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

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

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

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

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

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

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

There are things we need to do.

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

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

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

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

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

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

These are the ultimate exploding mortgages. They gave homebuyers the option of not even covering the interest some months, but after two or three years, the monthly mortgage payment can skyrocket, often by 50 percent or more. An estimated 2.8 million option ARMs are scheduled to reset over the next 2½ years.

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

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

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

The assistant legislative clerk proceeded to call the roll.

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

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

CONCLUSION OF MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Morning business is closed.

EXECUTIVE SESSION

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

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate will proceed to executive session to consider the following nomination, which the clerk will report.

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

The ACTING PRESIDENT pro tempore. Under the previous order, the time until 2 p.m. will be equally divided in 1-hour alternating blocks of time, with the majority controlling the first hour.

The Senator from Vermont is recognized.

Mr. LEAHY. Mr. President, we began debate yesterday on this historic nomination of Judge Sonia Sotomayor to the Supreme Court. Senator REID, Senator FEINSTEIN, Senator MENENDEZ, Senator WHITEHOUSE, and Senator BROWN gave powerful statements—powerful statements—in support of Judge Sotomayor's long record, a record that makes her a highly qualified nominee and a record that brought about her receiving the highest qualification possible from the American Bar Association. I thank those Senators for their statements.

In the course of my opening statement yesterday, I spoke about the value of real-world judging. Among the cases I discussed were two involving the strip searches of adolescent girls. I spoke about how Judge Sotomayor and Justice Ginsburg properly—properly—approached those decisions in their respective courts.

Judge Sotomayor is certainly not the first nominee to discuss how her background has shaped her character. Many recent Justices have spoken of their life experiences as an influential factor in how they approach cases. Justice Alito, at his confirmation hearings, described his experience as growing up as a child of Italian immigrants saying:

> 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.

He was praised by every single Republican in the Senate for that.

Chief Justice Roberts testified at his confirmation hearing:

> Of course, we all bring our life experiences to the bench.

Again, every single Republican voted for him.

Justice O'Connor echoed these statements when she said recently:

> We're all creatures of our upbringing. We bring whatever we are as people to a job like the Supreme Court. We have our life experiences . . . So that made me a little more

pragmatic than some other justices. I liked to find solutions that would work.

Justice O'Connor explained recently:

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

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

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

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

And added:

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

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

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

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

He began his opinion:

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

He went on to describe the Ku Klux Klan as a ''terrorist organization,'' while discussing the history of cross burning, particularly in Virginia, and the brutalization of racial minorities and others through terror and lawlessness. Would anyone deny Justice Thomas his standing or seek to belittle his perspective on these matters? I trust not. Who would call him biased or attack him as Judge Sotomayor is now being attacked? I trust no one would. Real-world experience, real-world judging, and awareness of the real-world consequences of decisions are vital aspects of the law. Here we have a nominee who has had more experience as a Federal judge than any nominee in decades and will be the only member of the U.S. Supreme Court with experience as a trial judge.

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

I yield the floor, first, to Senator KLOBUCHAR.

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

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

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

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

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

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

It is worth remembering, for example, that when Justice O'Connor graduated from law school, the only offers she got from law firms, after graduating from Stanford Law School, was for legal secretary positions. Justice O'Connor, who graduated third in her class in law school, saw her accomplishments reduced to one question: Can she type?

Justice Ginsburg faced similar obstacles. When she entered Harvard Law School, she was 1 of only 9 women in a class of more than 500. The dean of the law school actually demanded she justify why she deserved a seat that could have gone to a man. Later, she was passed over for a prestigious clerkship, despite her impressive credentials.

Nonetheless, both of these women persevered and they certainly prevailed. Their undeniable merits triumphed over those who sought to deny them opportunity. The women who came before Judge Sotomayor—all those women judges—helped blaze a trail. Although Judge Sotomayor's record stands on her own, she is also standing on those women's shoulders.

I am pleased to recognize several women Senators who are here today to speak in support of Judge Sotomayor. The first is my great colleague from New Hampshire, Senator SHAHEEN.

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

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

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

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

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

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

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

Her now-familiar personal story is no less impressive. The confirmation of Judge Sonia Sotomayor to the highest

Court of our country will inspire girls and young women everywhere to work hard and to set their dreams high.

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

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

I thank Senator KLOBUCHAR. I yield the floor.

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

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

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

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

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

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

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

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

It also has a big impact on the individual prosecutor. No matter how many years may pass, you never forget some of the very difficult cases. For Judge Sotomayor, we know this includes the case of the serial burglar turned killer—the Tarzan murderer. For me, there was always the case of Tyesha Edwards, an 11-year-old girl with an unforgettable smile, who was at home doing her homework when a stray bullet from a gang shooting went through the window and killed her.

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

Judge Sotomayor's former supervisor said she is ''an imposing and commanding figure in the courtroom, who could weave together a complex set of facts, enforce the law, and never lose sight of whom she was fighting for.''

As her old boss, Manhattan District Attorney Robert Morgenthau said: She is a ''fearless and effective'' prosecutor.

Mr. President, before I turn this over to my colleague, the Senator from Michigan, who has just arrived, I thought it would be interesting for people to hear a little more about Judge Sotomayor's experience as a prosecutor, so you can hear firsthand from her own colleagues.

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

We served together during some of the most difficult years in our city's history. Crime was soaring, a general sense of disorder prevailed in the streets, and the popular attitude was increasing violence was inevitable. Sonia Sotomayor began as a ''rookie'' in 1979, working long hours prosecuting an enormous caseload of misdemeanors before judges managing overwhelming dockets. Sonia so distinguished herself in this challenging assignment, that she was among the very first in her starting class to be selected to handle felonies. She prosecuted a wide variety of felony cases, including serving as co-counsel at a notorious murder trial. She developed a specialty in the investigation and prosecution of child pornography cases. Throughout all of this, she impressed us as one who was singularly determined in fighting crime and violence. For Sonia, service as a prosecutor was a way to bring order to the streets of a city she dearly loves.

Her colleagues go on in this letter:

We are proud to have served with Sonia Sotomayor. She solemnly adheres to the rule of law and believes that it should be applied equally and fairly to all Americans. As a group, we have different world views and political affiliations, but our support for Sonia is entirely 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.

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

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

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

I rise today to strongly support the confirmation of Judge Sonia Sotomayor as the next Justice of the Supreme Court. Over 230 years ago, Alexander Hamilton called experience ''that best oracle of wisdom.'' His words continue to ring true today. Judge Sotomayor has over 17 years of experience on the Federal bench. She will be the most experienced Supreme Court Justice in over 100 years—a lifetime.

But it isn't just her years of experience that will make her a great Justice. It will be the experience of a uniquely American life—the American dream. She was raised in a South Bronx housing project where her family instilled in her values of hard work and sacrifice. At the age of 9, her father—a tool-and-die worker—died tragically. After that, her mother—a nurse—raised her the best she could. I would say she did a pretty good job.

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

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

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

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

Judge Sotomayor's story is the American story—that a young person

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

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

Mr. President, I strongly urge my colleagues to vote to confirm Judge Sotomayor.

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

Ms. KLOBUCHAR. Mr. President, I thank the Senator from Michigan for her strong words in favor of this very strong nominee.

I was talking earlier about the experience that Judge Sotomayor brings to the bench as a prosecutor. For me, it means she meets one of my criteria for a nominee because I am looking for someone who deeply appreciates the power and the impact that laws and the criminal justice system have on real people's lives. From her first day in the Manhattan DA's office, Judge Sotomayor talked about and understood how it was important to view the law as about people and not just the law.

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

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

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

We want people with good judgment, because a lot of the job of a prosecutor is making decisions. I also want to see some signs of humility in anybody that I hire. We're giving young lawyers a lot of power, and we want to make sure that they're going to use that power with good sense and without arrogance.

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

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

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

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

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

Louis Freeh writes:

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

Freeh goes on to say:

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

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

Louis Freeh, a Republican-appointed judge, goes on to say:

To me, there is no better measure by which to evaluate a judge than the standards of the former Chief Judge of the U.S. District Court of Minnesota—

Mr. President, I like this part—

—and nationally renowned American jurist, Edward J. Devitt. A former Member of Congress and World War II Navy hero, Judge Devitt was appointed to the federal bench by President Eisenhower and became one of the country's leading trial judges and teacher of judges. A standard Jury Instruction textbook (Devitt and Blackmun) as well as the profession's most coveted award recognizing outstanding judges, the Devitt Award, bears his name.

I recently had the honor of participating in the dedication of a courtroom named for Judge Devitt. The judges and lawyers who spoke in tribute to Judge Devitt very ably and insightfully described the critical characteristics which define and predict great judges. But rather than discuss Judge Devitt's many decisions, particular rulings or the ''sound bite'' analyses which could have been parsed from the thousands of complex and fact specific cases which crossed his docket, they focused on those ultimately more profound and priceless judicial qualities.

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

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

He then goes on to say:

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

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

I see we are now being joined by the Senator from New York, my distinguished colleague, who also will be speaking in favor of Judge Sotomayor.

Senator GILLIBRAND had the distinguished honor to introduce Judge Sotomayor when she so eloquently spoke at the hearing. I am very honored to have her join us here today.

I will turn this over to Senator GILLIBRAND.

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

I thank the Senator.

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

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

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

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

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

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

The breadth and depth of Judge Sotomayor's experience makes her uniquely qualified for the Supreme Court. Her keen understanding of case law and the importance of precedent is derived from working in nearly every aspect of our legal system—as a prosecutor, corporate litigator, civil rights advocate, trial judge and appellate judge. With confirmation, Judge Sotomayor would bring to the Supreme Court more Federal judicial experience than any justice in 100 years and more overall judicial and more overall judicial experience than any justice in 70 years.

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

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

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

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

Judge Sotomayor has been in agreement with her colleagues more often than most—94 percent of her constitutional decisions have been unanimous.

She has voted with the majority in over 98 percent of constitutional cases.

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

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

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

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

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

The PRESIDING OFFICER (Mr. BENNET). The Senator from Minnesota is recognized.

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

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

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

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

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

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

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

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

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

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

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

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

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

I have examined her personal and professional history, and studied her 17-year record on the Federal bench.

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

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

By now, many Americans have heard the remarkable life story of Judge

Sonia Sotomayor. Judge Sotomayor is truly the embodiment of the American dream.

Though many Americans by now have heard Judge Sotomayor's story, some points bear repeating.

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

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

After graduating from high school, Judge Sotomayor attended college at Princeton and law school at Yale.

She spent five years prosecuting criminal cases in New York, 7 years in private law practice, and 17 years as a Federal judge on the U.S. District Court and Court of Appeals.

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

Of course, a compelling personal story of triumph in tough circumstances is not itself enough.

I have long used several criteria to evaluate nominees for judicial appointments: Are they ethical, honest, and qualified? Will they be fair, independent, and even-handed in administering justice? And will they protect the rights and liberties of all Americans?

I am confident that Judge Sotomayor meets these criteria.

She has 17 years of Federal judicial experience and unanimously received the highest rating of the American Bar Association—which called her ''well qualified'' based on a comprehensive evaluation of her record and integrity.

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

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

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

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

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

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

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

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

I yield the floor.

The PRESIDING OFFICER. The Senator from Minnesota is recognized.

Ms. KLOBUCHAR. I wish to first thank the Senator from Washington for her excellent remarks on Judge Sotomayor.

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

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

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

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

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

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

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

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

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

But, again, the facts do not support these claims. In race discrimination cases, for example, Judge Sotomayor voted against plaintiffs 81 percent of the time. She also handed out longer jail sentences than her colleagues as a district court judge. She sentenced white-collar criminals to at least 6 months in prison 48 percent of the time; whereas, her other colleagues did so only 34 percent of the time.

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

A few weeks ago, I was in the Minneapolis airport and a guy came up to me, he was wearing an orange vest. He said: Are you going to vote for that woman?

At first, I did not know what he was talking about. I said: What do you mean?

He said: That judge.

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

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

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

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

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

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

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

I believe that everything in a nominee's professional record is fair game

to consider. After all, we are obligated to determine whether to confirm someone for an incredibly important lifetime position. That is our constitutional duty and I take it seriously.

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

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

These are the facts my colleagues should be looking at. You have the support from the International Association of Chiefs of Police. You have the support of the Major Cities Chiefs Association; she has the support of the National Association of Police Organizations; she has the support of the Association of Prosecuting Attorneys; we have letters supporting her from the Detectives Endowment Association; from the National Black Prosecutors Association; from the National Organization of Black Law Enforcement Executives. The list goes on and on and on.

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

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

According to one newspaper story about this topic, Judge Sotomayor developed a reputation for asking tough questions at oral arguments and for being sometimes brisk and curt with lawyers who were not prepared to answer them. Well, where I come from, asking tough questions, having very little patience for unprepared lawyers is the very definition of being a judge. As a lawyer, you owe it to the bench and to your clients to be as well prepared as you possibly can be.

When Justice Ginsburg was asked about these anonymous comments regarding Judge Sotomayor's temperament recently, she rhetorically asked: Has anybody watched Scalia or Breyer on the bench?

Surely, we have come to a time in this country when we can confirm as many to-the-point, gruff female judges as we have confirmed to-the-point, gruff male judges. We have come a long way, as you can see from my colleagues who came here during the last hour.

We know that when Sandra Day O'Connor graduated from law school 50-plus years ago, the only offer she got was from a law firm for a position as a legal secretary. Justice Ginsburg faced similar obstacles. We have come a long way.

But I hope my colleagues in this case will also come a long way and look at the record and look at the facts. As I have said, people are entitled to their own opinions, but they are not entitled to their own facts.

In short, I am proud to support Judge Sotomayor's nomination. I believe she will make an excellent Supreme Court Justice. She knows the law, she knows the Constitution, but she knows America too.

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

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

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

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

Mr. BURR. I ask unanimous consent that the Republican time for the next hour be allocated as follows: 15 minutes to myself, 15 minutes to Senator MARTINEZ, 10 minutes to Senator BOND, and 20 minutes to Senator CORNYN.

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

Mr. BURR. Mr. President, I rise to express my thoughts on the nomination of Judge Sonia Sotomayor to be a U.S. Supreme Court Justice.

Votes on Supreme Court nominees are among the most important cast by a Senator. These nominations warrant a full and in-depth debate. We are, after all, considering a lifetime appointment to the highest Court in the land.

I will not spend much time this morning going through the impressive background of Judge Sotomayor because I think all Members agree that her experience and her academic credentials meet the threshold of what the American people expect in a Supreme Court Justice.

As an alumnus of two of the most prestigious schools in the Nation with a lengthy judicial record, Judge Sotomayor is certainly a quality nominee for the post. I am also sure she has inspired many throughout her noble career.

More important than the Ivy League schools and the length of public service, however, is the judicial record of a nominee and the decisions she has made during her tenure on the bench.

While many see a lengthy judicial record as something that could only be considered a positive factor in determining a nominee's suitability to serve on the highest Court in the land, others, including myself and many of my constituents, see it as an opportunity for a panoramic view into the decision-making process of a nominee.

Just as I looked into the background and experience of Judge Roberts and Judge Alito, I did the same thing with Judge Sotomayor. With all the years she has served on the Federal bench, she has plenty of case material to examine and consider.

Among the most important factors in determining one's suitability for the High Court is the nominee's understanding and appreciation for the role they are about to take on. Other than having the ultimate say in the judicial branch's analysis of the case at hand, the proverbial last word, it is no different than a judge's role on any lower court.

I believe a judge's role is to adhere to the longstanding case precedent and to apply the law according to a strict interpretation of the Constitution. Let me say that again because I believe it is too important to go unheard.

I believe a judge's role is to adhere to the longstanding case precedent and apply the law according to the strict interpretation of the U.S. Constitution.

That is my understanding of the judge's role in our country. Others may have different views, and they certainly are entitled to them. As I have said, I am troubled by her decisions in cases where she has appeared to rely on something other than well-settled law to come to a decision. My fear is that she was unable to separate her personal belief system from that of the letter of the law.

In our one-on-one meetings, Judge Sotomayor gave me her assurances that she would stick to the letter of the law. Her judicial record indicates otherwise, particularly in a couple of very significant places and recent occurrences. While my colleagues have mentioned both of them prior to me stating them again, today I think they bear repeating. Both cases highlight how Judge Sotomayor adheres to applicable case precedent.

First is the Ricci case. I think it is important to take a close look at her decision in Ricci v. DeStefano. This is a case where she dismissed the claims of 19 White firefighters and one Hispanic firefighter who alleged reverse discrimination based on the New Haven, CT, decision not to use the results of a promotional exam because not enough minorities would be eligible for promotion. In the Ricci case, she rejected the firefighters' claim in a one-paragraph opinion. When questioned about it in the confirmation hearing, she maintained she was bound by precedent. A potentially and ultimately legal landmark case warranting a careful and thorough review of the facts at hand and the law to be interpreted, and Judge Sotomayor dismissed the claim in one paragraph. Clearly, a case with issues involving race and discrimination deserved more than a one-paragraph explanation and analysis.

