

The Confirmation of Justice Sotomayor

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Table of Contents

Introduction	3
The Schedule:	3
sources on the Internet	4
this document	5
Opening Statements: 13 July	6
Leahy	6
Republicans	7
Sotomayor	8
my comments	8
Day Two: 14 July 2009	10
Leahy	10
Sessions	11
Kyl	15
Graham	18
my comments	19
Day Three: 15 July 2009	20
Cornyn	20
Specter	28
super precedent ?	28
separation of powers	30
Day Four: 16 July 2009	31
Kyl	31

Graham	37
Cornyn	40
Hatch	45
Cornyn	45
Commentary	48
Prof. Seidman 14 July	48
Washington Post 14 July	49
Prof. Adler 15 July	50
Prof. Althouse 15 July	50
Prof. Gerken 15 July	51
Prof. Bonventre 15 July	52
Mirengoff 16 July	53
Federalist Society Debate 16 July	53
The Washington Post 16 July	55
Politico 17 July	57
Los Angeles Times 17 July	57
Prof. Althouse 17 July	59
Mirengoff, 17 July	59
Politico 18 July	60
Fineman in Newsweek 18 July	61
The Washington Post 19 July	61
editorial, The Washington Post 19 July	62
The Washington Post 20 July	63
Prof. Bonventre 20-21 July	65
Associated Press 23 July	66
Prof. Bonventre 30 July	67
Supplementary Q & A	68
Irrelevant Rubbish About Clothing	71
Perjury Hypothetical	73
Votes	76
Schumer's prediction, 12 July	76
McConnell	77
Martinez 17 July	77
Kyl's speech 22 July	78
Graham's speech 22 July	79
Hatch 24 July	81
Cornyn's speech 24 July	81

Sessions 27 July	84
Judiciary Committee Vote	85
Reid's prediction 29 July	86
identity politics	87
no schedule, 3 Aug	88
debate 4-6 Aug	89
final vote	92
Conclusion	93

Introduction

On 30 April 2009, Justice Souter announced his retirement from the U.S. Supreme Court. I immediately began collecting quotations from newspapers, government documents, and online commentary about the process of finding a nominee for the vacant position on the U.S. Supreme Court. I posted a 185-page document at <http://www.rbs0.com/sotomayor.pdf> that explains how and why President Obama selected Judge Sonia Sotomayor to be his nominee for the vacant seat on the U.S. Supreme Court. That document covers the time from 30 April 2009 through 12 July 2009. That document reached two major conclusions: (1) President Obama selected Judge Sotomayor because she is a Hispanic woman, which elevates ethnicity and gender over merit, and (2) the entire nomination process is corrupted by partisan politics.

This document collects quotations from the confirmation hearings in the U.S. Senate Judiciary Committee and the subsequent debate on the floor of the U.S. Senate, as well as collects quotations from contemporary legal commentators. The purposes of this document are to be a resource for historians, and to explain to citizens how the confirmation process actually works.

The Schedule:

Monday, 13 July — 10-minute opening statements by each senator, a completely unnecessary introduction of Sotomayor by the two senators from her state, followed by an opening statement by Judge Sotomayor. Exhausted, the committee will then recess, after four hours of hearings.

Tuesday/Wednesday, 14-15 July — examination of Judge Sotomayor by each senator.

First round: 30 minutes each.

Closed session for FBI background report.

Second round: 20 minutes for each senator.

Thursday, 16 July

Third round for a few senators.

Thursday afternoon, 16 July, testimony of outside witnesses

Tuesday, 28 July — vote by the Judiciary Committee

6 August — final vote by the entire Senate

sources on the Internet

Copies of the prepared opening statements are available at:

<http://judiciary.senate.gov/hearings/hearing.cfm?id=3959>

Transcripts of opening statements on 13 July at *The Washington Post*:

http://voices.washingtonpost.com/supreme-court/2009/07/the_committees_opening_stateme.html

Transcripts of the hearings on 13-16 July are available at *The Washington Post* website:

<http://www.washingtonpost.com/wp-srv/package/supremecourt/hearings20090713.html> (13 July)

<http://www.washingtonpost.com/wp-srv/package/supremecourt/hearings20090714.html> (14 July)

<http://www.washingtonpost.com/wp-srv/package/supremecourt/hearings20090715.html> (15 July)

<http://www.washingtonpost.com/wp-srv/package/supremecourt/hearings.html> (16 July)

http://voices.washingtonpost.com/supreme-court/2009/07/archived_key_witness_testimony.html
(outside witnesses on 16 July)

The *Los Angeles Times* posted complete transcripts of the Sotomayor confirmation hearings at:

<http://latimesblogs.latimes.com/washington/2009/07/soto0mayor-hearings-complete-transcript-part-5.html>
(part five, 14 July 2009)

The New York Times posted transcripts of these hearings by the Federal News Service:

<http://www.nytimes.com/2009/07/14/us/politics/14confirm-text.html> (14 July 2009)

this document

I do not have time to read *all* of the hearing transcripts, so I am concentrating on Senators Leahy and Specter, and the five Republicans who graduated from law school (i.e., Sessions, Hatch, Kyl, Graham, Cornyn). I emphasize that this document is *not* a complete transcript of any senator's questions and corresponding answers from Judge Sotomayor. The quotations below select the parts of the testimony that I thought were significant or interesting. For the complete transcript of the entire hearings, see the resources cited on page 4, above.

The following quotations from the hearings are all taken by cut-and-paste from *The Washington Post*. I made some minor editorial changes. In one place, I used the prepared version of Senator Leahy's opening statement to remove a phonetic transcription error. In a few places, I edited out the stammering of a senator or the witness, to make the text more coherent and to omit dashes inserted by the transcriptionist. I italicized names of cases, to make the text conform to conventional legal writing style. I corrected a few spelling errors, such as changing "pro curiam" to "per curiam". And so on.

Opening Statements: 13 July

Leahy

Senator Leahy's opening remarks as chairman of the Judiciary Committee:

We are in a different era [than when Justices Brandeis and Marshall were confirmed], and I would trust that all members of this committee here today will reject the efforts of partisans and outside pressure groups that sought to create a caricature of Judge Sotomayor while belittling her record and achievements, her intelligence. Let no one demean this extraordinary woman, her success, her understanding of the constitutional duties she's faithfully performed for the last 17 years. I hope all senators will join together as we did when we considered President Reagan's nomination of Sandra Day O'Connor as the first woman to serve on the Supreme Court. There, every Democrat and every Republican voted to confirm her.

....

She has a deep understanding of the real lives — the real lives — of Americans, and the duty of law enforcement to help keep Americans safe, and the responsibility of all of us to respect the freedoms that define America.

Now, unfortunately, some have sought to twist her words and her record and to engage in partisan political attacks. Ideological pressure groups began attacking her even before the president made his selection. They then stepped up their attacks by threatening Republican senators who do not oppose her.

That's not the American way, and that should not be the Senate way.

In truth, we do not have to speculate about what kind of a justice she'll be, because we've seen what kind of a judge she has been. She is a judge in which all Americans can have confidence.

She has been a judge for all Americans. She'll be a justice for all Americans.

....

[Leahy concluded:]

We are a country bound together by our magnificent Constitution. It guarantees the promise that our country will be a country based on the rule of law. In her service as a federal judge, Sonia Sotomayor has kept faith with that promise.

She understands it's not one law for one race or another. There's not one law for one color or another. There is not one law for rich and a different one for poor. There's only one law.

And, Judge, I remember so well. You sat in my office and you said that, ultimately and completely, a judge has to follow the law, no matter what their upbringing has been.

That's the kind of fair and impartial judging the American people expect. That's respect for the rule of law. But that's the kind of judge Judge Sotomayor has been. It's the kind of fair and impartial justice she'll be and the American people deserve.

Judge Sotomayor has been nominated to replace Justice Souter, whose retirement last month has left the Court with only eight justices. Justice Souter served the nation with distinction for nearly two decades on the Supreme Court with a commitment to justice, an

admiration for the law and an understanding of the impact of the Court's decisions on the daily lives of ordinary Americans.

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

In the weeks and months leading up to this hearing, I've heard the president and senators from both sides of the aisle make reference to the engraving over the entrance of the Supreme Court. I look at that every time I go up there. It's carved in Vermont marble, and it says, "Equal justice under law."

Judge Sotomayor's nomination keeps faith with those words.

Patrick Leahy, Opening Statement (13 July 2009)

http://www.washingtonpost.com/wp-srv/politics/documents/leahy_openingstatement_sotomayor.html

Republicans

Senator Lindsey Graham, a Republican from South Carolina, admitted in his opening statement that Sotomayor will be confirmed, and later added some serious concerns about her.

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

[LAUGHTER]

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

....

