience. But please don't lose sight of the fact not so very long ago, the test was rigged a different way.

Mr. Vargas, you're one generation removed from where your last name would have been it. Do you understand that?

VARGAS: Yes, sir.

(UNKNOWN): What did you go through personally to stand with Mr. Ricci? What came your way? Does anybody criticize you?

VARGAS: I received lots of criticism.

(UNKNOWN): Well, tell me the kind of criticisms you had.

VARGAS: But I have -- I have a thick skin. I believe that I'm a person with thick skin.

(UNKNOWN): Well, did people call you an Uncle Tom?

VARGAS: Yes, sir.

(UNKNOWN): People thought you were disloyal to the Hispanic community? VARGAS: Absolutely, yes.

(UNKNOWN): Well, quite frankly, my friend, I think you've done a lot for American-Hispanic community. My hat's off to you.

VARGAS: Thank you, Senator.

(UNKNOWN): Finally, Mayor, having to govern a city as diverse as New York must be very, very difficult. It is also a pleasure?

BLOOMBERG: It is a pleasure, and we -- I said before you came in that some of Judge Sotomayor's views I don't happen to agree with some of her decisions. I think on Ricci, for example, I disagreed with what the city of New Haven did.

In New York City, you should know that our city is a defendant in a case, a class action suit in the Justice Department where the challenge is to entry-level tests for our fire department, one given in 1999 before I became mayor, and one afterwards in 2002. And we're defending it on the grounds -- the suit alleges that the written portions of the test were not germane to the job and had a disparate impact.

I've chosen to fight this. I think that in fact the tests were job-related and were consistent with business necessity. This is a case that's going to go to trial sometime later this year. What we've tried to do is to approach it from a different point of view, aggressive recruiting to try to get more minorities to apply to be firefighters.



And we have revised our test. We've had a substantial increase in the number of minorities taking the test, passing the test, and joining our fire department.

I really do believe that that's a better way to solve the diversity problem, which does affect an awful lot of fire departments around this country, rather than throwing out tests and thereby penalizing those who pass the test.

CARDIN: Senator Klobuchar?

KLOBUCHAR: Thank you. I'm going to let Senator Specter, who is -- I guess I'm more senior to him only because of a technicality, but also he's been here longer. So I'm going to let him go and then I will go after.

CARDIN: Senator Specter?

SPECTER: No, no, I'll defer to Senator Klobuchar. (LAUGHTER)

KLOBUCHAR: OK. Here we go. I first wanted to thank both firefighters for your service. As a prosecutor, we worked extensively on arson cases and I just got a little sense of what you go through every day and how dangerous your job is. So thank you for that.

I just wanted to follow up on one thing. Ms. Chavez, when you talked about your clearly know Ms. Sotomayor's history and her record, but when you talked about how she got into Princeton, you didn't point out the one thing that I think Mr. Morgenthau did, and that is that she ended up graduating from there summa cum laude, and that certainly is all about numbers and grades, I would think, and not affirmative action. Would that be correct?

CHAVEZ: That's absolutely right, and I wish that was the message that she was giving to her Hispanic audiences, that she was able to do it; that she was able to overcome adversity; that she was able because she applied herself and worked hard and put in the hours studying to be able to succeed. And that is not the message.

KLOBUCHAR: OK. But she also was valedictorian of her high school class. Where I went to high school, that was all numbers and grades and nothing to do with anything else. Is that true?

CHAVEZ: I am only quoting what she has said herself. I don't have any idea what her test scores were. I don't think anyone but she does. But she has said that she got in to Princeton and also Yale based on the affirmative action programs of those universities.

KLOBUCHAR: OK. Mr. Morgenthau, it's just an honor to meet you. When I was district attorney, I hired a number of people that learned everything they knew from you and your office, so thank you for that.

And in fact, when I did my opening statement, I talked about a quote you gave once about how you hired people, and you say, "We want people with good judgment because a lot of the job of a prosecutor is making decisions." You said, "I also want to see some signs of humility in anybody that I hire. We're giving young lawyers a lot of power and we want to make sure that they're going to use that power with good sense and without arrogance."

Could you talk about those two qualities -- the good judgment and the humility, and how you think those qualities may be or may not be reflected in our nominee?

MORGENTHAU: Well, I'm -- I mean, I think she met all those standards. I -- I interviewed her and talked to her, thought she was a hard worker. I thought she would relate to the victims and witnesses. I thought she had humility. I thought she was fair. I thought she'd apply the law.

She met all of those standards that I thought were important to me, and I hired her entirely on the merits, entirely on the merits, nothing to do with her ethnic background or anything else. She was an outstanding candidate on the merits.

KLOBUCHAR: There is also a letter that we received from 40 of her colleagues. And one of the things I've learned is that, well, maybe sometimes someone does well in their workplace by their superiors, sometimes their colleagues think something else. And here you have her colleagues talking about the long hours she worked, how she was among the very first in her starting class to be selected to handle felonies.

Could you describe how your process works in your office and how certain people get to handle felonies sooner than others?

MORGENTHAU: Well, it's (inaudible) we have six trial bureau of about 50, 55 lawyers in each one. And it's up to the bureau chief, the deputies to decide who should move along.

And I know one of the people who wrote that letter had gone to -- to Princeton and to Yale Law School and studied for the bar with Sonia. And I said to him, "I guess she was a little bit ahead of you." And he said, "She was a full step ahead of us."

And she has the judgment, the gravitas, the knowledge of people, the ability to persuade victims and witnesses to testify. We thought she was a natural to move up to the Supreme Court. KLOBUCHAR: Very good.

Mayor Bloomberg, I noted today earlier that the -- that Judge Sotomayor has the support of so many law enforcement organizations in New York, National District Attorneys Association, could you talk about the -- what that support means and how -- I know you've had success along with Mr. Morgenthau's amazing record of bringing crime down in New York, working with the police, working with the county attorneys as a team and, while our nominee was a small part of that, one -- one assistant district attorney in -- as part of a big effort, what difference that has made to New York?

BLOOMBERG: Well, I think, Senator, the reason that we've been able to bring crime down and improve the schools and the economy and all of these things is because I've never asked anybody or considered their ethnicity, their marital status, orientation, gender, or religion, or anything else. I just try to get the best that I possibly can to come to work for the city, and I think the results are there.

When I interview for judges -- and I've appointed something like 140 so far in the last seven-and-a-half years, I look for integrity, and professional competence, and judicial temperament, and how well they write, and their appellate records, and their reputation for fairness and impartiality.

But also we extensively talk to members of the bar and the bench to see what professionals who have to work with the candidate day in and day out think. It's very easy to be on your best behavior when you come to Washington and have to testify before a group like this, but the truth of the matter is, your real character comes out when you do it day in and day out over a long period of time. And that's what your contemporaries see.

So the fact that a lot of people who've worked with this judge think that she is eminently qualified to move up carries an awful lot of weight with me. They can -- they know a lot more about her and her abilities than you or I could ever find out with the short period of time that we interact with her or read of -- read about her

decisions, sort of out of context of what was going on at the time, and we don't have the ability to do all of the research that her contemporaries have been doing.

KLOBUCHAR: So you're saying that -- you give that a lot more weight than all the questions we've been asking for the last three days?

BLOOMBERG: No, I wouldn't -- I wouldn't go quite that far, but I do think that people who work with somebody for a long period of time really do get to know them. And most importantly, people who are on the other side of the issues, on the other side of the bench, if they think that even though -- and sometimes they win and sometimes they lose -- their views, to me, matter an awful lot more.

KLOBUCHAR: I would agree. Thank you.

Day 4 Part 7

WHITEHOUSE: Senator Hatch?

HATCH: Well, thank you, Mr. Chairman. Mayor, it's always good to see you. I appreciate the joy and the verve of which you run New York City. I know that it's a tough city to run, but you do a great job.

BLOOMBERG: Thank you.

HATCH: And, Mr. Morgenthau, we all respect you. You know that. I know that. And you've given a long public service that is of great distinction. It's always good to have attorneys general from any state here, and we're grateful to have you here, Mr. McDaniel. Mr. Henderson and I have been friends for a long time.

We sometimes oppose each other, but it's always been with friendship and kindness. We're grateful to have you two -- you two great people here who do such very important work in the city of New Haven. I know it takes guts to come here, and we appreciate you being here.

Mr. Kirsanow, let me just -- and, certainly, Mr. Kirsanow and Linda Chavez, we -- we recognize your genius, too, and the things that you bring to the table. Let me just ask you this, Mr. Kirsanow, because I was....

...the one who raised the Ricci case to begin with. I -- I have two related questions about the Ricci case. Do you agree with Judge Cabranes and -- and the other five judges who agreed with him that this was a case of first impression in the Second Circuit, which means that there was no precedent?

KIRSANOW: That's correct, Senator. We took a very strong look as to whether or not there was anything on point. There may have been some peripheral cases that wouldn't provide any definitive guidance. But as I indicated in my statement, to the extent there were cases to provide guidance, maybe equal protection clause cases -- Wygant's one and so forth -- those were the kind of cases you'd have to look through, but none -- none under Title VII.

HATCH: Well, explain what was the issue of first impression that these six judges found.

KIRSANOW: It was...

HATCH: They were in the minority 7-6, but they -- they -- Judge Cabranes got very alarmed, because this was a summary order that ordinarily they wouldn't have seen, but he caught it in the newspaper, asked to see it, and then said, "My gosh, this is a case of first impression. We ought to do more than just a summary order on it," which is something that I've been very critical of.

KIRSANOW: Senator, it was the tension between two provisions of Title VII and...

HATCH: You're talking about disparate treatment and disparate impact?

KIRSANOW: Precisely.

HATCH: And this was...

KIRSANOW: And trying to balance the two. And keep in mind that the 1991 amendments were really a product of *Griggs v. Duke Power* and its progeny. And remember that *Griggs* was really a response to the

difficulty in demonstrating intentional discrimination so that there was a resort to disparate impact to try to help prove the case.

So whether you give primacy to intentional discrimination or disparate impact was, what was trying to be determined here? Or not necessarily primacy, but trying to evaluate both consistently with the purposes of Title VII.

HATCH: Well, please explain the difference between what the Supreme Court split 5-4 and what all nine of the justices on the Supreme Court, why they criticized Judge Sotomayor's decision.

(UNKNOWN): Had to do with the process by which the decision was reached. Even the dissent, Justice Ginsburg, noted in (inaudible) 10 that this is something that ordinarily should have been sent back on remand because it was to determine whether -- that is, to determine whether or not there was good cause for taking the decision New Haven took.

The majority, on the other hand, said the city of New Haven had to have a strong basis in evidence before it discarded the test results.

So there are two separate standards by both the majority and the dissent, but neither agreed with the manner in which the Sotomayor panel disposed of the case.

HATCH: So all nine justices on the court agreed that the appropriate law wasn't followed.

(UNKNOWN): Correct.

HATCH: And five of them said the city of New Haven was wrong.

(UNKNOWN): Correct.

HATCH: So the firefighters won.

(UNKNOWN): Now, Mr. Vargas, I just wanted to make that clear, because I don't think a lot of people realize that, and that's a very, very big thing to me. Mr. Vargas, your comments about your sons were powerful. What difference does it make for them whether merit or race determines opportunity? And what difference does this case mean for them?

VARGAS: I believe this is going to be a greater opportunity for them in the future because they're not going to be stigmatized that way, they're not going to be looked at that ways, and they're going to rise and fall on their own merits...(CROSSTALK)

HATCH: And that's one reason why you brought this case...

VARGAS: That's absolutely right.

HATCH: Mr. Ricci, I only have a few seconds, but let me say this. I want to thank you for your service for protecting your fellow citizens up there.

As I understand it, the City of New Haven went to great lengths to devise this promotion test that was -- the lengths were fair, objective -- the test was fair, objective and not tilted toward or against any demographic group. In fact, I understand the test was not questioned.

They worked on the kind and context of the question so that they were relevant to the job, but would not create a hurdle for anyone. They used both a written and an oral exam format, right?

Is your understanding of how they worked to put together the test and did -- that that's the way they put it together? And did that make you believe that you would be judged on your merits?

RICCI: Yes, Senator. The rules of the game were set up and we have a right to be judged fairly. And just by taking the test we knew that the test -- we didn't even need to go any further -- just by taking the test we knew that the test was job-related and measured the skills, ability and knowledge need for a competent fire officer.

HATCH: Well, did that make you see this as a genuine opportunity that might, indeed, be open to you?

RICCI: Yes, Senator.

HATCH: Now, tell me more about your expectations when you looked at this opportunity. You were no doubt familiar with the racial dynamics that existed in New Haven at the time. Anyone involved in their community anywhere would be aware of that.

Do you think that at all, that because the test was so rigorously and fairly designed that any of those outside racial dynamics would become an obstacle to your future service in the fire department as long as you were qualified for the job?

RICCI: No. Myself and all 20 plaintiffs, including other firefighters that didn't join the suit, including African Americans and Hispanics, I think we all had the expectation when we took the test that the test would be fair and job-related and that it was going to be dictated by one's merit on how well you did you did on the exam, not by the color of your skin.

HATCH: OK. General, I just have one statement to make. You made the comment that the Supreme Court changed the law by a majority. They didn't change the law. They actually recognized there was a case of first impression here that had to be decided, and they decided it. They didn't change any laws.

(UNKNOWN): No.

(UNKNOWN): And it wasn't by their majority. I mean nine of them said the case should be reexamined. Five of them said that New Haven was wrong. And I just wanted to make that clear so that everybody would understand it because this is not some itty-bitty case. This is one of the most important cases in the country's history, and that's why it's caused such a furor.

And I want to compliment all of you firemen who have been willing to stand up in this issue because this is an important issue for people of whatever race or gender or ethnicity. And I -- you know you've taken a lot of flack for it, and you shouldn't. Thank you, Mr. Chairman.

LEAHY: Thank you. Senator Specter?

SPECTER: Thank you, Mr. Chairman. Mr. Ricci, I agree with just about everything you said, but you had a right to go to federal court and get justice that racial statistics are wrong. What we sought was even-handed

justice, and as the court finally decided, you have been deprived of your rights and made a change. The question that I have for you, do you have any reason to think that Judge Sotomayor acted in anything other than good faith in trying to reach a fair decision in the case?

RICCI: That's beyond my legal expertise. I am not an attorney or a legal scholar. I simply welcome an invitation by the United State Senate to come here today, and this is our first time that we've gotten to testify about our story. So I can't comment on...

SPECTER: Well I think that it's very good that you've been here and had a chance to testify. I agree with that totally. And there's enormous appreciation for the work the firefighters do.

I had a lot of association with the firefighters in my day as a city official in Philadelphia, and on the Homeland Security been in the forefront of funding for firefighters. And what the firefighters did on 9/11 was -- words are inadequate: heroism and bravery and the loss of lives and the suffering.

Lieutenant Vargas, again, agree with all of your testimony. In your work you have to get it right the first time.

Well, when you have 5-4 decisions it's hard to say which way the ball bounces, especially when they get reversed from time to time. But I would ask you the same question I asked of Mr. Ricci: whether you have any reason to doubt the good faith of Judge Sotomayor in coming to the conclusion she did.

VARGAS: I would have to defer to pretty much the same response: that we were invited here to give our story, and we wanted to focus on that. And I -- I really didn't took much to that, no.

SPECTER: OK. Well that's fair enough. And it's up to the Senate. We hope we get it right. But all anybody can use is their best judgment. Mr. Boies, when you place so much reliance on Ricci v. Adista Funnel was a basis for opposing Judge Sotomayor. Isn't that case just overloaded with subtlety and nuance? Could've gone the other way? Could you really place much reliance on criticism of Judge Sotomayor as a disqualifier?

BOIES: Well first of all, Senator Specter, I think I actually went back to criticize Judge Sotomayor's activities going all the way back to Princeton University, so I don't think I relied exclusively.

I think what -- and I would answer the questions that you asked Mr. Vargas and Mr. Ricci. I do think that Judge Sotomayor, based on her history, her involvement with the Puerto Rican Legal Defense and Education Fund, her writings, her activism, has indicated a preference to eliminate testing. She has fought to -- to get rid of civil service testing. She has challenged tests as being inherently -- standardized tests as being inherently unequal and as always arriving arriving at a disparate impact.

And I think that activism, that involvement, going back decades, did in fact influence the way she approached this case. So I think it is relevant. And that is the reason I'm criticizing it. It's not just her one decision in one case. It is her whole body of work, her whole life experience and the views that she has expressed over several decades.

SPECTER: Well, we consistently have nominees for the Supreme Court come to this panel, Justice Alito, Chief Justice Roberts, Justice Thomas, on both sides of the ideological divide, and what they do in an advocacy position is customarily set aside to make an evaluation as to their -- their competency. When you talk about being a woman or being an Hispanic, it's my view that that kind of diversity is enormously helpful.

I go back to a question I asked Attorney General Meese more than 25 years ago. If you have -- the debate was raging on affirmative action even more than it is now -- if you have two people of equal competency and one is a minority, Attorney General Meese, not known for being a flaming liberal, took -- took the minority position.

And my own view is that it's time we have more women and we had more diversity. And we have to have qualifications -- have to have qualifications. And I think that's what ultimately determines this nomination. Attorney General McDaniel, let me ask you a loaded question. You can handle a loaded question.

Do you think, with all of the critical issues we have to face on separation of powers and what the Congress does by way of fact-finding and what is done on the Americans With Disabilities Act and trying to find out about warrantless wiretaps and the Foreign Intelligence Surveillance Act and compensation for the survivors of the victims of 9/11 and the intricate relationship to the State Department influencing the way Congress interprets the foreign sovereign immunity, that there's a little too much attention paid to the Ricci case -- not that it's not very important, but there are lot of other matters that are important.

Isn't this a little heavy on one case?

MCDANIEL: Senator, not only do I agree with you about the other issues that should be given ample attention because of their enormous weight, I think that perhaps the wrong focus of attention even on this case has been applied.

Chief Justice Roberts has said that he would like to "narrow standing analyses" and he would like to be a conservative justice who want to look only at the disagreements between two parties and not go beyond the scope of that.

One of the important issues in the Ricci case was a standing issue, which was there standing to bring action if one had not been denied promotion?

Senator Hatch's attorney -- own attorney general joined with me in the brief because we thought that that was among the issues that were important and should have been followed under stare decisis. Instead the court expanded standing to someone who had not been harmed under the legal standard.

I think that that is important to consider. I think that it's important to note that, if they were going to change standing and standards, I think it's somewhat unfair to put emphasis on the footnote -- for instance, footnote 10 of Justice Ginsberg, which said that, if we are going to change the rules of the game, then we should remand the case back to be reviewed. But that wasn't critical of the second circuit, in and of itself.

SPECTER: I regret...(CROSSTALK)

MCDANIEL: So I agree with you about your -- your emphasis, or the...(CROSSTALK)

SPECTER: I regret that there's so little time. Having Mayor Bloomberg and D.A. Morgenthau and (inaudible) Henderson, we'd like to really have a chance to cross-examine...(LAUGHTER) ... except that I agreed with your testimony. Thank you, Mr. Chairman.

WHITEHOUSE (?): Thank you, Senator. Senator Cornyn?

CORNYN: Thank you, Mr. Chairman. I want to extend my appreciation to each of the witnesses for taking your time and -- to be here today. It's very important. These are -- as we need to remind ourselves, this is a historic time and appointment, and these are very important issues that should not be neglected or overlooked because of the press of other activities.



My own position is that I think, by virtue of her training, her experience and her high achievement, Judge Sotomayor is very well-qualified, all other things being equal.

Unfortunately, because of her speeches and other public statements where she said there's no such thing as objectivity in the law, which -- the opposite of objectivity is subjectivity. She said there's no neutrality. And if there's no neutrality, then I guess all that leaves is bias.

And it really strikes a body blow, I think, to -- to the concept of equal justice under the law. Judges are not policymakers and judges should leave that job to the elected representatives of the people, who reserve the time-honored right to throw the rascals out if they don't like what we're doing as elected members of the legislative branch.

So, you know, my -- my concern is what kind of judge would she be if confirmed to the United States Supreme Court, the kind of judge that follows her speeches or the kind that follows the law?

And -- but I just want to say to these firefighters what I told them earlier today when they were kind enough to come by my office. I think, you know, judges make mistakes. They used to say the only lawyer who hadn't lost a case is one that hadn't tried one.

And I don't necessarily hold it so much against Judge Sotomayor that she didn't rule your way in the case. Unfortunately, I think she did not give it the proper respect and -- and pay it the sort of attention that she should. Because there were real claims there that needed to be resolved by a court.

Every citizen's entitled to that, to have judges pay attention and not make mistakes by, you know, trying to sweep it under the rug.

And thank goodness that Judge Cabranes found the case, because it almost got slipped through the cracks, and then highlighted it so if you get to the Supreme Court of the United States and the Supreme Court could address this very important -- the important issues that you've presented here.

And one of the most important aspects, I think, of this hearing is this provides an opportunity, and it would not have been provided, I think, in large part unless these firefighters had had the courage to do what they've done, is for us to refocus our attention on some of these areas like, as Chief Justice Roberts said, he said, "It's sordid business, this divvying up by race, " and looking at people not as an individual human being, but as a member of a group or because of their sex or their ethnicity or their race.