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

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

Maloney v. Cuomo, a second amendment case, is another decision of Judge Sotomayor that troubles my impression of her ability to separate her own beliefs from that of the letter of the law. It was just decided this year—so recently, in fact, that it has not even had a chance to be reviewed by the Supreme Court.

Not to rehash the facts of the case in too much detail, but in Maloney v. Cuomo, Judge Sotomayor was faced with determining whether an individual right—in this case, the right to bear arms—could also be enforced against a State. She decided the Maloney case after the historic Heller decision specifically concluded, without any explanation, that the right to bear arms is, in fact, not a fundamental right—a conclusion no other court has ever reached. As a matter of fact, I cosponsored an amicus brief which supported the argument that the right to bear arms is a fundamental right and one that could not be taken away by government without the highest standard of review. This was the argument that ultimately favored the Supreme Court in their decision.

To me, a nonlawyer, her decision in Maloney stands directly contrary to what the Supreme Court had just concluded in the Heller case. So not only did the Supreme Court set the precedent, she ignored the precedent of Heller in the ruling of the Maloney case. How could Judge Sotomayor so distinctly and openly come to the conclusion that bearing arms was not, in fact, a fundamental right when the Supreme Court, just months before, ruled the opposite way? Where did her reasoning come from? I am troubled by the lack of deference and adherence to the High Court's decision, and it leads me to call into question the commitment she made to me in a one-on-one meeting.

Actions, in this case—actually, decisions—speak much louder than rhetoric. These are just two recent, clear examples of where her record as a judge, while lengthy, caused me to call into question her ability to apply case precedent to come to a decision that would affect the lives of North Carolinians and the whole Nation.

These two decisions I have cited are not examples of missteps early in her career or decisions based on lack of experience. These are decisions Judge Sotomayor made after 17 years of experience on the Federal bench. These are decisions made within the last year or so by a seasoned Federal judge who is being considered for a lifetime appointment to the Supreme Court of the United States.

My esteemed colleague from North Carolina mentioned in her speech supporting Judge Sotomayor that the late Senator Jesse Helms, who was a dear friend of mine, supported the nomination of Judge Sotomayor to be a judge on the Second Circuit Court of Appeals. What Senator Helms did not have when he reviewed her nomination, however, was the benefit of Judge Sotomayor's judicial record during her decade of service on the appellate court.

It is imperative that all Members of the Senate look at the cases judges have decided and not just say they have been through the confirmation process in the Senate, therefore it should be automatic the second time. Their decisions weigh on the relevance of their nomination and on their confirmation.

I am sure her impressive academic and professional resume influenced Senator Helms, and I am sure he gave her the benefit of the doubt without any reason to question how she might rule on the bench. I have, and the Senate has, the benefit of reviewing Judge Sotomayor's actual decisions as a circuit judge, in addition to her statements to the record. I have the benefit of seeing if she stuck to the letter of the law as she stated she would do in testimony when nominated for the appellate court in 1998. She has not stuck to the letter of the law.

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

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

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

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

I realize, at the conclusion of the next several days, Judge Sotomayor has the votes to be a Justice. I will continue to watch the decisions she makes based upon the answers she provided to me. But as most, if not all, have stated, this is a lifetime appointment. The debate that happens over the next 48 hours will determine, in many cases, whether a change might happen in this nomination. We cannot end this debate without the realization that we will live for generations to come with the decisions of this Court, the next Court, and the next Court. It will be just as incumbent on Members of the Senate in the future to make sure that those nominees are debated thoroughly, that their records are reviewed in great detail, and that their pledge to protect the Constitution and to follow it as a Justice is upheld. My hope is that I am incorrect about how Judge Sotomayor will, in fact, use the Constitution. Today, I announce that I will vote against her.

I yield the floor.

The PRESIDING OFFICER. The Senator from Florida.

Mr. MARTINEZ. Mr. President, I rise to speak on the nomination of Judge Sotomayor to the Supreme Court. I am happy to have this opportunity, for I view it as a historic moment in many ways.

The confirmation of a Supreme Court nominee is one of the most solemn and unique duties in our constitutional system of government. The Framers, recognizing the risk of abuse inherent in a lifetime judicial appointment, created a process that brings together all three branches of the Federal Government. The Constitution, article II, section 2, requires that a nominee to the Federal court must be selected by the President and then ''with the advice and consent of the Senate.'' These moments must be appreciated and approached with a great deal of thoughtfulness and respect. This is all the more true when the appointment is to our highest Court, the Supreme Court.

There was a time when Members of the Senate seemed to better understand their role, when Senators expected a President of the other party to pick a judge who would likely be different from someone they would have picked. There are a couple of examples I would like to use.

Justice Ginsburg, a very talented person who served as general counsel to the ACLU, was not likely to have been someone selected by a Republican President. But yet she was confirmed with 95 votes. Republicans knew she would be a liberal Justice, but she was also well qualified for the job.

There is another example; that is, Justice Antonin Scalia. He was picked by a Republican President and received

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

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

I notice another example. The nominations of Miguel Estrada, Chief Justice Roberts, and Justice Alito—all three of these illustrate how partisan politics have been permitted to overwhelm the fundamental question posed to the Senate, which is, Is this nominee qualified? Do you give your advice and your consent?

My colleagues will recall that Mr. Estrada was first nominated by President George W. Bush to the DC Circuit in May of 2001. He was unanimously rated ''well-qualified'' for the bench by the American Bar Association.

Mr. Estrada was someone who had a very impressive history and personal story and resume. He was a native of Honduras. Mr. Estrada immigrated to this country at age 17, graduated magna cum laude and Phi Beta Kappa from Columbia University. He received his law degree from Harvard in 1986, where he was a member of the Harvard Law Review, and went on to clerk on the Supreme Court for Justice Kennedy.

Mr. Estrada then entered private practice and was a very well-respected lawyer working in a New York law firm and served as an assistant U.S. attorney in the Southern District of New York, where I believe our nominee also served. But then Mr. Estrada took a job in the George H.W. Bush administration as an Assistant Solicitor General. What does an Assistant Solicitor General do? They prepare and argue cases before the Supreme Court. What could be a better training ground, in addition to having a prior clerkship for a Court member, than to be an Assistant Solicitor General? As a longtime attorney, I always admire greatly those who have served in that office because they are the very best of the very best.

But politics intervened. He was branded a conservative. Through the course of an unprecedented seven cloture votes, Democrats in this body filibustered his nomination. Time and again, they filibustered his nomination. It lingered for 28 months, until he finally withdrew—exhausted, wanting to get on with his life, knowing he needed to be able to continue to do work for clients, that he could not continue to be in this limbo where he had been for 28 months because of the misguided notion that he was just too conservative and so it was OK to filibuster him. For 28 months he was hanging, dangling in the wind. That was not right. It was not to the Supreme Court, but some feared that someday he might be a Supreme Court candidate, he might have been the first Hispanic serving in the Supreme Court, nominated, perhaps, by a Republican President.

So while the nominations of Chief Justice Roberts and Justice Alito ended quite differently from Mr. Estrada's, the record is, frankly, equally disturbing.

During the debates on both Roberts and Alito, then-Senator Barack Obama declared each man to be qualified to sit on the Supreme Court. Of then-Judge John Roberts, Senator Obama said, right here on the Senate floor:

> There is absolutely no doubt in my mind Judge Roberts is qualified to sit on the highest court in the land.

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

He then said of then-Judge Alito:

> I have no doubt that Judge Alito has the training and qualifications necessary to serve. He's an intelligent man and an accomplished jurist. And there's no indication he's not a man of great character.

But despite these emphatic statements of confidence, then-Senator Obama voted against confirmation. Why? Because of his perception that their philosophy would not allow him to vote for them.

Given this record, some of my colleagues conclude that what is good for the goose is good for the gander; that because of these recent precedents, and despite her qualifications, they may still vote against Judge Sotomayor's confirmation. I could not disagree more heartily.

It is my hope that starting today, we will no longer do what was done to Miguel Estrada; that beginning today, no Member will pursue a course and come to the floor of this Chamber to argue against the confirmation of a qualified nominee.

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

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

Here is something that is very important: Her 17-year judicial record overwhelmingly indicates she will apply the law without bias. That is very important because we could find someone who really is facially qualified but whose views might be, for some reason, so outside the mainstream, so different from what the norm of our jurisprudence would be, that it might render them, while facially qualified, truly unqualified—that they really could not be relied on to look at a case and apply the facts and the evidence and apply the law to the evidence presented, that they would not follow the law, that they would not be faithful to their oath because their views would be so extreme, so outside the mainstream, so completely beyond what would be the norm or considered to be the norm. But here in this person we have a 17-year record. She has written thousands of opinions. These opinions provide the body of law of what she does as a judge—not what she said to a group of students one day, trying to encourage them in their lives and what they might be doing, not what someone might gain from reading an opinion that perhaps they would not agree with. It is not about whether we agree with her outcomes, it is whether her opinions were reasoned, whether they had a foundation in law, whether they were reasonable decisions, whether she reached them on the basis of law and evidence that are supported by sound legal thinking. Her worst critics cannot cite a single instance where she strayed from sound judicial thinking.

I believe she will serve as an outstanding Associate Justice to the U.S. Supreme Court, and she will be a terrific role model for many young people in this country.

Were I to have had my opportunity to pick, I may have chosen someone different than Judge Sotomayor. But that is not my job. I do not get to select judges. I get to give advice and consent. We sometimes confuse the role of the Senate. Elections have their consequences. Some of her writings and her statements indicate that her philosophy might be more liberal than mine, but that is what happens in elections.

When I was campaigning for my colleague and dear friend JOHN MCCAIN, I knew it was going to be important because there would be vacancies to the Court. I knew I would be much more comfortable with a nominee whom JOHN MCCAIN would nominate than one my former colleague and friend, President Barack Obama, might nominate. The President has the prerogative, the obligation, the responsibility to choose his own nominees. Our job is to give advice and consent.

The President has chosen a nominee, and my vote for her confirmation will

be based solely and wholly on relevant qualifications. Judge Sotomayor is well qualified. She has been a Federal judge for 17 years. She has the most experience of any person—on-the-bench judicial experience of any person—nominated for the Court in a century. In 100 years, there has not been anyone who has been on the bench with such a distinguished record for such a long period of time. That is why, by the way, her record is really her judicial decisions. We do not have to wonder. We do not have to sit around and try to divine whether someday she will answer the siren call to judicial activism, as I have heard someone say on the floor of the Senate. You do not have to wonder. You can wonder, and it might give you an excuse to vote against someone who is otherwise qualified, but the fact is, with a 17-year record, you should have a pretty good idea whether that siren call would have been answered by now. To my estimation, it has not been.

She received the highest possible rating from the American Bar Association for a judicial candidate—equal to that of Miguel Estrada, equal to that of Chief Justice Roberts, and equal to that of Justice Alito. She has been a prosecutor. She has been, throughout her career, an outstanding lawyer. As a prosecutor, she was a pretty tough one too. With less than a handful of exceptions, her 17-year judicial record reflects that while she may be left of center, she is certainly well within the mainstream of legal thinking.

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

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

This debate raises critical and difficult issues regarding the role of federalism in the application of fundamental constitutional rights. But the confirmation process is not the proper place to relitigate this question, nor is Judge Sotomayor's judicial record on this issue outside the mainstream.

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

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

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

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

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

I suggest the absence of a quorum.

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

The assistant legislative clerk proceeded to call the roll.

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

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

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

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

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

The walls of that Supreme Court form the vessel that holds the great protections of our liberty.

Those black robes give life to the Constitution's freedoms and the flourishing of our ideas and beliefs.

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

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

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

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

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

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

Would the Cabinet sit empty because of partisan divide?

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

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

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

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

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

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

That is not something I could support, for I surely supported judicially conservative Justices such as Roberts and Alito, Thomas and Bork—Scalia certainly if I had been in the Senate at the time.

That is the kind of Justice I support, a judge that calls balls and strikes like an umpire, not letting their own personal views bias the outcome of the trial.

The statue of justice is blindfolded for a reason, so that she cannot tip the scales of justice with the prejudice of bias or belief.

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

They take a more active role in shaping their decisions, to fit an ideal of their own vision.

I supported these nominees of a Democratic President, as did 86 of my colleagues for Justice Breyer, and 95 of my colleagues for Justice Ginsberg.

I hope those votes do not reflect a time that has slipped away, when partisanship did not infect every facet of our political life.

I could forget that time, as President Obama did when he was a Senator.

I could easily say, as Senator Obama said, that I disagree with a nominee's judicial approach, and that allows me to oppose the nominee of a different party.

Luckily for President Obama, I do not agree with Senator Obama.

I reject the Obama approach to nominees.

While I reject the way Senator Obama approached nominations, that does not mean that I support the way Judge Sotomayor approaches judging.

I disagree that the civil rights of a firefighter mean so little that they do not deserve even a full opinion before an appeals court.

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

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

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

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

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

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

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

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

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

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

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

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

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

But I do agree that the country is tired of partisanship infecting every debate. The country is tired of every action by the Congress becoming a political battle.

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

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

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

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

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

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

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

The Senate has reviewed her nomination and has asked her its questions. There have been no significant findings against her. There has been no public uprising against her.

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

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

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

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Texas.

Mr. CORNYN. Mr. President, I wish to address the nomination of Judge Sonia Sotomayor to be an Associate Justice of the U.S. Supreme Court as well. I have spoken about this nomination several times, both here on the Senate floor and on the Senate Judiciary Committee on which I serve. I have shared what I admire about Judge Sotomayor, including her long experience as a Federal judge, her academic background, which is stellar, and her record of making decisions that for the most part are within the judicial mainstream. I have also explained before why I will vote against this nomination and I wish to reiterate and expand on some of those comments here today as all of us are stating our intentions before this historic vote which I suspect will be held sometime tomorrow.

First, I cannot vote to confirm a nominee to the U.S. Supreme Court who restricts several of the fundamental rights and liberties in our Constitution, including our Bill of Rights. Based on her decision in the Maloney case, Judge Sotomayor apparently does not believe that the second amendment right to keep and bear arms is an individual right. Indeed, she held in that case that the second amendment did not apply to the States and local jurisdictions that might impose restrictions on the right to keep and bear arms. Then based on her decision in the Didden v. The Village of Port Chester case, she apparently does not believe that the takings clause of the fifth amendment protects private property owners when that private property is taken by government for the purpose of giving it to another private property owner, in this case a private developer. I am very concerned when the government's power to condemn property for a private purpose conflicts with the stated intention of the Framers of the Constitution that the right of condemnation of private property only extend to public uses and then, and only then, when just compensation is paid.

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

Fortunately, the Supreme Court of the United States saw fit to overrule

Judge Sotomayor's judgment in the New Haven firefighter case. Millions of Americans became aware, perhaps for the first time, of this notorious decision and what a morass some of our laws have created when, in fact, distinguished judges like Judge Sotomayor think they have no choice but to allow people to be denied a promotion based upon the color of their skin for fear of a disparate impact lawsuit, even when substantial evidence is missing that such a disparate lawsuit would have merit or likely be successful.

I cannot vote to confirm a nominee who has publicly expressed support for many of the most radical legal theories percolating in the faculty lounges of our Nation's law schools.

We heard this during the confirmation hearings and, frankly, Judge Sotomayor's explanations were unconvincing. Previously, she said there is no such thing as neutrality or objectivity in the law—merely a series of perspectives, thus, I think undermining the very concept of equal justice under the law. If the law is not neutral, if it is not objective, then apparently, according to her, at least at that time, the law is purely subjective, and outcomes will be determined on which judge you get rather than what the law says.

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

Third, I cannot vote to confirm a judicial nominee who testified before the Judiciary Committee that her most controversial decisions were guided by precedent, when her colleagues on the Second Circuit, and indeed the Justices of the U.S. Supreme Court who reversed her, said just the opposite; or who testified that she meant the exact opposite of what she said—every time she said something controversial and was trying to explain that; or a person who testified that she had no idea what legal positions the Puerto Rican Legal Defense and Education Fund was taking—even when she chaired the litigation committee of its board of directors.

The hearings before the Senate Judiciary Committee have a very important purpose, and that purpose is informed by article II of the U.S. Constitution that provides for advice and consent on nominations. It is not to serve as a rubberstamp. I have heard colleagues say that elections have consequences, and the President won. Well, it is obvious and evident that elections have consequences and that President Obama won. But that doesn't negate or erase the obligation each Senator has under the same clause and article of the Constitution to provide advice and consent based on our best judgment and good conscience.

In the case of Judge Sotomayor, the question becomes: What will she do with the immense power given to a member of the U.S. Supreme Court? What impact will she have on our rights and liberties over the course of a lifetime? Of course, this appointment is for life. In short, the question is, what kind of Justice will she be on the Supreme Court, where her decisions are no longer reviewed by a higher court as they were as a Federal district court or a court of appeals justice. The question is, will she be the judge she has been as a lower court judge, making decisions which, by and large, have been in the mainstream, with some notable exceptions, which I have talked about, or will she be untethered? Will she be the Judge Sotomayor of some of her radical speeches and writings, which cause me concern?