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

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

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

Lindsey Graham, Opening Statement (13 July 2009)

http://www.washingtonpost.com/wp-srv/politics/documents/graham_openingstatement_sotomayor.html

Jon Kyl, Republican from Arizona, final three paragraphs said:

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

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

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

Jon Kyl, Opening Statement (13 July 2009)

http://www.washingtonpost.com/wp-srv/politics/documents/kyl_openingstatement_sotomayor.html

Sotomayor

Judge Sotomayor was placed under oath “Do you swear the testimony you are about to give before the committee will be the truth, the whole truth, and nothing but the truth, so help you God?” and then she made her opening statement, which contained the following paragraphs:

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

In the past month, many senators have asked me about my judicial philosophy. Simple: fidelity to the law. The task of a judge is not to make law. It is to apply the law.

And it is clear, I believe, that my record in two courts reflects my rigorous commitment to interpreting the constitution according to its terms, interpreting statutes according to their terms and Congress's intent, and hewing faithfully to precedents established by the Supreme Court and by my circuit court.

In each case I have heard, I have applied the law to the facts at hand. The process of judging is enhanced when the arguments and concerns of the parties to the litigation are understood and acknowledged.

That is why I generally structure my opinions by setting out what the law requires and then explaining why a contrary position, sympathetic or not, is accepted or rejected. That is how I seek to strengthen both the rule of law and faith in the impartiality of our judicial system. My personal and professional experiences helped me to listen and understand, with the law always commanding the result in every case.

Sonia Sotomayor, Opening Statement (13 July 2009)

http://www.washingtonpost.com/wp-srv/politics/documents/sotomayor_openingstatement_071309.html

my comments

I am sorry, but I don't believe these opening remarks from Judge Sotomayor. She speaks of “the law” as if there were one monolithic body of law that always produces one, and only one, correct result in a case. This is nonsense. When the result of applying the law to the facts of a case produces one obvious result, the parties usually settle, and the case is not heard by a judge. In cases that go to trial, and then are appealed, there are legal arguments that favor each side, and a correct result is not obvious. That is why it is so very important that judges be impartial, so their personal opinions and biases do not contaminate the process of making a decision.

Judge Sotomayor specifically says: “The task of a judge is not to make law.” She is *wrong*. It is the duty of all judges, even at the trial level, to contribute to the evolution of the common law. Furthermore, judges must decide what statutes really mean, when the literal wording of the statute is vague or contains undefined words or phrases.

Judge Sotomayor says “... I have witnessed the human consequences of my decisions.” That is what Obama calls “empathy”, and it has no place in the rule of law. But, in her next sentence, Sotomayor herself declares that her “decisions have not been made to serve the interests of any one litigant, but always to serve the larger interests of impartial justice.” Well, that sort of washes away the stain of bias (empathy). Actually, she is spewing slogans and phrases in a way that defies understanding.

And Sotomayor claims: “In each case I have heard, I have applied the law to the facts at hand. That is why I generally structure my opinions by setting out what the law requires and then explaining why a contrary position, sympathetic or not, is accepted or rejected. That is how I seek to strengthen both the rule of law and faith in the impartiality of our judicial system.” Well, she surely did **not** do that in the one-paragraph summary order in the *Ricci* case, which was not a methodical application of law to facts. Given her speeches with her strong Latina identity and being a personal beneficiary of affirmative action, it is easy to suspect that she was biased in the *Ricci* case. Whether she was actually biased is *unknown*.

Furthermore, she did not mention her numerous speeches that say a “wise Latina” is *better* than a white male judge. She did not mention her membership in organizations that benefit only Hispanics. She did not explain why she wrote so few articles in law reviews. In short, she ignored her deficiencies. One of the things that law students — and students of rhetoric in general — learn is to address openly the deficiencies of their case, because (1) it makes us look credible and (2) hiding defects looks like concealment. I think the platitudes and broad generalities in her opening speech were *unworthy* of a graduate of Princeton University and Yale Law School.

James Oliphant of the *Los Angeles Times* had a nifty closing remark:

The Senate Judiciary Committee just recessed until Tuesday. Why not keep going? Consider it a carefully planned product roll-out. Sotomayor’s remarks end the day and will lead any news story about the hearings. A tough question-and-answer sequence might have resulted in a different result.

James Oliphant, Sotomayor hearings: Summing up nominee's opening remarks,” *Los Angeles Times* (15:17 EDT, 13 July 2009)

<http://latimesblogs.latimes.com/washington/2009/07/the-opening-statement-prepared-by-judge-sonia-sotomayor-with-input-no-doubt-from-the-white-house-attempted-to-achieve-sev.html>

Day Two: 14 July 2009

Leahy

Senator Leahy was the first to question Sotomayor. Because Leahy, the chairman of the Judiciary Committee, is a supporter of Sotomayor, Leahy gently led Sotomayor through some of the criticism against her, and invited her to explain herself before she was attacked by Republicans.

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

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

You said that, quote, you “would hope that a wise Latina woman with the richness of her experiences would reach wise decisions.”¹ I remember other justices — the most recent one, Justice Alito — talking about the experience of his immigrants — the immigrants in his family and how that would influence his thinking and help him reach decisions.

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

And then you said judges must transcend their personal sympathies and prejudices and aspire to achieve a greater degree of the fairness and integrity based on reason of law. And I'll throw one more quote in there. It's what you told me that ultimately and completely, the law is what counts — or the law is what controls.

So tell us, you've heard all of these charges and countercharges, the wise Latina and on and on. Here's your chance. You tell us — you tell us what's going on here, Judge.

SOTOMAYOR: Thank you for giving me an opportunity to explain my remarks.

No words I have ever spoken for written have received so much attention.

(LAUGHTER)

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

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

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

¹ Leahy *misquoted* Sotomayor to make her statement less objectionable. What Sotomayor actually said was “I would hope that a wise Latina woman, with the richness of her experiences, would more often than not reach a better conclusion.” The paragraph from her speech is quoted in my earlier essay at <http://www.rbs0.com/sotomayor.pdf> .

an equal opportunity to be a good and wise judge regardless of their background or life experiences.

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

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

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

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

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

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

SOTOMAYOR: That is the fundamental job of a judge.

LEAHY: Good.

Sessions

SESSIONS: Well, I will just note you made that statement in individual speeches about seven times over a number of years span. And it's concerning to me.

So I would just say to you I believe in Judge Seiderbaum's (ph) formulation. She said -- and you disagreed. And this was really the context of your speech. And you used her -- her statement as sort of a beginning of your discussion.

And you said she believes that a judge, no matter what their gender or background, should strive to reach the same conclusion. And she believes that's possible.

You then argued that you don't think it's possible in all, maybe even most, cases. You deal with the famous quote of Justice O'Connor in which she says a wise old man should reach the same decision as a wise old woman. And you pushed backed from that. You say you don't think that's necessarily accurate. And you doubt the ability to be objective in your analysis.

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

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

I also, as I explained, was using a rhetorical flourish that fell flat. I knew that Justice O'Connor couldn't have meant that if judges reached different conclusions — legal conclusions — that one of them wasn't wise.

That couldn't have been her meaning, because reasonable judges disagree on legal conclusions in some cases. So I was trying to play on her words. My play was — fell flat.

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

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

....

[Senator Sessions made a long, rambling speech about the *Ricci* case.]

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

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

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

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

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

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

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

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

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

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

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

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

And, in fact, your vote was the key vote. Had you voted with Judge Cabranes, himself of Puerto Rican ancestry -- had you voted with him, you -- you -- you could have changed that case.

So in truth you weren't bound by that case had you seen it in a different way. You must have agreed with it and agreed with the opinion and stayed with it until it was reversed by the court.

[Leahy interrupted to remind Sessions to ask a question of Sotomayor.]

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

....

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

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

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

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

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

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

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

SOTOMAYOR: The panel decision was based on a 78-page district court opinion.² The opinion referenced it. In its per curium, the court incorporated in differently, but it was referenced by the circuit. And it released on that very thoughtful, thorough opinion by the district court.

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

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

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

SESSIONS: Well, Judge, I think it's not fair to say that a majority -- I guess it's fair to say a majority voted against rehearing. But it was 6 to 6.³ Unusual that one of the judges had to challenge a panel decision, and your vote made the majority not to rehear it.⁴

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

² Sotomayor later admitted the opinion was much less than 78 pages. See page 70, below.

³ The vote was actually 6 to 7.

⁴ Sotomayor's vote was no more decisive than any of the other seven judges.

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

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

They did have before them a 78-page thorough opinion by the district court.⁵ They, obviously, disagreed with the law as it stood under Second Circuit precedent. That's why they were pursuing their claims and did pursue them further.