.... it's time for this nation, I think, I hope we would all agree, to look at everyone as individuals, and to reward hard work, sacrifice and initiative, the kinds of things that I think, particularly you, Frank and Ben, you -- Frank is the lead (inaudible), but all of the firefighters have helped demonstrate the importance of not divvying up by race, not using de facto quotas.

And I think -- I would have felt a lot better if Judge Sotomayor had said, "You know what? This is really an important issue and we should have addressed it, but it slipped through our fingers, but thank goodness it was caught and it was ultimately reviewed." But she didn't.

And I think the idea that the city could throw out a test just because the outcome wasn't what they wanted is really pretext for racial discrimination. It's to deny people what they are entitled to because of the color of their skin.

So I just want to ask in the short time I have here, Mr. Vargas, you've -- I read earlier a statement that you made to the New York Times about the reason why you've gone through these five grueling years of litigation and the abuse that you've taken from people who -- who tried to shame you out of standing on your rights and seeing this thing through. Could you just tell the committee what sacrifices you have made, what your family's made? And why you felt like those sacrifices were so important to vindicate this important right?

VARGAS: Well, let alone the financial sacrifice, but you know, it starts from the moment you get out of the academy. I mean, this was something that I wanted to do. I wanted to advance my career as a firefighter right through the ranks. And you know, the books came with me to work every single day, you know, from the minute I graduated from the academy, right up to when I got promoted to lieutenant. And they kept coming with me right on until I took the captain's exam.

And once I get promoted to captain, they're going to continue to come with me as I go up through the ranks. You know, it's not something that, you know, you can lose sight of. You've got to continue to work hard, and I want to instill that in my kids. I want them to see that and I want them to know that this is what America is all about.

You work hard. This is how America was built -- the greatest country in the world because you -- you, as I said before, you rise and fall on your own merits.

(UNKNOWN): Do you hope for a day for your children what -- we mentioned Martin Luther King's statement previously, that a day when they will be judged by the content of their character and not the color of their skin?

VARGAS: I think our case goes a long way to help in the (inaudible) up for them, and they're going to benefit from this, and I think we're going in the right direction now.

(UNKNOWN): I couldn't agree more. Thank you, Mr. Chairman.

CARDIN (?): Senator Cornyn (?)

CORNYN (?): Thank you, Mr. Chairman. Welcome to all of you. One of the things that I think may have gotten lost in all of this is why tests are important. And I particularly wanted to ask the two firefighters here, Mr. Ricci and Mr. Vargas.

What difference does it make how well you perform on the test, whether you pass it or not? What's the big deal? What do you really have to show in those tests? And when you're out performing your duties, what difference does it make whether you pass the test or not? Mr. Ricci, maybe start with you.

RICCI: Thank you, Senator. It's important to realize that over 100 firefighters die in the line of duty each year and an additional 80,000 are injured. You need to have a command of the knowledge in order to make command decisions. You need to understand the rules and regulations.

Experience is the best teacher, but only a fool learns in that school alone. You have to have a basis to make the right decisions, because firefighters operate in all different types of environments.

I've had the proud privilege of training the United States Marine Corps sea berth team, and they responded to anthrax attacks in one of these buildings. I mean, firefighters have to be prepared for the regular house fire to the car accident to the hazardous material incident.

You go to work every day, and we're like an insurance policy for the American public that they hope they never have to use. But when someone calls 911, within four to five minutes, there's a fully staffed fire company at your door with no paperwork, and we're there to answer the call.

And when you show up, the officer has to be competent to lead his men and women of this fire service, career and volunteer across the country, to make the right decision.

KYL: Thank you. That's a great explanation. Lieutenant Vargas?

VARGAS: There's not much I can add to that.

KYL: That was pretty good. Well, I -- I appreciate it, and I know that everybody here, regardless of party or position on the nominee or anything else, appreciates what you do and what your colleagues do. And -- and I'm sure I speak for all of us in that regard. One of the things that I wanted to -- to just say briefly is that, I -- I am very proud of our -- I was a lawyer and I practiced law. And -- and I won some, and I lost some, but I always had confidence in our system.

And America is not unique, but there aren't very many countries in the world like us where we willingly volunteer to put our -- our fortunes, our freedom, in the event that we're accused of a crime, maybe even our life, if there could be a death penalty involved, our careers, in the case of the suits that you all were involved in. We willingly do that.

And the way we do it is interesting. You all may not know this, but the lawyers here certainly know it. When I filed a case in the U.S. District Court in Arizona, I didn't know which judge I was going to get. There were about 10. There was one I hoped I didn't get.

But I knew that the other nine, it didn't matter. They would all approach -- there were Democrats. There were Republicans. But I didn't know, because it's the next one in order, and the lawyers don't know the order, so it's almost by lot.

But we had confidence that we could put our client's issue before the court and that justice would be done, because that's the way our system works, and over 220 years, the rule of law has been established in this country by judges applying the law fairly and impartially. And over time, the precedents have been built up.

And what struck me about what you all had -- and I'm talking about the two of you -- had to go through is, first of all, you were confronted with a judge who, in a very thorough decision, said, "You lose." And then you appealed to the Second Circuit and in a per curiam opinion -- and you all know now what that is all too well -- the court didn't even write about it, said, "No, you lose again."

And then, the day that you got the results from the Supreme Court, just -- what's the difference between what you felt at the first situation and when you got the news about the Supreme Court, about your confidence in our system?

VARGAS: I -- I tried to say earlier that this is exactly how this country was built. This is why we're so great, because, you know, you can work hard, and you can go after the things that you want in this -- in this country, and -- and, you know, you're going to be successful, you know, but you have to apply yourself.

And those are the things that I try to instill in my kids, and I'll always put that forth, and I'll speak with my actions so that they can see that it's a great country, you know? And -- and that's why you need to work hard.

RICCI: The price of democracy is vigilance. And to be -- to be willing to participate -- and the original feeling was, you know, we always, through our attorneys, always went back to that process and said, "This is America. If we keep going forward, the process will work." And that, at the end, to be able to look at my son and say, "You know, I haven't been there for you," but to look at him and say, "This is -- this is an unbelievable civics lesson that, if you participate in democracy, that's how it all works." And I thank you, Senator.

KYL: Well, and I thank you. And I -- I hope that all of you will have confidence in our legal system in the future. And everybody here, again, regardless of position, will really stand in awe at a system which in our country year in, year out has proved to be a very, very good system for our people. Thank you.

CARDIN: Well, Senator Kyl, I want to thank you for your questions and the responses. I think it was the right way for the record to reflect the end of this panel, which has been, I think, very, very helpful to us in the record, on the confirmation process for Judge Sotomayor.

I want to thank Chairman Leahy for allowing me to chair this panel. We've had a very distinguished -- all eight of you, we thank you for being here.

I particularly want to thank Mayor Bloomberg for taking the time to come from New York. I mention him because not only he does a great job as mayor, but has had an important role at Johns Hopkins University. And we very much appreciate that.

And to Mr. Morgenthau, you are the model for the nation in the district attorney's office. And it's -- it's a real honor to have you before our committee. And we -- we thank you for your energy and continuation in public service.

And to firefighter Ricci and to Lieutenant Vargas, I personally want to thank you for being here. You put a face on the issues. We -- we look at cases, and we talk about the impact, but it affects real people and real lives and real families. And I think you really have added to today's hearing by your personal stories.

Each one of us thank you for your public service. And we thank you for your belief in our nation and for the testimony that you have given to this committee. It's been extremely helpful to each one of us on -- on the Judiciary Committee.

And with that, we are going to take a five-minute recess. When we return, Senator Klobuchar will be chairing the next panel.

(RECESS)

KLOBUCHAR: OK, I think we're going to start our third panel here, if everyone could be seated. I will warn those of you out there, anyone that has asked David Cone to sign a baseball, you must ask all seven of our other panelists, as well. OK. We're going to start by getting sworn in.

Will you please stand and raise your right hand? Do you affirm that the testimony you are about to give before the committee will be the truth, the whole truth, and nothing but the truth, so help you God? Thank you.

We're going to start. I'll introduce each of you, and then you'll give your five minutes of testimony. And then we will have questions after that. And we are going to start here with Mr. Freeh. Louis Freeh is the former director of the Federal Bureau of Investigation, whose career in the Department of Justice began in 1975 when he became a special agent in the FBI.

Mr. Freeh has a long and distinguished career as a public servant under both Democratic and Republican presidents. He was appointed by President George H.W. Bush, as a federal district court judge on the Southern District of New York.

He was also a career federal prosecutor in the United States Attorney General's Office for the Southern District of New York, serving as chief of the organized crime unit, deputy United States attorney and associate United States attorney. He graduated from Rutgers Law School and has an LLM degree in criminal law from New York University Law School. I look forward to your testimony, Mr. Freeh.

FREEH: Thank you very much, Senator. Good afternoon, Senator Sessions. Good afternoon to you. It's a great privilege to be before the committee, a committee where I've appeared over 100 times. And it's always a pleasure to be here, many friends on the committee who I've seen over the last few days.

So you have a prepared statement from me. And as Senator Sessions knows, I generally don't read my opening statements, which has gotten me in trouble with OMB over the years. But I thought it might be good just to talk and tell you why I'm here.

You know, I've had the privilege to work with great judges and appear before great judges. And let me just mention a couple.

I served on the district court with Constance Baker Motley, who, before she was a judge, you know, had those qualities of fairness and open-mindedness and commitment to the rule of law that I think we wish to see in our judges.

The last case I tried as a judge was in the district of Minnesota, before Judge Devitt. And it was a case which, by the way, Judge Sessions, Senator Sessions and I, worked on together. He was the attorney general of Alabama, a great attorney general, and I was an assistant U.S. attorney working on the case. And it was the murder of a federal judge. It was one of the few tragic times in our history where a federal judge was murdered.

And the case was tried before Judge Devitt. And Judge Devitt, who many of his peers said was the judge from central casting, was the model of judicial commitment. The instruction book, Devitt and Blackmar, is named after him. There's an award which is probably the most prestigious award that goes to judges named after him. And he was actually one of my mentors when I went on the Southern District bench.

I was sworn in as FBI director by Judge Frank Johnson, who, as someone has mentioned here before, was a legendary judicial hero from Winston County, Alabama, who, with a handful of other Republican (inaudible) by their commitment to the law, their fearlessness, and the honesty and integrity with which they took upon their office.

So it's my -- it's my pleasure to recommend to the committee the confirmation of this outstanding judge. And I want to talk a little bit about her judicial experience. And I think -- and I've been here or listening to these proceedings for the last few days -- I think I may be the only lawyer who's actually been with her in the courtroom.

And since that, in my view and experience, is the best indicator of what someone will do in the future, is how they've behaved and conducted and written and decided matters as a justice, as been mentioned before, this candidate has an enormous and rich judicial record. Seventeen years. Thousands of opinions. All the things that you want to look for as you make your evaluation.

And the process by which you've come here is quite extensive. You have the president and his reviewers' own investigation. You have bar associations, this committee. You have the FBI that conducted now three background investigations. I was actually director when the second one was done.

You have any and all information that's come from the public, from the citizenry, from Americans. You have reputational evidence from other judges, from lawyers who have appeared before her.

My association with her began in 1992. She was a new judge on the Southern District, and we had this tradition where the second-newest judge would mentor the new judge.

Some of us didn't think it was the wisest rule to have, since I had about nine months on the bench when she was entrusted to my care, so to speak.

And I actually sat with her in court. I sat with her during trials. I helped review opinions that she asked me to look at. My law clerks were encamped with her law clerks.

And I guess what I want to communicate to you in a very short period remaining is, you know, the enormous judicial integrity and commitment to finding the facts, to being open-minded, to being fair. She struggled and deliberated in making sure she had the facts, making sure she had the right law, following the law, and being the kind of judge that I think we would all be proud of.

You know, speeches are important, and it's great the way you all have considered that so carefully. But, you know, when you enter the courtroom and you put the bench on, just as you assume the authority when you take your commitment, there's a whole different set of influences and immense power and influence that takes over.

And when she's been on the bench, when she's written, when she's argued, the way she's conducted herself, I think we can very safely predict this is going to be an outstanding judge, with all the qualities I know that you would want. So I urge you all to support her. Thank you very much.

KLOBUCHAR: Thank you very much. Thank you for your testimony. Next we have Chuck Canterbury, is the national president of the Fraternal Order of Police, one of the nation's largest and most prominent voices for law enforcement officers.

Mr. Canterbury has served in numerous capacities in the organization, including national vice president and national second vice president. He has 25 years of experience in law enforcement, where he worked as a police officer in Horry County, South Carolina.

Maybe you know Lindsey Graham, one of our members here. In only the best ways, I'm sure. We look very much forward to your testimony. Thank you, Mr. Canterbury. Thank you, Mr. Canterbury.

CANTERBURY: Thank you, Madam Chair, Ranking Member Sessions, Senator Hatch. It's a pleasure to be here today to offer the support of 327,000 rank-and-file police officers, my members in the Fraternal Order of Police. It's my pleasure to testify in support of the nomination of Judge Sonia M. Sotomayor to the Supreme Court.

You know, speaking as a law enforcement officer, I think it says a lot about the character of a young person who graduated from Yale and then accepted her first job as a poorly paid prosecutor in the district of Manhattan, yet that is exactly what Judge Sotomayor did, as my members do in every city in America. She spent five years with that office, prosecuted many criminal cases, including a triple homicide.

And she forged an excellent working relationship with the men and women working the beat in Manhattan. She earned their respect and reputation as being tough, which in my profession is a compliment.

As an appellate judge, she has participated in over 3,000 panel decisions and authored roughly 400 opinions, handling difficult issues of constitutional law, complex procedural matters, and lawsuits involving complicated business organizations.

Some of her critics have pounced on a few of those decisions, as well as some of the comments made during speaking engagements, and have engaged in some pretty wild speculation as to what she would do as a Supreme Court justice. As a law enforcement officer, I prefer to rely on evidence and fact and not speculation to reach those conclusions.

One such area of speculation is on her feelings towards our right to bear arms as guaranteed by the Second Amendment. I want no mistake to be made: I take a back seat to no one in my reverence for the Second Amendment. In fact, if I thought that Judge Sotomayor's presence on the court posed a threat to my Second Amendment right, I would not be supporting her today.

The facts, as some have already pointed out, reflect a brilliant and thoughtful jurist, respectful of the law, and committed to its appropriate enforcement. Over the course of her career, she has analyzed each case on its merits. To me, that's evidence of strong commitment to duty and to the law, two characteristics that we should expect from all of our judges.

I want to cite a few cases which I'm familiar with, because they deal with issues that every beat cop in the United States has dealt with. In *United States v. Falso*, an offender indicted on 242 counts relating to child pornography sought to have evidence against him thrown out because the search warrant that was thrown out lacked probable cause. Judge Sotomayor's ruling held that the error was committed by the district court in issuing the warrant, not the officers who executed it. The conviction was upheld.

In *United States v. Santa*, she ruled that law enforcement officers executing a search of a suspect based on an arrest warrant they believed to be active and valid should not result in the suppression of evidence, even if that warrant had expired.

In *United States v. Howard*, she overturned the district court's decision to suppress evidence of drug trafficking by finding warrantless automobile searches to be constitutional.

In *United States v. Clarke*, she held that the law enforcement officers did not violate the Fourth Amendment by asking to see the VIN pin under the hood of a vehicle after discovering that the VIN plate on the dashboard was missing.

All of these rulings show that Judge Sotomayor got at least as much of her legal education from her five years as a prosecutor as she did at Yale Law School. These five years, in my view, reflect the same kind of commitment to the law that I have seen in the officers that I represent.

She's clearly demonstrated that she understands the fine line that police officers must walk and, in her rulings, reflect a working knowledge, not a theoretical knowledge, of the everyday realities of law enforcement work.

After reviewing her record, I can say that Judge Sotomayor is a jurist in whom any beat cop could have confidence. And it's for that reason that the national executive board of the FOP voted unanimously to support her nomination, and we urge you to do so, as well. Thank you very much.

KLOBUCHAR: Thank you very much, Mr. Canterbury. Next is David Cone. David Cone is a former Major League Baseball pitcher who, over an 18-year career, played for five teams in both the American and National leagues. Mr. Cone won the American League Cy Young Award in 1994 and pitched a perfect game in 1999 as a member of the New York Yankees.

He was a member of the Major League Baseball Players Association throughout his Major League career and was an officer from 1994 through 2000. Thank you very much for being here, Mr. Cone.

CONE: Thank you, Senator Klobuchar. Senator Sessions, Senator Hatch, nice to see you again. On behalf of all Major League players, both former and current, I greatly appreciate the opportunity to acknowledge the unique role that Judge Sonia Sotomayor played in preserving America's pastime.

As you know, I'm not a lawyer, much less a Supreme Court scholar. I was a professional baseball player from the time I was drafted out of high school in 1981 until the time I retired in 2003. I was also a union member and an officer of the Major League Baseball Players Association.

As is well known, Major League Baseball has a long history of acrimonious labor relations. It was not until the 1970s that players first gained the right to free agency and salary arbitration. This meant that, for the first time ever, players were able to earn what they were worth and have some choice about where they played.

The next 20 years were quite difficult. There was a lockout or strike at the end of every contract. To the players, every -- every dispute seemed to center upon the owners' desire to roll back free-agency rights the players had won.

But 1994 was the worst. The owners said that they wanted the salary cap and refused to promise that they would abide by the rules of the just-expired contract after the season ended. Believing we had no choice, the players went on strike in August of 1994. I should note that this was before Congress passed the Curt Flood Act, authored by Senators Hatch and Leahy, which made it clear that baseball's antitrust exemption could not be used to undermine federal law.

In response, the owners canceled the remainder of the season, which meant that there would be no World Series. Discussions continued through the fall and the early winter, but were fruitless. In December of 1994, the owners unilaterally implemented a salary cap and imposed new rules and conditions on employment which would have made free agency virtually meaningless. And they announced they would start the 1995 season with so-called replacement players instead of major leaguers.

We did not think the owners were negotiating in good faith, as they were required to do under federal law. We went to the National Labor Relations Board. The board agreed with us and went to federal court to seek an injunction against the owners' unilateral changes.

The United States district judge who drew the case was Judge Sotomayor. The rest is history, or at least baseball history. Judge Sotomayor found that the owners had engaged in bad-faith bargaining. She -- she issued an injunction. Her decision stopped the owners from imposing new work rules, ended our strike, and got us all back on the field.

The words she wrote cut right to the heart of the matter, and I quote: "This strike is about more than just whether the players and owners will resolve their differences. It's also about how the principles embodied by federal law operate. This strike has placed the entire concept of collective bargaining on trial. Issuing an injunction by opening day is important to ensure that the symbolic value of that day is not tainted by an unfair labor practice and the NLRB's inability to take effective steps against its perpetuation."



Judge Sotomayor grasped not only the complexity of the case but its importance to our sport. Her decision was upheld by a unanimous Court of Appeals panel comprised of judges appointed by different presidents from different parties with different juridical philosophies.

On the day he announced her nomination, President Obama observed that some have said Judge Sotomayor saved baseball. Others may think this is an overstatement, but look at it this way. A lot of people, both inside and outside of baseball, tried to settle the dispute.

Presidents, special mediators, secretaries of Labor, members of Congress all tried to help but were not successful. With one decision, Judge Sotomayor changed the entire dispute. Her ruling rescued the 1995 baseball season and forced the parties to resume real negotiations.

The negotiations were not easy but ultimately were successful, which in turn led to an improved relationship between the owners and the players. Today baseball is currently enjoying a run of more than 14 years without interruption, a record that would have been inconceivable in the 1990s.

I believe all of us who have loved the game, players, owners and fans, are in her debt. If Judge Sotomayor is confirmed, I hope the rest of the country will realize, as the players did in 1995, that it can be a good thing to have a judge or a justice on the Supreme Court who recognizes that the law cannot always be separated from the realities involved and the disputes being decided. Thank you again, and I would be glad to answer any questions you may have.

(UNKNOWN): Thank you very much, Mr. Cone. Our next witness is Kate Stitz. She is the Lafayette S. Foster professor of law at Yale Law School, where she teaches and writes in the areas of criminal law, criminal procedure and constitutional law.

Previously, Professor Stitz was an assistant U.S. attorney for the Southern District of New York, where she prosecuted white-collar and organized crime cases.

After graduating from Harvard Law School, she clerked for Judge Carl McGowan of the U.S. Court of Appeals for the District of Columbia and for Associate Justice Byron White on the Supreme Court. Thank you for being here, and we look forward to your testimony.

STITZ: I thank you, Senators, for the opportunity to comment on the nomination of Judge Sonia Sotomayor, whom I have known since she became a judge in 1992.

As you noted, before I joined the faculty at Yale Law School in 1985, I was a federal prosecutor in New York and I was also a special assistant at the Department of Justice in Washington.

While a federal prosecutor in New York, I had the pleasure of working with Louis Freeh. It is my judgment that this is an exceptionally strong nomination. My judgment has nothing to do with Judge Sotomayor's sex, ethnicity or personal story. I'm judging her on the same criteria that I used when I was asked by the Yale Daily News, some years ago, whether Samuel Alito would be a strong nomination to the Supreme Court. I answered yes then, and I answer yes now.