The answers to these questions, I regret, are no clearer after the hearings than before. The stakes are simply too high for me to confirm someone who could redefine ''the law of the land'' from a liberal, activist perspective.

I respect different views of Senators on this nomination, and I have no doubt that Judge Sotomayor will be confirmed. But I am unwilling to abdicate the responsibility I believe I have as a Senator when it comes to voting my conscience and expressing my reservations. The Senate developed our confirmation process for a very important purpose: to learn more about the individual nominees. But over the last several weeks, I think we have also learned more about a rising consensus with regard to what we should expect from a judge. I will highlight two important lessons we have learned.

One is encouraging to me and one is worrisome. Let's start with the good news. I believe Republicans and Democrats on the Judiciary Committee, and indeed Judge Sotomayor herself, seem to say the appropriate judicial philosophy for nominees to the Federal bench is one that expresses fidelity to the law and nothing else. Over years, we have been debating whether we have an original understanding of the Constitution or some evolving Constitution, even though it can be interpreted in different ways, even though the words on the paper read exactly the same. We went back and forth on the merits, or lack of merits, of judicial activism—judges taking it upon themselves to impose their views rather than the law in decisions. On many occasions, our disagreements over judicial philosophy were anything but civil and dignified.

I think of the nomination of Miguel Estrada to the District of Columbia Court of Appeals, which some have said is the second highest court in the land. Miguel Estrada, although an immigrant from Honduras who didn't speak any English when he came to the United States, graduated from a top university and law school in this country. He was filibustered seven times an denied an up-or-down vote. One member of the Judiciary Committee, disparaging Mr. Estrada's character, called him a ''stealth missile, with a nose cone, coming out of the right wing's deepest silo.''

Samuel Alito, an Italian-American who is proud of his heritage, had to defend himself against false charges of bigotry—accusations that left his wife in tears.

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

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

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

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

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

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

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

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

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

> Foreign law cannot be used as a holding or a precedent, or to bind or influence the outcome of a legal decision interpreting the Constitution or American law.

As I said, notwithstanding her earlier statements, I agree with that statement she made at the hearing. I believe both Republicans and Democrats were satisfied with that statement as well.

We agreed that ''empathy'' or ''what's in a person's heart''—to borrow a phrase from then-Senator Obama—should not influence the decisions of a judge. I think we were all a little surprised when Judge Sotomayor, at the hearing, rejected President Obama's standard. She said:

> I wouldn't approach the issue of judging the way the President does. . . . Judges can't rely on what's in their heart. They don't determine the law. Congress makes the law. The job of a judge is to apply the law. And so it's not the heart that compels conclusions in cases—it is the law.

I agree with that statement, and indeed Republicans and Democrats alike appeared to embrace that statement of an appropriate judicial philosophy. No one defended the statement that then-Senator Obama made with regard to empathy or what is in a person's heart. I was encouraged to see that.

Mr. President, supporters of Judge Sotomayor appear willing to accept her statements that I have just quoted at the Judiciary Committee at face value. I hope they are right; I really do. I certainly intend to take my colleagues' agreement with these statements at face value. I expect future nominees to the Federal judiciary to conform to this new consensus articulated by Judge Sotomayor at her hearing and embraced in a bipartisan fashion by the members of the Judiciary Committee.

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

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

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

Mr. SPECTER. Mr. President, I ask unanimous consent that the hour of Democratic speaking time be divided 30 minutes under my control, 15 minutes for Senator LAUTENBERG, and 15 minutes for Senator DODD.

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

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

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

The criticisms which were made against her, my judgment is they were vacuous. A great deal of time in committee was spent on her comment about ''a wise Latina woman.'' My view is that she should have been commended for that statement, not criticized. Why do I say ''commend''? Why shouldn't a woman stand up for women's capabilities? In a society which did not grant women the right to vote until 1920, in a society which still harbors the tough glass ceiling limiting women, in a society where only two women have served on the Supreme Court, in a Senate where only 17 of the 100 Senators are women, I would expect a woman to proudly speak up for women's competency.

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

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

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

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

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

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

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

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

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

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

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

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

The Supreme Court has adopted a standard of judging constitutionality as to whether the statute satisfies congruence and proportionality, a standard which has emerged very recently. It defies understanding to quantify or

figure out what congruence and proportionality means, except to give the Supreme Court carte blanche, in effect, to legislate.

Two cases interpreting the Americans with Disabilities Act went 5 to 4 in opposite directions between Titles I and II—one case holding one of them constitutional and the other was unconstitutional. Justice Scalia, dissenting in one case, characterized congruence and proportionality to be a flabby standard which, in effect, allowed the Court to legislate.

When Chief Justice Roberts appeared before the Judiciary Committee in response to questions from Senator DEWINE and myself, he said it was up to the Congress to make findings of fact, that that was a peculiarly legislative function because it is the Congress which has the hearings, the ability to develop facts, and it is congressional responsibility.

Yet when the Voting Rights Act case was heard earlier this year, although decided on narrower grounds, every indication is being given that Chief Justice Roberts' assurances to the Judiciary Committee are being reversed and that the Court, from all indicators, is on the verge of declaring the Voting Rights Act as unconstitutional, notwithstanding the voluminous record which was created and the great care the Senate operated to come down with the voting rights legislation.

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

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

The one comment I do have, other than full support for Judge Sotomayor, was her reluctance to answer questions. One question which I asked her is illustrative. Chief Justice Roberts, in his confirmation hearing, when confronted with the light workload of the Court, said that he thought the Court could take on more responsibility. I asked Judge Sotomayor if she agreed with that conclusion. Judge Sotomayor would not answer the question. She said she would have to be more fully familiarized, even though the statistics which I quoted to her about the Court's workload contrasted with 1886 when the Supreme Court decided 451 cases; in 1985, there were only 161 written opinions; in 2007, only 67 written opinions.

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

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

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

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

Mr. President, I ask unanimous consent to have printed in the RECORD a copy of an op-ed I wrote for the New York Times, dated October 9, 1987, which sets forth in some greater detail—which I do not have the time to go into now—the reasons why I voted against Judge Bork and I think the reasons why Judge Bork's nomination was defeated by the margin of 58 to 42 when it came before the Senate for a vote.

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

[From the New York Times, Oct. 9, 1987]

WHY I VOTED AGAINST BORK

(By Arlen Specter)

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

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

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

During the August recess, when I had a chance to read many of his approximately 80 speeches, 30 law review articles and 145 circuit court opinions, I found a scholar and jurist whose views and opinions were vast and complex. In voting to confirm Chief Justice William H. Rehnquist and Justice Antonin Scalia last year, I had already decided that a nominee's judicial philosophy need not agree with mine. But I also believed that a nominee's views should be within the tradition of our constitutional jurisprudence. With that in mind, I compared Judge Bork's views with those of other conservative justices.

On freedom of speech, I was surprised to find that Judge Bork in his writings rejected Justice Oliver Wendell Holmes's standard of a ''clear and present danger,'' Chief Justice Warren Burger's notion of constitutional protection for commercial speech and Justice (now Chief Justice) Rehnquist's Court opinion protecting a sexually explicit (as distinguished from an obscene) movie from censorship.

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

Judge Bork's views on equal protection of the law also underwent a major change at the hearings. He committed himself to apply current case law after having long insisted that equal protection applied only to race and, more recently, to ethnicity. His narrow position had put him at odds with Chief Justice Rehnquist and Justices Sandra Day O'Connor and Scalia, as well as 101 years of Supreme Court decisions that had applied equal protection to women, aliens, indigents, illegitimates and others.

These significant shifts raised questions about Judge Bork's motives and the depth of his convictions. But I felt he should have a full opportunity to explain his new positions because a person is entitled to change.

During a long Saturday session, I had an unusual opportunity to explore at length some troubling aspects of Judge Bork's jurisprudence. I was particularly concerned with his writings on ''original intent.'' He had maintained that judges had to base their opinions on the Framers' original intentions. Without adherence to original intent, he said, there was no legitimacy for judicial decisions. And without such legitimacy, there could be no judicial review.

But Judge Bork conceded during the hearings that original intent was often difficult, perhaps impossible, to discern. I feared that this approach could jeopardize the fundamental principle of constitutional law—the supremacy of judicial review. Although Judge Bork himself never went so far, some prominent political figures have suggested that the Supreme Court should not be the ultimate arbiter of constitutionality. Their

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

I had also been concerned by Judge Bork's insistence on ''Madisonian majoritarianism,'' the idea that, in the absence of explicit constitutional limits, legislatures should be free to act as they please. Conservative justices had traditionally protected individual and minority rights even without a specifically enumerated right or proof of original intent where there were fundamental values rooted in the tradition of our people.

Just this year, for example, Chief Justice Rehnquist and Justices O'Connor and Scalia had found a right in the Constitution for a prisoner to marry. But Judge Bork, at his confirmation hearing, could still find no acceptable rationale for the decision desegregating the District of Columbia schools 33 years ago.

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

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

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

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

The ''clear and present danger'' standard was restated by the Court in 1969, in Brandenburg v. Ohio, and again in 1973, in Hess v. Indiana. When Judge Bork committed himself to accepting Brandenburg, I pressed as to how we could be confident that he would apply that test to the next case, which obviously would be different on the facts. He promised he would, but then promptly insisted that he was not committed to Hess because it was an ''obscenity'' case.

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

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

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

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

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

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

Senator Obama went on to say:

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

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

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

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

Certainly, there are nominees whom I have voted for, if I were to have been the President and made the selection, it would have been different. If I were to have applied my own philosophy or ideology on the vote to confirm or not, it would have been different. When Judge Bork was so far out of the mainstream and had views so totally antithetical to the continuum of constitutional law—being out of the mainstream—it was different. But I think it is worth noting what is happening to the confirmation process, as Senators are moving to utilize their own ideology in deciding how to vote—illustrated, as I say, by Alito and the confirmation which we currently have—and not giving the traditional and customary deference to the President.

Moving on to the subject of the Court's reduced workload and the failure to decide major cases, in the context of the statistics which I cited—451 cases decided in 1886, 161 written opinions in 1985; the year 2007, only 67 signed opinions; the Supreme Court having decided not to hear the case involving the terrorist surveillance program, which posed a dramatic conflict between congressional authority under article I to enact the Foreign Intelligence Surveillance Act, with the President's asserted authority under article II as Commander in Chief to have warrantless wiretaps; the district court in Detroit declared the terrorist surveillance program unconstitutional. The Sixth Circuit reversed 2 to 1 on the grounds of standing—with the dissent being much better reasoned—a doctrine to avoid deciding the case and the Supreme Court denying cert. Similarly, on the conflict which was posed by litigation brought by the survivors of victims of 9/11 against Saudi Arabian princes, where the Congress had legislated in the Foreign Sovereign Immunities Act to exclude torts, as when you fly an airplane into the World Trade Center, the executive branch intervened. The Department of State objected through the Solicitor General to

the court hearing the case, and that case was not decided. Many circuit splits, which are detailed in a series of letters which I am going to ask to be admitted into the RECORD, letters which I sent to Judge Sotomayor, dated July 7, June 15, and June 25, detailing a great many circuit splits which the Court has not decided.

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

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

U.S. SENATE,
Washington, DC, July 7, 2009.

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

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

The decisions by the Supreme Court not to hear cases may be more important than the decisions actually deciding cases. There are certainly more of them. They are hidden in single sentence denials with no indication of what they involve or why they are rejected. In some high profile cases, it is apparent that there is good reason to challenge the Court's refusal to decide.

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

During his Senate confirmation hearing, Chief Justice John G. Roberts, Jr., said the Court ''could contribute more to the clarity and uniformity of the law by taking more cases.'' The number of cases decided by the Supreme Court in the 19th century shows the capacity of the nine Justices to decide more cases. According to Professor Edward A. Hartnett: ''. . . in 1870, the Court had 636 cases on its docket and decided 280; in 1880, the Court had 1,202 cases on its docket and decided 365; and in 1886, the Court had 1,396 cases on its docket and decided 451.'' The downward trend of decided case is noteworthy since 1985 and has continued under Chief Justice Roberts' leadership. The number of signed opinions decreased from 161 in the 1985 term to 67 in the 2007 term.

It has been reported that seven of the nine justices, excluding Justices Stevens and Alito, assign their clerks to what is called a ''cert. pool'' to review the thousands of petitions for certiorari. The clerk then writes and circulates a summary of the case and its issues suggesting justices' reading of cert. petitions is, at most, limited.

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

(1) The necessity for an agency head to personally assert the deliberative process privilege;

(2) Mandatory minimums for use of a gun in drug trafficking;

(3) Equitable tolling of the Federal Tort Claims Act's statute of limitations period;

(4) The standard for deciding whether a Chapter 11 bankruptcy may benefit from executory contracts;

(5) Construing the honest services provisions of fraud law; and

(6) The propriety of a jury consulting the Bible during deliberations.

One procedural change for the Court to take more of these cases would be to lower the number of justices required for cert. from four to three or perhaps even to two.

Of perhaps greater significance are the high-profile, major constitutional issues which the court refuses to decide involving executive authority, congressional authority and civil rights. A noteworthy denial of cert. occurred in the Court's refusal to decide the constitutionality of the Terrorist Surveillance Program which brought into sharp conflict Congress' authority under Article I to establish the exclusive basis for wiretaps under the Foreign Intelligence Surveillance Act with the President's authority under Article II as Commander in Chief to order warrantless wiretaps.

That program operated secretly from shortly after 9/11 until a New York Times article in December 2005. In August 2006, the United States District Court for the Eastern District of Michigan found the program unconstitutional. In July 2007, the Sixth Circuit reversed 2–1, finding lack of standing. The Supreme Court then denied certiorari.

The dissenting opinion in the Sixth Circuit demonstrated the flexibility of the standing requirement to provide the basis for a decision on the merits. Judge Gilman noted, ''the attorney-plaintiffs in the present case allege that the government is listening in on private person-to-person communications that are not open to the public. These are communications that any reasonable person would understand to be private. After analyzing the standing inquiry under a recent Supreme Court decision, Judge Gilman would have held that, ''[t]he attorney-plaintiffs have thus identified concrete harms to themselves flowing from their reasonable fear that the TSP will intercept privileged communications between themselves and their clients. On a matter of such importance, the Supreme Court could at least have granted certiorari and decided that standing was a legitimate basis on which to reject the decision on the merits.

On June 29, 2009, the Supreme Court refused to consider the case captioned In re Terrorist Attacks on September 11, 2001, in which the families of the 9/11 victims sought damages from Saudi Arabian princes personally, not as government actors, for financing Muslim charities knowing those funds would be used to carry out Al Qaeda jihads against the United States. The plaintiffs sought an exception to the sovereign immunity specified in the Foreign Sovereign Immunities Act of 1976. Plaintiffs' counsel had developed considerable evidence showing Saudi complicity. Had the case gone forward, discovery proceedings had the prospect of developing additional incriminating evidence.

My questions are:

(1) Do you agree with the testimony of Chief Justice Roberts at his confirmation hearing that the Court ''could contribute more to clarity and uniformity of the law by taking more cases?''

(2) If confirmed, would you favor reducing the number of justices required to grant petitions for certiorari in circuit split cases from four to three or even two?

(3) If confirmed, would you join the cert. pool or follow the practice of Justices Stevens and Alito in reviewing petitions for cert. with the assistance of your clerks?

(4) Would you have voted to grant certiorari in the case captioned In re Terrorist Attacks on September 11, 2001?

(5) Would you have voted to grant certiorari in A.C.L.U. v. N.S.A.—the case challenging the constitutionality of the Terrorist Surveillance Program?

Sincerely,

ARLEN SPECTER.

U.S. SENATE,
Washington, DC, June 15, 2009.

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

DEAR JUDGE SOTOMAYOR: When we concluded our meeting which lasted more than an hour, I commented that I would be writing to you on other subjects which I intended to cover at your hearing, and I appreciated your response that you would welcome such advance notice.

In the confirmation hearing for Chief Justice Roberts, there was considerable discussion about the adequacy of congressional fact finding to support legislation. This issue is again before the Supreme Court on the reauthorization of the Voting Rights Act where the legislation is challenged on the ground that there is an insufficient factual record. At our hearing, I would like your views on what legal standards you would apply in evaluating the adequacy of a Congressional record. In the 1968 case Maryland v. Wirtz, Justice Harlan's rationale would uphold an act of Congress where the legislature had a rational basis for reaching a regulatory scheme. In later cases, the Court has moved to a ''congruence and proportionality standard.''.