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

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

[Standler's comment: Note that Sotomayor never cited the precedent she was relying on. One *must* cite the precedent upon which one relies. It's a shame that the important *Ricci* case was addressed in such a rambling, unfocused way in these hearings.]

Kyl

KYL: Let me ask you about what the president said — and I talked about it in my opening statement — whether you agree with him. He used two different analogies. He talked once about the 25 miles — the first 25 miles of a 26-mile marathon. And then he also said, in 95 percent of the cases, the law will give you the answer, and the last 5 percent legal process will not lead you to the rule of decision. The critical ingredient in those cases is supplied by what is in the judge's heart. Do you agree with him that the law only takes you the first 25 miles of the marathon and that that last mile has to be decided by what's in the judge's heart?

SOTOMAYOR: No, sir. That's — I don't — **I wouldn't approach the issue of judging in the way the president does.**⁶ He has to explain what he meant by judging. I can only explain what I think judges should do, which is judges can't rely on what's in their heart. They don't determine the law. Congress makes the laws. The job of a judge is to apply the law. And so it's not the heart that compels conclusions in cases. It's the law. The judge applies the law to the facts before that judge.

[Standler's comment: here Sotomayor explicitly disagreed with President Obama's “empathy” criterion for judges.]

⁵ Sotomayor later admitted the opinion was much less than 78 pages. See page 70, below.

⁶ Boldface added by Standler.

....

KYL: I want to go back through the — I've read your speeches, and I've read all of them several times. The one I happened to mark up here is the Seton Hall speech, but it was virtually identical to the one at Berkeley.

You said this morning that your — the point of those speeches was to inspire young people. And I think there is some in your speeches that certainly is inspiring, and, in fact, it's more than that. I commend you on several of the things that you talked about, including your own background, as a way of inspiring young people, whether they're minority or not, and regardless of their gender. You said some very inspirational things to them.

And I take it that, therefore, in some sense, your speech was inspirational to them. But, in reading these speeches, it is inescapable that your purpose was to discuss a different issue, that it was to discuss — in fact, let me put it in your words. You said, "I intend to talk to you about my--I--my Latina identity, where it came from, and the influence I perceive gender, race, and national original representation will have on the development of the law."

....

So, you develop the theme. You substantiated it with some evidence to substantiate your point of view. Up to that point, you had simply made the case, I think, that judging could certainly reach -- or judges could certainly reach different results and make a difference in judging depending upon their gender or ethnicity. You hadn't rendered a judgment about whether that -- they would be better judgments or not.

But then, you did. You quoted Justice O'Connor to say that, a wise old woman, wise old man, would reach the same decisions, and then you said: "I'm also not sure I agree with that statement." And that's when you made the statement that's now relatively famous. "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion."

So here, you're reaching a judgment that, not only will it make a difference, but that it should make a difference. And you went on. And -- and this is the last thing that I'll quote here. You said: In short, I -- well, I think this is important.

You note that some of the old white guys made some pretty good decisions eventually -- Oliver Wendell Holmes, Cardozo and others. And -- and you acknowledge that they made a big difference in discrimination cases. But it took a long time to understand. It takes time and effort, something not all people are willing to give, and so on.

And then you concluded this: In short, I accept the proposition that difference will be made by the presence of women and people of color on the bench, and that my experiences will affect the facts that I choose to see. You said: I don't know exactly what the difference will be in my judging. But I accept that there will be some based on gender and my Latina heritage.

You don't, as -- as you said in your response to Senator Sessions, you said that you weren't encouraging that. And you -- you talked about how we need to set that aside. But you didn't, in your speech, say that this is not good. We need to set this aside. Instead, you seem to be celebrating it. The clear inference is, it's a good thing that this is happening.

So, that's why some of us are concerned, first with the president's elucidation of his point of view here about judging, and then these speeches, several of them, including speeches that were included in Law Review articles that you edited, that all say the same thing. And it would certainly lead one to a conclusion that, (a) you understand it will make a difference; and (b) not only are you not saying anything negative about that, but you seem to embrace the difference in -- in concluding that you'll make better decisions.

That's the basis of concern that a lot of people have. Please take the time you need to respond to my question.

SOTOMAYOR: Thank you. I have a record for 17 years. Decision after decision, decision after decision. It is very clear that I don't base my judgments on my personal experiences or — or my feelings or my biases. All of my decisions show my respect for the rule of law, the fact that regardless about if I identify a feeling about a case, which was part of what that speech did talk about, there are situations where one has reactions to speeches -- to activities.

It's not surprising that, in some cases, the loss of a victim is very tragic. A judge feels with those situations in acknowledging that there is a hardship to someone doesn't mean that the law commands the result. I have any number of cases where I have acknowledged the particular difficulty to a party or disapproval of a party's actions and said, "No, but the law requires this."

So, my views, I think, are demonstrated by what I do as a judge. I'm grateful that you took notice that much of my speech, if not all of it, was intended to inspire. And my whole message to those students, and that's the very end of what I said to them, was: I hope I see you in the courtroom somebody [sic: someday?]. I don't know if I said it in that speech, but I often end my speeches with saying, "And I hope someday you're sitting on the bench with me."

And so, the intent of the speech, it's structure, was to inspire them to believe, as I do, as I think everyone does, that life experiences enrich the legal system.

I used the words "process of judging." That experience that you look for in choosing a judge, whether it's the ABA rule that says the judge has to be a lawyer for X number of years or it's the experience that your committee looks for in terms of what's the background of the judge, have they undertaken serious consideration of constitutional questions. All those experiences are valued because our system is enriched by a variety of experiences.

And I don't think that anybody quarrels with the fact that diversity on the bench is good for America. It's good for America because we are the land of opportunity. And to the extent that we're pursuing and showing that all groups can be lawyers and judges, that's just reflecting the values of our society.

[later in Senator Kyl's questioning:]

KYL: Let me just ask you one last question here. I mean, can you — have you ever seen a case where, to use your example, the wise Latina made a better decisions than the non-Latina judges?

SOTOMAYOR: No. What I've seen...

[Leahy interrupted]

SOTOMAYOR: I was using a rhetorical riff that hearkened back to Justice O'Connor, because her literal words and mine have a meaning that neither of us, if you were looking at it, in their exact words make any sense.

Justice O'Connor was a part of a court in which she greatly respected her colleagues. And yet those wise men -- I'm not going to use the other word -- and wise women did reach different conclusions in deciding cases. I never understood her to be attempting to say that that meant those people who disagreed with her were unwise or unfair judges.

As you know, my speech was intending to inspire the students to understand the richness that their backgrounds could bring to the judicial process in the same way that everybody else's background does the same.

I think that's what Justice Alito was referring to when he was asked questions by this committee and he said, you know, when I decide a case, I think about my Italian ancestors and their experiences coming to this country. I don't think anybody thought that he was saying that that commanded the result in the case.

These were students and lawyers who I don't think would have been misled, either by Justice O'Connor's statement, or mine, in thinking that we actually intended to say that we could really make wiser and fairer decisions.

I think what they could think, and would think, is that I was talking about the value that life experiences have, in the words I used, to the process of judging. And that is the context in which I understood the speech to be doing.

The words I chose, taking the rhetorical flourish, it was a bad idea. I do understand that there are some who have read this differently, and I understand why they might have concern.

But I have repeated — more than once — and I will repeat throughout, if you look at my history on the bench, you will know that I do not believe that any ethnic, gender or race group has an advantage in sound judging. You noted that my speech actually said that.

And I also believe that every person, regardless of their background and life experiences, can be good and wise judges.

Graham

Senator Graham began his questioning by noting that her judicial opinions were within the mainstream, but her speeches were extremely troubling.

GRAHAM: My problem, quite frankly, is that, as Senator Schumer indicated, the cases that you've been involved in to me are left of center, but not anything that jumps out at me, but the speeches really do.

I mean, the speech you gave to the ACLU about foreign law, we'll talk about that probably in the next round, was pretty disturbing. And I keep talking about these speeches because what I'm -- and I listen to you today. I think I'm listening to Judge Roberts.

I mean, I'm, you know, listening to a strict constructionist here, so we've got to reconcile in our own minds here to put the puzzle together to go that last mile, is that you got Judge Sotomayor, who has come a long way and done a lot of things that every American should be proud of.

You've got a judge who has been on a circuit court for a dozen years. Some of the things trouble me, generally speaking left of center, but within the mainstream, and you have these speeches that just blow me away. Don't become a speechwriter, if this law thing doesn't work out, because these speeches really throw a wrinkle into everything. And that's what we're trying to figure out. Who are we getting here? You know, who are we getting as a nation?

...