Specifically, I am confident that Sonia Sotomayor would serve this nation with powerful intelligence, vigor, rectitude and an abiding commitment to the Constitution.

Moreover, her service as a state prosecutor and as district judge will make her unique on the court to which she will ascend.

My views on her are informed by many sources. First, I have been unusually involved, at least for a professor, with members of the bar and bench within the Second Circuit. Among these lawyers and judges who know her best, she is held in the highest repute across the board. My views are also based on my many conversations with her.

Among the most telling are those in which she has described the attributes she is looking for in prospective law clerks. Through these discussions, over more than 15 years, I believe I've gained insight into her view of the role of a judge.

And the bottom line is this: What she wants in her law clerks are the qualities we all want in a judge. She wants to make sure, first, that they are serious about the law, not about politics or professional opportunities after the clerkship. And they must be serious about all areas of the law. For Judge Sotomayor, there are no favorite areas -- which brings me to a third quality she wants in her clerks.

The prospective clerk must be willing to work his or her fingers to the bone, if necessary, in order to ensure that the opinions Judge Sotomayor writes and those she joins do not miss a relevant precedent and do not get a fact wrong.

And there's an overriding fourth quality that the judge considers critical. Is the prospective clerk willing to take criticism, work harder, and, where appropriate, rethink her initial assessment, or his initial assessment of the issues?

Over the years, the judge's former clerks have told me, time and again, that they greatly appreciate her devoted commitment to the law, as a result of which they were held to higher standards and learned more than in any other time in their lives.

Her conception of the role of a judge is borne out by her judicial opinions that I have read in the area of criminal law and procedure.

On criminal procedure, let me just note that the usual categories of left and right do not easily apply. I would say that her decisions, on the whole, reflect more pragmatism and less formalism than those of, say, Justice Souter. Sometimes this cuts for the government; sometimes it cuts against it.

I want to focus, in particular, on one substantive criminal law case: *United States v. George*, decided in 2004. Judge Sotomayor's unanimous 16-page opinion in that case concerns the meaning of the mens reia term "willfully" in a federal statute that makes it a crime to "willfully falsify a passport application." Her opinion makes clear that the role of the courts is not to determine what level of mens reia they think should apply but what Congress intended when it wrote the word "willfully."

The Iomega then embarks on an heroic effort to figure out what Congress meant in this particular statute. The opinion is so clarifying and insightful that my coauthors and I decided to include a long excerpt from it in our forthcoming federal criminal law casebook.

But the significance of the case isn't only that it's an excellent opinion. It also resulted from the willingness of Judge Sotomayor and her two colleagues to reconsider their initial decision when additional arguments were brought to their attention, even though this meant that a different party would prevail.

Their aim was neither to affirm the conviction nor to reverse the conviction but to find the best resolution of the complex and conflicting precedents on this mens reia issue.

In conclusion, I submit that Judge Sotomayor's opinion in the George case reveals four juridical qualities that she clearly possesses. First she cared deeply about the issue at hand. No matter how minor or word-parsing it may seem even to lawyers.

Second, she was willing to reassess her initial judgment and dig deeper.

Third, her legal analysis was exceptionally clear and astute.

And, fourth, she had no agenda other than trying to get the law right. And in a society committed to the rule of law, trying to get the law right is what it means to be fair and impartial. This is a great judge. I urge you to vote in favor of her confirmation. Thank you, Senators.

KLOBUCHAR: Thank you very much. We next have Dr. Charmaine Yoest, who is the president and CEO of Americans United for Life, the first national pro-life organization in the nation whose legal strategists have been involved in every pro-life case before the United States Supreme Court since *Roe v. Wade*.

Dr. Yoest began her career in the White House during the Reagan administration. She has also worked as the project director of the Family, Gender and Tenure Project at the University of Virginia and as a vice president at the Family Research Council. Welcome, Dr. Yoest. We look forward to your testimony.

YOEST: Thank you very much, Senator Klobuchar, ranking member Sessions, and members of the committee for inviting me to testify before you today.

As you said, I'm here on behalf of Americans United for Life. And we are the nation's oldest pro-life legal organization. Our vision at AUL is a nation where everyone is welcomed in life and protected in law. We've been committed to defending human life through vigorous judicial legislation -- legislative and educational efforts since 1971, and we have been involved in every abortion-related case before the United States Supreme Court, beginning with *Roe v. Wade*.

I'm here today because of AUL's deep concern about the nomination of Judge Sonia Sotomayor to the United States Supreme Court. A vote to confirm Judge Sotomayor to our highest court is a vote for unrestricted abortion on demand and a move towards elevating abortion as a fundamental right, equal to our freedom of religion and freedom of speech.

A nominee's judicial philosophy goes to the heart of his or her qualifications to serve on the United States Supreme Court. And based on Judge Sotomayor's record of prior statements, combined with her over a decade-long service on the board of the Puerto Rican Legal Defense and Education Fund, Judge Sotomayor's judicial philosophy makes her unqualified to serve on the Supreme Court.

When judges fail to respect their limited role under our Constitution by imposing their personal preferences regarding public policy through their decisions, our entire judicial system of equal justice under the law is corrupted. In a series of speeches, as we've heard chronicled here this week, Judge Sotomayor has indicated a troubling willingness to celebrate her own personal preferences and characteristics.

Several references have been made during this hearing to the judge's 2001 "wise Latina" speech. I would note that, in that very same speech, she stated that, quote, "Personal experiences affect the facts that judges choose to see," not just what they do see, but what they choose to see.

Of even greater concern, Judge Sotomayor stated in the same lecture that, "The aspiration to impartiality is just that: It's an aspiration," end quote.

However, impartiality is not merely an aspiration. Impartiality is a discipline, and its necessity is enshrined in the judicial oath. A judge who injects personal experiences into a decision corrupts the very foundations of our judicial system.

Perhaps the clearest example of Judge Sotomayor's problematic philosophy is her April 2009 speech in which she said, "Ideas have no boundaries. Ideas are what set our creative juices flowing. Ideas are ideas. And whatever their source, if it persuades you, then you're going to adopt its reasoning."

We see her here building a case for judicial activism, yet creativity is the approach Americans want least from a judge. A judge who approaches the bench seeking to, quote, unquote, "implement ideas" is an activist judge by definition. The laboratories of democracy in our system should remain firmly lodged in the state legislatures, not preempted from the court.

These troubling speeches did not occur in isolation. Looking at the totality of the judge's record must include her 12 years of service on the board of the Puerto Rican Legal Defense and Education Fund.

During that time, the organization filed not one but six amicus briefs in five abortion-related cases before the Supreme Court. Given her particular emphasis on personal viewpoint and jurisprudence, we believe these cases become uniquely relevant in providing insight into her judicial philosophy.

Judge Sotomayor served the fund as a member and vice president of the board of directors and also as chairperson at the education and litigation committees and has been described as an involved and ardent supporter of their various legal efforts.

What, then, does her tenure with the organization tell us about her judicial philosophy? The fund's briefs consistently argued the position that abortion is a fundamental right, expressing hostility to any regulation of abortion, including parental notification, informed consent, and bans on partial-birth abortion.

For example, in *Planned Parenthood v. Casey*, the fund compared abortion to the First Amendment right to free speech and argued that any burden on the right to abortion was unconstitutional.

In *Ohio v. Akron and Casey*, the fund asked the court to strike down parental involvement statutes, insisting that minors should be, quote, "protected against parental involvement that might prevent or obstruct the exercise of their right to choose."

In *Williams v. Zbaraz*, the fund argued that failure to publicly fund abortions was "discriminatory." In *Webster v. Reproductive Health Services*, the fund argued against -- against -- a requirement that physicians personally counsel patients. They even argued in *Webster* that strict scrutiny is required because of the "preciousness of the fundamental right to abortion," end quote, underscoring not just a willingness to engage in creative jurisprudence, but an ideological commitment to advancing an extremist abortion agenda.

In conclusion, I would like to end on a personal note related to the fund briefs. We've heard quite a bit about settled versus unsettled this week. And the one thing that we do know is that, as we've seen this week, this country is still very unsettled about abortion doctrine.

However, among the American people, there are some elements of abortion-related policy that absolutely do provide common ground. Preeminent among these is a core American belief in the bonds between parent and child. I have five children, and the notion -- the notion that my daughters might be taken for a surgical procedure without my knowledge is horrific.

This common-sense commitment to protect our children is overwhelmingly shared among all of those who identify themselves as pro-life and pro-choice. And yet it is precisely these kinds of common-sense policies, like parental notification, that are threatened by this nomination.

In the fund's brief in *Ohio v. Akron*, they argued that, quote, "The court would also need to consider whether the state, through giving the parents' confidential information, has enhanced these parents' ability to indoctrinate, control or punish their minor daughters who choose abortion," end quote.

This is a viewpoint far outside the mainstream of American public opinion, and it points to another truth about the fund arguments and their worldview, which the evidence indicates Judge Sotomayor shares. While arguing to promote abortion to a fundamental right equivalent to the freedom of religion or speech, they actually wish to elevate it even further, placing it singularly alone among rights beyond the reach of the American public to regulate or even debate. Thank you very much.

KLOBUCHAR: Thank you very much. Next we have Sandy Froman. Sandy Froman is the past president of the National Rifle Association of America. Ms. Froman is also currently a member of the NRA board of directors, where she has served since 1992, and in 2007, was unanimously elected to a lifetime appointment on the NRA Council.

A graduate of Stanford University and Harvard Law School, Ms. Froman is a practicing attorney and speaks and writes regularly on the Second Amendment. Welcome to the committee. We look forward to your testimony.

FROMAN: Thank you, Madam Chair. Chairman Leahy, Ranking Member Sessions, Senator Hatch, thank you for the opportunity to appear before this committee today to comment on the nomination of Sonia Sotomayor as it relates to her views on the Second Amendment.

It's critical that a Supreme Court justice understand and appreciate the origin and meaning of the right of the people to keep and bear arms, a right exercised and valued by almost 90 million American gun owners.

Yet Judge Sotomayor's record on the Second Amendment and her unwillingness or inability to engage in any meaningful analysis of this enumerated right when twice given the opportunity to do so suggests either a lack of understanding of Second Amendment jurisprudence or hostility to the right.

In 2004, Judge Sotomayor and two colleagues in *U.S. v. Sanchez-Villar* discussed the Second Amendment claim in a one-sentence footnote, holding without any analysis that the right to possess a gun is clearly not a fundamental right. Judge Sotomayor reiterated her view earlier this year as part of a panel in *Maloney v. Cuomo*, holding that the Second Amendment is not a fundamental right, does not apply to the states, and that if an object is designed primarily as a weapon, that is a sufficient basis for total prohibition even in the home.

The *Maloney* court ignored directives and precedents from the Supreme Court in last year's landmark case, *District of Columbia v. Heller*, which held that the Second Amendment guarantees to all law-abiding responsible citizens the individual right to arms, particularly for self-defense.

Although the Supreme Court in *Heller* warned against applying Supreme Court incorporation cases from the late 1800s without conducting a proper 14th Amendment inquiry, Judge Sotomayor's panel in *Maloney* did just that. They cited the 1886 cases of *Presser v. Illinois*, decided under the privileges or immunities clause of the 14th Amendment, for the proposition that the Second Amendment does not limit the states, and they ignored the Supreme Court's 2008 directive to conduct a 14th Amendment analysis under the modern doctrine of the due process clause to determine if the right is fundamental and should be incorporated.

By contrast, the 9th Circuit in *Norlight v. King*, when faced with the same incorporation question earlier this year, did follow the Supreme Court's directive and correctly concluded that the Second Amendment is a fundamental right and does apply to the state through the due process clause.

Our Second Amendment rights are no less deserving of protection against states and local governments than the First, Fourth and Fifth Amendments, all of which have been incorporated. When faced with the most important question remaining after *Heller*, whether the right to keep and bear arms is fundamental and applies to the states, Judge Sotomayor dismissed the issue with no substantive analysis.

She and her colleagues also failed to follow Supreme Court precedent when they held that the New York statute could be upheld if the government had a rational basis for the law. They ignored that the Supreme Court in *Heller* rejected the rational basis test for Second Amendment claims.

By failing to conduct a proper 14th Amendment analysis, the *Maloney* court evaded its judicial responsibilities, offered no guidance to lower courts, and provided no assistance in framing the issue for resolution by the Supreme Court.

Whenever an appellate judge fails to provide supporting analysis for their conclusion or address serious constitutional issues presented by the case, it is legitimate to ask whether the judge reach that conclusion by application of the constitution and statutes, or based on a political or social agenda.

Judge Sotomayor's view robs the Second Amendment of any real meaning. Under her view the City of New Orleans' door-to-door confiscation of firearms from law-abiding, peaceable citizens in the aftermath of Hurricane Katrina was constitutional. Preventing an individual from exercising what the *Heller* court said was the Second Amendment's core lawful purpose of self-defense is no less dangerous when accomplished by a state law than by a federal law.

The Second Amendment survives today by a single vote in the Supreme Court. Both its application to the states and whether there will be a meaningfully strict standard of review remain to be decided. Judge Sotomayor has already revealed her views, and they are contrary to the text, history, and meaning of the Second and 14th Amendments.

As a circuit court judge she is constrained by precedent, but as a Supreme Court justice appointed for life she would be making precedent. A supermajority of Americans believe in an individual's personal right to arms. They deserve a justice who will interpret the Second Amendment in a fair and impartial manner, and write well-crafted opinions worthy of respect from those of us who must live by their decisions.

The president who nominated Judge Sotomayor has expressed support for the City of Chicago's gun ban, which is being challenged in *NRA v. Chicago*, a case headed to the Supreme Court. Seating a justice on the Supreme Court who does not treat the Second Amendment as a fundamental right deserving of protection against cities and states could do far more damage to the right to keep and bear arms than any legislation passed by Congress. Thank you.

**ACTING CHAIR:** Thank you very much for your testimony, Ms. Froman. Our next witness is David Kopel. He is currently the research director of the Independence Institute in Golden, Colorado, and an associate policy analyst at the Cato Institute. He is also a contributor to the *National Review Magazine*. He graduated from the University of Michigan Law School. Thank you very much for being here. We look forward to your testimony.

**KOPEL:** Thank you. The case of *Sonia Sotomayor versus the Second Amendment* is not yet found in the record of Supreme Court decisions. Yet if Judge Sotomayor is confirmed to the Supreme Court, the opinions of the

newest justice may soon begin to tell the story of a justice with disregard for the exercise of constitutional rights by tens of millions of Americans.

New York state is the only state in the union which completely prohibits the peaceful possession of a nunchaku, a (inaudible) ban enacted after the opening to China in the early 1970s and the growth of interest in the martial arts. In the colloquy with Senator Hatch on July 14, Judge Sotomayor said that there was a rational basis for the ban because a nunchaku could injure or kill someone.

The same point could just as accurately be made about bows and arrows, swords or guns. All of them are weapons, and all of them can be used for sporting purposes or for legitimate self-defense.

Judge Sotomayor's approach would allow states to ban archery equipment with no more basis than to claim the obvious, that bows are weapons. Even if there were no issue of fundamental rights in this case, Judge Sotomayor's application of the rational-basis test was shallow and insufficiently reasoned, and it was contrary to Supreme Court testament showing that the rational-basis test is supposed to involve a genuine inquiry, not a mere repetition of a few statements made by prejudiced people who impose the law.

The plaintiff in Maloney had argued that even putting aside the Second Amendment the New York prohibition violated his rights under the 14th Amendment. There was no controlling precedent on whether Mr. Maloney's activity involved an unenumerated right protected by the 14th Amendment. Accordingly, Judge Sotomayor and her fellow Maloney panelists should have provided a -- a reasoned decision on the issue.

Yet Judge Sotomayor simply presumed, with no legal reasoning, that Mr. Maloney's use of arms in his own home was not part of the exercise of a fundamental right.

Testifying before this committee on July 14, Judge Sotomayor provided further examples of her troubling attitude to the right to arms. She told Senator Hatch that the -- the Heller decision had authorized gun control laws which could pass the rational basis test. To the contrary, the Heller decision had explicitly rejected the weak standard of review, which Justice Breyer had argued for in his dissent.

Both Judge Sotomayor and some of her advocates have pointed to the Seventh Circuit's decision in *NRA v. Chicago* as retrospectively validating her actions in Maloney. The argument is unpersuasive. Both the Maloney and the NRA courts cited 19th century precedents which had said that the 14th Amendment's privileges or immunities clause did not make the Second Amendment enforceable against the states.

However, as the Heller decision itself had pointed out, those cases, quote, "did not engage in the sort of 14th Amendment inquiry required by our later cases." In particular, the later cases require an analysis under the separate provision of the 14th Amendment, the due process clause.

Notably, the Seventh Circuit addressed this very issue and provided a detailed argument for why the existence of modern incorporation under the due process clause would not change the result in the case at bar. In contrast, Judge Sotomayor's per curiam opinion in Maloney did not even acknowledge the existence of the issue.

Various advocates have made the argument that, since Maloney and NRA reached the same result, and since two of the judges in *NRA v. Chicago* were -- were Republican appointees who are often called conservatives, then the Maloney opinion must be all right.

This argument is valid only if one presumes that conservatives and/or Republican appointees always meet the standard of strong protectiveness for constitutional rights which should be required for any Supreme Court nominee.

In the case of the *NRA v. Chicago* judges, that standard was plainly not met. The Seventh Circuit judges actually made the policy argument that the Second Amendment should not be incorporated because incorporation would prevent states from outlawing self-defense by people who are attacked in their own homes.

A wise judge demonstrates and builds respect for the rule of law by writing opinions which carefully examine the relevant legal issues and which provide careful written explanations for the judge's decisions on those issues.

Judge Sotomayor's record on arms right cases has been the opposite. Her glib and dismissive attitude toward the right is manifest in her decisions and has been further demonstrated by her testimony before this committee.

In Sonia Sotomayor's America, the peaceful citizens who possess firearms, bows, or martial arts instruments have no rights which a state is bound to respect and those citizens are not even worthy of a serious explanation as to why. Thank you.

KLOBUCHAR: Thank you very much. And did I say your name correctly?

KOPEL: (OFF-MIKE)

KLOBUCHAR: Oh, well, that was good. Thank you. Next we have Ilya Somin. And Professor Somin is an assistant professor at George Mason University School of Law. His research focuses on constitutional law, property law, and the study of popular political participation and its implications for constitutional democracy.

He currently serves as co-editor of the *Supreme Court Economic Review*, one of the country's top-rated law and economic journals. After receiving his M.A. in political science from Harvard University and his law degree from Yale Law School, Professor Somin clerked for Judge Jerry E. Smith of the U.S. Court of Appeals for the Fifth Circuit. I look forward to your testimony, Mr. Somin. Thank you for being here.

SOMIN: Thank you very much. I'd like to thank the committee for the opportunity to testify, and even more importantly, for your interest in the issue of constitutional property rights that I will be speaking about.

For the Founding Fathers, the protection of private property was one of the most important reasons for the establishment of the Constitution in the first place.

As President Barack Obama has written, our Constitution places the ownership of private property at the very heart of our system of liberty. Unfortunately, the Supreme Court and other federal courts have often given private property rights short shrift and have denied them the sort of protection that is routinely extended to other constitutional rights, and I hope that the committee's interest in this issue will over time help begin to change that.

In my oral testimony today, I will consider Judge Sotomayor's most well-known property decision, *Didden v. Village of Port Chester*. In my written testimony, which I hope will be entered into the record, I also discuss her decision in *Krimstock v. Kelly*.

The important background to the *Didden* decision is the Supreme Court's 2005 decision in the case of *Kelo v. City of New London*, which addressed the Fifth Amendment's requirement that private property can only be taken by the government if it is for a public use.



Unfortunately, a closely divided 5-4 Supreme Court ruled in *Kelo* that it is permissible to take property from one private individual and give it to another solely for purposes of promoting economic development, even if there isn't even any evidence necessarily that the development will actually occur.

This licensed numerous abuse of takings in many parts of the country. Indeed, since World War II, economic development in other similar takings have displaced hundred of thousands of people, many of them poor or ethnic minorities.

But as broad as the *Kelo* decision was in upholding a wide range of abusive takings, Judge Sotomayor's decision in the *Didden* case went even further than *Kelo* in doing so.

The facts of the *Didden* case are as follows. In 1999, the Village of Port Chester in New York declared a redevelopment area in part of its territory where, therefore, property could be taken by eminent domain in order to promote development there. And they also appointed a person named Greg Wasser, a powerful developer, as the main developer for the area.

In (inaudible) 2003 Bart Didde and Dominic Bologna, two property owners in the area, approached the village for permission to build a CVS on their property, and they were directed by Mr. Wasser -- they were directed to Mr. Wasser, who told them that they must either pay him \$800,000 or give him a 50 percent stake in their business, otherwise he threatened he would have the village condemn their property.

When they refused his demand, the property was condemned almost immediately after that.

Now, in her decision, with two other members of the 2nd Circuit, the panel that Judge Sotomayor was on upheld this condemnation in a very short, cursory summary order that included almost no analysis. Now, it is true that they cited the *Kelo* decision. However, they made no mention of the fact that the *Kelo* decision actually stated that pretextual takings are still forbidden under the Constitution, pretextual takings being defined as takings where the official rationale for the condemnation was merely a pretext for a plan to benefit a powerful private party of some sort.