In advance of the hearing for Chief Justice Roberts by letter dated August 8, 2005, I wrote him in part: ''members of Congress are irate about the Court's denigrating and, really, disrespectful statements about Congress's competence. In U.S. v. Morrison, Chief Justice Rehnquist, speaking for five members of the Court, rejected Congressional findings because of 'our method of reasoning'. As the dissent noted, the Court's judgment is 'dependent upon a uniquely judicial competence' which implicitly criticizes a lesser quality of Congressional competence.'' In Morrison, there was an extensive record on evidence establishing the factual basis for enactment of the Violence Against Women legislation. In dissent, Justice Souter noted ''. . . the mountain of data assembled by Congress here showing the effects of violence against women on interstate commerce,'' and added: ''The record includes reports on gender bias from task forces in 21 states and we have the benefit of specific factual finding in eight separate reports issued by Congress and its committees over the long course leading to its enactment.''

In a subsequent letter to Chief Justice Roberts dated August 23, 2005, I wrote concerning Alabama v. Garrett where Title I of the Americans with Disabilities Act was based on task force 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 those findings, the Garrett Court concluded in a five to four decision: ''The legislative record of the Americans with Disabilities Act, however, simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled.''

In another five to four decision, the Court in Lane v. Tennessee concluded Title II of the Americans with Disabilities Act met the ''congruence and proportionality standard''. There, Justice Scalia dissented attacking the ''congruence and proportionality standard'' calling it a ''flabby test'' and an ''invitation to judicial arbitrariness and policy driven decision making'' adding: ''Worse still, it casts this Court in the role of Congress's taskmaster. Under it, the courts (and ultimately this Court) must regularly check Congress's homework to make sure that it has identified sufficient constitutional violations to make its remedy constitutional and proportional. As a general

matter, we are ill-advised to adopt or adhere to constitutional rules that bring us into conflict with a coequal branch of Government.''

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

In response to my questioning, Chief Justice Roberts said: ''And I appreciate very much the differences in institutional competence between the judiciary and the Congress when it comes to basic questions of fact finding, development of a record, and also the authority to make the policy decisions about how to act on the basis of a particular record. It's not just disagreement over a record. It's a question of whose job it is to make a determination based on the record'' . . . ''as a judge that you may be 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.''

The Supreme Court heard oral argument in Northwest Austin Municipal Utility District v. Holder on April 29, 2009 involving the sufficiency of the Congressional record on reauthorizing the Voting Rights Act. While too much cannot be read into comments by justices at oral argument, Chief Justice Roberts' statements suggested a very different attitude on deference to Congressional fact finding than he expressed at his confirmation hearing. Referring to the argument that ''. . . action under Section 5 has to be congruent and proportional to what it's trying to remedy,'' Justice Roberts said that: ''. . . one-twentieth of 1 percent of the submissions are not precleared. That, to me, suggests that they are sweeping far more broadly than they need to, to address the intentional discrimination under the Fifteenth Amendment.'' Chief Justice Roberts went on to say: ''Well, that's like the old—you know, it's the elephant whistle. You know, I have this whistle to keep away the elephants. You know, well, that's silly. Well, there are no elephants, so it must work. I mean if you have 99.98 percent of these being precleared, why isn't that reaching far too broadly.''

As a factual basis for the 2007 Voting Rights Act, Congress heard from dozens of witnesses over ten months in 21 different hearings. Applying the approach from Chief Justice Roberts' continuation hearing, that would appear to satisfy the ''congruence and proportionality standard''.

My questions are:

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

2. What are your views on Justice Scalia's characterization that the ''congruence and proportionality standard'' is a ''flabby test'' and ''an invitation to judicial arbitrariness and policy driven decision making''?

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

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

Sincerely,

ARLEN SPECTER.

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC, June 25, 2009

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

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

In an electronic era where the public obtains much, if not most, of its news and information from television, there is a strong case in my judgment that the Supreme Court of the United States should have its public proceedings televised just as the United States House of Representatives and United States Senate are televised.

It is well established that the Constitution guarantees access to judicial proceedings to the press and the public. In 1980, the Supreme Court relied on this tradition when it held in Richmond Newspapers, Inc. v. Virginia, that the right of a public trial belongs not just to the accused but to the public and the press as well. The Court noted that such openness has ''long been recognized as an indisputable attribute of an Anglo-American trial.''

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

In the same vein, Justice Felix Frankfurter said: ''If the news media would cover the Supreme Court as thoroughly as it did the World Series, it would be very important since 'public confidence in the judiciary hinges on the public perception of it'.''

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

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

Many of the justices have commented favorably on televising the Court. Justice Stevens, in an article by Henry Weinstein on July 14, 1989 said he supported cameras in the Supreme Court and told the annual Ninth Circuit Judicial Conference at about the same time that, ''In my view, it is worth a try.'' During Justice Breyer's confirmation hearing in 1994, he indicated support for televising Supreme Court proceedings. He has since equivocated, but noted that it would be a wonderful teasing device.

In December 2000, Marjorie Cohn's article noted Justice Ruth Bader Ginsburg's support of camera coverage so long at it was gavel to gavel. Justice Alito in his Senate confirmation hearing said that as a member of the Third Circuit Court of Appeals he voted to admit cameras; but added that it would be presumptive of him to take a final position before he had consulted with his colleagues, if confirmed, promising to keep an open mind. Justice Kennedy, according to a September 10, 1990 article by James Rubin, told a group of visiting high school students that cameras in the Court were ''inevitable.'' He has since equivocated, stating that if any of his colleagues raise serious objections, he would be reluctant to see the Court televised. Chief Justice Roberts said in his confirmation hearing that he would keep an open mind on the subject.

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

In the 109th and 110th Congresses, with several bipartisan co-sponsors, I introduced legislation providing for televising public Supreme Court proceedings. Both bills were reported favorably out of the Judiciary Committee, but were never taken up by the full Senate. Sensitive to separation of powers and recognizing the authority of the Supreme Court to invalidate any such legislation, it should be noted that there are analogous directives from Congress to the Court on procedural/administrative matters such as setting the first Monday of October as the beginning of the Court's term, requiring six sitting justices to form a quorum and establishing nine as the number of Supreme Court justices. In May 2007, Associate Professor Bruce Peabody of the Political Science Department of Fairleigh Dickinson wrote an article in the Journal on Legislation concluding the proposed legislation was constitutional.

There is obviously enormous public interest in Supreme Court proceedings. When the case of Bush v. Gore was argued, streets around the Supreme Court building were filled with television trucks, although no camera was admitted inside the chamber. Shortly before the argument, Senator Biden and I wrote to Chief Justice Rehnquist urging that the proceedings be televised and received a prompt reply in the negative; but the Supreme Court did break recede by releasing an audiotape when the proceedings were over and the Court has since intermittently made audiotapes available. Such audiotapes are obviously no substitute for television, but are a step in the right direction.

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

In 1990, the Federal Judicial Conference authorized a three-year pilot program allowing television coverage of civil proceedings in six federal district courts and two federal circuit courts. The program began in July 1991 and ran through December 31, 1994. The Federal Judicial Center monitored the program and issued a positive final evaluation. The Judicial Center concluded: ''Overall attitudes of judges toward electronic media coverage of civil proceedings were initially neutral and became more favorable after experience

under the pilot program.'' The Judicial Center also said: ''Judges and attorneys who had experience with electronic media coverage under the program generally reported observing small or no effects of camera presence on participants in the proceedings, courtroom decorum, or the administration of justice.''

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

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

Sincerely,

ARLEN SPECTER.

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

For many years, I have urged that the Supreme Court be televised. Legislation which I have introduced has twice been voted out of committee, and it is pending again. I think this is an especially good time to take up the issue. The Congress has the authority to establish when the Supreme Court sits—the first Monday in October; what it takes to have a quorum; how many members there will be on the Court—contrast that to what President Roosevelt tried to do to expand the number to 15. We have authority on the timetable, under the Speedy Trial Act, to set time limits on habeas corpus, and it is my legal judgment that we have the authority to call on the Supreme Court to be televised.

The Supreme Court has the final word on that subject, as they do on all others, and could invalidate legislation on the grounds of separation of power. But in light of what is happening and the demand for greater transparency, the televising of the House, the televising of the Senate; the fact that recently the highest court in Great Britain has admitted television cameras, it is time that should occur.

With the departure of Justice Souter, assuming the confirmation of Judge Sotomayor, the major opponent to televising the Court will no longer be there. Justice Souter made the famous statement that the television cameras would roll in over his dead body. When the nominees have been questioned repeatedly, they have always been very concerned, almost to a person, about being solicitous of the views of others. I concede that Justice Souter's strong views might have been a considerable obstacle. Justice Stevens has said it is worth a try. Justice Ginsburg said it would be fine if it were gavel to gavel. Other Justices have been televised. It is worth noting that the Federal Judicial Conference authorized a 3-year pilot program for six Federal district courts and two Federal circuit courts of appeals. The Judicial Center concluded:

Overall, attitudes of judges toward electronic media coverage of civil proceedings were initially neutral and became more favorable after experience under the pilot program. Judges and attorneys who had experience with electronic media coverage under the program generally reported observing small or no effects of camera presence or participants in the proceedings, courtroom decorum, or the administration of justice.

It is my suggestion it would be very healthy for our country to have a little sunshine come into the Supreme Court.

The PRESIDING OFFICER. The Senator's time has expired.

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

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

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

It may surprise people to know that it was not until 1981 that the Judiciary Committee proceedings on nominations were televised. Seeing what a great appearance it is today, and of how much value—this is really our only opportunity to speak to the Court, to speak to Chief Justice Roberts. Are you going back on your commitment that it is up to the Congress to decide facts on a congressional record? Why are you doing congruence and proportionality when no one understands it?

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

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

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

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

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

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

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

DEAR CHAIRMAN LEAHY AND RANKING MEMBER SESSIONS: As members of the Supreme Court Bar including those of us who have had the honor to represent the United States in the Court, as Solicitor General or members of the Solicitor General's professional staff—we respectfully support confirmation of Judge Sonia Sotomayor as an Associate Justice of the United States Supreme Court.

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

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

Sincerely,

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

Timothy S. Bishop, Mayer Brown LLP.

Richard P. Bress, Latham & Watkins LLP; Assistant to the Solicitor General, 1994–1997.

Louis R. Cohen, WilmerHale LLP; Deputy Solicitor General, 1986–88.

Drew S. Days III, Yale Law School; Solicitor General, 1993–96.

Walter Dellinger, O'Melveny & Myers LLP; Acting Solicitor General, 1996–97.

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

Bartow Farr, Farr & Taranto; Assistant to the Solicitor General, 1976–1978.

Meir Feder, Jones Day LLP.

Jonathan S. Franklin, Fulbright & Jaworski LLP.

David C. Frederick, Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC; Assistant to the Solicitor General, 1996–2001.

Andrew L. Frey, Mayer Brown LLP; Deputy Solicitor General, 1973–1986.

Charles Fried, Harvard Law School; Solicitor General, 1985–1989.

Kenneth S. Geller, Mayer Brown LLP; Deputy Solicitor General, 1979–1986.

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

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

Jeffrey T. Green, Sidley Austin LLP.

Caitlin J. Halligan, Weil, Gotshal & Manges LLP; New York Solicitor General, 2001–2007.

Pamela Harris, Georgetown University Law Center.

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

Pamela S. Karlan, Stanford Law School.

Michael K. Kellogg, Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC; Assistant to the Solicitor General, 1987–1989.

Douglas W. Kmiec, Pepperdine Law School.

Jeffrey A. Lamken, Baker Botts LLP; Assistant to the Solicitor General, 1997–2004.

Timothy K. Lewis, Schnader Harrison Segal & Lewis LLP; Judge, U.S. Court of Appeals for the Third Circuit, 1992–1999.

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

Robert A. Long, Covington & Burling LLP; Assistant to the Solicitor General, 1990–1993.

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

Patricia Millett, Akin Gump Strauss Hauer & Feld, LLP; Assistant to the Solicitor General, 1996–2007.

Randolph D. Moss, WilmerHale LLP.

Carter G. Phillips, Sidley Austin LLP; Assistant to the Solicitor General, 1981–1984.

Andrew J. Pincus, Mayer Brown LLP; Assistant to the Solicitor General, 1984–1988.

E. Joshua Rosenkranz, Orrick, Herrington & Sutcliffe LLP.

Charles A. Rothfeld, Mayer Brown LLP; Assistant to the Solicitor General, 1984–1988.

Gene C. Schaerr, Winston & Strawn LLP.

Joshua Schwartz, George Washington University Law School; Assistant to the Solicitor General, 1981–1985.

Virginia A. Seitz, Sidley Austin LLP.

Stephen M. Shapiro, Mayer Brown LLP; Deputy Solicitor General, 1981–1983.

Paul M. Smith, Jenner & Block LLP.

Jerold S. Solovy, Jenner & Block LLP.

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

Richard Taranto, Farr & Taranto; Assistant to the Solicitor General, 1986–1989.

Laurence H. Tribe, Harvard Law School.

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

Seth P. Waxman, WilmerHale LLP; Solicitor General, 1997–2001.

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

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

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

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

In Newark, NJ, there exists a venerated courthouse that bears my name. On the entrance to this courthouse there is an inscription that says:

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

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

Based on her history, my meeting with Judge Sotomayor, and her testimony before the Senate Judiciary Committee, I have no doubt that if confirmed, Judge Sotomayor will pursue the fair, wise, and unbiased dispensation of justice. That is why I believe we must confirm Judge Sotomayor's appointment without delay.

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

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

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

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

I grew up in Paterson, NJ, a hard-scrabble mill town. My family lacked resources but left an inheritance of values with no valuables. My parents were brought to America by my grandparents seeking an opportunity to be free and to make a living. We were taught that we were obligated, if we had the opportunity, to make sure we gave something back to the community in which we lived.

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

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

The truth is, Judge Sotomayor comes to this nomination process with more judicial experience than any Supreme Court nominee in a century. Think about it when the detractors try to find ways to sully her reputation. But before she became a judge and long before she appeared before the Judiciary Committee, where she demonstrated a remarkable command of the law and comfort with her knowledge, Judge Sotomayor carved out a reputation as a brilliant legal mind.

Yet, in one of the most scurrilous campaigns against a judicial nominee I have ever witnessed, the partisan attack mills begin to churn out piles of distortions and half-truths about Judge Sotomayor right after the President picked her to be his nominee. They had their gunsights settled on whoever it might be. But in this instance, we have one of the more distinguished scholars of the law to be able to be honored and to honor us at the same time. They tried to paint her as a radical. They even tried to paint her as a bully. They even tried to paint her as lacking intelligence. But there was absolutely no place in her judicial record to use anything serious against her. They went down the path of personal destruction; it has become a habit around here. They picked through her speeches. They zeroed in on one sentence here and another there to try to discredit her as nothing more than an affirmative-action choice.

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

If confirmed, she will be the only member of the Supreme Court who has previously worn a trial judge robe. The experience should not be overlooked.

Right now, Justice Souter, whom Judge Sotomayor would replace on the Court, is the only Justice with a trial court background.

Earlier this year, before Justice Souter had even announced his retirement, Chief Justice Roberts said that the Court's dearth of trial bench knowledge was, here I quote, ''an unfortunate circumstance'' and a ''flaw.'' Trial court judges handle civil and criminal cases and they see firsthand the impact of the law on ordinary Americans.

While on the trial bench, Judge Sotomayor handled 450 cases. Put directly, her experience is varied, multifaceted. What is more, she was appointed to the bench by both Democratic and Republican Presidents. Did they have bad judgment? I think not. I think not. Her record proved that. On any fair examination of her judicial record, including more than 400 published opinions as a Federal appellate court judge, it shows she is balanced in her approach, takes in all the facts, and follows precedent. Her legal reasoning has been consistently admired for applying the law fairly, and her opinions reveal nothing more than a strict adherence to the rule of law.

The American Bar Association has given her its highest rating, calling her ''well qualified.''

That is a distinction of significant importance.

This nomination is an incredibly important moment for our country. The Supreme Court makes decisions that determine the very contours of our country's future. It has a direct say on the rights or lack of rights that our children and grandchildren will have.

The Court decides whether big corporations have a stronger claim to justice than the little guy. The Court sets the table for government power, whether it goes unchecked or is responsible to the people. That is the domain. Critical. The rulings of the Court affect everyday people from New Jersey and everyday Americans.

The Framers of the Constitution created a system of checks and balances with three coequal branches. No one understands that better than Judge Sotomayor, who said during her confirmation hearings, ''The task of a judge is not to make law, it is to apply the law.''

After consideration, careful consideration, I conclude that I must vote ''yes'' on the confirmation of Judge Sotomayor. Judge Sotomayor has consistently shown judicial restraint and she will prove to be a strong and independent voice on that Court.

Like many Americans, I am sure I will not always agree with every decision she makes. But I have the comfort of knowing, of believing, that she will resolve legal questions with an open mind, will put the rule of law above any personal beliefs.

Her judicial record is unparalleled. Her professional and academic credentials are impeccable, and her story is inspiring. I watched and listened carefully to what she had to say during her confirmation hearings and when we met in person.