GRAHAM: [quoting Sotomayor] "I would hope that a wise Latino [sic] woman, with the richness of her experience, would more often than not reach a better conclusion than a white male." And the only reason I keep talking about this is that I'm in politics. And you've got to watch what you say, because, one, you don't want to offend people you're trying to represent. But do you understand, ma'am, that if I had said anything like that, and my reasoning was that I'm trying to inspire somebody, they would have had my head? Do you understand that?

SOTOMAYOR: I do understand how those words could be taken that way, particularly if read in isolation.

GRAHAM: Well, I don't know how else you could take that. If Lindsey Graham said that I will make a better senator than X, because of my experience as a Caucasian male makes me better able to represent the people of South Carolina, and my opponent was a minority, it would make national news, and it should.

Having said that, I am not going to judge you by that one statement. I just hope you'll appreciate the world in which we live in, that you can say those things, meaning to inspire somebody, and still have a chance to get on the Supreme Court. Others could not remotely come close to that statement and survive. Whether that's right or wrong, I think that's a fact. Does that make sense to you?

SOTOMAYOR: It does. And I would hope that we've come in America to the place where we can look at a statement that could be misunderstood, and consider it in the context of the person's life.

GRAHAM: You know what? If that comes of this hearing, the hearing has been worth it all, that some people deserve a second chance when they misspeak and you would look at the entire life story to determine whether this is an aberration or just a reflection of your real soul. If that comes from this hearing, then we've probably done the country some good.

my comments

I do not accept her explanation for her "wise Latina" sentence. She made essentially the same statement in several prepared speeches, one of which was published in a law journal. This is *not* a single, unfortunate remark. It is disingenuous for her to clearly say something and now deny it. If her command of rhetoric and the English language is bad, then she is not qualified to be a judge in any court in the USA.

Sotomayor explains the context that she was trying to *inspire* Hispanic or female students. I do *not* see anything inspirational in the racist statement that a "wise Latina" will reach a *better* conclusion than a white male.

Did Sotomayor ever go to a group of white male students and encourage *them* to become lawyers? Did Sotomayor tell white males that a Latina would be a better judge than white males? Maybe Sotomayor thinks white male lawyers should stick to workers' compensation hearings and real estate transactions. <*grin*> But Leahy, in his opening statement, proclaimed that Sotomayor "has been a judge for all Americans. She'll be a justice for all Americans."

Sotomayor did make one good point with regard to her "wise Latina" remark. Her judicial opinions (with the one exception of the summary order in *Ricci*) have not been accused of racial or ethnic bias.

In reading the hearing transcript, I am troubled by senators emphasizing the obligation of a judge to be impartial, and yet these same senators ask questions concerning controversial issues that will come before the Court (e.g., abortion, ownership of firearms, etc.). If Justices are to be impartial — and if Justices are to be truly independent of the two political branches of government — Justices must *not* be selected and confirmed on the basis of their personal opinions about controversial issues. Either the senators are hypocrites or the senators are ignorant of professional responsibility of judges. Either way, the senators seem *unqualified* to be evaluating judges.

Approximately 1/3 of the 19 senators on the Judiciary Committee (e.g., Grassley, Coburn, Feinstein, Kohl, Kaufman, Franken) never attended law school, which is one of the *minimum* qualifications of any attorney or judge. People who are not qualified to be an attorney should *not* evaluate a nominee for a judicial position — the Senate's practice is like having a janitor approve professorial appointments in a mathematics or physics department.

Day Three: 15 July 2009

Cornyn

In addition to his law degree in 1977, John Cornyn earned a Masters of Law from the University of Virginia Law School in 1995. Cornyn was formerly elected as a Justice on the Texas state supreme court during 1991-97, and was then elected Attorney General of Texas during 1999-2002. He has been a U.S. Senator since Dec 2002.

CORNYN: Thank you, Mr. Chairman. Good morning, Judge.

SOTOMAYOR: Good morning, Senator. It's good to see you again.

CORNYN: Good to see you. I recall, when we met in my office, you told me how much you enjoy the back-and-forth that lawyers and judges do. And I appreciate the good humor and attitude that you've brought to this. And I very much appreciate your -- your willingness to serve on the highest court in the land.

I'm afraid that sometimes in the past these hearings have gotten so downright nasty and contentious that some people are dissuaded from willingness to serve, which I think is a great tragedy. And, of course, some have been filibustered. They have been denied the opportunity to have an up-or-down vote on the Senate floor.

I told you, when we visited my office, that's not going to happen to you if I have anything to say about it. You will get that up-or- down vote on the Senate floor.

But I want to ask your assistance this morning to try to help us reconcile two pictures that I think have emerged during the course of this hearing. One is, of course, as Senator Schumer and others have talked about, your lengthy tenure on the federal bench as a trial judge and court of appeals judge.

And then there's the other picture that has emerged that — from your speeches and your other writings. And I need your help trying to reconcile those two pictures, because I think a lot of people have wondered about that.

And I guess the reason why it's even more important that we understand how you reconcile some of your other writings with your judicial experience and tenure as a fact that, of course, now you will not be a lower court judge subject to the appeals to the Supreme Court. You will be free as a United States Supreme Court justice to basically do what you want with no court reviewing those decisions, harkening back to the quote we started with during my opening statement about the Supreme Court being infallible only because it's final.

So I want to just start with the comments that you made about the "wise Latina" speech that, by my count, you made at least five times between 1994 and 2003. You indicated that this was really — and please correct me if I'm wrong, I'm trying to quote your words — a, quote, "failed rhetorical flourish that fell flat."

I believe at another time you said they were, quote, "words that don't make sense," close quote. And another time, I believe you said it was, quote, "a bad idea," close quote.

Am I accurately characterizing your thoughts about the use of that — of that phrase that has been talked about so much?

SOTOMAYOR: Yes, generally. But the point I was making was that Justice O'Connor's words, the ones that I was using as a platform to make my point about the value of experience generally in the legal system, was that her words literally and mine literally made no sense, at least not in the context of what judges do or — what judges do.

I didn't and don't believe that Justice O'Connor intended to suggest that, when two judges disagree, one of them has to be unwise. And if you read her literal words — that wise old men and wise old women would come to the same decisions in cases — that's what the words would mean, but that's clearly not what she meant. And if you listen to my words, it would have the same suggestion that only Latinos would come to wiser decisions.

But that wouldn't make sense in the context much my speech either because I pointed out in the speech that eight, nine white men had decided *Brown v. Board of Education*.

And I know noted in a separate paragraph of the speech that — that no one person speaks in the voice of any group. So my rhetorical flourish, just like hers, can't be read literally. It had a different meaning in the context of the entire speech

CORNYN: But, Judge, she said a wise man and a wise woman would reach the same conclusion. You said that a wise Latina woman would reach a better conclusion than a male counterpart.

What I'm confused about, are you standing by that statement? Or are you saying that it was a bad idea and you -- are you disavowing that statement?

SOTOMAYOR: It is clear from the attention that my words have gotten and the manner in which it has been understood by some people that my words failed. They didn't work. The message that the entire speech attempted to deliver, however, remains the message that I think Justice O'Connor meant, the message that higher nominees, including Justice Alito meant when he said that his Italian ancestry, he considers when he's deciding discrimination cases.

I don't think he meant -- I don't think Justice O'Connor meant that personal experiences compel results in any way. I think life experiences generally, whether it's that I'm a Latina or was a state prosecutor or have been a commercial litigator or been a trial judge and an appellate judge, that the mixture of all of those things, the amalgam of them help me to listen and understand.

But all of us understand because that's the kind of judges we have proven ourself to be, we rely on the law to command the results in the case. So when one talks about life experiences, and even in the context of my speech, my message was different than I understand my words have been understood by some.

CORNYN: So you — do you stand by your words of yesterday when you said it was a failed rhetorical flourish that fell flat? That they are words that don't make sense and that they're a bad idea?

SOTOMAYOR: I stand by the words. It fell flat. And I understand that some people have understood them in a way that I never intended. And I would hope that, in the text of the speech, that they would be understood.

CORNYN: Well, you spoke about the law students to whom these comments from frequently directed and your desire to inspire them. If, in fact, the message that they heard was that the quality of justice depends on the sex, race, or ethnicity of the judge, is that an understanding that you would regret?

SOTOMAYOR: I would regret that because, for me, the work I do with students -- and it's just not in the context of those six speeches. As you know, I give dozens more speeches to students all the time and to lawyers of all backgrounds, and I give -- and have spoken to community groups of all type.

And what I do in each of those situations is to encourage both students and, as I did when I spoke to new immigrants that was admitting as students, to try to encourage them to participate on all levels of our society. I tell people that that's one of the great things about America, that we can do so many different things and participate so fully in all of the opportunities America presents.

And so the message that I deliver repeatedly and as the context of all of my speeches is I've made it. So can you. Work hard at it. Pay attention to what you're doing, and participate.