Now, there is some controversy over what counts as a pretextual taking and what doesn't. But if anything does count as a pretextual taking, it is surely a case like *Didden* where essentially the property would not have been condemned but for the owner's refusal to pay a private party \$800,000.

Surely, if anything is a pretextual, it is a case where property is condemned as part of a scheme for leverage to enable a private individual to extort money from the property owner.

Now, in her oral testimony before this committee, Judge Sotomayor did say that her decision was based in part on a belief that the property owners had filed their case too late. I think the important thing to remember about this statement is that in her own decision, she actually specifically wrote that she would have ruled the same way, quote, "Even if the appellant's claims were not time-barred." So she claimed that even regardless of when they filed their case, she would have come out the same way.

Moreover, as I discuss in my written testimony, it is actually the case that her statute of limitations holding was entirely dependent on the substantive property rights holding as well, and I can discuss that further in questions if the senators are interested.

I think the bottom line about this case is its extreme nature. If one is not willing to strike down a condemnation in a situation like this, if one is not willing to say that this isn't a public use, it's not clear that there are any limits

whatsoever on the government's ability to take private property for the benefit of politically powerful individuals.

And on that note, I'm happy to conclude and I thank you very much for the opportunity to testify.

KLOBUCHAR: Thank you very much for your testimony. We are now going to have each senator ask five minutes of questions, and I will start with Director Freeh. You're the only panelist who has had the opportunity to sit with Judge Sotomayor as a fellow judge. What did you learn about her and her approach to judging that led you to endorse her?

FREEH: You know, I think all the qualities that we've heard in this hearing as the optimal qualities -- mainstream, fair-mindedness, prepared, integrity, knowledge and intellect, patience. Part of being a good judge is listening and making sure that the parties are all heard, and really, her, you know, her sense of commitment to getting all the facts and then applying the law.

As you said, Senator, I not only served with her, but actually was with her in court, as I mentioned in my opening statement. I what we call "second sat" her in a number of her first trials, where I actually observed her entire conduct of the trial, preparation, motion practice, instruction to juries, how she treated witnesses. And I think of all the things I observed over a six-month period was really, you know, how -- how detailed she was in preparing her written opinions.

This was never a judge that had a predisposition or a pre-notion or a personal agenda, but struggled and committed a lot of time and effort to getting the facts and applying the law. And I think she did that as a brand new judge. She's done it for 17 years, and I think we can be assured she will do it as a justice.

KLOBUCHAR: As someone who was appointed by President H.W. Bush, do you have any reservations about her ability to be a Supreme Court justice without activism or an ideological agenda?

Day 4 Part 8

ACTING CHAIR AMY KLOBUCHAR: As someone who was appointed by President H.W. Bush, do you have any reservations about her ability to be a Supreme Court justice without activism or an ideological agenda?

LOUIS FREEH: I'm totally confident that this would be an outstanding judge. Whether it was President Obama or someone else, as you mentioned, Judge Sotomayor was first appointed by George Bush -- the first George Bush. I was also. You know, I think she has all....

...the mainstream, moderate, restrained adherence to the law qualities that we want, and I think we're going to be very proud of her.

KLOBUCHAR: Thank you. Mr. Canterbury, you spent more than 25 years as an active-duty police officer in South Carolina. I know what a difficult job you had. From my previous job, I've been able to see it first-hand. Are you confident if confirmed, Judge Sotomayor has the background and judicial record to be a justice who will be mindful of the need for law enforcement to protect our nation and have a pragmatic view of law enforcement issues?

CANTERBURY: We're very confident of that, based on the over 450 criminal cases that we reviewed. We felt that her judgment was fair, tough and balanced throughout all of the cases that we reviewed. And, looking at the totality of her career, we feel very comfortable that she'll make a fine judge.

KLOBUCHAR: Thank you very much. Just as I said, Mr. Freeh was the only one on the panel that served with Judge Sotomayor. Mr. Cone, you are the only one on the panel that has pitched a perfect game, as far as I know. (LAUGHTER) Did you believe her to be fair when she ended the baseball strike?

I have to tell you that I thought your testimony -- people have, for, now, four days now, talked about each specific case and questioned a lot on different cases, and were very thorough in their questioning and their understanding, but I thought you so -- so succinctly described the effect that her ruling had on many, many people across the country.

And what do you think that this decision says, a little more broadly, about her approach to law, in general, and the impact of her judicial philosophy on the lives of individual Americans?

CONE: Well, thank you, Senator. You know, from my perspective, as I said in my statement, a lot of people tried to end that dispute, including President Clinton -- we were called to the White House -- special mediators, members of Congress.

I spent weeks on end, here in Washington, lobbying Congress on trying to get -- or a partial repeal of the antitrust exemption, which did happen. And Sen. Hatch and Sen. Leahy certainly sponsored that bill, the Curt Flood Act, which I think had an enormous impact as well.

But Judge Sotomayor is the one who made the tough, courageous call that put the baseball players back on the field. And, you know, from my perspective as a union member, we felt that we were in trouble, that the game was in trouble. It was to the point of almost being irreparably damaged. And she made the courageous decision to put the game back on the field and get the two parties back to the bargaining table and negotiate it in good faith.

KLOBUCHAR: Thank you very much. Sen. Sessions?

SESSIONS: Thank you, Madam Chairman. It's good to be with you, and we're glad you're on this committee.

KLOBUCHAR: Thank you.

SESSIONS: Mr. Cone, I was reading a story about statistical stuff the other day. It came to me that, you know, you throw a coin, it can land five times in a row on heads, and -- and so I wonder about that, a little bit, in our effort to have racial harmony on test-taking. Because sometimes it's just statistically so, which makes me think there's the American League could have won, what, 12 out of the last 13 All-Star games.

CONE: It makes you wonder, yes.

SESSIONS: Two or three is about all they're worth, right? No, it is -- thank you for your testimony, and we've enjoyed it. Judge Freeh, nice to see you. I value your testimony, always do, and I appreciate it very much.

I would note, and I think you would agree with me, but President Bush -- former President Bush -- former, former President Bush nominated Judge Sotomayor as Sen. Moynihan's pick.

In other words, they had a little deal that President Bush would appoint three judges, I think, and Sen. Moynihan would get to pick one. And he nominated -- the recommendation of Sen. Moynihan. Is that the way you remember it?

FREEH: I think that's correct. But I also think he's supporting this nomination now.

SESSIONS: OK. Good comment. You did good. (LAUGHTER) Madam -- Ms. Stith, thank you for you very insightful comments. I appreciated that very much and it's valuable to us. Dr. Yoest, I was thinking about this organization Legal -- Puerto Rican Legal Defense Fund, PRLDF -- and do board members of your organization know what lawsuits you're -- you're pursuing and generally what the issues are? Push your button.

YOEST: I was asked that question actually right after Judge Sotomayor was nominated, and it was the day before my board came to town for one of our annual meetings. And as I listened to the discussion of her relationship with the fund as a board member I have found the connection between her association with the cases and her description to really strain credulity.

The fact of the matter is to -- you don't have to have read an individual case, reviewed a particular point as a board member to be intimately associated with it. The point of being a board member for all of us who've dedicated our lives to the nonprofit realm is to have oversight and to have accountability and responsibility for the organization. And so I think it's -- I think it's...(CROSSTALK)

SESSIONS: Well, I think that probably most boards should operate that way at least. Ms. Froman, is it correct to say that Judge Sotomayor's opinion in Maloney, which said the 2nd Amendment does not apply to this case, if it is not overruled and if it is followed by the United States Supreme Court, then basically the 2nd Amendment rights are eviscerated with regard to cities and states that can eliminate firearms?

FROMAN: That's correct, Senator. The problem is the Heller case did not have to deal with the incorporation issue because it took place in Washington, D.C., which is a federal enclave and federal law applies directly. But if the 2nd -- if the 2nd Circuit decision or the 7th Circuit decision remains law is approved by the Supreme Court, goes up to the Supreme Court and is affirmed, then, yes, cities and states can ban guns.

SESSIONS: Did it worry you that the judge has already ruled on the case one way and it was a 5-4 case before now could be deciding -- being deciding vote on how that might turn out?

FROMAN: It's of great concern to me, Senator, and that's why I'm here today to testify. And it's of particular concern to be today because she did not give any reason. She did not explain what the basis was for her holding.

It's kind of like when I was in math class it wasn't enough to get the right answer. You had to show your work so the professor knew that you actually worked the problem and you didn't cheat. So you know without any explanation of how she reached her conclusion we can't tell whether that was a legitimate application of the Constitution and the statute...

SESSIONS: I know your organization officially I see today they said they want to see how the hearings went and what the nominee said. After that what has -- has the National Rifle Association now made an announcement today? And what is it?

FROMAN: Well I -- I of course have been here today, and I'm not here to speak on behalf of the NRA. I'm here to speak on my own behalf, and of course on behalf of other American gun owners. The NRA is the oldest and largest civil rights organization in the history of this country. They are dedicated to preserving and protecting the 2nd Amendment, and I think they have been out every day talking about the concerns that the NRA has over...(CROSSTALK)

SESSIONS: Well, are you aware that I was just given a document here that said that "therefore the National Rifle Association opposes the confirmation of Judge Sotomayor." Were you aware that that had happened?

FROMAN: I was told about that while I was here, Senator. Yes, and so I'm -- I'm sure that they have given a full explanation of that position and I'm glad to see that.

SESSIONS: Mr. Somin, thank you for your testimony. Thank you, Mr. Kopel, for yours. And I'm going to -- I frankly feel now obligated to look more closely at the Didden case. You raised most serious concerns and I realize, in fact I guess I was thinking this is worse than I thought, after hearing your testimony. I do think that it does impact property rights of great importance, and thank you for sharing that. If you want a brief comment, my time is...

SOMIN: Yes, thank you, Senator. I agree with you. It raises very important concerns and that these sorts of takings affect thousands of people around the country, particularly to poor and minorities, as the NAACP actually pointed out in their amicus brief in the Kelo case, where they indicated that the poor and politically vulnerable and ethnic minorities tend to be targeted for these sorts of condemnations.

SESSIONS: Thank you.

KLOBUCHAR: Thank you very much. Sen. Kyl?

KYL: Thank you, Madam Chairman. First of all, let me acknowledge those on the panel who I know, but thank all of you for being here. Louie Freeh, it's great to see you again. I respect your opinions greatly, I want you to know that. I also respected the way David Cone played baseball very, very much, and I used to root for you, as a matter of a fact. I didn't say that as an Arizona Diamondbacks fan, but I had another team in the other league.

(UNKNOWN): Did you -- (inaudible) Senator (inaudible) did you (inaudible) -- was his perfect game the last one when you did it?

CONE: No. His was done back in the '60s, but there's only I think 17 perfect games in the history of the game. I'm lucky enough to be one of them.

KYL: And of course, Dr. Yoest. And Sandy Froman is a person with whom I have consulted over many, many years, during -- long before she was the national president of the NRA, but also on legal matters. And I appreciate her because of her distinguished law career, the judgment that she gives on this. I wish I could ask all of you a question, but let me just ask a couple here.

First of all, Sandy, the question that Sen. Sessions asked I think gets right to the heart of the matter, and I wonder if you could just put a little bit of a legal spin to it. The question is: What would it mean to the gun owners of America if Judge Sotomayor's opinion were to be the controlling law in this country from now on?

She acknowledged under my questioning that it would be more difficult -- I don't have her exact quotation here -- but it would be more difficult for gun owners to challenge the regulations of states or cities, but it was unclear exactly how much more. Could you describe the test that would be used in such a situation? And in your opinion, how much more difficult it would be for gun owners to sustain their rights as against states and localities?

FROMAN: Yes, thank you, Sen. Kyl. Well, I believe if I heard you questioning one of the panels earlier, you raised that issue yourself, which is she said the rational basis test would be sufficient to sustain any gun ban that the government wanted to impose, whether it was a city or a state. And the rational basis test is the lowest threshold that the government has to meet to sustain a ban. They can articulate any reason, pretty much, and it will be sufficient to get past that view.

Now, the Supreme Court in Heller made it clear that the rational basis test is not allowed when you're interpreting an enumerated right like the 2nd Amendment. So -- but she ignored that in the Maloney case and talked about rational basis, anyway.

So that is of great concern to me, and I think to the almost 90 million American gun owners, that, yes, it's fine to say in Heller that we have a right that's protected against infringement by the federal government, but that doesn't mean -- the Heller case doesn't mean that cities and states can't ban guns, can't issue whatever regulations they want, as long as they can articulate what will meet this rational basis test. It's a very, very low threshold.

And as a matter of fact, that's why the District of Columbia had their gun ban. That's why the city of Chicago basically has a gun ban that prevents people from having firearms, even in their home for self-defense.

So that is what we're concerned about as gun owners in America.

KYL: Thank you very much. Dr. Yoest, in the questioning by Sen. Coburn of the nominee, he asked about advances in technology. And as I recall Judge Sotomayor's testimony, she did not want to acknowledge the impact of advances in technology as it relates to the Supreme Court's evaluation of restrictions on abortion.

Do you believe that advances in technology are important to the viability trimester framework that the court articulated in Roe, and why?

YOEST: Well, I would reference back to the confirmation hearings of the chief justice in which he went through one of the -- one of the elements that we look at when we reconsider factual -- how things relate to a case, and there has definitely been tremendous advances on the scientific realm as it relates to human life.

So I think it's important to see her, whether or not she's willing to consider that kind of thing.

And it also goes to Americans United for Life works very focused on pro-life legislation at the state level, and what part of the challenge that we face is this question of how much the American people are going to be allowed to interact with their duly elected representatives at the state level in restricting abortion in a common-sense way that they'd like to see.

KYL: Thank you. Just to be clear, I have recalled her testimony slightly incorrect. She actually didn't say or wouldn't say how she viewed it. She said it would depend upon the case that came before her. So I don't want to mischaracterize her testimony. But your point is that it would be very important for a court in evaluating a restriction imposed by a state.

YOEST: Yes, sir.

KYL: OK. Thank you. Again, I wish I had more time to -- but we have, I think, one or two panels left here, so we should probably move on.

KLOBUCHAR: Senator, we have two panels left.

KYL: Yes. But we thank you very much. This is an important event in our country's history. You've contributed to it. And we thank you, all of you for it.

SESSIONS: Thank you, Mr. Canterbury. Appreciate FOPs.

KLOBUCHAR: Yes, I wanted to thank all of you. And you just did a marvelous job in stating your opinions. I think it was helpful for everyone.

And thank you -- thank you very much. Have a very good afternoon. It was one of our shortest panels. You're lucky. You can go home and have dinner. We're going to take a five-minute break, and then we will have the next panel join us. Thank you very much.

(RECESS)

ACTING CHAIR: OK. We're going to get started with our next panel. If you could stand to be sworn in. Raise your right hand. Do you affirm that the testimony you are about to give before the committee will be the truth, the whole truth, and nothing but the truth, so help you God?

ROMERO: Yes, I do.

ACTING CHAIR: We're joined here by Sen. Sessions. I know Sen. Kyl may be joining us and has been with us today, and whoever else stops by. But we want to thank you for coming. We have had a good afternoon, and what I'm going to do is introduce each of you individually and then you will give your -- your five minutes of testimony. And I know one of our witnesses is a little late so we're going to start here with you, Ms. Romero.

Ramona Romero is the current national president of the Hispanic National Bar Association and the corporate council for logistics and energy at DuPont. She is also a co-founder and former board member of the Dominican-American National Roundtable. She is a graduate of Harvard Law School.

Ms. Romero, we're honored to have you here. Thank you. We look forward to your testimony. Well, you can give your testimony because our other witness got a little delayed coming over from the House. So thank you.

ROMERO: Good afternoon. As Madam Chair said, my name is Ramona Romero and I am the national president of the Hispanic National Bar Association, which is known as the HMBA. We're grateful to Chairman Leahy, to you, Sen. Sessions, and to all of the members of the committee for affording the HMBA the opportunity and honor of testifying at this hearing.

This is the fifth time that we have appeared before this committee in support of the confirmation of a Supreme Court justice. We take great pleasure in endorsing Judge Sotomayor, our support of this first and foremost on the merit of her stellar credentials.

The HMBA was founded in 1972. One of its primary goals is to promote equal justice for all Americans by advancing the participation of Hispanics in the legal profession. It is a nonprofit, voluntary bar association. We have 37 affiliates in 22 states. The HNBA is nonpartisan. And it does not represent a particular ideology.

Today, I am accompanied by nine former HNBA national presidents and vice president-elect. Like many Americans, we were proud when President Obama announced the nomination of Judge Sotomayor. As many members of this committee know, for decades, the HNBA has worked to promote a fair, independent, and, yes, diverse judiciary, one that reflects the rich mosaic of the American people.

There are over 45 million Hispanics in the United States. We represent over 15% of the population. We are the largest, fastest-growing, and youngest segment of the population. Yet Hispanics are underrepresented among lawyers and judges.

The appointment of the first Hispanic to the Supreme Court is an important, important symbolic milestone for our country, just like Justice Marshall was with respect to African Americans and Justice O'Connor was with respect to women.

The HNBA often reviews the qualifications of judicial candidates regardless of background or politics. We consider a number of factors -- exceptional professional competence, intellect, character, integrity, temperament, commitment to equal justice, and service the American people and also to Hispanics, the community we serve. Judge Sotomayor more, more than satisfies all of these criteria.

Before her nomination, we were already familiar with Judge Sotomayor's impressive background. We had endorsed her for both of her prior judicial appointments. In 2005, the HNBA also named the judge on a bipartisan short list of eight potential Supreme Court nominees prepared by a Supreme Court committee after substantial due diligence.

The HNBA Supreme Court Committee again performed due diligence on her record after this nomination.

As a result, we're confident that Judge Sotomayor is extraordinarily well qualified to serve as a justice of the Supreme Court.

Some have suggested that this confirms the judge would render decisions based on her personal bias. They could not be more wrong. Her extensive judicial record shows that her background and her experiences will not detract from her ability to adhere to the rule of law.

On the contrary, they are a positive. Her story resonates with all Americans. She is proof that in our country, in our country, there is no limit, even for those of us from the most humble of backgrounds. Her confirmation will mark another key step in our journey as one nation indivisible. We are grateful to President Obama for making a wise decision in nominating Judge Sotomayor. Our thanks to all Americans for their interest in one of our



country's shining stars. The HNBA thanks this committee and urges the Senate to confirm Judge Sotomayor. Thank you for listening.

(UNKNOWN): Thank you very much, Ms. Romero. And also, welcome to all the many past presidents that are here -- that's quite a number -- as well as vice presidents. We've now been joined by the Honorable Nydia Velazquez, who is the congresswoman here. And I know she is incredibly busy and has joined us in Sen. Sessions and I both agreed that you wouldn't have to stay for questions.

She is currently serving her ninth term as representative for New York's 12th Congressional District. She was the first Puerto Rican woman elected to the U.S. House of Representatives and currently serves as the Chairwoman of the Congressional Hispanic Caucus, Chair of the House Small Business Committee, and a senior member of the Financial Services Committee. And because you missed the swearing in, we will do that now.

This is the Senate Judiciary Committee. So welcome. Could you raise your right hand? Do you affirm that the testimony that you are about to give before the committee is the truth, the whole truth, and nothing but the truth, so help you God?

VELAZQUEZ: I do.

(UNKNOWN): Thank you. You have five minutes, congresswoman. And we're honored to have you here. Thank you.

VELAZQUEZ: Thank you. Madam Chairman, ranking members, and the members of the committee, I have known Sonia Sotomayor for over 20 years. In fact, when I was first elected to Congress in 1993, I asked her to administer my oath of office.

I can tell you personally that she is a grounded and professional individual. And over the last 3 1/2 days, all of us have been able to see her considerable legal ability impressively displayed.

Hispanics everywhere are proud that such a distinguished legal talent hails from our community. We have all been energized by her nomination. But of course, that is not the reason why she should be confirmed. The case for Judge Sotomayor's confirmation is built on her vast experience, keen intellect, and tremendous qualifications.

It is not that Judge Sotomayor does not have a compelling life history. She does. As so many have already pointed out, hers is a uniquely American story, one that begins in the Bronx projects and ultimately reaches the highest echelons of our legal system.

This background instilled within her the belief that hard work is rewarded and the knowledge that with the right combination of talent and effort, anything is possible in America. These core values propel Sonia Sotomayor to remarkable heights. As her career progressed, she managed to reach nearly every level of the legal system. With each new step, she excelled, not only as a prosecutor and a litigator, but also as an appellate judge.

And yet throughout that process of achievement, she never once lost touch with her roots or her Bronx neighborhood. Instead, she augmented her vast legal experience with common-sense understanding of working-class America. That appreciation will add a valuable perspective to the Supreme Court. Make no mistake. The stakes are high for Hispanic Americans. The Supreme Court will rule on many matters that are critical to our community, from housing policy to voting rights. These are delicate issues. With many of

these matters passion runs deep on both sides. Resolving them fairly will require objectivity, impartiality, and an unwavering commitment to the rule of law.

Judge Sotomayor's record demonstrates this quality. She has the reputation as a nonideological jurist. Someone who chooses not to spar with those who think differently, but to instead find common ground.