Her life has been one of breaking down barriers. I look forward to seeing her break one more. For those reasons I am honored to support Judge Sotomayor's breakthrough nomination.

I hope my colleagues will step up and vote their conscience and vote their beliefs and not inject any of the insignificant things we have seen discussed all over the place until this. I hope they will confirm her in an overwhelming majority, which is what she and the country deserve.

I yield the floor.

The PRESIDING OFFICER. The Senator from Connecticut is recognized.

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

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. DODD. I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. DODD. Mr. President, I rise in strong support of the nomination of Judge Sonia Sotomayor to be an Associate Justice of the U.S. Supreme Court.

I wish to thank PAT LEAHY, my seatmate here in the Senate, the Chairman of the Judiciary Committee, for his leadership. Let me also thank JEFF SESSIONS, who is the ranking Republican on the committee, and all members of the committee.

Those are pretty important jobs they have. Obviously they are considering nominees for the district court, the appellate court. But moments when you consider a nominee to the Supreme Court do not happen every day and are pretty significant moments.

I commend the committee for the speed with which they handled this. A lot of time these matters can get tied up for weeks on end, as we have seen in prior years. But I particularly commend PAT LEAHY, who does a great job chairing the Judiciary Committee, and all members for their work in this area.

Article II of the Constitution gives the Senate an awesome responsibility for providing advice and consent on judicial nominations. Those who we confirm are in a lifetime position as one of the nine men and women who will have the ability to literally shape every phase of American law and society.

Other than authorizing war or amending the U.S. Constitution, this body has no more important power than the one we exercise when we choose to confirm a nominee to sit on the U.S. Supreme Court.

Clearly, then, the Constitution demands that we subject nominees to very close scrutiny. But it does not tell us how. Each Senator must determine for himself or herself the appropriate criteria.

Over the years I have been here, I have had the privilege of listening, not as a member of the Judiciary Committee, but as a Member of this body, to debates, and there have been some tremendous ones over the years on various nominees. Most have been confirmed, some have not. But it is usually a robust debate, an important debate, and the scrutiny of these nominees is the highest any nominee for any office receives.

I have always relied on a three-part test.

The first test I apply, and have done this across the board over the years: Does the nominee have the technical competence and legal skills to do the job?

Second: Does the nominee have the proper character and temperament to serve on the highest Court of our land?

And, third: Does the nominee's record demonstrate respect for and adherence to the principle underlying our legal system—that is, equal justice for all?

I am convinced, without any doubt or hesitation, that Judge Sotomayor passes all three tests with distinction.

As to Judge Sotomayor's competence: Her résumé is that of experienced and accomplished jurist, one who will take her seat with more bench experience, I might point out, as I am sure others have, than any other Justice currently serving on the U.S. Supreme Court.

She graduated from Yale Law School in my home State of Connecticut, has been a prosecutor and private attorney, and spent 17 years on the Federal bench as both a district court judge and an appellate court judge.

As to Judge Sotomayor's character: Her long list of enthusiastic recommendations and her terrific performance before the Judiciary Committee revealed her to be a remarkable woman of deep integrity. Her incredible life story, rising from a housing project in the Bronx to the height of American jurisprudence, is truly an inspiration. And, of course, as someone who would be the first Latina and third woman to serve on the Court, Judge Sotomayor is an historic figure.

As to Judge Sotomayor's legal philosophy: Her writings and her thoughtful answers to difficult questions raised by our colleagues on the Judiciary Committee make it clear that Judge Sotomayor is committed to the principle of equality that forms the foundation of America's system of jurisprudence.

For Judge Sotomayor, as for any nominee, that is enough to earn my vote, regardless of what I think about any particular decision. I voted to confirm Chief Justice Roberts, much to the consternation of people in my own party and others who felt we should object because we did not agree with Judge Roberts' decisions in a number of cases. But I applied my three-part

test and Justice Roberts passed. I have applied that test over the years.

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

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

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

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

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

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

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

But it also is a moment of celebration as well, that we in this country respect diversity of our population. Many have said this is a remarkable story, and I appreciate the point they are trying to make. But it is not terribly remarkable, it is America. And in America that story is not remarkable. That is the great brilliance of our country. We have a President of the United States who was raised by a single mother under difficult circumstances. Bill Clinton, whom we are talking about today because of his heroic efforts to help release the two women who were held in North Korea, had an equally compelling story. Ronald Reagan had a compelling story.

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

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

She is a brilliant jurist. She is a remarkable American. And she is going to make a fantastic Justice on the U.S. Supreme Court. I could not be prouder, when the time arrives, to cast my vote in favor of this nominee.

The Judiciary Committee has received letters of support from several State and local bar associations, including the New York City Bar, the Women's Bar Association of the State of New York, and the Connecticut Hispanic Bar Association.

The Connecticut Hispanic Bar Association, which honored Judge Sotomayor in 1998 with its Achievement Award at its Annual Awards Dinner, wrote:

Since being appointed to the bench, Judge Sotomayor has compiled an exemplary and distinguished record. She has earned a stellar reputation as a defender of the rule of law and praise for her thoughtful and thorough written opinions.

I ask unanimous consent these letters be printed in the RECORD.

EXHIBIT 1

WOMEN'S BAR ASSOCIATION
OF THE STATE OF NEW YORK,
New York, NY, July 1, 2009.

Senator PATRICK J. LEAHY,
U.S. Senate, Russell Senate Office Building, Washington, DC.

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

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

Sincerely,

CYNTHIA SCHROCK SEELEY.

WOMEN'S BAR ASSOCIATION OF THE STATE OF NEW YORK

STATEMENT IN SUPPORT OF JUDGE SONIA SOTOMAYOR

June 30, 2009

INTRODUCTION

The Women's Bar Association of the State of New York (''WBASNY''), representing more than 3,800 attorneys, judges, and law students from across the State of New York, is honored and proud to support President Obama's nomination of Second Circuit Judge Sonia Sotomayor—a WBASNY member—to the United States Supreme Court. Judge Sotomayor's wealth of experience, keen intelligence, and moderate judicial philosophy make her extremely well-qualified to serve as an Associate Justice of the Supreme Court.

OUTSTANDING EXPERIENCE

Judge Sotomayor has superb educational credentials and more than sixteen years' experience as a federal judge. After graduating summa cum laude from Princeton University, she served as an editor of The Yale Law Journal while pursuing her law degree at Yale Law School. For the first five years of her career, Judge Sotomayor was an assistant district attorney for the County of New York, prosecuting such crimes as murder, robbery, child abuse, police misconduct, and fraud. New York District Attorney, Robert M. Morgenthau, calls her a ''fearless and effective prosecutor,'' who ''believes in the rule of law.'' After leaving the district attorney's office, Judge Sotomayor worked for a private law firm as a corporate litigator, where she handled complex commercial cases, both international and domestic. Her work focused on the areas of intellectual property, real estate, employment, banking, contracts, and agency law.

In October 1992, Judge Sotomayor was appointed to the U.S. District Court for the Southern District of New York by President Bush and became the youngest judge on the Court. In her six years as a district court judge, Judge Sotomayor presided over approximately 450 cases, earning a reputation as a ''sharp'' and ''fearless'' jurist. She was elevated to the U.S. Court of Appeals for the Second Circuit in 1998 by President Clinton, where she has participated in more than 3000 appeals and written approximately 400 published opinions. Her colleagues on the Second Circuit bench have praised her as ''a brilliant lawyer and a very sound and careful judge'' who is ''fair and decent in all her dealings.''

JUDICIAL PHILOSOPHY—A PASSION FOR MODERATION

Judge Sotomayor's judicial opinions faithfully adhere to applicable legal precedents, defer to legislative and regulatory decision-making, and carefully examine the facts of each case. Because she applies the same principled analysis to each matter she reviews, her conclusions do not fall into superficially predictable categories. Judge Sotomayor's application of the law hews closely to established law and precedents. Hers is a clear and consistent voice for moderation that demonstrates an appreciation for the far-reaching implications of appellate decisions. Essentially limiting the scope of her own power, Judge Sotomayor is a model of judicial restraint.

In dissenting from the Second Circuit's reversal of a district court decision that dismissed an age discrimination claim brought by a seventy-year-old clergyman, Judge Sotomayor wrote that the majority opinion ''violate[d] a cardinal principle of judicial restraint by reaching unnecessarily the question of [the Religious Freedom Restoration Act]'s constitutionality'' when the question

had not been presented to the Court.'' Similarly, upon reviewing an immigration asylum case that addressed China's restrictive family planning policies, Judge Sotomayor wrote that the majority opinion ''mark[ed] an extraordinary and unwarranted departure from our longstanding principles of deference and judicial restraint.''

Judge Sotomayor's awareness of the long-range effects of judicial decisions undergirds her passion for judicial restraint. Addressing an immigration asylum claim brought by three women who had been subjected to female genital mutilation in their native Guinea, Judge Sotomayor wrote that a colleague's analysis of continuing persecution claims was ''unnecessary . . . may never need to be decided, . . . [and] . . . could have far reaching implications in other types of cases.'' Reviewing a Fourth Amendment claim of illegal search in the context of a plaintiff's suit for money damages, Judge Sotomayor reminded her colleagues of the Supreme Court's articulation of the applicable law: ''[T]he Supreme Court has struck a careful balance between the vindication of constitutional rights and government officials' ability to exercise discretion in the performance of their duties. Our case law, in subtle but important ways, has altered this balance . . . In the vast majority of cases, including this one, the particular phrasing of the standard will not alter the outcome . . . [y]et the effect in future cases may not always be so benign. . . . It is time to . . . reconcile our . . . analysis with the Supreme Court's most recent, authoritative jurisprudence.''

DISTINCTIVE COMMON-SENSE PERSPECTIVE

Judge Sotomayor brings a distinctive common-sense perspective to the Court, and an appreciation of the differences among litigants' individual attributes and experiences. In 2007, then-Senator Obama might have been describing Judge Sotomayor when he said, ''Part of the role of the Court is . . . to protect people who may be vulnerable in the political process, the outsider, the minority, those who are vulnerable, those who don't have a lot of clout.'' While always adhering to established law and precedent, her opinions and decisions reveal a special sensitivity to challenges facing those whom WBASNY seeks to protect: women and other groups for whom the equal administration of justice has been elusive, such as immigrants, children, and the disabled.

Judge Sotomayor is eminently qualified for the Supreme Court without regard to gender. However, the members of WBASNY believe that her gender enhances her other stellar qualifications. Supreme Court Justice Ruth Bader Ginsburg recently stated that the Supreme Court needs another woman: ''[T]here are perceptions that we have because we are women. . . . Women belong in all places where decisions are being made. I don't say (the split) should be 50–50. It could be 60% men, 40% women, or the other way around. It shouldn't be that women are the exception.'' Similarly, Justice Sandra Day O'Connor stated, ''Despite the encouraging and wonderful gains and the changes for women which have occurred in my lifetime, there is still room to advance and to promote correction of the remaining deficiencies and imbalances.'' Addressing an audience of WBASNY members in 1999, Judge Sotomayor discussed the impact of her gender on her own jurisprudence: ''Each day on the bench, I learn something new about the judicial process and its meaning, about being a professional woman in a world that sometimes looks at us with suspicion. . . . I can and do . . . aspire to be greater than the sum total of my experiences but I accept my limitations. I willingly accept that we who judge must not deny the differences resulting from experience and gender but attempt . . . continuously to judge when those opinions, sympathies and prejudices are appropriate.''

Judge Sotomayor's decisions reflect an understanding of ''women's issues'' and how they are essentially human issues. Dissenting from an immigration decision, Judge Sotomayor wrote, ''The majority concedes that both spouses suffer a ''profound emotional loss'' as a result of a forced abortion or sterilization, but it never sufficiently explains why the harm of sterilization or abortion constitutes persecution only for the person who is forced to undergo such a procedure and not for that person's spouse as well. . . . [T]he majority's conclusion disregards the immutable fact that a desired pregnancy . . . necessarily requires both spouses to occur, and that the state's interference with this fundamental right ''may have subtle, far reaching and devastating effects'' for both husband and wife. The termination of a wanted pregnancy under a coercive population control program can only be devastating to any couple, akin, no doubt, to the killing of a child.''

In the same case, Judge Sotomayor addressed the Court's obligation to consider the differences between Chinese asylum seekers and U.S. citizens when making assumptions about parties' actions: ''We simply have no foundation on which to conclude that all couples have the financial resources to escape at the same time, and as the government stated at oral argument, it is not uncommon for Chinese couples to separate and have one spouse go abroad in order to amass the necessary resources to bring over the other spouse. I believe the majority here is opining on a subject—imbued with potentially significant cultural differences—with which it has no expertise or empirical evidence.''

Judge Sotomayor has also demonstrated an understanding of the particular difficulties women and girls face in our society. In a case alleging discriminatory failure to promote and retaliatory discharge, Justice Sotomayor held that the plaintiff had failed to establish that she was discriminated against on either basis.''' However, addressing the same employee's claim of sexual harassment, Judge Sotomayor held that testimony that the woman's supervisor repeatedly commented that ''women should be barefoot and pregnant . . . [and that he] would stand very close to women when talking to them and would 'look[ ] at [them] up and down in a way that's very uncomfortable'' was sufficient to entitle the plaintiff to a jury trial on the question of whether she had been subjected to a hostile work environment.

In a case involving strip searches of young girls admitted to juvenile detention centers, Judge Sotomayor wrote that the majority failed adequately to consider ''the privacy interests of emotionally troubled children,'' most of whom ''have been victims of abuse or neglect, and may be more vulnerable mentally and emotionally than other youths their age.'' She cautioned, ''We should be especially wary of strip searches of children, since youth 'is a time and condition of life when a person may be most susceptible to influence and to psychological damage.' ''

Dissenting from a dismissal of a claim that a school district had discriminated against an African American child in demoting him from first grade to kindergarten, Judge Sotomayor wrote, ''I consider the treatment this lone black child encountered . . . to have been . . . unprecedented and contrary to the school's established policies.'' She found it ''crucial'' that the student as ''the only black child in this classroom and one of the very few black students in the entire school.''

Addressing a claim brought by a father who was investigated by the Vermont Department of Social and Rehabilitation Services after his estranged wife accused him of sexually abusing his three-year-old son, Judge Sotomayor first noted that the U.S. Supreme Court has afforded constitutional protection to parents' interest in the care, custody and management of their children, then addressed the ''compelling governmental interest in the protection of minor children, particularly in circumstances where the protection is considered necessary as against the parents themselves.'' Carefully analyzing the actions of the social workers sued by the father, and the applicable law available to guide the actions of those social workers, Judge Sotomayor ultimately held that despite problems with the investigation, ''we conclude that defendants had a reasonable basis for their substantiation determination and that they therefore did not violate plaintiffs' constitutional rights.'' However, she also provided clear guidance to child protection workers: ''[F]rom this day forward, these and other case workers should understand that the decision to substantiate an allegation of child abuse on the basis of an investigation similar to but even slightly more flawed than this one will generate a real risk of legal sanction.''

Judge Sotomayor has also thoughtfully applied the law governing the rights of disabled persons. In holding that the court below had inaccurately formulated a jury charge in an employment discrimination case, Judge Sotomayor wrote, ''Taken as a whole, the charge suggests that an employer may offer any accommodation that does not cause an undue hardship, including reassignment to an inferior position, and that the plaintiff is required to accept . . . . The district court . . . erred.''

As a district judge for the Southern District of New York, Judge Sotomayor considered a claim brought by a woman with a learning disability who sought reasonable accommodations in taking the New York State Bar Examination. Judge Sotomayor conducted a total of twenty-five days of trial, reviewed thousands of pages of exhibits and briefs, and heard testimony from eight experts, finally concluding that the plaintiff was entitled to accommodations of her disability in taking the bar examination, and $7,500 in damages. Her detailed and respectful treatment of the parties and witnesses in a decision on a matter involving less than ten thousand dollars in damages is testament to her commitment to the fair and equal administration of justice to all who come before her.

In another case, Judge Sotomayor considered a district court's dismissal of the claim of a former employee who alleged that he was discharged after he suffered a disabling back injury. In a clear and erudite decision, Judge Sotomayor addressed the interplay of three different disability statutes, evaluated complex procedural issues, and analyzed the potential liability of a parent corporation and a sister corporation for employment discrimination. Her succinct conclusion reinstated the employee's claim against his employer, affirmed the dismissal of the claim against the sister corporation, and resolved the procedural issues.

CONCLUSION

Judge Sotomayor's jurisprudence defies easy categorization because each of her decisions is characterized by careful consideration of the law and the facts. Her clear and compelling analyses and her fair treatment of the parties epitomize the ideal qualities of a Supreme Court Justice. She will bring balance and perspective to the Court and will enhance the delivery of justice to all.

CONNECTICUT HISPANIC BAR ASSOCIATION,
Hartford, CT, July 10, 2009.