CORNYN: Let me ask about another speech you gave in 1996 that was published in the Suffolk University Law Review, where you wrote what appears to be an endorsement of the idea that judges should change the law. You wrote, quote, "Change, sometimes radical change, can and does occur in a legal system that serves a society whose social policy itself changes." You noted, with apparent approval, that, quote, "A given judge or judges may develop a novel approach to a specific set of facts or legal framework that pushes the law in a new direction," close quote.

Can you explain what you meant by those words?

SOTOMAYOR: The title of that speech was, "Returning Majesty To The Law." As I hope I communicated in my opening remarks, I'm passionate about the practice of law and judging, passionate in sense of respecting the rule of law so much. The speech was given in the context of talking to young lawyers and saying, "Don't participate in the cynicism that people express about our legal system."

CORNYN: What kind of ...

SOTOMAYOR: I ...

CORNYN: Excuse me. I'm sorry. I didn't mean to interrupt you.

SOTOMAYOR: And I was encouraging them not to fall into the trap of calling decisions that the public disagrees with, as they sometimes do, activism or using other labels, but to try to be more engaged in explaining the law and the process of law to the public. And in the context of

the words that you quoted to me, I pointed out to them explicitly about evolving social changes, that what I was referring to is Congress is passing new laws all the time. And so whatever was viewed as settled law previously will often get changed because Congress has changed something.

I also spoke about the fact that society evolves in terms of technology and other developments, and so the law is being applied to a new set of facts. In terms of talking about different approaches in law, I was talking about the fact that there are some cases that are viewed as radical, and I think I mentioned just one case, *Brown v. Board of Education*, and explaining and encouraging to -- them to explain that process, too.

And there are new directions in the law in terms of the court. The court -- Supreme Court is often looking at its precedents and considering whether, in certain circumstances whose precedent is owed, deference for very important reasons, but the court takes a new direction. And those new directions rarely, if ever, come at the initiation of the court. They come because lawyers are encouraging the court to look at a situation in a new way, to consider it in a different way.

What I was telling those young lawyers is: Don't play into people's skepticism about the law. Look to explain to them the process.

I also, when I was talking about returning majesty to the law, I spoke to them about what judges can do. And I talked about, in the second half of that speech, that we had an obligation to ensure that we were monitoring the behavior of lawyers before us so that, when questionable, ethical, or other conduct could bring disrepute to the legal system, that we monitor our lawyers, because that would return a sense...

CORNYN: Judge, if you let me -- I think we're straying away from the question I had talking about oversight of lawyers. Would you explain how, when you say judges should -- or, I'm sorry, let me just ask. Do you believe that judges ever change the law? I take it from your statement that you do.

SOTOMAYOR: They change -- they can't change law. We're not lawmakers. But we change our view of how to interpret certain laws based on new facts, new developments of doctrinal theory, considerations of whether -- what the reliance of society may be in an old rule.

We think about whether a rule of law has proven workable. We look at how often the court has affirmed a prior understanding of how to approach an issue. But in those senses, there's changes by judges in the popular perception that we're changing the law.

CORNYN: In another speech in 1996, you celebrated the uncertainty of the law. You wrote that the law is always in a, quote, "necessary state of flux," close quote.

You wrote that the law judges declare is not, quote, "a definitive -- capital L -- Law that would make -- that may -- many would like to think exists," close quote, and, quote, "that the public fails to appreciate the importance of indefiniteness in the law." Can you explain those statements? And why do you think indefiniteness is so important to the law?

SOTOMAYOR: It's not that it's important to the law as much as it is that it's what legal cases are about. People bring cases to courts because they believe that precedents don't clearly answer the fact situation that they're presenting in their individual case. That creates uncertainty; that's why people bring cases.

And they say, "Look, the law says this, but I'm entitled to that." "I have this set of facts that entitle me to relief under the law." It's the entire process of law. If law was always clear, we wouldn't have judges. It's because there is indefiniteness not in what the law is, but its application to new facts that people sometimes feel it's unpredictable.

That speech, as others I've given, is an attempt to encourage judges to explain to the public more of the process. The role of judges is to ensure that they are applying the law to those new facts, that they're interpreting that law with Congress' intent, being informed by what precedents say about the law and Congress' intent and applying it to the new facts.

But that's what the role of the courts is. And, obviously, the public is going to become impatient with that if they don't that process. And I'm encouraging lawyers to do more work in explaining the system, in explaining what we are doing as courts.

CORNYN: In a 2001 speech at Berkeley, you wrote, quote, "whether borne from experience or inherent physiological or cultural differences, a possibility I abhor less or discount less than my colleague, Judge Sederbaum, our gender and national origins may and will make a difference in our judging," close quote.

The difference -- a difference is physiological if it relates to the mechanical, physical, or biochemical functions of the body, as I understand the word. What do you mean by that?

SOTOMAYOR: I was talking just about that. There are, in the law, there have been upheld, in certain situations, that certain job positions have a requirement for a certain amount of strength or other characteristics that may be the -- a person who fits that characteristic can have that job.

But there are differences that may affect a particular type of work. We do that all the time.

CORNYN: We're talking about judging.

SOTOMAYOR: You need to be a pilot who has good eyesight.

CORNYN: We're not talking about pilots. We're talking about judging. Right?

SOTOMAYOR: No, no, no. But what I'm -- was talking about there because the context of that was talking about the difference in the process of judging. And the process of judging, for me, is what life experiences brings to the process. It helps you listen and understand. It doesn't change what the law is or what the law commands.

My life experience, as a prosecutor, may help me listen and understand an argument in a criminal case. It may have no relevancy to what happens in an anti-trust suit. It's just a question of the process of judging. It improves both the public's confidence that there are judges from a variety of different backgrounds on the bench because they feel that all issues will be more -- better at least addressed. Not that it's better addressed, but that it helps that process of feeling confident that all of arguments are going to be listened to and understood.

CORNYN: So you stand by the comment or the statement that inherent physiological differences will make a difference in judging?

SOTOMAYOR: I'm not sure -- I'm not sure exactly where that would play out, but I was asking a hypothetical question in that paragraph. I was saying, look, we just don't know. If you read the entire part of that speech, what I was saying is let's ask the question. That's what all of these studies are doing. Ask the question if there's a difference.

Ignoring things and saying, you know, it doesn't happen isn't an answer to a situation. It's consider it. Consider it as a possibility and think about it. But I certainly wasn't intending to suggest that there would be a difference that affected the outcome. I talked about there being a possibility that it could affect the process of judging.

CORNYN: As you can tell, I'm struggling a little bit to understand how your statement about physiological differences could affect the outcome or affect judging and your stated commitment to fidelity to the law as being your sole standard and how any litigant can -- can know where that will end.

But let me ask you on another topic. There was a *Washington Post* story on May the 29th, 2009, where — that starts out saying, "The White House scrambled yesterday to assuage worries from liberal groups about Judge Sonia Sotomayor's scant record on abortion rights." And White House — it goes on to say, "White House press secretary said the president did not ask Sotomayor specifically about abortion rights during their interview."

Is that correct?

SOTOMAYOR: Yes, it's absolutely correct. I was asked no questions by anyone, including the president, about my views on any specific legal issue.

CORNYN: Do you know then on what basis, if that's the case — and I accept your statement — on what basis that White House officials would subsequently send a message that abortion rights groups do not need to worry about how you might rule in a challenge to *Roe v. Wade*?

SOTOMAYOR: No, sir, because you just have to look at my record to know that, in the cases that I addressed on all issues, I follow the law.

[Standler's comment: Here Judge Sotomayor admitted that the White House misinformed the citizens of the USA about Sotomayor's opinion on abortion rights.]

CORNYN: On what basis would George Pavia, who was apparently a senior partner in the law firm that hired you as a corporate litigator, on what basis would he say that he thinks support of abortion rights would be in line with your generally liberal instincts?

He's quoted in his article saying, quote, "I can guarantee she'll be for abortion rights," close quote. On what basis would Mr. Pavia say that, if you know?

SOTOMAYOR: I have no idea, since I know for a fact I never spoke to him about my views on abortion, frankly, on my views on any social issue. George was the head partner of my firm, but our contact was not on a daily basis.

I have no idea why he's drawing that conclusion, because if he looked at my record, I have ruled according to the law in all cases addressed to the issue of termination of abortion rights — of women's right to terminate their pregnancy. And I voted in cases in which I upheld the application of the Mexico City policy, which was a policy in which the government was not funding certain abortion-related activities.

CORNYN: Do you agree -- do you agree with his statement that you have generally liberal instincts?

SOTOMAYOR: If he was talking about the fact that I served on a particular board that promoted equal opportunity for people, the Puerto Rican Legal Defense and Education Fund, then you could talk about that being a liberal instinct in the sense that I promote equal opportunity in America and the attempts to assure that.