When working with Republican appointees, colleagues, Sotomayor's record will show that 95 percent of the time she managed to forge consensus. She was able to do this because she commands a sophisticated grasp of legal argument and have a keen awareness of the law's affect on every American.

When the Congressional Hispanic Caucus reviewed, it brought range of qualified Supreme candidates these were the traits we were looking for. We were looking for individuals who upheld constitutional value, exhibited a record of integrity, and had a profound, profound respect for our Constitution. It is our overwhelming belief that Judge Sotomayor meets these criteria. That is why we enthusiastically and unanimously endorse her nomination.

Senators, the decision before the committee today is one of your greatest responsibilities. I know this is something none of you on either side of the aisle take lightly. But I believe Judge Sotomayor's records of judicial integrity, impartiality, and as she puts it, fidelity to the law, is one we can all admire, regardless of party or ideology.

If confirmed, Judge Sotomayor's service on the court will bring great pride on the Hispanic community. That goes without saying. But more importantly, it will add another objective, disciplined legal talent to that of the body.

Thank you again for the opportunity to testify. I look forward to answering any question. Either you can send it to my office, but we are going right now, and I really, really appreciate the opportunity you have given me on behalf of the Congressional Hispanic Caucus.

(UNKNOWN): Thank you so much, Congresswoman Vasquez, and that was an eloquent and personal statement. It means a lot to us, and you've contributed much to the hearing.

VASQUEZ: Thank you. I know her well. I know her heart, her soul, her intellect, but most importantly her temperament and integrity. Thank you.

(UNKNOWN): Thank you.

ACTING CHAIR: And thank you so much, Congresswoman Vasquez. We know you have to vote and there's many things going on over in the House. So we appreciate and understand that. Thank you very much.

Next we have Theodore M. Shaw. Mr. Shaw is a professor at Columbia Law School, and former director council and president of the NAACP Legal Defense Fund. He began his legal career in the Civil Rights Division of the United States Department of Justice. He's a graduate of Wesleyan University and the Columbia University School of Law. Thank you very much, Mr. Shaw. We look forward to your testimony.

SHAW: Thank you, Madam Chair. Thank you, Sen. Sessions, and in his absence, of course, Chairman Leahy. I have known Sonia Sotomayor for over four years. We first met in 1968 as freshmen at Cardinal Spellman High School in the Bronx. We were among a modest number of black and Latino students. Perhaps 10 percent of that school's population in what was one of the most academically challenging high schools in New York City.

It was a time of great change, great challenge. 1968 was a year that Dr. King was assassinated and also Robert Kennedy, the year of the Chicago Democratic National Convention. And there was much unrest. Many of the minority students at Spellman, including Sonia and I, came from the public housing projects of Harlem or the Bronx, or the tenement houses that surrounded them. We were shaped by these extraordinary times and by the communities in which we came for better or worse.

During that time the light of opportunity began to shine into corners of society that were long neglected for reasons of race and poverty. Many of us were beneficiaries of what has come to be known as affirmative action. That is the conscious effort to open opportunities to individuals and groups that had been historically discriminated against and excluded from mainstream America.

Some people will immediately seize upon that description to talk about "unqualified" individual. Affirmative action properly structured and implemented lifts qualified individuals from obscurity rooted in unearned inequality. In spite of her brilliance there was a time when someone like Judge Sotomayor would've been routinely left out of the mainstream opportunity we have come to associate with somebody of her capabilities and accomplishments.

Sonia was at the top of our class at Cardinal Spellman High School. Everyone, white, black, Latino, Asian ranked behind her. She was studious, independent minded, mature beyond her years, thoughtful. She wasn't easily influenced by what was going on around her. She walked her own path.

To be sure Sonia was comfortable in her own skin and proud of her community and her heritage. She did not run from who or what she was and is. Still Sonia was not one to be easily swayed by peer pressure, fad, or the politics of others around her. She approached any issue from the standpoint of fierce intellectual curiosity and integrity. In fact she was an intellectual powerhouse. Sonia was a leader among students at Cardinal Spellman High School. She set the pace at which others wanted to run.

Sonia did not live a life of privilege. She lost her father at a very young age. She had been diagnosed with diabetes even before she came to high school. It was not something I remember her talking about. She simply carried herself with an air of dignity, seriousness, of purpose, and a sense that she was going somewhere.

In my four years of high school I never saw Sonia interact with anyone in a disrespectful or pretentious, antagonistic manner. Her temperament was, well even then judicious. In short, although I never told her then, and although she did not know it, I envied her intellectual capacity, her discipline, her unquestionable integrity. I admired her.

After graduating from the -- from Cardinal Spellman at the top of our class and as valedictorian she was off to Princeton and somewhere further down in the rankings I was off to Wesleyan. I did not stay in touch with her over many of the ensuing years, but we -- we did meet up again some years later. I followed her as one does a star from one's high school orbit.

Eventually of course she went onto Yale Law School after Princeton. She excelled in everything she did. Her qualification for the Supreme Court would ordinarily be a no-brainer, but for the politics of judicial nominations. I have faith that the Senate and this committee will not let those politics get in the way.

My career has been as a civil rights lawyer. I have been in the midst of ideological warfare on contentious issues. I have been unabashed about my points of view. I'm conscious of the fact that as I testify about Sonia there may be some who project my thoughts and beliefs onto her. Some have already tried to label her as an activist outside of the political mainstream.

To be sure I consider those who work for racial justice and other civil rights to be a vital part of mainstream America. But Sonia's life has not been lived on the battlefield of ideology or partisanship where many of us who are labeled or who label ourselves as liberal or conservative have locked horns. Indeed her record defies a simplistic label.

She began her legal career as a prosecutor, not ordinarily a job thought of as the bastion of liberal activism. Her service on the Board of the Puerto Rican Legal Defense Fund both speaks to the strength of that organization and the range of her interests from prosecution to civil rights. Her service was commendable.

In fact this range of experience and commitment places Judge Sotomayor in a mainstream of middle America for surely Americans are both interested in the prosecution and punishment of those who engage in criminal activities as well as the protection of civil rights and the elimination of invidious discrimination.

I have much more to say, but it's in my written testimony and I see my time is expiring. I would like to refer you to my comments on this whole notion of experience and what that brings to the bench.

But to conclude I want to say that she's served our nation for 17 years as a federal district court judge with -- and then as an appellate judge with great distinction. Now she's being considered for an appointment as associate justice to the United States Supreme Court.

Kind of compels me to admit that I swell with pride when I contemplate the possibility that my high school classmate may ascend to the highest court in the land. But quite aside from this petty and undeserved pride on the part of one who was merely a high school classmate, there are millions of Americans who see for the first time the possibility that someone who looks like them or who comes from a background like theirs may serve on the United States Supreme Court, someone who is supremely qualified by any measure.

It is a great honor for Judge Sotomayor that President Obama has nominated her to the United States Supreme Court. It would be even a greater honor for our nation if she were to be confirmed and were to serve. Thank you.

ACTING CHAIR: Thank you very much. Our next witness -- appreciate it, Mr. Shaw. Our next witness is Tim Jeffries. Tim Jeffries is the founder of P7 Enterprises, a management consulting practice located in Scottsdale, Ariz. Mr. Jeffries serves on the board of directors of several corporations and nonprofit organizations, including the National Organization for Victim Assistance and the Arizona Voice for Crime Victims. I don't know if you want to add anything, Sen. Kyl.

KYL: Well, Madam Chairman thank you for that opportunity. I think you'll see when he testifies how the basis for his knowledge and passion about the protection of victims' rights, and I think that will speak for itself. And I'm anxious to follow-up with a question as well, but I thank you very much.

ACTING CHAIR: Thank you very much. Welcome to the committee, Mr. Jeffries. We look forward to your testimony.

JEFFRIES: Thank you, Madam Chairman, Sen. Sessions, Sen. Kyl. I appreciate the humbling invitation to provide my personal testimony in opposition to the Honorable Judge Sotomayor's appointment to the U.S. Supreme Court. The views I express here today are my own and not the views of any organization I may reference.

As my bio shows I come from a blue-collar family. My father's grandfather served in the Union Army during the Civil War and rode for the Pony Express. My mother's grandparents immigrated from Portugal to America in the 1900s with no money in their pocket and no English in their vocabularies.

Similar to thousands of other simple, hard-working Americans, my involvement in the crime victims support movement was born from unimaginable tragedy. On Nov. 3rd, 1981, my beloved older brother Michael was kidnapped, beaten, tortured, and murdered by a transient gang of street criminals in Colorado Springs, Colo.

The two murderers stabbed my dear, defenseless brother 65 times and ultimately killed Michael by slashing his throat and crushing his skull with the heel of a remorseless, blood-soaked boot.

Based on federal crime statistics, 17,000 people are murdered in our country every year. On average, someone is murdered every 31 minutes. On average, every 10 weeks, more people are murdered in our country than passed on that brutal, horrible day of Sept. 11.

In fact, since Sept. 11, 115,000 people have been murdered in America. This gut-wrenching level of violence in our country exceeds the approximate population of Santa Clara, Calif., or Gresham, Ore., or Peoria, Ill., or Allentown, Pa.

Further compounding this epic national crisis, other violent crimes in our country are committed in an appalling rate. Based on the crime clock produced by the Office for Victims of Crime in the Department of Justice, someone is raped in our country every 1.9 minutes. Someone is assaulted in our country every 36.9 seconds. An instance of child abuse or neglect is reported every 34.9 seconds.

Making matters worse, this breathtaking spectrum of heinous violence in our country does not receive the consistent political action it warrants and the constant media focus it deserves. Prior to my testimony, my wife sent me a text. And she asked, "Where are all the senators?" And perhaps that is a metaphor for what vexes and undermines the crime victims support movement.

The true horror and verifiable existence of evil in our country are often minimized if not trivialized with well-intentioned yet sadly misguided equivocations about the troubled lives of guilty criminals in their various personal circumstances.

Unfortunately, based on public statements, Judge Sotomayor has repeatedly offered misplaced sympathy for criminals, despite the fact that justice exists to protect the innocent and to punish the guilty. Forgiveness and mercy are one thing. Punishment and accountability are another.

In four situations, four different events that are noted in my testimony, Judge Sotomayor displayed sympathy and perhaps empathy for criminals that may be well intentioned but I feel is tragically misplaced.

At a Columbia Law School Public Service Center, she stated, "It is all too easy as a prosecutor to feel the pain and suffering of victims and to forget that defendants, despite whatever illegal act they've committed, however despicable their acts may have been, the defendants are human beings."

In January 1995 in receiving the Hogan-Morganthau Award, Judge Sotomayor stated, "The end result of a legal process is to find a winner. However, for every winner, there is a loser. And the loser is himself or herself a victim," forgetting for the fact that when meeting justice, it's not to find a winner; it's to find justice.

On July 12, 1993, in a federal sentencing hearing that she provided over, over a cocaine dealer, Judge Sotomayor apologized to the cocaine dealer for having to send him to federal prison. She stated the mandatory five-year sentence was a "great tragedy for our country." She also stated she hoped the cocaine dealer "will appreciate that we all understand that you were a victim of the economic necessities of our society." And then she added, "But unfortunately, there are laws I must impose."

Having viewed the autopsy photos of my massacred brother and heard the heartbreaking stories of thousands of victims and survivors of violent crimes in America, I believe Judge Sotomayor's sympathy for criminals at the expense of the burdens carried by crime victims is unworthy of our nation's highest court, where public safety and protection of the innocent should be paramount.

Whereas Judge Sotomayor's biography is admirable and compelling, it is a great American story of which as an American I am proud. I am deeply troubled that she has regularly offered well-intentioned yet misguided sympathy to criminals without notable deference to the pain and suffering of victims. These are the very people who need government's protection.

Statistics show that the most egregious crime in our country disproportionately impacts the poor, the disadvantaged, the downtrodden, the defenseless. These are the very people that the justices in our highest court must have sympathy for, must have empathy for. Madam Chairman, I appreciate your patience with my testimony that has extended beyond its time. (CROSSTALK)

(UNKNOWN): And I'd be happy to answer any questions at the appropriate time.

(UNKNOWN): That's fine. And thank you for sharing that tragic story. It must've been very difficult. Naomi Rowe is our next witness. And Naomi Rowe is a professor of law at George Mason University. Previously, she served as Associate Counsel and Special Assistant to President George W. Bush and served as a counsel to the Senate Judiciary Committee. She is a graduate of the University of Chicago Law School. That's something we have in common. Professor Rowe clerked for Supreme Court Justice Clarence Thomas and 4th Circuit Judge J. Harvie Wilkinson. I look forward to your testimony. Thank you for being here.

ROWE: Thank you very much, Madam Chairman, Sen. Sessions, and other distinguished members of this committee. It is an honor to testify at these historic hearings, which provide -- which have provided the opportunity to have a respectful public dialogue about the important work of the Supreme Court and the judicial philosophy of an accomplished nominee.

I have submitted more detailed written testimony. And I should state at the outset that I take no position on the ultimate question of the confirmation of Judge Sotomayor. In my opening remarks, I would like to highlight some points about the judicial role.

During this hearing, Judge Sotomayor has expressed broad principles about fidelity to the law with which we can all agree. But fidelity to the law can mean very different things to different judges.

Although in her testimony she has distanced herself from some of her earlier remarks, her speeches and writings might still be helpful in understanding her view of the judicial process.

First, Judge Sotomayor has explicitly rejected the idea that there can be an objective stance in judging. She has explained that every case has a series of perspectives and thus requires an individual choice by the judge. This goes beyond recognizing the need to exercise judgment in hard cases or the idea that reasonable judges may at

times disagree. If there is no objective view, one can question whether there is any law at all apart from a judge's personal choices.

Second, there is the related issue of the role of personal experiences in judicial decision making. It would be hard to deny that judges are human and made up of their unique life journeys. Many judges recognize this and explain how they strive to remain impartial by putting aside their personal preferences. Judge Sotomayor's position, however, has suggested that her personal background, her race, gender, and life experiences, should affect judicial decisions.

Throughout her testimony, Judge Sotomayor has reaffirmed that she decides cases by applying the law to facts and that she does not follow what is in her heart. Of course, all nominees to the Supreme Court honestly state their fidelity to the law. Nonetheless, this leaves open the question of how a judge chooses to be faithful to the law. And judges go about this task in different ways.

Following the law could mean, as formalists believe, that the judicial role and the privilege of political independence require judges to stick closely to the actual words of statutes and the Constitution. The basic idea is that by focusing on the written law, judges act as fair and impartial arbiters.

Other judges consider that they're following the law when they interpret it to conform to what is rational or coherent or just. They believe that following the law means trying to bring about what they consider to be the best outcome all things considered. These judges may be ruled by pragmatism or personal values, such as empathy.

Even with the sincere purpose of following the law, judges use very different methods for finding what the law requires. For example, some judges are far more likely to determine that the law is ambiguous and therefore requires the judge to fill in the gaps.

If the judge finds the law indeterminate, he or she may look to outside sources, such as international law, or to personal values about what is fair or rational.

Pragmatic, flexible interpretation of the law allows significant room for individual assessments of what the law requires, as each judge will have his or her own conceptions about what is best.

If the law is really a series of perspectives, this suggests a very thin conception of law. Fidelity to law as a series of perspectives is something very different from fidelity to law as binding, written command of the legislature and constitution. If law is simply one's own perspective, the fidelity to law is little more than fidelity to one's own views.

The Supreme Court gets the final word with regard to constitutional interpretation. A nominee's judicial philosophy is important because on the Supreme Court, the only real restraint is self-restraint. Our constitutional structure does not give judges political power. It gives them the judicial power to decide particular cases through an even-handed application of the law to fairly interpret statutes and the Constitution for all that they contain, not more, not less.

In our courts, the rule of law should prevail over the rule of what the judge thinks is best.  
Thank you for giving me the chance to testify today.

(UNKNOWN): Thank you very much, Ms. Rowe, for your testimony. Next, we have John McGinnis. John McGinnis is a professor of law at Northwestern University. Previously, he was a deputy assistant attorney

general in the Department of Justice's Office of Legal Policy. A graduate of Harvard Law School where he was the editor of the Harvard Law Review, something he has in common with President Obama. That's not true?

MCGINNIS: He was president of the Harvard Law Review. I was just a...(CROSSTALK)

KLOBUCHAR: You were editor.

MCGINNIS: A humble servant.

KLOBUCHAR: Well, we can just pretend for today. Professor McGinnis also clerked on the U.S. Court of Appeals for the District of Columbia. Thank you for being here, Professor McGinnis. We look forward to your testimony.

MCGINNIS: Thank you so much, Chairman Klobuchar and Ranking Member Sessions for the opportunity to address you. At the outset I want to make clear that like my colleague I'm not taking any position on Judge Sotomayor's nomination, although I will say she has my respect and good wishes.

What this hearing affords is one of the rare opportunities for a constitutional conversation with the American people with the correct constitutional principles can be identified. Ultimately the Constitution rests on the people's confidence in the Constitution and their fidelity to the principles. Only once the correct constitutional principles are identified can the nation measure a nominee's adherence to those principles and so determine whether he or she should be confirmed.

My subject, the use of international and foreign law, is an issue of substantial importance, not least because the Supreme Court has come to rely on such materials. For instance, in *Lawrence vs. Texas* the Supreme Court relied on the European Court of Human Rights as part of its decision to strike down a statute of one of our states. In my view such reliance distorts the meaning of our Constitution. It undermines domestic democracy and it threatens to alienate Americans from a document that is their common bond.

So what are the correct principles? I think they can be simply stated. They are that judges should avoid giving any weight to contemporary, foreign or international law unless the language of the Constitution calls for it, and the language of the Constitution generally does not.

If the Constitution, as I believe, should be interpreted according to the meaning it had at the time it was ratified, it follows directly that the use of contemporary and foreign or international law is not proper. The problem with this use in fact is that it's contemporary, not simply the fact that it's foreign or international because the meaning of the Constitution was fixed at the time it was ratified.

But even for one of the self-styled pragmatists about constitutional theory, the use of contemporary, foreign or international law on constitutional jurisprudence is still objectionable. Pragmatists believe the Constitution should only invalidate our laws if they have bad consequences.

But a conflict between our law and foreign law is not appropriately used to create any doubt about the beneficence of our own law. Foreign law is formulated to be good for that foreign nation, not for ours. Indeed a proposition of foreign law is really only the tip of an iceberg of some complex set of social norms that in another nation. But since the United Nations doesn't share all those norms, importing that single legal proposition into our nation can have very bad consequences for us.



International law differs from foreign law because international law at least purports to have some kind of universality, which foreign law does not. But raw international law also lacks any democratic pedigree and can't cast out our democratically made law.

Indeed international law has multiple democratic feedback. Totalitarian nations have participated in its fabrication. Very unrepresentative groups like law professors still shape its norm. It's also hardly transparent. American citizens have enough trouble trying to figure out what's going on in hearings like this one let alone in diplomatic meetings in Geneva.

As I read Judge Sotomayor's speech on this issue, her position depends on propositions that seem to me in some tension. Judge Sotomayor stated that justices should not use foreign or international law, but they should consider the ideas they find in such materials in their decision-making.

I understand that at this hearing Judge Sotomayor disavowed that such materials have any influence on jurisprudence, and I welcome that disavow. But she left unexplained, to my satisfaction at least, however is her view in the speech that such materials can help us decide our issues.

Her praise for the use of such law in *Lawrence vs. Texas*, which expressly relies on that European Human Rights decision, and perhaps the most puzzling of all, her endorsement and her praise for Justice Ginsburg's view when it's well known that Justice Ginsburg in contrast with say Justice Scalia believes that such materials are relevant to decision-making. Indeed, Justice Ginsburg says that they're nothing less than the basic denominators of fairness between the governors and the governed.

Foreign and international law may well contain good ideas as Justice Sotomayor suggested, but so do many other sources that have no weight, and should not I think routinely be cited as authority. To put the question in perspective, undoubtedly the Bible and the Koran have many legal ideas that many people think are good, but we'd be rightly concerned if judges used them as guidance for interpreting the Constitution or even routinely cited them. Depending on what text the judge cited and what she omitted, we might think she was biased in favor of one tradition at the expense of others.

In my view the rule of law itself ultimately is founded on the proposition that only material that is formally relevant should have weight in a judge's decision. And a way a judge can demonstrate adherence to the rule of law in this context is extremely simple. Simply refrain from appealing to the authority of foreign or international law in her opinion. Thank you very much.

KLOBUCHAR: Thank you very much, Professor McGinnis. Last but not least we have Professor Rosenkranz. Nicholas Quinn Rosenkranz is an associate professor at Georgetown University Law Center. After graduating from Yale Law School he clerked for Judge Frank Easterbrook on the U.S. Court of Appeals for the 7th Circuit and for Justice Anthony Kennedy on the U.S. Supreme Court. He then served as an attorney advisor at the Office of Legal Council in the United States Department of Justice.

You should know, Mr. Rosenkranz, that Judge Easterbrook was my professor at law school and I know that must've been kind of a tough clerkship. I'm sure you had to work very hard. So we look forward -- we look forward to hearing your testimony. Thank you.