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

DEAR SENATOR LEAHY: The Connecticut Hispanic Bar Association (CHBA) writes on the eve of the commencement of the hearing on Judge Sonia Sotomayor's nomination to the United States Supreme Court to urge you and the other members of the United States Senate Judiciary Committee to treat Judge Sotomayor with the respect she deserves, examine her extensive record thoughtfully, and perform your constitutional duty to advise and consent to her nomination expeditiously and without obstruction.

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

Judge Sotomayor is a member and a longtime supporter of the CHBA. In recognition of her accomplishments, the CHBA honored Judge Sotomayor in 1998 with its Achievement Award at its Annual Awards Dinner.

Since being appointed to the bench, Judge Sotomayor has compiled an exemplary and distinguished record. She has earned a stellar reputation as a defender of the rule of law and praise for her thoughtful and thorough written opinions. Moreover, in her over 11 years of service with the United States Second Circuit Court of Appeals, she has participated in over 3,000 decisions and authored approximately 400 opinions on important issues of constitutional law, difficult procedural matters, and complex corporate and business issues.

Additionally, as you know, her personal story is similarly compelling. Judge Sotomayor grew up in a working-class family in New York City. She attended Princeton University on a scholarship where she graduated summa cum laude and was elected Phi Beta Kappa. She went on to earn her law degree at Yale Law School where she was an editor of the Yale Law Journal. During most of her career, Judge Sotomayor has chosen to serve the American public, first as a prosecutor in Manhattan and then as a federal judge.

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

Sincerely,

RENÉ ALEJANDRO ORTEGA,
President.

NEW YORK CITY BAR,
New York, NY, June 30, 2009.

Re evaluation of nomination Judge Sonia Sotomayor.

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

DEAR SENATOR LEAHY: The Association of the Bar of the City of New York reviewed and evaluated the nomination of Judge Sonia Sotomayor to be a Justice of the United State Supreme Court. The Association found Judge Sotomayor to be Highly Qualified for that position.

A report detailing our findings can be found at: http://www.nycbar.org/pdf/report/11693606_3.pdf

Sincerely,

PATRICIA M. HYNES,
President.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK FINDS JUDGE SONIA SOTOMAYOR HIGHLY QUALIFIED FOR U.S. SUPREME COURT

NEW YORK, June 30, 2009.—Patricia M. Hynes, President of The Association of the Bar of the City of New York, announced that the Association has concluded that Judge Sonia Sotomayor is Highly Qualified to be a Justice of the United States Supreme Court.

The Association found that Judge Sotomayor demonstrates a formidable intellect; a diligent and careful approach to legal decision-making; a commitment to unbiased, thoughtful administration of justice; a deep commitment to our judicial system and the counsel and litigants who appear before the court; and an abiding respect for the powers of the legislative and the executive branches of our government.

In conducting its evaluation, the Association reviewed and analyzed information from a variety of sources: Judge Sotomayor's written opinions from her seventeen years on the circuit court and district court; her speeches and articles over the last twenty-one years; her prior confirmation testimony; comments received from the Association's members and committees; press reports, blogs and commentaries; interviews with her judicial colleagues and numerous practitioners; and an interview with Judge Sotomayor.

The Association determined that Judge Sotomayor possesses, to an exceptionally high degree, all of the qualifications enumerated in the Guidelines established by the Association for considering nominees to the United States Supreme Court: (1) exceptional legal ability; (2) extensive experience and knowledge of the law; (3) outstanding intellectual and analytical talents; (4) maturity of judgment; (5) unquestionable integrity and independence; (6) a temperament reflecting a willingness to search for a fair resolution of each case before the court; (7) a sympathetic understanding of the Court's role under the Constitution in the protection of the personal rights of individuals; and (8) an appreciation for the historic role of the Supreme Court as the final arbiter of the meaning of the United States Constitution, including a sensitivity to the respective powers and reciprocal responsibilities of the Congress and Executive.

The Association has been evaluating judicial candidates for nearly 140 years in a nonpartisan manner based upon the nominees' competence and merit. Although the Association had evaluated a number of Supreme Court candidates over the course of its history, in 1987 it determined to evaluate every candidate nominated to the Supreme Court.

In 2007, the Executive Committee of the Association moved from a two-tier evaluation system in which candidates were found to be either ''qualified'' or ''not qualified'', to a three-tier evaluation system. The ratings and the criteria that accompany them are as follows:

''Qualified.'' The nominee possesses the legal ability, experience, knowledge of the law, intellectual and analytical skills, maturity of judgment, common sense, sensitivity, honesty, integrity, independence, and temperament appropriate to be a Justice of the United States Supreme Court. The nominee also respects precedent, the independence of the judiciary from the other branches of government, and individual rights and liberties.

''Highly Qualified.'' The nominee is qualified, to an exceptionally high degree, such that the nominee is likely to be an outstanding Justice of the United States Supreme Court. This rating should be regarded as an exception, and not the norm, for United States Supreme Court nominees.

''Not Qualified.'' The nominee fails to meet one or more of the qualifications above.

The present review is the first time the Association has utilized this three-tier system for a Supreme Court review.

The PRESIDING OFFICER. The Senator from Kansas is recognized.

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

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

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

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

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

During the Senate's debate on the nomination of Chief Justice John Roberts, then-Senator Obama stated:

> that while adherence to legal precedent and rules of statutory or constitutional construction will dispose of 95 percent of the cases that come before the Court, so that both a Scalia or Ginsburg will arrive at the same place most of the time on those 95 percent of the cases, what matters on the Supreme Court is those 5 percent of cases that are truly difficult. In those cases, adherence to precedent and the rules will only get you through the 25th mile of the marathon. That last mile can only be determined on the basis of one's deepest values, one's core concerns, one's broader perspectives on how the world works, and the depth and breadth of one's empathy.

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

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

While Judge Sotomayor stated during her confirmation hearing that ''it is not the heart that compels conclusions in cases, it is the law,'' I still have concerns regarding her ability to remain impartial. She has made some statements in Law Review articles and speeches that are of serious concern. I

am not convinced that Judge Sotomayor will set aside her personal judgments and views.

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

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

Turning to firearm rights, Judge Sotomayor joined an opinion ruling that the second amendment is not a fundamental right and, therefore, does not apply to State and local governments. It is likely that at some point the second amendment's application to States could be argued before the Supreme Court. That could come very quickly. I would certainly hope that should this matter be argued before the Supreme Court, Judge Sotomayor would recuse herself. During her hearing, she did not indicate whether she would recuse herself in any decision. That was not, however, the case during the nomination hearings of Judges Alito and Roberts.

I do not discount the fact that Judge Sotomayor is a very accomplished judge and has an extensive judicial record. However, some of her statements, writings, and rulings concern me. They indicate her personal judgments and views may impact her judicial decisions. We have a constitutional obligation to ensure that our judges are impartial and faithful to the law.

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

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

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

For these reasons and others cited by some of my colleagues, I oppose her nomination.

I yield the floor.

The PRESIDING OFFICER. The Senator from Wyoming.

Mr. BARRASSO. Mr. President, I have three criteria in evaluating an individual to fill a vacancy on the Supreme Court. First, select the best candidate for the job. Second, the Justice must be impartial and allow the facts and Constitution to speak. Third, a Justice's responsibility is to apply the law not to write it.

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

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

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

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

At her confirmation hearing, Judge Sotomayor stated that her judicial philosophy is ''fidelity to the law.'' This is in contrast to her extensive commentary over the past 15 years, a commentary that emphasizes personal experience over impartiality in a judge's decisionmaking. The contrast is especially troubling when a judge, as was the situation in the case of Ricci v. DeStaphano, fails to articulate the reasons for the decision.

In the Ricci case, the firefighters case, an exam was used as part of the promotion process. The exam consisted of a written test as well as an oral test. It was prepared by Industrial Organizational Solutions, a professional testing firm. The test measured individual knowledge, individual skills, and individual abilities related to the specific position being filled.

The highest scores on the written exam were achieved overwhelmingly by White firefighters. After the results were posted, the city of New Haven, CT, did not like the results and decided at that point to not use the exam. Several officers sued. They sued the city for taking this action.

Who were the officers who sued? One was Frank Ricci, the lead plaintiff. He was a career firefighter. He is dyslexic. To study, he hired and paid someone to read the recommended study books onto an audio tape so he could listen to the tapes. He studied up to 13 hours a day. He gave up a second job, time with his family.

Lt Ben Vargas was another officer who sued and testified at Judge Sotomayor's confirmation hearing. He also has a career as a firefighter. He grew up in Fair Haven, which is a neighborhood of New Haven. His father was a factory worker. His family spoke Spanish at home, making school a challenge for him. He is the father of three boys. One of the reasons he joined the lawsuit:

> I want them [my three sons] to have a fair shake, to get a job on their merits.

The district court ruled against the firefighters. Judge Sotomayor's court upheld the lower court ruling dismissing the case. Judge Sotomayor's court issued a one-paragraph opinion summarily dismissing the appeal. Her court failed to cite any precedents for this decision.

In June of 2009, the U.S. Supreme Court reversed Judge Sotomayor's opinion. The Supreme Court stated:

> The City made its employment decision because of race. The City rejected the test results solely because the higher scoring candidates were white.

The Supreme Court went on to say:

> The process was open and fair. The problem of course is that after the tests were completed, the raw racial results became the predominant rationale for the City's refusal to certify the results.

The Supreme Court's 34-page majority opinion, fully analyzing the facts and the legal issues, stands in stark contrast to the one-paragraph ruling by Judge Sotomayor. The lack of a detailed explanation by the judge's court on an issue that the Supreme Court said was not settled law is one I find troubling. More importantly, it raises doubt, fairly or unfairly, as to why Judge Sotomayor's court ruled the way it did. Through her own words, Judge Sotomayor's ability to completely disown personal beliefs and biases to reach a decision is in question.

I have additional concerns about the principles Judge Sotomayor will apply in deciding future cases involving important issues such as the second amendment. In a 2009 second amendment case decided by Judge Sotomayor's court, her court ruled that the second amendment did not apply to the States. The court cited Supreme Court cases from the 1800s as precedent. But Judge Sotomayor's court went further. They ruled that the second amendment right is not a fundamental right, thereby allowing

States and local authorities broad powers to deny individuals the right to bear arms. The court's ruling that the second amendment right is not a fundamental right can't be reconciled with recent decisions on other courts.

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

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

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

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

I yield the floor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

On the issue of whether the second amendment right to bear arms is a fundamental right, I am extremely concerned that a nominee for the highest Court in our land would make such an argument. I am very concerned that a nominee for the highest Court in our

Nation could so construe the second amendment right to bear arms. This disregard of history and legal precedent is, to me, a clear sign of a penchant toward judicial activism.

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

The county—

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

The county and its amici—

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

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

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

But we do not measure the protection the Constitution—

The Constitution—

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

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

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

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

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

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

My experiences will affect the facts I choose to see as a judge.

In another previous speech, she said:

Personal experiences affect the facts that judges choose to see.

This is simply shorthand for judicial activism and making policy rather than applying the law—exactly what the Ninth Circuit said courts were not to do. To defend against this very notion, however, justice is supposed to be blind. Indeed, Lady Justice is depicted with a blindfold. To judge by selectively choosing which facts to emphasize is akin to lowering the blindfold and taking a peek, thereby rejecting equal justice under the law. Those who are called to judge must adhere to the rule of law no matter what they personally think the law should be or what the outcome of a particular case should be.

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

My personal and professional experiences help me listen and understand, with the law always commanding the result in every case.

So we are left to wonder what has caused this contradiction, and whether she still believes that judges may choose to see the facts they want to see to get the result they want to get.

Also, I indicated I had a concern about foreign law. Another very puzzling contradiction in Judge Sotomayor's testimony involves the issue of judges looking to foreign law when deciding cases.

In her testimony before the Judiciary Committee, Judge Sotomayor said:

I have actually agreed with Justices 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.

However, in March of this year, in a speech to the ACLU of Puerto Rico, she did not seem to agree with Justices Scalia and Thomas when she said:

And that misunderstanding is unfortunately endorsed by some of our Supreme Court justices. Both Justice Scalia and Justice Thomas have written extensively criticizing the use of foreign and international law . . . in Supreme Court decisions. How can you ask a person to close their ears? Ideas have no boundaries. Ideas are what set our creative juices flowing. They permit us to think, and to suggest to anyone that you can outlaw the use of foreign or international law is a sentiment that's based on a fundamental misunderstanding. What you would be asking American judges to do is to close their minds to good ideas. . . .Unless American courts are more open to discussing the ideas raised by foreign cases, and by international cases, we are going to lose influence in the world.

Mr. President, I do not agree. In fact, that a nominee to the highest Court in our land would say that our Constitution and our statutes in America may be interpreted by reliance on foreign law is alarming.

The Supreme Court is charged with deciding the constitutionality of a law or interpreting it in the context of our American system of justice, not in accordance with selectively chosen foreign laws, which are numerous, contradictory, and often inconsistent with American jurisprudence. How else would a judge choose among these various foreign laws and precedents other than selecting those that align with that judge's personal opinion?

Mr. President, I have raised three issues today that have caused me very significant concern: Judge Sotomayor's interpretation of the second amendment right to keep and bear arms, clearly written after the Supreme Court of the United States has given the guidance necessary for us to resolve the issue; her penchant toward choosing facts, enabling a judge or Justice, in this case, to reach the outcomes they want regardless of the way the law should be applied and the outcome that the law would otherwise require; and her willingness to allow American jurisprudence to be determined at the highest levels in our land by reliance on foreign law, foreign cases, and foreign precedent.

For these reasons, I cannot support President Obama's nomination of Judge Sotomayor to the Supreme Court. When we get to the vote on it this week, I will cast a ''no'' vote. I recognize the likelihood is her nomination will proceed and be confirmed, but it is my keen hope and conviction the issues I have raised and that many others have raised today will be heard and that, regardless of the outcome of the vote in the Senate this week, Judge Sotomayor, if she is confirmed, and all Justices on the Supreme Court will continue to recognize the fundamental nature of our right to bear arms under the second amendment; that they will focus on the proper role of judges not in creating law but in interpreting the law, and that they will decline to rely on foreign law to interpret and to create American jurisprudence.

With that, I yield the floor and note the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

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

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

Mr. WICKER. Mr. President, I wish to begin by thanking the members of the Judiciary Committee for conducting a thorough, fair, and respectful confirmation hearing. Judge Sotomayor herself stated that the hearing was as gracious and fair as she could have hoped. I consider that statement to be a tribute to Senators Leahy, Sessions and the committee members and their staffs and I commend them.

Article II, section 2 of the Constitution states that the President shall nominate—by and with the advice and consent of the Senate—Judges of the Supreme Court. The constitutional duty of ''advice and consent'' given to the Senate is of profound importance, particularly when considering a lifetime appointment to the Nation's highest Court. In reviewing Judge Sotomayor's nomination, I have taken this obligation very seriously.

Following Judge Sotomayor's nomination by the President, I, as did nearly all my colleagues in this Chamber, had a private, one-on-one meeting with her. We had a very cordial conversation, one in which I found Judge Sotomayor to be likeable and gracious. I appreciated learning more about her background. Make no mistake, Judge Sotomayor has a great personal and professional story to tell. She is proud of it, and she certainly should be. But in the instance of a Supreme Court nominee, the constitutional duty of advice and consent given to the Senate is not about personalities, likeability or life stories. It is about judicial philosophy and adherence to impartiality and fidelity to the law.

After careful consideration of her record, I was left with a number of irreconcilable concerns. I am deeply troubled by what I see as Judge Sotomayor's aversion to impartiality. The judicial oath requires judges to:

> Administer justice without respect to persons, and do equal right to the poor and to the rich, and . . . faithfully and impartially discharge and perform all the duties incumbent upon [them] under the Constitution and laws of the United States.

To be clear, the oath requires judges to be impartial with respect to their social, moral and political views and to apply the law to the facts before them. In other words, provide equal justice under the law.

Yet Judge Sotomayor appears to believe in a legal system where decisions are based upon personal experiences and group preferences, not the letter of the law. Judge Sotomayor has said on repeated occasions that she:

> Willingly accept[s] that judge[s] must not deny the differences resulting from experience and heritage but attempt . . . continuously to judge when those opinions, sympathies, and prejudices are appropriate.

These are her own words. She has stated many times, during more than a decade, that her background and personal experiences will affect the facts she chooses to see as a judge. In our brief meeting in June, Judge Sotomayor stated this notion a slightly different way, by saying her Latina heritage caused her to ''listen a different way.'' I find these to be disconcerting statements which seem to conflict with the impartiality that I and an overwhelming majority of Americans believe is essential to our judicial system and even the very bedrock principles our Nation was founded upon.

In looking at her rulings, I noted that the Supreme Court has disagreed with Judge Sotomayor in 9 out of 10 cases it has reviewed and affirmed her in the remaining case by a narrow 5-to-4 margin. This record was demonstrated most recently in the Ricci case, where a majority of Justices of the Supreme Court rejected Judge Sotomayor's panel decision. This is a case in which a group of firefighters who had studied for months and passed a test were denied promotion because not enough minority firefighters had done as well. In a one-paragraph, unsigned, and unpublished cursory opinion, Judge Sotomayor summarily—almost casually—dismissed the claims of these firefighters who had worked hard for a promotion.