But he has not read my jurisprudence for 17 years, I can assure you. He's a corporate litigator. And my experience with corporate litigators is that they only look at the law when it affects the case before them. (LAUGHTER)

CORNYN: Well, I hope, as you suggested, not only liberals endorse the idea of equal opportunity in this country — that's a, I think, bedrock doctrine that undergirds all of our law.

But that brings me, in the short time I have left, to the New Haven firefighter case.

As you know, there are a number of the New Haven firefighters who are here today and will testify tomorrow. And I have to tell you, your Honor, as a former judge myself, I was shocked to see that the sort of treatment that the three-judge panel you served on gave to the claims of these firefighters by an unpublished summary order which has been pointed out in the press would not likely to be reviewed or even caught by other judges on the Second Circuit except for the fact that Judge Cabranes read about a comment made by the lawyer representing the firefighters in the press that the court gave short shrift to the claims of the firefighters.

Judge Cabranes said the core issue presented by this case, the scope of a municipal employer's authority to disregard examination results based solely on the successful applicant is not addressed by any precedent of the Supreme Court or our circuit.

And looking at the -- looking at the unpublished summary order, this three-judge panel of the Second Circuit doesn't cite any legal authority whatsoever to support its conclusion. Can you explain to me why -- why you would deal with it in a way that appears to be so -- well, dismissive may be too strong a word -- but avoid the very important claims that the Supreme Court, ultimately, reversed you on that were raised by the firefighters appeal?

SOTOMAYOR: Senator, I can't speak to what brought this case to Judge Cabranes' attention. I can say the following, however. When parties are dissatisfied with a panel decision, they can file a petition for rehearing and bond (ph). And, in fact, that's what happened in the *Ricci* case.

Those briefs are routinely reviewed by judges. And so publishing by summary order or addressing an issue by summary order or by published opinion doesn't hide the party's claims from other judges. They get the petitions for rehearing.

Similarly, parties, when they're dissatisfied with what a circuit has done, file petitions for certiorari, which is a request for the Supreme Court to review a case. And so the court looks at that as well. And so regardless of how a circuit decide a case, it's not a question of hiding it from others.

With respect to the broader question that you're raising, which is why do you do it by summary order or why do you do it in a published opinion or in a per curiam, the question or the practice is that about 75 percent of circuit court decisions are decided by summary order, in part, because we can't handle the volume of our work if we were writing long decisions in every case. But, more importantly, because not every case requires a long opinion if a district court opinion has been clear and thorough on an issue.

And in this case, there was a 78-page decision by the district court.⁷ It adequately explained the questions that the Supreme Court addressed and reviewed.

And so, to the extent that a particular panel considers that an issue has been decided by existing precedent, that's a question that the court above can obviously revisit, as it did in *Ricci*, where it looked at it and said, well, we understand what the circuit did, we understand what existing law is, but we should be looking at this question in a new way. That's the job of the Supreme Court.

⁷ Sotomayor later admitted the opinion was much less than 78 pages. See page 70, below.

[Standler's comment: I must remark that Judge Sotomayor reminds me of Marie Antoinette, when told that the peasants had no bread, allegedly replied "then let them eat cake." A petition for rehearing by a three-judge panel is rarely granted. A petition for en banc review is futile in the Second Circuit, because those judges have a history of denying petitions for an en banc hearing. And the U.S. Supreme Court grants review in only about 1% of the cases appealed to that Court. So all of these additional appellate opportunities are — in fact — rarely available. Judge Sotomayor and her two colleagues were the last judges to hear this case as a matter of right.

Although the three-judge panel recognized the case was important enough to grant extra time at oral arguments, they didn't bother to write a formal opinion. Why a terse, one-paragraph summary order? Sotomayor claims only that she was following precedent, and the trial court's opinion adequately cited the precedent. But the U.S. Supreme Court's majority opinion did not find any precedent to cite (or to overrule), which casts doubts on Sotomayor's "following precedent" excuse.]

CORNBYN: But, Judge, even the district court admitted that a jury could rationally infer that city officials worked behind the scenes to sabotage the promotional examinations, because they knew that the exams -- they knew that, were the exams certified, the mayor would incur the wrath of Reverend Boise Kimber and other influential leaders of New Haven's African-American community.

So you decided that, based on their claim of potential disparate impact liability, that there's no recourse -- that the city was justified in disregarding the exams and thus denying these firefighters, many of whom suffered hardship in order to study and to prepare for these examinations and were successful, only to see that hard work and effort disregarded and not even acknowledged in the court's opinion.

And, ultimately, as you know, the Supreme Court said that you just can't claim potential disparate impact liability as a city and then deny someone a promotion based on the color of their skin. There has to be a strong basis in evidence.

But you didn't look to see whether there was a basis in evidence to the city's claim. Your summary opinion -- unpublished summary order didn't even discuss that. Don't you think that these firefighters and other litigants deserve a more detailed analysis of their claims and an explanation for why you ultimately deny their claim?

SOTOMAYOR: As you know, the court's opinion issued after discussions en banc recognize, as I do, the hardship that the firefighters experienced. That's not been naysaid by anyone.

The issue before the court was a different one, and the one that the district court addressed was what decision the decision-makers made, not what people behind the scenes wanted the decision-makers to make, but what they were considering. And what they were considering was the state of the law at the time and in an attempt to comply with what they believe the law said and what the panel recognized as what the Second Circuit precedent said, that they made a choice under that existing law.

The Supreme Court in its decision set a new standard by which an employer and lower court should review what the employer is doing by the substantial evidence test. That test was not discussed with the -- with the panel. It wasn't part of the arguments below. That was a

decision by the court borrowing from other areas of the law and saying, "We think this would work better in this situation."

CORNBYN: My time's up. Thank you.

Specter

Senator Arlen Specter — chairman of the Senate Judiciary Committee during 2005-2007, when he was a Republican and the Republicans held the majority — asked Judge Sotomayor for her opinions on a number of issues that are expected to come before the Court. Judge Sotomayor, quite properly, declined to answer those questions.

super precedent ?

SPECTER: Well, I can tell you're not going to answer. Let me move on.

On a woman's right to choose, Circuit Judge Luttig, in the case of *Richmond Medical Center*, said that "*Casey v. Planned Parenthood* was super-stare decisis." Do you agree with Judge Luttig?

SOTOMAYOR: I don't use the word "Super." I don't know how to take that word. All precedent of the court is entitled to the respect of the doctrine of stare decisis.

SPECTER: Do you think that *Roe v. Wade* has added weight on stare decisis to protect a woman's right to choose? By virtue of *Casey v. Planned Parenthood*, as Judge Luttig said?

SOTOMAYOR: That is one of the factors that I believe courts have used to consider the issue of whether or not a new direction should be taken into law. There is a variety of different factors the court uses, not just one...

SPECTER: But that is one, which will give it extra weight. How about the fact that the Supreme Court of the United States has had 38 cases after *Roe v. Wade* where it could have reversed *Roe v. Wade*? Would that add weight to the impact of *Roe v. Wade* to stare decisis to guarantee a woman's right to choose?

SOTOMAYOR: The history of a particular holding of the court and how the court has dealt with it in subsequent cases would be among one of the factors as many that a court would likely consider. Each situation, however, is considered in a variety of different view points and arguments and -- but most importantly, factors of the court applies to this question of should precedence be altered in a way.

SPECTER: Well, wouldn't 38 cases lend a little extra support to the impact of *Roe* and *Casey*, where the court had the issue before it, could have overruled it?

SOTOMAYOR: In *Casey* itself...

SPECTER: Just a little extra impact?

SOTOMAYOR: *Casey* itself applied, or by opinion offered by Justice Souter, talked about the factors that a court thinks about in — whether to change precedent. And among them were issues of whether or not or how much reliance society has placed in the prior precedents? What are the costs that would be occasioned by changing it? Was the rule workable or not? Have the — either factual or doctrinal basis of the prior precedent altered, either from developments in related areas of law or not, to counsel a re-examination of the question.

SPECTER: I'm going to move off. Go ahead.

SOTOMAYOR: And the court has considered, in other cases, the number of times the issue has arisen and what actions the court has or not taken with respect to that. ... *Casey* did reaffirm the court holding of *Roe* and so my understanding would be that the issues would be addressed in light of *Casey*, on the stare decisis today.