ROSENKRANZ: Madam Chair, thank you. Ranking Member Sessions, members of the committee, I thank you all for the opportunity to testify at this momentous hearing. I too have been asked to comment on the use of contemporary foreign legal materials in the interpretation of the U.S. Constitution.

I agree entirely with Professor McGinnis' analysis. In my remarks I'll try to explain why this sort of reliance on foreign law is in tension with fundamental notions of democratic self-governance. I should emphasize that I too take no position on the ultimate question of whether Judge Sotomayor should be confirmed, and I offer my comments with the greatest respect. But I am concerned that her recent speech on this issue may betray a misconception about how to interpret the United States Constitution.

In this room and at the Supreme Court, and in law schools and throughout the nation, we speak of our Constitution in almost metaphysical terms. In the United States we revere our Constitution, and while we should, it is the single greatest charter of government in history. But it worth remembering exactly what it is that we revere.

The Constitution is a text. It is comprised of words on parchment. A copy fits comfortably in an inside pocket, but copies don't quite do it justice. The original is just down the street at the National Archives, and it is something to see.

It is in a sealed titanium case, filled with argon gas, and at night it's kept in an underground vault, but during the day, anyone can go, and see it, and read it, and everyone should. The parchment's in remarkably good condition, and the words are still clearly visible.

The most important job of a Supreme Court justice is to discern what the words on that piece of parchment mean. The job is not to instill the text with meaning; the job is not to declare what the text should mean. It is to discern, using standard tools of legal interpretation, the meaning of the words on that piece of parchment.

Now, sometimes the meaning of the text is not obvious. One might need to turn to other sources to help understand the meaning of the words. One might, for example, turn to the Federalist Papers or to early Supreme Court cases to see what other wise lawyers thought that those words meant.

What the Supreme Court has done in two recent controversial cases is to rely on contemporary foreign law in determining the meaning of the United States Constitution, and this is the practice that Judge Sotomayor seems to endorse in her recent speech.

When one is trying to figure out the meaning of the document down the street at the Archives, it is mysterious why one would need to study other legal documents written in other languages for other purposes in other political circumstances hundreds of years later and thousands of miles away.

To put the point most simply, as a general matter, it is unfathomable how the law of, say, France in 2009 could help one discern the original public meaning of the United States Constitution.

Those who would rely on such sources must be engaged in a different project. They must be trying to update the Constitution, to bring it in line with world opinion.

To put the point most starkly, this sort of reliance on contemporary foreign law must be in essence a mechanism of constitutional change. Foreign law changes all the time, and it has changed continuously since the founding. If modern foreign law is relevant to constitutional interpretation, it follows that a change in foreign law can alter the meaning of the United States Constitution. And that is why this issue is so important.

The notion of the court updating the Constitution to reflect its own evolving view of good government is troubling enough, but the notion that this evolution may be brought about by changes in foreign law violates basic premises of democratic self-governance.

When the Supreme Court declares that the Constitution evolves and it declares further that foreign law may affect its evolution, it is declaring nothing less than the power of foreign governments to change the meaning of the United States Constitution.

And even if the court purports to seek a foreign consensus, a single foreign country might tip the scales. Indeed, foreign governments might attempt this deliberately.

France, for example, has declared that one of its priorities is the abolition of capital punishment in the United States, yet surely the American people would rebel at the thought of the French parliament deciding whether to abolish the death penalty, not just in France, but thereby in America.

After all, foreign control over American law was a primary grievance of the Declaration of Independence. It, too, may be found at the National Archives, and its most resonant protest was that King George III had subjected us to a jurisdiction foreign to our Constitution.

This is exactly what is at stake here: foreign government control over the meaning of our Constitution. Any such control, even at the margin, is inconsistent with our basic founding principles of democracy and self-governance. I hope that the committee will continue to explore Judge Sotomayor's views on this important issue. Thank you.

KLOBUCHAR: Thank you very much to all of you. And just -- just to clarify, Mr. Rosenkranz, the one case that Judge Sotomayor considered on the death penalty, she actually sustained it. She rejected a claim that it didn't apply. And I don't think she used foreign law at all to say that it didn't apply. She actually sustained the death penalty. Are you aware of that case, the Heatley case?

ROSENKRANZ: Yes, I am aware of it. I'm referring primarily to the speech that she gave on this topic.

KLOBUCHAR: OK. Well, I would say that her opinion probably rules if you look at how she actually ruled on this. She didn't say that you couldn't have the death penalty because of French law. Thank you. Ms. Romero, I had some questions about your testimony. You -- you talked about the fact that Ms. Sotomayor's opinions are characterized by a diligent application of the law, reasoned judgment, and an unwavering commitment to upholding the Constitution and Supreme Court precedent. Do you want to talk to me about how you reached that conclusion?

ROMERO: We have a Supreme Court committee, as I mentioned. And the committee conducted a thorough review of her background. In addition to reviewing about 100 of her cases, we commissioned a review by a group of law professors who reviewed about 100 of her cases.

We reviewed many of her speeches and articles and also spoke to dozens of colleagues and people who know her. So we conducted a fair -- fairly extensive due diligence. In terms of -- so our conclusion is based primarily on a review of her cases, which I think is what really should prevail here.

KLOBUCHAR: You also noted in your remarks that the judge's opinions can't be readily associated with a particular political persuasion or judicial philosophy. And I think that may be reflected in the fact that she's been endorsed, in our last panel, Louis Freeh, who had been appointed by George H.W. Bush and also served as the FBI director.

We had the Fraternal Order of Police, the largest police organization in the country. We had -- we've had the National District Attorneys Association that supports her. In fact, a review of her sentences shows that she is

right in the mainstream. I questioned her yesterday about some of her white-collar sentences were actually quite lengthier than some of her colleagues'.

Do you want to talk about what you mean by that her opinions can't be readily associated with a particular political persuasion or judicial philosophy?

ROMERO: Well, she doesn't -- there's no pattern that emerges of an activist judge here. It is quite apparent that her opinions are highly fact-driven and that she relies extensively on the application of the law through the facts that face her.

KLOBUCHAR: OK. Thank you. Mr. Shaw, do you want to comment a bit about what she was like in high school? You said she was judicious, and I was trying to imagine if I was judicious in high school. But you did know her from Cardinal Spellman High School, is that correct?

SHAW: Cardinal Spellman High School in the Bronx. And she -- her temperament was even-keeled, calm. She was very thoughtful, fair-minded. She treated all individuals equally. She exhibited many of the qualities that she exhibits now.

Some of the testimony I've heard here is delivered by people who don't know her and, frankly, who won't let the facts get in the way. It has nothing to do with who she is. But I understand part of what goes on at these hearings.

Her -- her career is one that has been very centrist as a judge. And I cannot tell you that she would rule in the way that I would want her to rule in every case if she were confirmed to the Supreme Court. She hasn't done that in her career so far.

But I don't think that's a standard. I think that all any of us can expect and hope for and want is that she is fair, open-minded, and that she applies the law to the facts. And, clearly, her record has done that. Her speeches are not how she should be judged. It's her 17-year record on the bench.

KLOBUCHAR: Thank you. In fact, I -- I imagine you might not have agreed with some of the decisions. I think we found out that of the discrimination claims that are brought before her, she'd rejected 81 percent of them and, of course, had found for some of them.

So I think it's a tribute, Mr. Shaw, that you would still be here, knowing that you may not have agreed with her on every single decision that she made. Thank you very much.

SHAW: Thank you.

KLOBUCHAR: Sen. Sessions?

SESSIONS: I'll recognize Sen. Kyl and let him have my time now, but I would just note, Sen. Kyl is a superb lawyer, senior member of this committee, involved in the leadership of the Senate. So I know that's where he's had -- get back over right now, because a lot of things are happening. He also has argued three cases before the U.S. Supreme Court, which very few lawyers in this country can have the honor of ever arguing one.

KYL: Thank you, Madam Chairman. Thank you, Sen. Sessions. Just to give you one idea about what it's like to be in leadership, we're trying to figure out right now -- and the reason I've been consulting my BlackBerry while listening out of both ears to your testimony -- and I thank all of you for being here -- is we're trying to figure out if we're going to come back here and vote at 1 a.m. tomorrow morning or we're going to try to vote on probably

three -- have three different votes here yet this evening and not come back at 1 a.m., the kinds of things senators consider all the time. Again, let me thank all of you.

First, with regard to the last two panelists, I very much appreciate your discussion of foreign law. It is a subject that I think this committee needs to pay a lot more attention to.

Judge Sotomayor has said two contradictory things, and it will be up for us to try to square which will, in fact, govern her decisions on the Supreme Court, should she be confirmed.

She said, on the one hand, on numerous occasions, that she thinks that -- that foreign law should be considered and that she agreed with Justice Ginsburg and disagreed with Thomas and Scalia. And I think, Mr. Rosenkranz, you pointed out what that means in terms of the use of foreign law.

And yet she has said here that -- even, I think, this morning -- that she doesn't think foreign law should be used in interpreting the Constitution or statutes. So we're left to wonder, and I guess we'll just have to try to figure that out.

I -- I also wanted to specifically ask Tim Jeffries a question. I know Tim Jeffries, and I know of his considerable work on behalf of victims of crime. And that's why I think I'm fairly -- why I think you're a good person to answer this question, Tim.

To me, there is one place where empathy does play a role in a judge's decisions, and I can think of only this one situation, and it's at the time of sentencing, when at least some states and the federal government now allows persons who are not parties before the court to make statements before the court at the time of sentencing.

And that is a time where, to the extent there is discretion with respect to sentencing a judge can take into account what people tell him about the victim, about the defendant, about other matters, and empathy cannot help but play a role in that.

Could you just remind us from your perspective of having worked for victims' rights now why it is important for judges to consider the point of view of victims in this particular situation in -- in sentencing statements or in the other situations in which it's appropriate for a victim or a victim's advocate to make an appearance in a given case?

(UNKNOWN): Thank you, Madam Chairman, Sen. Kyl. As you know, in the U.S. Constitution there are over 20 references to defendants' rights. There are no references to victims' rights.

Currently under the Crime Victims Right Act, which is federal law, there is statutory protections for victims of federal crimes in which those protections provide the right to be informed, to be present, to be heard. But that is just for federal crimes. If you look at the states in our great union it is a patchwork quilt of victims' protections and in upwards to 15 states there are no victims' protections whatsoever.

It is challenging enough that incomprehensible crime is committed in our country. Fifty people will be murdered today. Seven hundred and sixty people will be raped today. Over 3,000 people will be assaulted. And over 4,000 children will be abused. It's incomprehensible, and as if that is not tough enough, when people enter the justice system, which should exist to do just things, re-victimization takes place.

Judge Sotomayor is a great American story: valedictorian of her grade school, valedictorian of her high school, the Pyne Prize at Princeton, summa cum laude, Phi Beta Kappa, editor of the Yale Law Journal. She's written

over 380 opinions. She's given over 180 speeches. Even today she said, "It's important to use simple words," and I quote.

So I can assure everyone here that when a victim, a victim's family is in a courtroom, above and beyond the fact that they're looking for justice that the system should meet, they're looking for the kindness that a just system should provide.

And whereas I continue to be very impressed with the Honorable Judge Sotomayor's story and her record of accomplishment and all the incredible witnesses that have come to support her, I'm extremely concerned that a jurist who understands how important words are through several decades of speeches could be so cavalier as it pertains to victims' feelings. And as I stated in my prepared remarks, forgiveness and mercy are one thing. Justice and accountability are another thing.

And so I am just hopeful. I am prayerful that if Judge Sotomayor is confirmed -- confirmed to our nation's highest court -- that she will never lose sight of what I'm sure were some very hard days she spent as a prosecutor. And that all due respect to the troubled lives of guilty criminals, we should be focused on victims.

KYLE: Thank you. And thank you all panelists.

KLOBUCHAR: Thank you very much. Sen. Kaufman?

KAUFMAN: Yes. I just have a few questions. Ms. Romero, can you tell us what Judge Sotomayor's confirmation would mean to your organization in your long struggle for greater diversity in the federal bench?

ROMERO: It's not only about our organization. I think it's about all Americans. It's about all Americans seeing themselves reflected at the highest levels of our profession. It's about public trust in the integrity of the judicial system. It's about public faith of -- and public understanding about the law.

It's not -- when I -- you know on the day that Justice Souter announced his retirement, I was in New Mexico speaking to a group of high school students, about 600 high school students primarily Hispanic in an underserved area of New Mexico -- of Albuquerque. And I told them I'm going to speak with you for about five minutes, give me five minutes, and if you want to afterwards I will answer any questions you want. I spoke to them for five minutes and they asked me questions for 40 minutes.

So I was very proud of the fact that they were enormously interested in the law. But some of the questions were a little bit more than troubling in the sense that they reflected some distrust in their interactions with the judicial system and in how the community interacts with the judicial system. So one of our missions at the Bar Association is to try to educate youngsters about you know the fact that the law really is fair and is just and that it reflects them and that it is accessible to them. It's about that. It's about access.

KAUFMAN: Professor Shaw, can you tell us just from your vast background just a little bit about the function of legal defense funds and how they serve society?

SHAW: Sure. I worked for almost 26 years for the NAACP Legal Defense Fund, ending up being director council and president. The Legal Defense Fund is the organization that was born out of the NAACP, which I consider to be and I think most historians would consider to be the oldest civil rights organization in this country, even though another claim has been made here today. But the Legal Defense Fund litigated Brown vs. Board of Education and many of the major civil rights cases on behalf of African Americans but also others.

PRLDF was modeled after the [NAACP] Legal Defense Fund as were many other legal defense funds, including some of the conservative legal defense funds that now exist in other institutions in other parts of the world. One of the things I would underscore because I listened with great interest with some of the things that some of the witnesses said about Judge Sotomayor's role as a board member.

I know that as deputy director of the Legal Defense Fund and then director council we made sure that the board understood its role and the staff understood its role. The board was not responsible for the selection of cases or responsible for legal strategy. And in fact I worked very hard to make sure that those lines remain drawn. That's not to say that the board didn't get engaged in policy, but the staff and the lawyers and the leadership of the organization have responsibility for legal strategy and also for deciding what cases would be filed. And I think that's pretty much the way most legal defense funds, including PRLDF, operated.

(UNKNOWN): Thank you very much. And I want to thank the entire panel for being here today.

KLOBUCHAR: Sen. Sessions?

SESSIONS: Thank you. Thank all of you. It's another good panel. And I think it's enriching our discussion. These all will be part of the record and is reflective of a commitment that the Senate should make, must make onto make sure this process is handled correctly. So thank you all.

I think that foreign law matters a big deal to me. Some people make out like it's nothing to this, this is just talk, but it's baffling to me how a person of discipline would think that foreign opinions or foreign statutes or U.N. resolutions could influence the interpretation of an American statute which may be 1970 or 1776.

And I -- I -- I think you mentioned, Mr. Rosenkranz, that Americans revere the Constitution. I remember the Judicial Conference of the 11th Circuit. Professor Van Osteen said that, if you respect the Constitution, if you truly respect it, you will enforce it as its written, whether you like it or not.

And that -- if you don't do that, then you disrespect and you weaken it. And the next judge someday further down the line will be even more likely to weaken it further. And just because you may like the direction somebody dents the Constitution this year in this case doesn't mean you're going to like it in the future. And liberties then become greater at risk. Would you agree with that?

ROSENKRANZ: (OFF-MIKE)

SESSIONS: Ms. Rao, you've discussed some of these philosophies. How do you feel about that?

RAO: (OFF-MIKE)

SESSIONS: (inaudible) your microphone. Ms. Rao, now, I'm not a legal philosopher, and one of the little thoughts I've had in the back of mind, I think Judge Sotomayor would have been better served to stay away from legal philosophers (inaudible) and remembered how her mama raised her and so forth. But these legal philosophies are another thing.

But she expressed some affirmation of legal realism. Isn't that a more cynical approach to the law in which you -- the theory somewhat to the effect that, well, it's not realistic to be idealistic about words having definite meanings and we all know the judges do differently? Would -- is that a fairly decent summary of that and the danger of that philosophy?

RAO: I think that is one of the dangers of legal realism. I think that there are two parts of legal realism, right? There's one -- one part of it that's largely descriptive, which is that legal realism means that often a judge's

viewpoint is going to influence their judging. And I think that everyone recognizes that that's a possibility. But I think many -- many people go a step beyond that to say, well, a judge's -- you know, a judge's individual views should shape their judging. And I think there's a big step.

SESSIONS: So -- all right, now, so in this law review article -- have you read that? Did you read the law -- the articles she wrote? I'm not sure it's an explicit endorsement, but it's certainly an affirmation of -- of that philosophy in many ways in her references to it. Would you agree?

RAO: It seemed that way to me, as well. And -- and I think it's also supported by her other statements in which she has said that there is no objective stance in judging. I think that that is all part of the same general idea.

SESSIONS: And there was no -- only perspectives? Was that one of the language? Do you remember those words?

RAO: Only -- only a series of perspectives.

SESSIONS: Well, that doesn't mean much to me. I'm not sure I'm comfortable with a judge who thinks things are just a series of perspectives.

The -- have any of you been familiar with the French judicial philosophy that involves single decisions? I'm told it's a technique that the French courts utilize to have -- my time has...

KLOBUCHAR: Keep going. Just speak in French from now on. (LAUGHTER)

SESSIONS: I studied it for two years, but I -- well, I -- my understanding is that the French courts frequently use very short, unsigned opinions without dissents and without discussion and that -- so it's very difficult to understand the principle behind their approach to law.

And so I'd just wonder about that. Are you familiar? I don't see any there. And -- thank you all for your comments and thoughts. We appreciate it very much. This is an important issue, and we value your insight.

KLOBUCHAR: Thank you very much, Sen. Sessions. And I wanted to thank all of you, as well. And, actually, Mr. Rosenkranz, I did appreciate your testimony. I think it is a valued issue to discuss. But I -- I just wanted to make it clear, when I asked you that question about the case that, in fact, Judge Sotomayor has written or joined more than 3,000 opinions in her 17 years as a judge and she has never used foreign law to interpret the Constitution or statutes, and including the case I mentioned. And that does mean that it's not a valid point to discuss.

ROSENKRANZ: She's never -- she's never used it to interpret the Constitution. I think she has to interpret the statutes.

KLOBUCHAR: The point of the -- the issue is that, when you brought up the death penalty and the French system, is that she hadn't used foreign law. In fact, she sustained the death penalty in that case. Thank you. And then...

SESSIONS: On that subject...

KLOBUCHAR: Go ahead, please.



SESSIONS: ... there is a national debate. Justice Ginsburg favors that. In her speech, she endorsed the Ginsburg model and criticized the Scalia model.

KLOBUCHAR: And then one last thing that I wanted to put on the record, a July 9 New York Times article entitled, "Sotomayor Meted Out Stiff Prison Terms, Report Indicates," in which it states that, "Most striking was the finding that across the board Judge Sotomayor was more likely to send a person to prison than her colleagues. This was true whether the offender was a drug dealer or had been convicted of a white-collar crime."

SESSIONS: Well, on that subject, I would point out that the Washington Post study found that her criminal justice decisions were on the left side of the Democratic judges, which were on the...

KLOBUCHAR: Well, you know what, Sen. Sessions? ... We'll put both articles in...

SESSIONS: Good deal.

KLOBUCHAR: ... in the record. (CROSSTALK)

SESSIONS: I think that one's already in the record.

KLOBUCHAR: OK, great. And I just wanted to thank all of you. I know all of your thoughts were heartfelt and well researched. Especially thank you, Mr. Jeffries, for coming with a difficult situation. I'm so sorry about what happened to your brother.

We are going to break for five minutes. And then Sen. Kaufman is going to be taking over this next panel, our last panel. Thank you very much.

SESSIONS: I would note for the record, it's highly unlikely that I would be a ranking member and that Sen. Kaufman would be chairing this committee. What a remarkable development that is.

KLOBUCHAR: Exactly. Just for the -- for everyone's knowledge, Sen. Kaufman was Sen. Biden's chief of staff for many, many years and took over his seat, and so now he is going to be chairing this committee hearing.

ROMERO: Madam Chair, if I may?

KLOBUCHAR: This is just a free-for-all. Go ahead. Ms. Romero, please comment.

ROMERO: No, I'm not commenting. I was just going to ask to ensure that the longer statement the HNBA submitted is inserted into the record.

KLOBUCHAR: Certainly. And everyone's longer statements will be included in this record for all of the panels. So thank you very much. We will recess for five minutes, and we will return.

(RECESS)

KAUFMAN: We'll now call our final panel, saving the best for last, of consisting Patricia Hynes, Dean Joanne Epps, Mr. David Rivkin, and Dr. Steven Hallberg. Before we start, Michael J. Garcia was supposed to be here today but -- to be here for the hearing. But he thought it was going to be tomorrow. We all thought it was going

to be tomorrow. Welcome to the Senate. You never know when things are going to happen. (inaudible) what I'd like to do is put his statement in the record.

And also, Congressman Serrano is going to try to make it. But why don't we do first, you know, with -- as within all the prior panels, all witnesses, as you know, are limited to five minutes for their opening statements. Your full written statement will be put in the record. Senators will then have five minutes to ask questions each panel. I now like to ask the witnesses to stand and be sworn.

Do you swear the testimony you're about to give before the committee will be the truth, the whole truth, and nothing but the truth, so help you God?