When discussing the qualifications he would look for in replacing Justice Souter, President Obama said:

> I view the quality of empathy, of understanding and identifying with people's homes and struggles as an essential ingredient for arriving at just decisions and outcomes.

Empathy is a great personal virtue, but there is a difference between empathy as a person and empathy as a judge. Judges should use the law and the law only, not their personal experiences or personal view or empathy. Personal biases and empathy have no place in reaching a just conclusion under the law. Ricci is an example of where Judge Sotomayor clearly failed this important test.

In addition, I am deeply concerned about Judge Sotomayor's decision in Maloney v. Cuomo, a second amendment case that could very easily be decided by the Supreme Court in the next year. In last year's Heller decision, the Supreme Court ruled that the second amendment guarantees an individual right to keep and bear arms. Yet, in Maloney, Judge Sotomayor relied on 19th century cases, arguably superseded after Heller, to summarily hold that the second amendment does not apply to the States. If Judge Sotomayor's decision is allowed to stand, the States will be able to place strict prohibitions on the ownership of guns and other arms. In refusing to confirm that the second amendment—a right clearly enumerated in the Bill of Rights—is a fundamental right that applies to all 50 States and, thus, to all Americans, Judge Sotomayor shows an alarming hostility to law-abiding gun owners across the country. That is a view that is certainly out of the mainstream in this Nation.

What is perhaps even more troubling is that Maloney is another example where Judge Sotomayor joined an unsigned, cursory panel decision. If she is confirmed to the Supreme Court, Judge Sotomayor will routinely hear cases raising fundamental constitutional issues such as Maloney. Those are the types of cases the Supreme Court hears. That is why issues of this nature make it to the Supreme Court. Yet Judge Sotomayor has a record of routinely dismissing such cases with difficult constitutional questions of exceptional importance to Americans with little or no analysis.

As an appeals court judge, Judge Sotomayor and her rulings are subject to a safety net: Her cases can be reviewed by the Supreme Court. In Ricci, the firefighters whose promotions were denied could appeal the decision and receive impartial justice. There is no backstop to the Supreme Court. Therefore, Judge Sotomayor's elevation to our Nation's highest Court takes on much more significance than her previous selection to the appeals court.

So let me be clear: I have tremendous respect for Judge Sotomayor's life story and professional accomplishments. I commend her for her achievements, and I wish her well in the future. However, I am not convinced she understands the proper role of the courts in our legal system. Her record and her pronouncements are those of someone who sees the court as a place to legislate and make policy. I am not convinced Judge Sotomayor truly believes in the bedrock of our judicial system, which is impartiality under the law. Therefore, I must withhold my consent and vote no on her confirmation.

I yield the floor.

The PRESIDING OFFICER. The Senator from Maine.

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

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

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

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

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

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

Senate ''complete and final discretion in whether to accept or approve a nomination.''

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

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

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

My decision to support this nominee does not reflect agreement with her on all of her rulings as a judge serving on the Second Circuit Court of Appeals. I disagreed, for example, with the perfunctory manner in which Judge Sotomayor has disposed of one case of constitutional consequence. Her panel's cursory analysis of the complex and novel questions about the 14th amendment's equal protection clause and title VII in the Ricci case—the case involving the New Haven firefighters, which has been called a reverse discrimination case—was as unfortunate as the decision itself. Indeed, in contrast to her panel's one-paragraph opinion, the Supreme Court, in this case, needed nearly 100 pages to debate and resolve just the statutory question presented—never mind the difficult constitutional questions that were set aside for another day.

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

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

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

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

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

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

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

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

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

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

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

Mr. SCHUMER. Mr. President, I rise today in wholehearted support of the historic nomination of Judge Sonia Sotomayor to become an Associate Justice of the U.S. Supreme Court.

I have two words to summarize my feelings about this nomination: It's time. It is time we have a nominee to the Supreme Court whose record has proven to be truly mainstream. It is time we have a nominee with practical experience in all levels of the justice system, whose upbringing in a Bronx housing project, whose experience as a prosecutor, litigator, and district court judge has enabled her to see, as she said in her own statement, ''the human consequences'' of her decisions. And it is time that we have a nominee who is Hispanic, a member of the fastest growing population in America. Finally, it is time that we have a frank discussion about what is preventing so many colleagues on the other side of the aisle from supporting Judge Sotomayor.

In short, this is the time, and it is time. It is time we have a moderate nominee. It is time we have someone with a great family history, an American family history. It is time we confirm the first Hispanic Justice to the U.S. Supreme Court.

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

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

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

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

No matter how we slice and dice these cases, we come up with the same conclusion about her moderation.

Within the category of criminal cases she decided, she ruled for the government 87 percent of the time in fourth amendment cases. This is important because the fourth amendment is an area where decisions are highly fact based and judges have discretion to decide when police have overstepped their bounds in executing searches and seizures. But she has not abused this discretion. In the overwhelming number of cases, she sides with the government, deciding each case carefully based on the facts before her.

Let's also look further at her immigration asylum cases. There she ruled for the government, against the petitioner for asylum, in 83 percent of the cases. That is also telling of her modulated approach to judging. Asylum law, as her colleague Judge Newman has pointed out, gives judges a great deal of discretion to decide who can be granted asylum to stay in the United States. Judge Sotomayor has not abused this discretion a jot.

Given her upbringing in a Hispanic neighborhood of the Bronx, we might expect that her personal background would make her more, to borrow a term, empathetic to an immigrant seeking asylum. But the cases show that any perceived empathy did not affect her results. In fact, her 83-percent record puts her right in the middle of judges in her circuit.

Even in the realm of sports cases, which are always contentious and closely watched, Judge Sotomayor has shown her evenhandedness. She ruled for the professional football league in an antitrust case brought by a player and against Major League Baseball when she ruled for the players and ended the baseball strike.

I can go on. Judge Sotomayor voted to deny the victims of TWA flight 800 crash a more generous recovery because that was ''clearly a legislative policy choice, which should not be made by the courts.'' If you have empathy, you certainly are going to decide with the victims. I met some of their families. She did not. The law did not allow her.

Judge Sotomayor ruled against an African-American couple who claimed they were bumped from a flight because of their race. Again, against a couple, a case called King, that said they were racially discriminated against. She did not think the facts merited their suit.

Judge Sotomayor rejected the claims of a disabled Black woman who said she was unfairly denied accommodations that were provided to White employees.

My Republican colleagues did not ask her about these cases. Instead, they looked at her speeches, not her cases, and decided that Judge Sotomayor believed it was the proper role of the court of appeals to make policy, and they condemned her roundly for this view.

Then they criticized her for not making policy in cases where they disagreed with the outcome. This occurred in three cases—in Ricci, which involved the New Haven firefighters, a second amendment case, and a case involving property rights. I guess from the point of view of my Republican colleagues, judicial policy making is a bad thing except when it is not.

In each of these three cases they criticized, where they criticized the short opinions which she did not even write for herself, they said the ruling showed she was unable or unwilling to grapple with major constitutional issues. But in each of these cases, Judge Sotomayor agreed with the other two members of her court that the second circuit or Supreme Court precedents squarely dictated the result. There was no need for a fuller explanation. In fact, second circuit rules forbade panels from revisiting squarely divided precedents. In other words, in these cases, she was avoiding making policies. The cases were governed by the precedents. She was bound. They were decided by settled law. It was just the fact my friends across the aisle do not like what the settled law was. So we are getting awfully close to a double standard here.

In Ricci, they wanted her to overturn the second circuit discrimination law. And in the gun case, they wanted her to ignore a 100-year-old precedent that governs how the second amendment is applied to the States.

In the property rights case, they wanted her to ignore the law that governed the statute of limitations.

My colleagues asked Judge Sotomayor about an EPA case. In that case, she ruled the EPA had mistakenly considered a certain factor in deciding whether a company had used the ''best technology available'' to clean water. Even though she gave deference to EPA's interpretation of the law, Judge Sotomayor ruled against the government.

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

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

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

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

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

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

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

But Judge Sotomayor, again, in addition to her full and transparent record, proved in her answers that she is not a stealth candidate. On abortion and the holding of Roe, when asked by Senator FRANKEN: ''Do you believe that this right to privacy includes the right to have an abortion?'' Judge Sotomayor answered clearly and to the point: ''The Court has said in many cases—and as I think has been repeated in the Court's jurisprudence in Casey—that there is a right to privacy that women have with respect to the determination of their pregnancies in certain situations.'' Clear. To the point.

When then-Judge Roberts was asked this question, he replied:

> Well, I feel I need to stay away from a discussion of particular cases. I'm happy to discuss the principles of stare decisis, and the Court has developed a series of precedents on precedent, if you will. They have a number of cases talking about how this principle should be applied.

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

On property rights, when asked by Senator GRASSLEY about her understanding of the Court's holding in Kelo, Judge Sotomayor explained fully her understanding of the Court's holding, and there is a quote. When asked about his view of Kelo, then-Judge Alito declined to discuss the case. There are many more examples of how Judge Sotomayor answered questions about existing cases in much fuller detail

than the past two nominees and certainly about the key cases—property rights and abortion—which we debate, as we should, in this body.

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

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

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

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

I don't agree with this approach to analyzing her record. Nonetheless, I agree with my colleague, Senator GRAHAM—who is voting for her after engaging in arguably the most searching examination of her speeches—that we are entitled to know who we are getting as a nation. He is absolutely right. Certainly it is appropriate to look at her speeches, but let us give them proper weight and proper context.

And let us be clear about another thing: Judge Sotomayor is no Robert Bork. She is no Judge Roberts or Judge Alito. She has not made comments outside the courtroom that indicate her strong views on abortion or her views that the power of Congress must be severely curtailed or that a substantial body of first amendment jurisprudence should be overturned. Again, if the standard is extrajudicial statements, my colleagues seem to be using a different standard for Judge Sotomayor than the standard they used for judges such as Roberts, Alito, and Thomas.

But let me give my friends some reassurance. The proof is in the pudding. Judge Sotomayor is and always has been a moderate judge. Similar to many judges across the country, she has remained neutral in race cases, in spite of her race; in gender cases in spite of her gender; in first amendment cases in spite of racist and repugnant speakers. The scales of justice in her courtroom are not weighted.

Let me now conclude by discussing the precedent set by past nominations—more broadly, where I think my colleagues are headed and where we ought to be going instead. In 2001, I wrote an op-ed arguing that we need to take ideology into account when evaluating judges. I wrote that op-ed because I was astounded by the nominees President Bush's administration was sending to the Senate.

The conservative movement had captured Congress and the White House for the first time. But even though conservatives—strong conservatives, hard-right conservatives—controlled these two branches, the hard right was not able to move the country as far to the right as they had hoped. So they turned to the judiciary. They couldn't do it with the President, even though they had elected him. They couldn't do it with the House or the Senate, even though, again, the hard right had predominated. So they turned to the one unelected branch—the judiciary—to advance the agenda they weren't able to move through the democratically elected branches of government.

The Bush administration complied with the hard right and nominated judges who were so far out of the mainstream it would have been irresponsible for us to confirm them blindly. So we asked them questions about their judicial philosophy and their ideology, and our questions were not met with thorough answers or with a demonstrated record of mainstream judging but with banalities or even obstinate silence.

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

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

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

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

We must and will continue to fight for mainstream judges.

I have heard some say this fight isn't about Judge Sotomayor, given her proven record of mainstream judging and fidelity to the law. These commentators argue that Republicans are laying down their marker for President Obama's next nominee. I don't know who that nominee will be, but I am confident it will be a qualified candidate who is significantly more in the mainstream, if you take the mainstream being the actual place where the middle of America is—more in the mainstream than Justices Thomas or Scalia or Roberts or Alito or some of the nominations we considered under the Bush administration, such as Miguel Estrada or Janice Rogers Brown or Charles Pickering. I am confident the next nominee will be consistent with the nominees President Obama has been sending us—moderate, mainstream, and rule of law.

At one point, the Republican Party argued for precedent and for strict construction because they wanted to push back on certain new precedents they thought were beyond the Constitution—precedents such as Roe and Miranda. But things have changed. Americans have accepted Roe and Americans have accepted Miranda. Now my colleagues want to change the law, so they have changed their methodology without changing the nomenclature. They still call judges activist, even though they want to stick to established law. I think it is a shame.

It is a shame that some of my colleagues can't put aside their own personal ideology and vote for a judge whom they might not have chosen but who is unquestionably mainstream. It is a shame we will not have the kind of nearly unanimous vote in favor of this nominee that judges on both sides of the aisle—from Justice Ginsburg to Justice Scalia—have received in the past. I think it is a shame the debate about this historic nomination has

been distilled to disputes over snippets of speeches.

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

In conclusion, as John Adams said: ''We are a Nation of laws, not of men.'' But if the law were just words on parchment, it would never evolve to reflect our own changing society. ''Separate but equal'' would never have been understood to be ''inherently unequal.'' Equality for women would never have been viewed as guaranteed under the Constitution's promise of equal protection under law. In fact, the second amendment might never have been viewed to extend beyond the right to possess a front-loading musket to defend, in a militia, against an occupying force.

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

I yield the floor.

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

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

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

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

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

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

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

Nor will a nominee generally be very specific about how he or she may rule on matters that could come before the Court.

So it is important to examine anything else in a nominee's background that could shed light on how the nominee really thinks about important issues. One source of information is a nominee's extrajudicial statements in speeches and writings. In these contexts, the nominee is not constrained by facts of particular cases, by precedents or the fear of appellate reprimand, but can say what he or she really thinks.

Before Judge Sotomayor's hearing, I studied not only her cases, but her extrajudicial writings, and a fraction of her speeches. I say a ''fraction'' because Judge Sotomayor was either unable or unwilling to provide a draft, video, or a sufficient topic description for more than 100 of the speeches that she identified for the Judiciary Committee.

But even with less than a full complement of her relevant materials, I saw a number of things in Judge Sotomayor's decisions and speeches that caused me to have great concern about her ability to put aside her biases and to impartially render a decision to the parties before her.

As I will explain, Judge Sotomayor's appearance before the Judiciary Committee did little to dispel my concerns. In many cases, her testimony exacerbated them.

I was and remain particularly troubled by Judge Sotomayor's speeches about gender and ethnicity. The speech that has garnered the most attention is, of course, her ''wise Latina woman'' speech, which was published in the Berkeley La Raza Law Journal. As it turns out, Judge Sotomayor delivered this same speech, with only minor variations, on multiple occasions over the course of several years.

In reading these speeches in their entirety, it is inescapable that her purpose was not simply ''to inspire young Hispanic, Latino students, and lawyers,'' as she asserted at her hearing. In fact, as she said at the beginning of several of these speeches, her purpose was to talk about ''my Latina identity, where it came from, and the influence I perceive it has on my presence on the bench.''

Judge Sotomayor reemphasized this theme later in her speeches. She 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.''

She continued: ''[N]o one can or should ignore pondering what it will mean or not mean in the development of the law.'' In these speeches, she cited statements of some who had a different point of view than hers. Then she came back to her overriding theme: ''I accept the proposition that, as Judge Resnik describes it, 'to judge is an exercise of power,' and because as . . . Professor Martha Minnow of Harvard Law School states 'there is no objective stance but only a series of perspectives—no neutrality, no escape from choice in judging. . . .'''

I believe judges must seek objective truth as found in the law of the case. I do not believe in judicial relativism, so I find her comment alarming. The essence of judging is neutrality. That is why Lady Justice is depicted with a blindfold. And that is why Federal judges are required to swear an oath to ''administer justice without respect to persons, and do equal right to the poor and to the rich'' and to ''faithfully and impartially discharge all of the duties incumbent on [her].'' That oath makes no allowance for a judge to choose the result based on his or her ''perspective.'' The oath requires exactly the opposite: a dispassionate adherence to impartiality and the rule of law.

Now, back to Judge Sotomayor's speech. After agreeing with law professors who say that there is no objective stance, only a series of perspectives, no neutrality, Judge Sotomayor then said, ''I further accept that our experiences as women and people of color will in some way affect our decisions. . . . What Professor Minnow's quote means to me is not all women or people of color, in all or some circumstances, or me in any particular case or circumstance, but enough women and people of color in enough cases will make a difference in the process of judging. Judge Sotomayor is talking here about different outcomes in cases based upon who the judge is. She goes on to substantiate her case by citing an outcome in a State court father's visitation case and two studies, which tended to demonstrate differences between women and men in making decisions in cases. She said, ''As recognized by legal scholars, whatever the reason, not one woman or person of color in any one

position, but as a group, we will have an effect on the development of law and on judging.'' She continued: ''our gender and national origins make and will make a difference in our judging.''