Standler's comment: In 2005-06, at the confirmation hearings of Chief Justice Roberts and Justice Alito, Senator Specter mentioned this concept of "super precedent" in an attempt to get Roberts and Alito to agree not to overrule *Roe v. Wade*. Senator Specter is pro-choice on abortion, and I strongly agree that a woman should have a legal right to an abortion for any reason in the early part of pregnancy. My problem is with Specter's bogus argument that respect for precedent (i.e., stare decisis) means that *Roe v. Wade* can **not** be overruled. This is a bogus argument because recent history shows that the U.S. Supreme Court overrules one or two of their prior cases each year.⁸ This is a bogus argument because anytime the Court recognizes that it has made a mistake — and the Court frequently makes mistakes — the Court *should* overrule its prior erroneous holding. Specter's concept of "super precedent" has no basis in law, as discussed in the following paragraph. If a holding is reaffirmed many times, that only indicates that it is a hot topic that continually comes before the Court, but it does *not* indicate that the holding is correct. Indeed, some of the ugly cases in the 1800s involving slavery and "separate but equal" treatment for racial minorities persisted for many tens of years before the Court finally overruled them, beginning in 1955.

My search of the Westlaw federal court database on 16 July 2009 shows there are *only two* mentions of super +3 ("stare decisis" precedent) in more than 2568 volumes of the Federal Reporter, and the U.S. Supreme Court has *never* used these phrases.

1. I understand the Supreme Court to have intended its decision in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), to be a decision of super-stare decisis with respect to a woman's fundamental right to choose whether or not to proceed with a pregnancy.
Richmond Medical Center for Women v. Gilmore, 219 F.3d 376, 376 (4thCir. 2000) (Luttig, J., concurring).

⁸ Standler, Overruled: Stare Decisis in the U.S. Supreme Court, <http://www.rbs2.com/overrule.pdf>, (Nov 2005).

2. At 115 years old, this decision may fairly be described as a triple “super-duper precedent.” See 151 CONG. REC. S10168, S10168 (2005) (statement of Sen. Specter). *San Juan County, Utah v. U.S.*, 503 F.3d 1163, 1208, n.1 (10thCir. 2007) (Kelly, J., concurring). The majority opinion in this case rejected this application of “super-duper precedent.”⁹

Note that both of these two uses of “super precedent” were in concurring opinions, which are technically *not* law. Even *if* these uses of “super precedent” were in majority opinions, which are law, a mere *two* mentions in the FEDERAL REPORTER does *not* make mainstream law. Further, note that the concurring opinion in *San Juan County* copied Senator Specter’s famous — but *unfounded* in law — use of this phrase. One must conclude that the concept of “super precedent” is bogus: there is no basis in law to use the phrase “super precedent”.]

separation of powers

Towards the end of his questioning, Senator Specter asked:

SPECTER: Is there anything the Senate or Congress can do if a nominee says one thing seated at that table and does something exactly the opposite once they walk across the street?

SOTOMAYOR: That, in fact, is one of the beauties of our constitutional system, which is we do have a separation of...

SPECTER: Beauty — beauty in the eyes of the beholder. It's only Constitution Avenue there.

SOTOMAYOR: Well, the only advantage you have in my case is that I have a 17-year record that I think demonstrates how I approach the law and the deference with which — or the deference I give to the other branches of government.

SPECTER: I think your record is exemplary, Judge Sotomayor, exemplary. I'm not commenting about your answers, but your record is exemplary. (LAUGHTER)

Specter interrupted Sotomayor’s answer, in which she was apparently going to say that the constitutional concept of separation of powers makes the Court independent of the Congress. The consequence of such separation of powers is that it would be *inappropriate* for Congress to impeach a Justice because Congress disagreed with a decision by the Justice. In the rare cases in which a federal judge was impeached, it is because the judge was corrupt (i.e., accepted bribes) or committed some other felony.

⁹ *San Juan County, Utah v. U.S.*, 503 F.3d at 1189 (“It should go without saying that the 1966 amendments to Rule 24 changed the law. Pre-1966 decisions are no longer binding precedent. *Sam Fox*, 366 U.S. 683, 81 S.Ct. 1309, 6 L.Ed.2d 604, was clearly rejected. And even if *Smith v. Gale*, 144 U.S. 509, 518, 12 S.Ct. 674, 36 L.Ed. 521 (1892), is a ‘triple super-duper precedent’ because it is 115 years old, Op. (Kelly, J., concurring) at 1208 n. 1 (internal quotation marks omitted), it would be such a precedent with respect to only the matter resolved by that decision — the meaning of a provision of the Code of the Dakota territory in the late nineteenth century. *Gale* hardly controls our interpretation of current Rule 24.”).

Sotomayor made a remark about her “17-year record ... [of] deference ... to the other branches of government.” She seems to imply that Congress should give her some deference too.

Below, beginning at page 73, I suggest that it is not practical to impeach a nominee for perjury during confirmation hearings.

Day Four: 16 July 2009

Kyl

KYL: Thank you, and good morning, Judge.

SOTOMAYOR: Good morning.

KYL: If response to one of Senator Sessions' questions on Tuesday about the *Ricci* case, you stated that your actions in the case were controlled by established Supreme Court precedent. You also said that a variety of different judges on the appellate court were looking at the case in light of established Supreme Court and Second Circuit precedent.

And you said that the Supreme Court was the only body that had the discretion and the power to decide how these tough issues should be decided. Those are all quotations from you.

Now, I've carefully reviewed the decision, and I think the reality is different.

No Supreme Court case had decided whether rejecting an employment test because of its racial results would violate the civil rights laws.

Neither the Supreme Court's majority in *Ricci* nor the four dissenting judges discussed or even cited any cases that addressed the question. In fact, the court, in its opinion, even noted — and I'm quoting here — that this action presents two provisions of Title 7 to be interpreted and reconciled with few, if any, precedents in the court of appeals discussing the issue.

In other words, not only did the Supreme Court not identify any Supreme Court cases that were on point, it found few, if any, lower court opinions that even addressed the issue.

Isn't it true that you were incorrect in your earlier statement that you were bound by established Supreme Court and Second Circuit precedent when you voted each time to reject the firefighters' civil rights complaint?

SOTOMAYOR: Senator, I was -- let me place the *Ricci* decision back in context. The issue was whether or not employees who had -- were a member of a disparately impacted group had a right under existing precedent to bring a lawsuit, that they have a right to bring a lawsuit on the basis of a prima facie case, and what would that consist of?

That was established Second Circuit precedent and had been — at least up to that point — been concluded from Supreme Court precedents describing the initial burden that employees had.

KYL: Well...

SOTOMAYOR: That was...

KYL: Are you speaking here now -- I mean, you said the right to bring the lawsuit. It's not a question of standing. There was a question of summary judgment.

SOTOMAYOR: Exactly. Of -- exactly, which is when you speak about a right to bring a lawsuit, I mean, what's the minimum amount of good-faith evidence do they have to actually file the complaint?

An established precedent said, you can make out an employee a prima facie case of a violation of Title VII under just merely by -- not merely -- that's denigrating it -- by showing a disparate impact. Then, the city was faced with the choice of, OK, we're now facing two claims, one...

KYL: If I could just interrupt, we only have 20 minutes here, and I'm aware of the facts of the case. I know what the claims were. The question I asked was very simple. You said that you were bound by Supreme Court and Second Circuit precedent. What was it? There is no Supreme Court precedent. And as the court itself noted, they could find few, if any, Second Circuit precedents.

SOTOMAYOR: The question was, the precedent that existed and whether viewing it, one would view this as the city discriminating on the basis of race or the city concluding that because it was unsure that its test actually avoided disparate impact, but still tested for necessary qualifications, was it discriminating on the basis of race by not certifying the test?

KYL: Well, so you disagree with the Supreme Court's characterization of the precedents available to decide the case?

SOTOMAYOR: It's not that I disagree. The question was a more focused one that the court was looking at, which was saying -- not more focused. It was a different look.

It was saying, OK, you got these precedents. It says employees can sue the city. The city — the city is now facing liability. It's unsure whether it can defeat that liability. It's — and so it decides not to certify the test and see if it could come up with one that would still measure the necessary qualifications.

KYL: Let me interrupt again, because you're not getting to the point of my question. And I know, as a good judge, if I were arguing a case before you, you would say, "That's all fine and dandy, counsel, but answer my question."

Isn't it true that -- two things -- first, the result of your decision was to grant summary judgment against these parties? In other words, it wasn't just a question of whether they had the right to sue; you actually granted a summary judgment against the parties.

KYL: And, secondly, that there was no Supreme Court precedent that required that result. And I'm not sure what the 2nd Circuit precedent is. The Supreme Court said few, if any. And I -- I -- I don't know what the precedent would be. I mean, I'm not necessarily going to ask you to cite the case. But was there a case? And if so, what is it?

SOTOMAYOR: It was the ones that we discussed yesterday, the bushy line of cases that talked about the prima facie case and the obligations of the city in terms of defending lawsuits claiming disparate impact. And so, the question then became how do you view the city's action. Was it a -- and that's what the district court had done in its 78-page opinion¹⁰ to say you've got a city facing liability...