(UNKNOWN): I do.

KAUFMAN: Thank you. Our first witness is Ms. Patricia Hynes. Patricia Hynes is President of the New York City Bar Association, a former chair of the American Bar Association Standing Committee on the Federal Judiciary. She's also senior counsel of Allen & Overy, LLP. She was Assistant U.S. Attorney in the Southern District of New York and clerked for Judge Joseph Zavadoff in the U.S. District Court for the Eastern District of New York. She's a graduate of Fordham Law School. Ms. Hynes, I look forward to your testimony.

HYNES: Thank you. Thank you, Chairman Kaufman, Ranking Member Sessions, and Sen. Whitehouse. I am the president -- the current president of the Association of the Bar of the City of New York. And I appreciate the opportunity to speak to you this evening regarding the nomination of Judge Sonia Sotomayor to be the associate -- an associate justice of the U.S. Supreme Court.

I am joined this evening by Lyn Noonan, who is sitting right behind me, who chaired the subcommittee of our executive committee that conducted the evaluation of Judge Sonia Sotomayor.

As this committee is aware, the Association of the Bar of the City of New York is one of the oldest bar associations in the country and since its founding in 1870 has given priority to the evaluations of candidates for judicial office. As far back as 1874, the association has reviewed and commented on the qualifications of candidates for the U.S. Supreme Court. It is a particular honor for me to participate in this confirmation process for this particular nominee.

In May of 1987, our association adopted a policy that directs the executive committee, our governing body, to evaluate all candidates for appointment to the U.S. Supreme Court. The executive committee has developed an extensive procedure for evaluating Supreme Court nominees, including a process for conducting research, seeking views of persons with knowledge of the candidate and of our membership of more than 23,000 members of the New York Bar and other bars. We evaluate the information we receive and express a judgment on the qualification of a person nominated to the U.S. Supreme Court.

In 2007, the executive committee of the association moved to a three-tier evaluation system by including a rating of highly qualified. This is the first time the association has used the three-tier rating for a nominee to the Supreme Court.

In evaluating Judge Sotomayor's qualifications, the association reviewed and analyzed information from a variety of sources. We reviewed more than 700 opinions written by Judge Sotomayor over her 17 years on both the Circuit Court and the District Court. We reviewed her speeches, articles, her prior confirmation testimony, comments received from members of the association and its committees, press reports, blogs, commentaries. And we conducted more than 50 interviews with judicial colleagues, former law clerks, numerous practitioners, as well as an interview with Judge Sotomayor herself.

The executive committee on evaluating the qualifications of Judge Sotomayor passed a resolution at its meeting on June 30th finding Judge Sotomayor highly qualified to be a justice of the Supreme Court. Based upon the committee's affirmative finding that Judge Sotomayor possesses to an exceptionally high degree all of these qualifications enumerated in the association's guidelines for evaluations of nominees to the Supreme Court.

And those guidelines are -- exceptional legal ability, extensive experience and knowledge of the law, outstanding intellectual and analytical talent, maturity of judgment, unquestionable integrity and independence, a temperament reflecting a willingness to search for a fair resolution of each case before the court, a sympathetic understanding of the court's role under the Constitution in the protection of personal rights of individuals, and an appreciation of the meaning of the United States Constitution, including a sensitivity to the respective powers and reciprocal responsibility of Congress and the Executive Branch.

These guidelines establish a very high standard which, in our opinion, Judge Sotomayor clearly meets. Specifically, the association found that Judge Sotomayor demonstrates a formidable intellect, a diligent and careful approach to legal decision-making, exhibiting a firm respect for the doctrine of judicial restraint, separation of powers, and stare decisis, a commitment to unbiased, thoughtful administration of justice, a deep commitment to our judicial system and the counsel and litigants who appear before the court, and an abiding respect for the powers of the legislative and executive branches of our government.

We believe Judge Sotomayor will be an outstanding justice of the United States Supreme Court. And I am very grateful to this committee to give us the opportunity to express the views of the association of the bar.

KAUFMAN: Thank you, Ms. Hynes. Our next witness is Dean JoAnne A. Epps. JoAnne Epps is the dean of the Beasley School of Law at Temple University, and she's taught at the International Criminal Tribunal for Rwanda. She is here today to speak on behalf of the National Association of Women Lawyers, where she serves as a co-chair of the Supreme Court.

Dean Epps, I attended Temple for one course. I'm sorry I didn't graduate, but I have enjoyed Temple basketball for over 50 years. So I'm looking forward to your testimony.

EPPS: Thank you very much, Mr. Senator. Sen. Kaufman, Sen. Sessions, Sen. Whitehouse, I'm really honored to be here this evening on behalf of the National Association for Women Lawyers, whose president, Lisa Horowitz, is seated behind me as I speak. And we are here today to urge your vote in support of the confirmation of Judge Sotomayor to be an associate justice of the Supreme Court.

After careful evaluation of Judge Sotomayor's background and qualifications, the National Association of Women Lawyers, NAWL, has concluded that Judge Sotomayor is highly qualified for this position. She has the intellectual capacity, the appropriate judicial temperament, and respect for established law and process needed to be an effective justice of the Supreme Court.

She's mindful of a range of perspectives that appropriately should be considered in rendering judicial decisions and, if confirmed, will clearly demonstrate that highly qualified women have a rightful place at the highest levels of our profession. We therefore encourage your vote in favor of her confirmation.

Founded over 100 years ago and with thousands of members from all 50 states, NAWL is committed to supporting and advancing the interests of women lawyers and women's legal rights. We campaigned in the 1900s for women's voting rights and the right of women to serve on juries, and we supported most recently this year the Lilly Ledbetter Fair Pay Act.

In all of the intervening years, NAWL has been a supporter of the interests of women. As such, NAWL cares deeply about the composition of the Supreme Court and ensuring that it includes the perspectives of all Americans, especially those of women, not just because most of our members are women, but because all of our members care about issues that affect women.

NAWL's recommendation today is based on the work of NAWL's committee for the evaluation of Supreme Court nominees. In evaluating the qualifications of Judge Sotomayor to serve as an associate justice, special emphasis was placed on matters regarding women's rights or that have a special impact on women. Eighteen committee members were appointed by the president of NAWL and include law professors and a law dean, appellate practitioners and lawyers concentrating in litigation.

I co-chaired this committee, together with Trish Refo, a partner at Snell & Wilmer in Phoenix, Ariz. We divided our committee work into two categories. Like others who testified here today, we read a large selection of Judge Sotomayor's opinions, and we interviewed more than 50 people who know her in a variety of capacities.

Those who were interviewed described Judge Sotomayor as open-minded, but respectful of precedent, which is consistent with what we found in her judicial opinions. She is courteous and respectful to those with whom she has professional interaction, including those who do not occupy positions of status or influence.

She has treated litigants, attorneys, and court personnel, and, in particular for our committee's review, women in the court with the utmost respect and professionalism both in and out of the court room. Those who had interacted with Judge Sotomayor in other capacities, both before and after she was appointed, described her as a good colleague, a team player, and supportive of institutional goals.

Our review of Judge Sotomayor's writing included her majority opinions, concurrences, dissents, and opinions that she wrote or joined in that were reviewed by the Supreme Court. And from that review, we have concluded that Judge Sotomayor has consistently displayed a superior intellectual capacity, a comprehensive understanding of issues with which she was presented, and a thorough and firm grasp of the legal issues that have come before her.

Looking at the clock, I'd like to move to the final point that we would like to say.

NAWL supports the confirmation of Judge Sotomayor for the important message that it conveys. NAWL does not believe that Judge Sotomayor should be confirmed solely because she is a woman or a Latina, but the fact is that Judge Sotomayor is, as ultimately we all are, a product of her experiences. And for her, those experiences include life as a woman and as a Latina.

Both perspectives will be welcome additions to this court's deliberations. As a nation, we have come a long way, but we still have much to do. Women are nearly half of this nation, but a mere one-ninth of the Supreme Court. The disparity in representation is not trivial in effect. In the legal profession, although women have comprised 50 percent or more of graduating law school classes for more than two decades, they continue to be markedly under-represented in leadership roles in the profession.

As of last year, women were only 16 percent of equity partners in the country's largest law firms; 99 percent of the law firms in this country reported that their highest paid lawyer was a man.

Just 23 percent of federal, district and circuit court judges were women. Just 1.9 percent of all law firm partners were women of color. And 19 percent of the nation's law firms have not one lawyer of color.

Your confirmation of Judge Sotomayor will, therefore, send a strong message to law firms, corporations, government, and academia that we must and can eliminate the persistent barriers to the advancement of women

attorneys. It will reinforce what should be a standard expectation that women of diverse ethnic backgrounds should of course occupy positions of parity with men.

As others have said this week, I long for the day when it wouldn't even occur to anyone to mention Judge Sotomayor's gender or ethnicity, those matters having become non-noteworthy, but that time is not yet here. With this vote, you will send a message most especially to the wonderful women and girls in your life, telling them not just that they matter, but that issues of concern to them matter.

In summary, NAWL, the National Association of Women Lawyers, found Judge Sotomayor eminently qualified for this position, but not simply because she's a woman. She has the intellectual capacity, the appropriate judicial temperament, and respect for established law and process to be an outstanding Supreme Court justice.

She's mindful of the human component of law and symbolizes the triumph of intelligence, hard work, and compassion. Accordingly, NAWL strongly supports her confirmation and urges you to vote in favor of her. Thank you very much for the opportunity to be here today.

KAUFMAN: Thank you, Dean Epps. Our next witness is the honorable Jose E. Serrano. Congressman Serrano, will you please stand and be sworn?

Do you swear the testimony you're about to give before the committee will be the truth, the whole truth, and nothing but the truth, so help you God? Thank you. Representative Jose Serrano represents the 16th Congressional District in New York and the Bronx. He's an active member of the Congressional Hispanic Caucus and now the most senior member of the Congress of Puerto Rican descent.

Previously, Representative Serrano served in the 172nd Support Battalion of the U.S. Army Medical Corps and was a member of the New York State Assembly. Congressman Serrano, I look forward to your testimony.

SERRANO: Thank you. And before you start the clock running, sorry I'm late. I'm chairman of the Financial Services of the Appropriations Committee. My counterpart is Sen. Durbin. And we just passed our bill for 17 amendments, a motion to recommit, and a lot of issues that had nothing to do with my bill being discussed.

KAUFMAN: No one starts a clock on a member of the Appropriations Committee prematurely.(LAUGHTER)

SERRANO: You're well taken care of, Senator. (LAUGHTER)

KAUFMAN: Thank you.

SERRANO: Sen. Kaufman, thank you. Sen. Whitehouse, Ranking Member Sessions, thank you so much for the honor you have given me by inviting me to testify on behalf to Judge Sonia Sotomayor. Today, I represent the proudest neighborhood in the nation, the Bronx, New York. I cannot begin to describe the pride and excitement that my community feels to know that one of our own stands on the verge of a historic confirmation to the Supreme Court.

Like you, I'm often greeted by constituents on the street, at diners, after church services, where I cut my hair, at the local bodega, or my favorite cuchifrito stand.

Usually, we talk about a personal or congressional issue or simply a friendly greeting. Now they just talk about Sonia. They speak about her as if she was a member of their own personal family, about their pride in her

accomplishments. They show a profound understanding of just how significant this nomination is and how it proves that, in our country, everything is possible.

One of the best examples of the significance of this nomination is the number of people who are watching these hearings. In the Bronx and in many communities around the nation, folks have come together to share this moment. That is the clearest sign of the pride and joy that they feel. Back home, believe me, it's a celebration. Like the nominee, my family moved from Puerto Rico to New York. Like her, I grew up in a public housing project in the Bronx. Like her family, we also struggled in our new surroundings. It was tough in the Bronx, but we had dignity and our eye on a better future.

One of the proudest moments of my life came when I was first elected to the New York State Assembly with my classmate, Sen. Chuck Schumer. As we were being sworn in, a friend said to my father, "Don Pepe, you're a lucky man. You have two children, one is a -- one son as a schoolteacher, and the other's an assemblyman." My pop, with that wonderful accented English, looked at him and replied, "I busted my back to get lucky."

I am sure that Judge Sotomayor and her mother have had many similar moments. We are living our parents' dreams, enabled by their sacrifices and years of hard work.

But our story is not unique to the community we come from. All around our great nation, there are people working day and night, saving, doing without, all in order that their children could live the life that they want for them.

Sonia represents the best of American culture. She comes directly from the strand of our national character that says: You can be anything you want. It says, through hard work, you can reach the top in this country.

She is living proof that our dreams for our children are never impossible.

When you invited me to speak, I wondered if my role here today was to tell you about her legal qualifications. Coming before you are many people who will speak to her work in the legal profession. We know that she is highly regarded and she has a deep understanding of the law and profound respect for the Constitution.

She comes before you with more federal court experience than any other nominee in the last 100 years. You know, I quickly came to the conclusion that my role is to tell you about where she comes from, how she got to this point, and what this means for our country.

We come from rough neighborhoods. We were surrounded by people making due on little. Sometimes there was desperation and despair. Around us were many distractions that could've taken us down a totally different road, but there was also ambition and people determined to make something of themselves.

We came from a place where family comes first. Where the core values were hard work and looking out for one another. As I moved out into the wider world, first through the Army and then in my political career, I learned that these were not liberal or New York or Puerto Rican or Latino values. They were American values. Rough neighborhoods may not seem as similar to middle America the values that we hold dear, family, freedom, looking out for the neighbors, all the same.

Everyone watching this nomination this week should know that based upon her background and ideals they're in good hands with Judge Sotomayor. When I walk into the Capitol to work every day I often stop and think how fortunate I am as a kid from a Bronx project to make it here. It's an incredible story that I have lived. But since she was nominated by President Obama I've had to remember that my story pales in comparison to hers.

In conclusion, this proud woman from the Bronx is perhaps the best and the brightest we have. She has risen to the top through her incredible intellect and hard, hard work. I know that her values are your values and those of the people around this country. Her story is my story, but her story is your story or that of your parents or your grandparents. She will be a brilliant member of the Court, and I urge you to vote for her nomination. And I thank you for allowing me to show up late and for giving me this honor, which is one of the greatest I've ever had, to testify on behalf of this great woman.

(UNKNOWN): Thank you, Congressman (Inaudible). It's an honor to have you here.

KAUFMAN: Congressman, thank you. That was a beautiful statement. We appreciate it very much.

(UNKNOWN): And with your permission, I don't know if it's allowed, I have some statements I made about her in the past in 1998 and '99 that I'd like to submit for the record.

KAUFMAN: Without objection.

(UNKNOWN): Thank you.

KAUFMAN: Our next witness is Mr. David Rivkin. David Rivkin is a partner in a law firm of Baker Hostetler. Previously he was associate executive director and counsel to the President's Council on Competitiveness at the White House. He also worked in both the Department of Justice and the Department of Energy. Mr. Rivkin, I look forward to your testimony.

RIVKIN: Chairman Kaufman, Ranking Member Sessions, I want to thank you for the opportunity to testify here today. Indeed I'm honored to be here. Let me begin, though, by noting briefly that I'm appearing here on my own account and do not represent the views of my law firm, its clients, or any other organization which I'm affiliated. And I'm also not expressing a view as to how you should discharge ultimately your advice and consent function.

Without a doubt Justice Sotomayor is both an accomplished jurist and an experienced lawyer. It is nevertheless critical that the Senate weigh her understanding of the judiciary's proper role in our constitutional system before consenting her appointment.

In my view it is particularly essential that the Senate probe her views on the proper judicial handling of national security cases. This is the case for two reasons.

First the United States remains engaged in a protracted global war against Al Qaeda and Taliban. Winning this war is essential to our country and its conduct presented noble legal challenges rarely seen in previous conflicts.

Second, despite Judge Sotomayor's long and distinguished service on the federal bench, she has not had an occasion to consider many cases in the national security area. Therefore the central topic of the committee's inquiries should be Judge Sotomayor's understanding of the proper role of Article 3 ... vis-a-vis the executive and legislative branches air of national defense. To the extent these hearings and your judgment have not produced sufficient information regarding her views in this area I would urge the committee to pose written questions to her.

As you know, Congress and the president have traditionally been accorded neoplenary authority in the national defense and foreign policy arenas, particularly in the conduct of conflict is involved. In recent years, however, the Supreme Court has dramatically expanded its role in these areas.

In my view it is significant and negative implications for our government's ability to prevent another devastating attack to the United States and able to win this war. Indeed there can be little doubt that the principle the Supreme Court has developed since *Sundby vs. Rosgold* was decided in 2004 make it more difficult for the United States to defeat any enemy if it resorts on international warfare. For example the Supreme Court has imposed what's proven to be an unworkable habeas corpus regime in regard to detainees now held in Guantanamo Bay, Cuba.

Meanwhile the lower courts have begun the process of extending this habeas regime individual captured and held in the United States and other parts of the world, particularly the Bagram air force base in Afghanistan. It was developed in my view threatens ability to wage war in Afghan and fear in general, and presents problems of operations of our special forces in particular.

I want to emphasize that this judicial activism was not prompted by, but was exclusively directed at the previous administration's alleged exaggerated view of executive power. To begin with the Bush administration's use of presidential powers in my view was far more modest than that of a previous wartime American president.

Second, in striking the key parts of the Military Commissions Act of 2006 and 2008 ... the Supreme Court invaded the constitution prerogatives of both political branches. The court majority did not seem to be particularly troubled by the fact that Congress and the president worked in concert at the very height of their respective Article 1 and Article 2 constitutional prerogatives as identified in Justice Jackson's seminal (inaudible) analysis.

The substance of these cases aside I'm also troubled by some of the stated assumptions that seem to undergird this ongoing wave of judicial activism in the national security area. The assumptions basically are that the courts are the best guardians of civil liberties, and that the extension of judicial jurisdiction over all national security issues would produce a superior overall policy formation. In my view this view is both historical and profoundly at odds with our constitutional fabric.

In Article 3 courts extend jurisdiction over matters that are not properly subject to judicial jurisdiction extraconstitutionally. Such an action by the courts intercloaked in a high-minded language of individual liberty is no better than any extra-constitutional absorption authority by congressional or executive branch.

As we address those issues today I notice that these concerns are now shared by both sides of the aisle. Despite criticizing President Bush's wartime policy during last year's campaign, President Obama has continued virtually all of them. His administration's litigation strategy on all the pending key national security issues is identical to that of his predecessor.

This is especially true in regard to detention of captured enemy from battalions on trial outside the United States.

His policies continue to be challenged in the courts, and the Supreme Court is certain to play a central role in determining what these policies should be. If Judge Sotomayor is confirmed her rulings would have immense consequences about country's safety and security.

I believe the Senate owes it to the American people to engage from those issues fully and openly. I thank you for the opportunity to share my views with the committee. I look forward to your questions.

KAUFMAN: Thank you, Mr. Rivkin. Our final witness in this panel is Dr. Stephen Halbrook. Dr. Stephen Halbrook has practiced law for over 30 years, has authored and edited seven books and numerous articles on the 2nd Amendment. Most recently he drafted the amicus brief for the Supreme Court case *District of Columbia vs.*



Heller, which was signed by Vice President Cheney, 55 Senators, and 250 members of the House of Representatives. He's a graduate of Georgetown University Law Center. Mr. Halbrook, I look forward to your testimony.

HALBROOK: Thank you, Chairman Kaufman, Ranking Member Sessions, Sen. Whitehouse. We've learned that Judge Sotomayor ended the great baseball strike. And we've learned that she was -- she is a fan of the New York Yankees. However, in her decision in *Maloney vs. Cuomo*, had the state of New York decided to ban baseball bats it would be upheld under the rational basis test.

Al Capone proved that you can bash out the brains of two colleagues with a baseball bat. Instead of banning one big piece of wood called a baseball bat, New York state banned two little pieces of wood connected by cord called a nunchaku, and that's what the court upheld in the *Maloney* case. But for our purposes the issue is the decision in *Maloney* that the 2nd Amendment does not apply against the states to the 14th Amendment.

The court relied -- the only Supreme Court case relied on my *Maloney* was *Presser vs. Illinois*, which simply held that the 1st and 2nd Amendments do not apply directly to state action. It was never raised whether the 14th Amendment incorporated the 2nd Amendment through the due process laws. *Presser* relied on *Cruikshank*. *Cruikshank* relied on three 14th Amendment cases deciding that the Bill of Rights did not apply directly against the states.

HALBROOK: But we -- we find out in *Heller*, the *Heller* decision, footnote 23, that *Cruikshank* does not apply because it did not engage in the kind of modern 14th Amendment analysis that's required by the Supreme Court cases decided primarily in the 20th century that Bill of Rights guarantees, especially substantive guarantees apply to the states to the due process laws of the 14th Amendment. Despite that admonition in the *Heller* case decided a year ago, the panel in the *Maloney* case did not say anything about the modern incorporation analysis.

Now Judge Sotomayor did say yesterday that under Supreme Court precedent the 2nd Amendment does not apply against the states to the 14th Amendment. That's an inaccurate statement. The Supreme Court has never decided that issue.