To recap: Judge Sotomayor announced her topic, developed the theme, refuted the arguments of those with a different view, and substantiated her point of view with some evidence. Up to this point, she had made the case that gender or ethnicity will have an impact on the way judges decide cases. She had not rendered a judgment about whether this influence would provide better outcomes from her perspective.

This is the context of the ''wise Latina'' comment. Judge Sotomayor quoted Justice O'Connor who said that a wise old woman and a wise old man would reach the same decisions. But, Judge Sotomayor said, ''I am also not sure I agree with that statement. . . . I would hope that a wise Latina woman with the richness of her experiences would, more often than not, reach a better conclusion than a white male who hasn't lived that life.''

Judge Sotomayor concluded, in other words, that, not only will gender and ethnicity make a difference, but that they should make a difference. She then acknowledged that some White male judges had made some good decisions in the past, but seemed to complain that it took a lot of time and effort, something that not all people are willing to give, and so on.

Judge Sotomayor concluded by saying, ''In short, I accept the proposition that a difference will be made by the presence of women and people of color on the bench and that my experiences will affect the facts that I choose to see as a judge.'' Judge Sotomayor added, ''I simply do not know exactly what that difference will be in my judging. But I accept there will be some based on gender and my Latina heritage.''

Even if the point of her speech was just to inspire young people or even to explore the question of whether judges could be influenced by their background, she should not have simply ''accepted'' that result. To conclude that judges could not avoid being so influenced and then not admonish that, of course, a judge must try his or her best to avoid that result, to try to set aside any bias and prejudice, was to abdicate her role as a judge in teaching her audiences.

Never, not once, in her speech, did she say that the biases she discussed were harmful to impartial judging and needed to be set aside. Instead, Judge Sotomayor's speeches seem to be celebrating these differences, these biases. The clear and unmistakable inference in her speeches is that she embraces the fact that minorities and women will reach a different outcome, indeed, a ''better'' outcome.

Before the Judiciary Committee, Judge Sotomayor refused to recant the speeches or acknowledge this egregious omission. But she did try desperately to convince committee members that her words conveyed a message other than the obvious one. Indeed, according to Judge Sotomayor, her words conveyed the exact opposite meaning. She said: ''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.'' I've read the speeches in their entirety many times, and have verified that that is most certainly not what she was ''talking about.''

Judge Sotomayor's recharacterization of her speeches before the Judiciary Committee sounds like the objective, neutral approach that her speech explicitly dismissed. It is hard to understand how the same person could honestly make both statements. They are irreconcilably antithetical.

Further examples abound, but for the sake of time I will offer only one more. When Judge Sotomayor tried to explain her disagreement with Justice O'Connor's statement about how a wise old man and a wise old woman would reach the same conclusions, she said: ''The words that I used, I used agreeing with the sentiment that Justice Sandra Day O'Connor was attempting to convey.'' That's not true. Her explanation strains credulity. Both as to whether she really believes judges should try to set aside biases, including those based on race and gender, and the basic element of judicial temperament, forthrightness and fidelity to the oath of truth she took before the Judiciary Committee, I conclude she did not carry the very low burden of proof.

I also would like to discuss another of Judge Sotomayor's speeches, an address to the Puerto Rican ACLU on the subject of foreign law. But first, I should take a moment to explain why this issue is so critical.

There is a growing school of thought among some academics, and even some judges, that foreign law and practices should be used as an aid to understanding and interpreting our own laws and Constitution. This is problematic for two main reasons.

First, as Chief Justice John Roberts pointed out during his confirmation hearing, the consideration of foreign law by American judges is contrary to principles of democracy. Foreign judges and legislators are not accountable to the American electorate. Using foreign law, even as a thumb on the scale, to help decide key constitutional issues devalues Americans' expressions through the democratic process. It is simply irrelevant, except in a very few specific situations.

Second, even if the use of foreign law were not inconsistent with our constitutional system, its use would free judges to enact their personal preferences under the cloak of legitimacy.

Against this backdrop, Judge Sotomayor delivered her April 28, 2009, speech entitled, ''How Federal Judges Look to International and Foreign Law Under Article VI of the U.S. Constitution.'' From that speech, we begin to see how foreign law could shape Judge Sotomayor's jurisprudence in the future. Her comments were not casual observations, but directed to this specific topic, and, presumably says what she means.

After conceding that judges ''don't use foreign or international law'' as binding precedent in a case, she nonetheless maintained that foreign law could, and should, be ''considered.'' In Judge Sotomayor's view, foreign law is a source for ''good ideas'' that can ''set our [i.e., judges'] creative juices flowing.'' Putting aside for a moment the fact that deciding an antitrust case, or a commerce clause dispute, or an Indian law issue, or an establishment of religion case does not require ''creative juices,'' Judge Sotomayor's suggestion that judges consider foreign law would interfere with specific rules of construction or application of precedent.

Judge Sotomayor went on in this same ACLU speech to distance herself from two sitting justices who are critical of judges considering foreign law and align her views with those of Justice Ginsburg who recently endorsed the use of foreign law at a symposium at the Moritz College of Law at Ohio State University.

Specifically, Judge Sotomayor stated that ''[t]he nature of the criticism comes from . . . the misunderstanding of the American use of that concept of using foreign law. And that misunderstanding is unfortunately endorsed by some of our own Supreme Court justices. Both Justice Scalia and Justice Thomas have written extensive criticisms of the use of foreign and international law in Supreme Court decisions. . . .''

She continues: ''I share more the ideas of Justice Ginsburg in thinking . . . that unless American courts are more open to discussing the ideas raised by foreign cases, and by international cases, that we are going to lose influence in the world. Justice Ginsburg has explained very recently . . . that foreign opinions . . . can add to the story of knowledge relevant to the solution of a question. And she's right.

Judge Sotomayor's rationale for judges looking to foreign law—so that the United States does not ''lose influence in he world''—is astonishing. Not only is such an approach irrelevant to the role of judges, vis-a-vis the other branches of government, and arguably usually irrelevant even for the President and Congress as a yardstick with which to measure U.S. domestic and foreign policy, it is totally irrelevant to the considerations for deciding any particular dispute between two parties.

In response to questions from committee members concerned about these kinds of statements, Judge Sotomayor again tried to drastically recharacterize her prior statements. She testified that her speech was quite clear

that ''foreign law cannot be used as a holding or a precedent or to bind or to influence the outcome of a legal decision interpreting the Constitution or American law that doesn't direct you to that law.'' But in April of this year, Judge Sotomayor said, ''ideas are ideas, and whatever their source, whether they come from foreign law or international law, or a trial judge in Alabama, or a circuit court in California, or any other place, if the idea has validity, if it persuades you, then you are going to adopt its reasoning.'' These two statements cannot be squared, even though they occurred just 2½ months apart.

Later in her hearing, Judge Sotomayor gave the following testimony: ''I will not use foreign law to interpret the Constitution or American statues. I will use American law, constitutional law to interpret those laws except in the situations where American law directs the court.'' While this kind of declarative statement would normally provide some measure of comfort, it is belied by words Judge Sotomayor uttered less than 3 months ago, that judges were ''commanded'' to look to ''persuasive'' sources, including foreign law, in interpreting our own law. And it is even inconsistent with an exchange Judge Sotomayor had with Senator SCHUMER earlier in the hearing, in which she agreed that foreign law could be used for the same purposes as traditional interpretive tools, such as dictionaries.

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

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

Specifically, as I just noted, in her hearing before the Senate Judiciary Committee, Judge Sotomayor testified under oath that ''foreign law cannot be used as a holding or a precedent or to bind or to influence the outcome of a legal decision interpreting the Constitution or American law that doesn't direct you to that law.'' In written answers submitted for the record she wrote, ''In my view, American courts should not 'use' foreign law, in the sense of relying on decisions of foreign courts as binding or controlling precedent, except when American law requires a court to do so. In limited circumstances, decisions of foreign courts can be a source of ideas, just as law review articles or treatises can be sources of ideas. Reading the decisions of foreign courts for ideas, however, does not constitute 'using' those decisions to decide cases.''

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

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

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

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

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

But Judge Sotomayor's court instead disposed of the case in an unsigned and unpublished opinion that contained zero—and I do mean zero—analysis. This is confounding given Judge Sotomayor's Judiciary Committee testimony, in which she said: ''I believe my 17-year record on the two courts would show that in every case that I render, I first decide what the law requires under the facts before me, and that what I do is explained to litigants why the law requires a result. And whether their position is sympathetic or not, I explain why the result is commanded by law.''

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

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

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

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

During the hearing, I pressed Judge Sotomayor to identify those controlling Supreme Court and Second Circuit precedents that allegedly dictated the outcome in Ricci. Rather than answer the question, she dissembled and ran out the clock. Perhaps that was because, as Judge Cabranes's dissent stated, the ''core issue presented by this case—the scope of a municipal employer's authority to disregard examination results based solely on the race of the successful applicants—is not addressed by any precedent of the Supreme Court or our Circuit.'' But even

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

The truth is that we will never know the reasons that guided the outcome of the case. But we know, at the very least, that Judge Sotomayor exercised poor judgment in dismissing serious claims in an unsettled area of the law without engaging in an analysis of the issues. As Judge Cabranes wrote in dissenting from the denial of rehearing en banc: ''The use of per curiam opinions of this sort, adopting in full the reasoning of a district court without further elaboration, is normally reserved for cases that present straight-forward questions that do not require explanation or elaboration by the Court of Appeals. The questions raised in this appeal cannot be classified as such, as they are indisputably complex and far from well-settled.''

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

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

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

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

What are the legal implications of this holding? State regulations limiting or prohibiting the ownership and use of firearms would be subject only to ''rational basis'' review. As Sandy Froman, a respected lawyer and former president of the National Rifle Association, said in her witness testimony, this is a ''very, very low threshold'' that can easily be met by a State or city that wishes to prohibit all gun ownership, even in the home. Thus, if Judge Sotomayor's decision were allowed to stand as precedent, then states will, ironically, be able to do what the Federal District of Columbia cannot—place a de facto prohibition on the ownership of guns and other arms.

Some have suggested that Judge Sotomayor's decision is not cause for alarm. They say that she was simply following precedent and that the Maloney case is not necessarily indicative of what she would do if confirmed to the Supreme Court. And they point to a recent decision by the Seventh Circuit, which similarly refused to apply the second amendment to State regulations. Apart from the fact that her ruling is now binding in the States covered by the Second Circuit, there is a critical difference between Judge Sotomayor's decision and that of the Seventh Circuit.

While the judges on the Seventh Circuit explicitly declined to decide what will be the key issue before the Supreme Court—whether the Second Amendment's right to bear arms is, in legal parlance, ''fundamental,'' and therefore enforceable against states as well as the Federal Government—Judge Sotomayor's perfunctory decision did not leave this question open. Her panel specifically concluded, without any explanation, that the right to bear arms is in fact not a ''fundamental'' right a conclusion that, to the best of my knowledge, no other court has ever reached—and that, as Sandy Froman noted, ''would rob the Second Amendment of any real meaning and would trample on the individual rights of America's nearly 90 million gun owners.'' Indeed, Judge Sotomayor's assessment stands in stark contrast to the Supreme Court's own opinion in Heller, which not once but twice refers to the right to bear arms as ''fundamental.'' It is hard, if not impossible, to square these facts with Judge Sotomayor's repeated assertions, in sworn testimony before the Judiciary Committee, that she was just following precedent.

Judge Sotomayor's opinion in Maloney is extraordinary both for its lack of serious analysis and for reaching an unprecedented conclusion that was wholly unnecessary. She could have as easily chosen the path taken by the seventh circuit, and reserved for the Supreme Court the opportunity to decide in the first instance whether the right to bear arms is ''fundamental.'' Or, like the ninth circuit, she could have undertaken a thorough analysis of the issue and determined that the right is, indeed, fundamental. She did neither.

As Sandy Froman stated:

> When faced with the most important question remaining after Heller, whether the right to keep and bear arms is fundamental and applies to the states, Judge Sotomayor dismissed the issue with no substantive analysis. . . . By failing to conduct a proper Fourteenth Amendment analysis, the Maloney court evaded its judicial responsibilities, offered no guidance to lower courts and provided no assistance in framing the issue for resolution by the Supreme Court. Whenever an appellate judge fails to provide supporting analysis for their conclusion or address serious constitutional issues presented by the case, it is legitimate to ask whether the judge reached that conclusion by application of the Constitution and statutes or based on a political or social agenda.

I agree. I did not expect or even want Judge Sotomayor to precommit to a particular reading of the second amendment. The Judiciary Committee did, however, have a right to receive from her an explanation of the Maloney decision. At the very least she could have been more forthcoming in response to questions regarding recusal, but she would not even commit to recusing herself from the Supreme Court's consideration of her own Maloney decision if it were taken up as part of a consolidated appeal.

I think it is fair to say that Judge Sotomayor's testimony about the second amendment raised more questions than it answered. The issue of incorporation is bound to come before the Supreme Court. Those of us who support the right of the people to keep and bear arms should be very concerned about the position she has already taken and the fact that she has clearly reserved the option of reviewing the case on the Court she could be confirmed to, particularly on a matter she has already decided.

As we have seen, Judge Sotomayor's testimony about her previous speeches and some of her decisions is difficult, if not impossible, to reconcile with her record. Similarly, her testimony about the extent of her role with the Puerto Rican Legal Defense and Education Fund is in tension with the evidence we have.

At her hearing, Judge Sotomayor tried to downplay her role at PRLDEF. She said:

> 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.

In emphasizing her role as a longtime board member, Judge Sotomayor deflected attention from her service in litigation-focused positions, such as her 8 years on the litigation committee and the 4 years she served as that committee's chairperson. As anyone who is familiar with advocacy and public interest groups can attest, it is inconceivable that the chair of an organization's litigation committee would not have a significant role in shaping the organization's legal strategy.

Moreover, Judge Sotomayor's testimony that ''it was not my practice and not that I know of, of any board member'' to review briefs, is undermined by

PRLDEF's own meeting minutes. For example, on October 8, 1978:

[Litigation Committee] Chairperson Sotomayor summarized the activities of the Committee over the last several months which included the review of the litigation efforts of the past and present. . . .

The New York Times has detailed her active involvement, as recounted by former PRLDEF colleagues, who have described Judge Sotomayor as a ''top policy maker'' who ''played an active role as the defense fund staked out aggressive stances.'' According to these reports, she ''frequently met with the legal staff to review the status of cases'' and ''was an involved and ardent supporter of their various legal efforts during her time with the group.''

What were the litigation positions advanced by PRLDEF during Judge Sotomayor's tenure there? Well, it argued in court briefs that restrictions on abortion are analogous to slavery. And it repeatedly represented plaintiffs challenging the validity of employment and promotional tests—tests similar to the one at issue in Ricci.

I want to return to a question I raised in my opening statement of Judge Sotomayor's hearing: 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 the law fairly and impartially to resolve disputes between parties.

This principle is universally recognized and shared by judges across the wide 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 remarks about a ''wise Latina woman'' making better decisions than other judges. Judge Paez described the instructions that he gives to jurors who are 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 both for jurors and judges.

Before the hearing, my biggest question about Judge Sotomayor was whether she could abide by that standard. We spent 3 days asking her questions, trying to understand what she meant in some of her controversial speeches and what drove her to questionable conclusions in cases such as Ricci and Maloney.

Judge Sotomayor did not dispel my concerns. Her sworn testimony was evasive, lacking in substance, and, in several instances, incredibly misleading.

Her dissembling was widely noticed. Indeed, in an editorial, the Washington Post criticized Judge Sotomayor's testimony about her ''wise Latina'' statement. Here is what the Washington Post said:

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

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

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

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

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

It may have been possible to vote to confirm her notwithstanding her decisions in Ricci, Maloney, and some other questionable cases. What I cannot abide, however, is her unwillingness to forthrightly confront the contradictions among her many statements, so as to give us confidence that her Judiciary Committee testimony represents what she believes and what she will do. Instead, she would have us believe that there is no contradiction, that she can hold onto what she said before in speeches and decisions—for example, that she merely followed Supreme Court and circuit precedent in Maloney, and that the dissenters in Ricci did not disagree with her reasoning—and also her testimony.

I cannot ignore her unwillingness to answer Senators' questions straightforwardly—for instance, her insistence that as chair of PRLDEF's litigation committee, she had little to do with the organization's legal positions. She has not carried her burden of proof and, therefore, regrettably, I cannot vote to confirm her.

RECESS

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate stands in recess until 5 p.m.

Thereupon, the Senate, at 3:11 p.m., recessed until 5 p.m. and reassembled when called to order by the Presiding Officer (Mr. BURRIS).

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

The PRESIDING OFFICER. Under the previous order, the Senate will resume the 1-hour alternating blocks of time with the Republicans controlling the first hour.

The Senator from Oklahoma.

Mr. COBURN. I ask unanimous consent that the Republican time for the next hour be allocated as follows: Myself, 15 minutes; Senator SNOWE, 30 minutes; and Senator BROWNBACK, 15 minutes.

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

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

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