Now there are pending before the Supreme Court two cert petitions on that issue, *NRA vs. Chicago*, which arose out of the 7th Circuit upholding the Chicago handgun ban held that incorporation had to be decided by the Supreme Court, that that Court was not able to do it. And Mr. Maloney has filed his own cert petition, and in fact he's asked that his case, if cert is granted in *NRA vs. Chicago*, he's asked that his case be consolidated with the *NRA* case.

Now in her questionnaire in response to this committee's questions Judge Sotomayor stated that conflict of interest would arise from any appeal arising from a decision issued by a panel of the 2nd Circuit that included me as a member. And she stated that she would recuse herself in that case. She has decided the issue now pending before the Supreme Court, and therefore we would expect and we would hope that she would recuse herself if she is in fact confirmed.

Now a case that -- another *procurium* case that she participated in deciding, *Sanchez vs.* (inaudible) has disturbing concerns involving both 2nd and 4th Amendment rights. That case held that the mere possession of a firearm gave rise to probable cause to search, seize, and arrest the person in possession thereof. Apparently under New York law the crime to possess a firearm, and it's only an affirmative defense that you have a license for it.

In that case the court stated that the right to possess a gun is clearly not a fundamental right. That was -- totally unnecessary to the decision. (inaudible) a conviction of an illegal alien for possession of a firearm. And the

correct decision would be to say that illegal aliens don't have 2nd Amendment rights.

And in fact, the court disregarded a Supreme Court decision *Verdugo-Urquidez* decided in 1990, which explicitly stated that the people -- that term the people in the 1st, 2nd and 4th Amendments refers to the members of our national community and not to aliens and not to illegal aliens.

A third case I want to mention briefly, *United States vs. Cavera*, an inbound decision by the 2nd Circuit upholding a gun control act prosecution and the sentencing under it, Judge Sotomayor wrote a dissenting opinion that I think is commendable. She made a statement that "arbitrary and subjective considerations, such as the judge's feelings about a particular type of crime, should not form the basis of the sentence." And she explained in great detail the reason for that. And that's exactly the way the law should be interpreted and constitutional rights should be interpreted as well. I think she made the correct decision in that case.

And the question now is whether she will also take 2nd Amendment right seriously. And that's the big unanswered question. Thank you.

KAUFMAN: Thank you, Mr. Hallberg. Congressman Serrano, you talked about your district and how people feel. How do young people growing up -- are going to be affected by Judge Sotomayor being on the Supreme Court?

SERRANO: It's amazing that you ask that question. And I assure the rest of the panel I did not give him that question. But I was talking to my chief of staff this morning, who was telling me how many watching parties were taking place in my district this week. Watching parties, people come together, you know, covered plates. They bring food. And they watch.

And that the question that seems to be rising out of the young people is what do I do to go to law school?

Now I don't know if this country needs more lawyers. You know the jokes about that. And I better stop because I'm not a lawyer. But I believe that what it has done more than anything else -- and it's not just her being on the Supreme Court but the exchanges between the panel and the judge -- is that people are becoming more aware of law cases, of law issues. And so, number one, I think it will invite young people to consider a legal profession.

Secondly, the issue of pride is so important in your own life. When I was a young man, there weren't many Puerto Ricans for me to look in New York as successes. So I always led myself of Roberto Clemente, the baseball player, who was such a dignified man and who insisted on being called Roberto and not Bob and then later on said Bob was okay, you know. And I saw that growth. And then his death was part of that dignity of that man.

But now, it's a different story. Now there are some people who look to me. There are people who look to others. There are people who look to other people. But one -- in closing, let me just say this. Nothing that you can accomplish in this country looks bigger than the presidency or the Supreme Court. And so obviously, it's going to inspire people to say I can do it. And in fact, she told you here while she was answering some tough questions that in many cases she was telling people you can make it. You can make it. And there's nothing more pro-American than to say to somebody you can make it.

KAUFMAN: Thank you. Ms. Hynes, how did just an amazing experience as a prosecutor and commercial litigator affect your ruling on the qualifications?

HYNES: Well, it just shows how well rounded she is. I was a prosecutor. Indeed, Bob Morgenthau appointed me in 1967. And in those days, I was the one woman in that office of 100. I have a great picture of a sea of 100

men. And I sit behind Bob, who was the boss, right? And he started my career as he did Judge Sotomayor's. I've had a wonderful career. But I had -- he gave me that opportunity.

And I spent 15 years in the prosecutor's office. And I went up through the ranks and became executive assistant. But when I left the prosecutor's office and went out to practice on the defense side, you really get the appreciation of that there are two sides to an issue you really have to measure and judge.

And so I think it makes her more well rounded that she's seen the prosecution side, those issues, the tensions. You heard the representative of the police association. You have Louie Freeh who we all worked with in that same office.

So she has the appreciation of those tensions. But she also understands the defense side. And she combines that with the, you know, a commercial litigator, a prosecutor, a trial judge, and an appellate judge. I mean, she is the total package. She is the total package. And she has done it, you know, in the best possible way.

And when I listen, as I've tried to do through all of the testimony, I think you just have to look at what her background is and her record. And after that, your questions should be answered because she has been a terrific example of someone who has very, very carefully applied the law and done what she thought was right.

I mean, she -- we are all proud of her. When I say I'm particularly proud to be here tonight for this candidate, it's because in New York, we know the quality of the judging that we have gotten from Judge Sotomayor.

KAUFMAN: Thank you very much. Dean Epps, based on your analysis of your organization of her record, how would you speak about Judge Sotomayor's judicial temperament?

EPPS: Thank you very much, Senator. We asked a lot of people who had the opportunity to appear before Judge Sotomayor, to appear as opposing counsel, to work with her as co-counsel, to be litigants before her.

And we found universally that people thought she had an extraordinarily appropriate judicial temperament. That doesn't mean that she's not passionate, which we believe that she is. But in all responses, people described her as respectful, considerate, and kind. And so on that particular issue, we were thoroughly satisfied that she has the temperament to be an appropriate associate justice of the Supreme Court.

KAUFMAN: Thank you. Ranking Member Sessions?

SESSIONS: Thank you. Congressman, thank you for your eloquence. I just appreciate that very much. And, Ms. Hynes, your professionalism and approach is worthy of the New York Bar Association. And I agree with you from the beginning that her experience is really the rich kind of experience, almost an ideal experience for any federal appellate judge.

And we wrestle with a lot of issues that are controversial in the legal system today. And a lot of people -- lot of us care deeply about those things. We're worried about some of the things we see in the courts. And so that, you know, affects how you approach a nominee. But her background and her integrity is exceptional. And I appreciate that.

Ms. Epps, thank you for your testimony. Mr. Rivkin, I just want take a minute because certain -- I guess Lindsey Graham asked some questions about national security issues. You note that Congress and the President have traditionally been accorded near plenary authority in national offense areas. That's I think consistent with the heritage of our country up until very recent years, post 9/11 years.

And I call your attention to a case before the 2nd Circuit, *Gold v. Mukasey* last year -- and that's Atty. Gen. Mukasey, former judge from New York Mukasey -- in which a three-judge panel held -- that included Judge Sotomayor -- ruled in part that certain provisions of the Patriot Act were unconstitutional under the 1st Amendment. Specifically, the panel found unconstitutional the provisions of the Patriot Act allowing senior government officials to certify that the release of certain documents would endanger national security.

The panel stated, "The fiat of a government official, though senior in rank and doubtless honorable, cannot displace a judicial obligation to enforce constitutional requirements." So does that give insight into Judge Sotomayor's approach to law? And the opinion went on to state, "Under no circumstances should the judiciary become the handmaiden of the executive."

RIVKIN: Yes, I think it's a troubling opinion, Sen. Sessions. It may strike some people as a technical case. The panel was concerned with the fact that the certifications by senior government officials, quite senior about, had to be treated as conclusive absent a showing of bad faith. And the view was that it unduly displaces judicial power. But it made judiciary a rubber stamp.

And I find it surprising in a couple ways. First of all, I don't see how you can read the language as establishing a rubber stamp on the context of a bad-faith inquiry, let's say by director of FBI in making the certification as to the disclosure of this information. You can ask the director how did you make the decision? What facts did you look at? Was that something you did generically? Did you drill down on it?

How often have you injected such a question in the past?

So it is a meaningful -- it's a deferential inquiry. But it's a meaningful inquiry. So I don't understand, especially in the face of a challenge why would you dismiss it in a sentence?

Point number two, there's nothing unique about treating governments -- government certifications by government officials as conclusive. There are numerous other criminal justice contexts, including, for example, requests (inaudible) orders arising in the context of grand jury proceedings, requests, for example, for pen register information. They've been treated with enormous deference by the court.

And what's interesting from my perspective, Senator, is that, ironically enough, more deference has been shown over the years to these types of certifications in pure criminal justice cases, drug cases, health fraud cases, than in national security cases, even though to me the (inaudible) public safety is far more palpable in the terrorism.

SESSIONS: I've seen some of that in our committee. Could you briefly give me this answer and see if I'm correct? We've had a lot of people contend that captured enemy combatants are entitled to habeas corpus.

And even in our committee, senators have continually denied habeas corpus. We've repealed habeas corpus. It's in the Constitution. Why would you deny it to these captives?

But isn't it true that, when the Constitution was written, made provision for the habeas corpus that it was never thought and never interpreted as applying to enemy combatants that were captured on the battlefield?

RIVKIN: And held overseas, that is absolutely right. That was the teaching of *Eisentrager*. That was something that happened throughout 200-plus years of American history. And the Supreme Court in the space of four short years has changed that view...

SESSIONS: So when President Bush actually relied on the historic interpretation, he was criticized because the Supreme Court basically changed the law later. Is that correct?

RIVKIN: That is correct. And then -- then the Bush administration established its legal architecture, Sen. Sessions. Anybody who seriously looked at the case law, he positions were entirely reasonable. It's Supreme Court that went away from it.

And very briefly, what's even more difficult from my perspective is that lower courts are now extending it further. The biggest problem now is, forget about Guantanamo. It's extending constitutional habeas to Bagram.

SESSIONS: And in reading Miranda warnings.

RIVKIN: Miranda warnings.

SESSIONS: Mr. Halbrook, you wrote the brief on behalf of 55 senators in favor of the -- in the Heller case. And your view, I guess, was accepted. And is it true that the decision -- the Maloney decision that Judge Sotomayor was a member of the panel that ruled on it -- and you've expressed concerns about it -- isn't it true that that case will need to be reversed or the Second Amendment does not apply to the states and any city in the country and state government could completely deny people the right to keep and bear arms?

HALBROOK: Sen. Sessions...

SESSIONS: If that law became -- go ahead.

HALBROOK: The basic issue is, first of all, the meaning of the 2nd Amendment. In Heller, the court said it protected an individual right to keep and bear arms, including a possession of a handgun in your home.

And Judge Sotomayor's answers to questions about that decision, by the way, this week have been very noncommittal as to whether she agrees with the decision. She does recognize it as precedent, of course. And then the next step, though, the next issue is whether the 2nd Amendment applies to the states through the 14th Amendment's due process clause, like virtually every other Bill of Rights freedom: assembly, petition, free speech, press, unreasonable search and seizure, right to counsel, the whole works.

And it's only logical once it's conceded, it's held that it's an individual right, that it would be considered an explicitly guaranteed right in the Constitution. Being explicitly guaranteed normally means it's a fundamental right in the -- the test of, instead of rational relations, the compelling state interest tests would apply, like other fundamental rights. And so that's the issue that's before the Supreme Court right now.

SESSIONS: Regardless of whether or not the precedent justified the decision in Maloney -- and I think we can argue about that -- just -- but the point is, that decision would eviscerate effectively the protection -- the constitutional protection to keep and bear arms if it became the Supreme Court opinion.

The Supreme Court affirmed that approach. It's going to need to reverse that approach or the 2nd Amendment is -- is severely weakened and really eviscerated.

HALBROOK: Well, most of the...

SESSIONS: Is that right, fundamentally...(CROSSTALK)

HALBROOK: That's correct. There's 20,000 firearm laws on the books, and most of them are at the state and local level, not federal law. The federal Gun Control Act has expanded greatly in the past years, but most firearms possession issues involve state and local law.

And the -- the ruling in the Seventh Circuit case in *NRA vs. Chicago*, the ruling in *Maloney* is that the 2nd Amendment has no application to states and localities, so you could ban firearms, you could ban anything you wanted to ban, anything that would be an arm. The 2nd Amendment just doesn't apply.

And it would be a curious doctrine that here you have a fundamental right protected in the Bill of Rights to say that it only applies to the federal government the 14th Amendment's framers desire and intended that the Bill of Rights guarantees apply to the states through the -- through the 14th Amendment. And one of the big issues of protection was the right of freed slaves to keep and bear arms, because they were violated by the black codes that were enacted by the Southern states after the Civil War.

And to get rid of -- of that kind of discrimination, to allow freed freemen to keep and bear arms, to have free speech, and to have all the other rights that are set forth in the Bill of Rights, that was the intent of the 14th Amendment, and that's the issue before the Supreme Court now, and that's the issue that *Maloney* decided adversely.

SESSIONS: Thank you, Mr. Chairman. You're very kind.

KAUFMAN: Sen. Whitehouse?

WHITEHOUSE: Thank you, Chairman. Here we are with the last panel, last witness, last question, or last questioner, anyway, and I do not want to cause undue trouble, but I would like to react to Dr. Halbrook's testimony, which, first of all, I think was fine.

You are very learned. You are outside counsel for the National Rifle Association. You're knowledgeable about their issues. You've won these cases in court before. Your advocacy was ardent, but also very polite and cordial, so I have no problem with what your testimony said.

My concern is this -- and I mentioned this in front of the ranking member, because he's been energetic on this -- on this point. There have been an array of witnesses who've made similar points. And there has been an array of questioning -- really, almost non-stop questioning -- on *Heller* and *Maloney*.

And as I understand the history of this, for 220 years, the United States Supreme Court never recognized any individual right to bear arms. And just last year, a new conservative majority, by the barest of majorities, discerned for the first time a new constitutional right, individual right to bear arms, which is fine. That's now the law of the land.

But it applied only in D.C., which is -- so it applied only to federal law, so the case itself never reached the question of the application of the individual right that *Heller* announced in its application to the states or, for that matter, to municipalities.

And that's against the background tradition of fairly extensive regulation of firearms by states and municipalities, restrictions on felons in possession, regulation of permits to carry concealed weapons, sentencing enhancement for armed crimes, prohibitions against unauthorized discharge of firearms in city limits and so forth, all of which are well, well, well established.

Now, it could well be that, when the Supreme Court is presented with an opportunity to discuss *Heller* and to evaluate whether it should be extended to apply against states and municipalities, that it may choose to do that, but it strikes me that that is presently an undecided question by the Supreme Court.

And as you yourself said a moment ago, the question of the application of precedent in Maloney is one we can argue about. And what I would hate to have happen here would be to create an atmosphere in which a Supreme Court candidate feels that he or she is going to walk into a volley of fire if he or she will not announce in advance or signal in advance an intention to expand Heller beyond where it now is, where the law has never gone before.

Maybe it should go there; maybe it will go there. But the point of fact is that, at this point in time, it has not gone there. And I believe there is a point at which it verges on unseemly lobbying of the nominee to send signals as to where she will vote when the inevitable petition to expand Heller gets brought before the court. I don't think it's appropriate for her to decide that now.

I don't think her decision in Maloney is outside of the bounds of normal judicial precedent, particularly in light of the unique circumstances of this, the Heller decision, the 220 years of having never discovered the right before, the limitation to federal law by virtue of it being a D.C. case, and the long history of state and municipal regulation of firearms without constitutional objection.

So it seems to me that a cautious judge -- small-c conservative judge -- would be inclined not to expand Heller at that point, but to make her decision within what she perceived the law to be at the time, and then if the court wanted to further expand this new constitutional right, that would be the job of the court.

But I hope that we have not in the course of this hearing begun to trespass into a point in which the message is being sent to Justice Sotomayor or to subsequent nominees that they need to signal how they will rule on a case that the Supreme Court has not yet decided in order to achieve confirmation, because I think, again, that crosses the boundary between testing the credentials of a candidate in a proper advise and consent and what is, I think unseemly and improper for the advice and consent process, which is to seek commitments in future cases or to lobby as to outcomes in future cases.

And I know that the ranking member feels very strongly about -- that this right should be extended. And we will all have the opportunity in due course to make our views known.

But I just want to point out that I think, in this advice and consent process, there is a point at which making one's point about something does trespass on unseemly lobbying. I'm not sure we've reached that point yet, but I think we're in that neighborhood, anyway.

And I would hope that my colleagues, as they evaluate Judge Sotomayor, would take that into consideration and evaluate her based on her talents, her abilities, and not on her failure to give what I think would be an improper advance signal as to how she might rule as a Supreme Court justice in Heller II, whatever the case will be named.

SESSIONS: Well, that's a good -- you're a good lawyer. And you make a -- a good point. I would say two things. First, it's...

WHITEHOUSE: We're both U.S. attorneys. We argue with each other all the time.

SESSIONS: It's -- he's my chairman of the Court Subcommittee. But the -- two things I would say about it. Number one, it's been appropriate to ask nominees about cases they decided. And she has decided this case.

And I think Sen. Kyl made a good point. If her case were the one that goes up to the Supreme Court, certainly she would recuse herself or would have to, I think, under the rules. And maybe even if another one with the very same issue comes up, maybe she should consider it.

Number two, let me tell you what the average American thinks. Just reading the words in the Constitution, it says, "Congress shall make no law respecting the establishment of a religion or free speech." It says Congress. That means the United States Congress. But that applies to the states. That's been incorporated.

The 2nd Amendment says, "A well-regulated militia, the right of the people to keep and bear arms shall not be infringed." And so that one -- I don't know how the -- it just seems to apply to the people.

WHITEHOUSE: I think the ranking member is a very good lawyer. And he makes a very good argument. My only point is...

SESSIONS: Maybe we ought to have the expert comment.

WHITEHOUSE: ... the Supreme Court hasn't accepted that argument yet. And until it does, it is an unanswered question. And, again, I don't want to say that we've trespassed that point at this stage, but I do think that it's worth demarcating, as we go through this advice and consent process, that there does come a point where it begins to look like we're pressuring candidates to reach a particular outcome and to make pledges about a particular outcome, rather than simply evaluating the merit of their decisions.

But your argument is -- is very well made. And it may very well prevail when that case comes before the Supreme Court. I thank the panel. I have no further questions. (LAUGHTER) (CROSSTALK)

SESSIONS: Mr. Chairman, it's been great to serve under your leadership.

KAUFMAN: This is a great -- this is a great panel.

SESSIONS: Who needs Pat Leahy? (LAUGHTER) Don't you tell him I said that. (LAUGHTER)

KAUFMAN: I need Pat Leahy. All I need is Pat Leahy and a member of the Appropriations Committee, and I could really -- I want to thank the panel. And, frankly, I want to thank all the panels.

I mean, it is -- it is -- this is -- this is an incredible process. The ranking member said, when we first started, that this is an educational experience for the American people. And I've been dealing with this process for a long time, and I really think that's true. People get to stop for a minute, look at our Constitution, look at the way our process works, and this is just a wonderful week in which people came, they argued, they fought. I mean, just this last exchange, everyone could say what they think. We had not just the members of the Congress -- not just the members of the Senate, but members of Congress from the public.

I just think it's a wonderful -- wonderful example of what a great country this is and how our Constitution works.

I'd also like to thank Chairman Leahy and Ranking Member Sessions for doing a very thorough hearing, being very open to letting people go where they go, and yet still getting this -- this whole thing done in record time.

This is an incredibly important process. I -- I believe, as a student of the Congress, outside of the decision to go to war, the decision of who's going to be on the Supreme Court is the single most important decision that you make as a United States senator.

Because when you pick a member for the Supreme Court, you're picking someone who serves for life. And if Judge Sotomayor is confirmed and serves on the court, she'll probably be here long after this panel of senators is gone.



WHITEHOUSE: Speak for yourself.

KAUFMAN: Except for Sen. Whitehouse. (LAUGHTER) But I just want to thank everybody for doing that. The chairman's left the record open until 5 p.m. Senator Sessions, anything you'd like to say?

SESSIONS: Thank you.

KAUFMAN: This hearing is hereby adjourned. ###

SEN. PATRICK J. LEAHY, D-VT. CHAIRMAN SEN. HERB KOHL, D-WIS. SEN. DIANNE FEINSTEIN, D-CALIF. SEN. RUSS FEINGOLD, D-WIS. SEN. CHARLES E. SCHUMER, D-N.Y. SEN. RICHARD J. DURBIN, D-ILL. SEN. SHELDON WHITEHOUSE, D-R.I. SEN. BENJAMIN L. CARDIN, D-MD. SEN. RON WYDEN, D-ORE. SEN. AMY KLOBUCHAR, D-MINN. SEN. EDWARD E. "TED" KAUFMAN, D-DEL. SEN. ARLEN SPECTER, D-PA. SEN. AL FRANKEN, D-MINN. SEN. JEFF SESSIONS, R-ALA. RANKING MEMBER SEN. ORRIN G. HATCH, R-UTAH SEN. CHARLES E. GRASSLEY, R-IOWA SEN. JON KYL, R-ARIZ. SEN. LINDSEY GRAHAM, R-S.C. SEN. JOHN CORNYN, R-TEXAS SEN. TOM COBURN, R-OKLA.