¹⁰ Sotomayor later admitted the opinion was much less than 78 pages. See page 70, below.

KYL: OK, all right. So -- so you contend that there was 2nd Circuit precedent. Now, on the en banc review, of course, the question there is different because you're not bound by any three-judge panel decision in your circuit. So what precedent would have bound -- and yet, you took the same position in the en banc review.

For -- for those who aren't familiar, a three-judge court decides the case in the first instance. In some situations, if the case is important enough, judges on -- the other judges on the circuit -- there may be nine or 10 or 20. I think in the 9th Circuit there are like 28 judges in the circuit. And you can request an en banc review. The entire circuit would sit.

And in that case, of course, they're not bound by a three-judge decision because it's the entire circuit sitting of 10 or 12 or 20 judges. So what precedent then would have bound in -- bound the court in the en banc review?

SOTOMAYOR: The panel acted in accordance with its views by setting forth and incorporating the district court's analysis of the case. Those who disagreed with the opinion made their arguments. Those who agreed that en banc certification wasn't necessary voted their way. And the majority of the court decided not to hear the case en banc.

I can't speak for why the others did or did not take the positions they did. They -- some of them have issued opinions. Others joined opinions.

KYL: But you felt you were bound by precedent?

SOTOMAYOR: That was what we did in terms of the decision, which was to accept the rule -- the -- not accept, but incorporate the district court's decision analyzing the case and saying we agreed with it.

KYL: Understood. But the district court's decision is not binding on the circuit court. And the en banc review means that the court should look at it in light of precedents that are stronger than a three-judge decision. **So I'm still baffled as to what precedent you're speaking of.**¹¹

SOTOMAYOR: Perhaps it's -- just one bit of background needs to be explained. When a court incorporates as we did in a per curiam, a district court decision below, it does become the court's precedent. And, in fact, the...

KYL: The three judges?

SOTOMAYOR: Yes, but when I was on the district court, I issued also a lengthy decision on an issue, a constitutional issue, direct constitutional issue that the circuit had not addressed and very other few courts had addressed on the question of whether etbus (ph) statute of limitations on habeas (ph)...

KYL: OK. If you excuse me, we're — I apologize for interrupting, but I've now used half of my time. And you — you will not acknowledge that even though the Supreme Court said there was no precedent, even though the district court judgment and a three-judge panel judgment cannot be considered precedent binding the en banc panel of the court, you still insist that somehow there was precedent there that you were bound by.

¹¹ Emphasis added by Standler.

SOTOMAYOR: As I explained, when the circuit court incorporated the district court's opinion, that became the court's holding.

KYL: Of course.

[Standler's comment: This tedious and laborious cross-examination would have been so much easier and simpler if Sotomayor had either said:

1. We followed no precedents, we just wrote an anonymous summary order to dispose of this case, because either: (a) we were lazy or (b) all three judges were liberals eager to continue affirmative action because of our personal political beliefs, regardless of legal problems and unfairness.
 2. I will cite the precedents on which I relied, in a short written statement to be included with the official transcript of the hearings.
- or
3. *Ricci* was a controversial political case that could have damaged my chances to be nominated as a Justice of the U.S. Supreme Court, if I had written a signed opinion.

The fact that she said none of these plain statements suggests to me that she is not telling the whole truth, as required by her oath as a witness. She can not choose excuse (1)(b) because that would be inconsistent with her earlier testimony that she *always* follows the law. She can not choose excuse (2), because there were apparently no precedents on the issue in *Ricci*. And there would be a scandal if she had confessed to excuse (3).]

SOTOMAYOR: So, it did become circuit holding. With respect ...

KYL: By three judges.

SOTOMAYOR: With respect -- yes, sir. I'm sorry.

With respect to the question of precedent, it must be remembered that what the Supreme Court did in *Ricci* was say, "There isn't much law on how to approach this should we adopt a standard different than the circuit did," because it is a question that we must decide how to approach this issue to ensure that two provisions of Title VII are consistent with each other.

That argument of adopting a different test was not the one that was raised before us, but that was raised clearly before the Supreme Court. And so that approach is different than saying that the outcome that we came to was not based on our understanding of what it make out a prima facie case.

KYL: Well, if it's a matter of first impression, do judges on the Second Circuit typically disposed of important cases of first impression by a summary one-paragraph order per curiam opinion?

SOTOMAYOR: Actually, they did in one case I handled when I was a district court judge.

KYL: Would that be typical?

SOTOMAYOR: I don't know how you define typical, but if the district court opinion, in the judgment of the panel, is adequate and fulsome and persuasive, they do. In my *Rodriguez v. Artus* (ph) case, when I was at district court on the constitutionality of an act by Congress with respect to the suspension clause of the habeas provision, the court did it in less than a paragraph. They just incorporated my decision as the law of the circuit, or the holding of the circuit.

KYL: Well, let me quote from Judge Cabranes' dissent. He said, "The use of per curiam opinions of this sort, adopting in full the reasoning of a district court without further elaboration, is normally reserved for cases that present straightforward questions that do not require exploration or elaboration by the court of appeals. The questions raised in this appeal cannot be classified as such, as they are indisputably complex and far from well settled."

I guess legal analysis -- analysts are simply going to have to research and debate the question of whether or not the cases of first impression or complex important cases are ordinarily dispensed of that way.

Let me just say that the implications -- the reason I address this is the implications of the decision are far-reaching. I think we would all agree with that. It's an important decision, and it can have far-reaching implications.

Let me tell you what three writers, in effect, said about it and get your reaction to it. Here is what the Supreme Court said in *Ricci* about the decision, about the rule that the -- that your court endorsed.

It said that the rule that you endorsed, and I'm quoting now, "Allowing employers to violate the disparate treatment prohibition based on a mere good-faith fear of disparate impact liability would encourage race-based action at the slightest hint of disparate impact." This is the Supreme Court. "Such a rule," it said, "Would amount to a de facto quota system in which a focus on statistics could put undue pressure on employers to make hiring decisions on the basis of race. Even worse, an employer could discard test results or other employment practices with the intent of obtaining the employer's preferred racial balance."

Your colleague on the Second Circuit, Judge Cabranes, said, that, under the logic of your decision -- I quote again -- "municipal employers could reject the results of an employment examination whenever those results failed to yield a desirable racial income." In other words, failed to satisfy a racial quota.

That's why the case is so important. I mean, I would imagine you would hope that that result would not pertain. I guess I can just ask you that, that you would not have rendered this decision if you felt that that would be the result.

SOTOMAYOR: As I argued -- argued -- as I stated earlier, the issue for us, no, we weren't endorsing that result. We were just talking about what the Supreme Court recognized, which was that there was a good-faith basis for the city to act. It set a standard that was new, not argued before us below, and that set forth how to balance those considerations.

That is part of what the court does is in the absence of a case previously decided that sets forth the test. And what the court there said is good faith is not enough.

KYL: Understood.

SOTOMAYOR: Substantial evidence is what the city has to rely on. Those are different types of questions.

KYL: Of course. And the point is you don't endorse the result that either Judge Cabranes or the Supreme Court predicted would occur had your decision remained in effect. I'm sure that you would hope that result would not pertain.

SOTOMAYOR: Yes. But I didn't -- that wasn't the question we were looking at. We were looking at a more narrow question which was could a city, in good faith, say we're trying to comply with the law. We don't know what standard to use. We have good faith for believing that we should not certify.

Now, the Supreme Court has made clear what standard they should apply. Those are different issues.

KYL: Well, I'm just quoting from the Supreme Court about the rule that was -- that you endorsed in your decision and, again, it said the Supreme Court said about your rule that such a rule would amount to a de facto quota system in which a focus on statistics could put undue pressure on employers to make hiring decisions on the basis of race. Even worse, an employer could disregard test results or other employment practices with the intent of obtaining an employer's preferred racial balance.

I guess we both agree that that is not a good result. Let me ask you about a comment you made about the dissent in the case. A lot of legal commentators have noted that, while the basic decision was five to four, that all nine of the justices disagreed with your panel's decision to grant some rejudgment; that all nine of the judges believed that the court should have been — that the district court should have found the facts in the case that would allow it to apply a test. Your panel had one test. The Supreme Court had a different test. The dissent had yet a different test.

But in any case, whatever the test was, all nine of the justices believed that the lower court should have heard the facts of the case before some rejudgment was granted. I heard you to say that you disagreed with that assessment. Do you agree that the way I stated it is essentially correct?

SOTOMAYOR: It's difficult because there were a lot of opinions in that case. But the engagement among the judges was varied on different levels. And the first engagement that the dissent did with the majority was saying if you're going to apply this new test, this new standard, then you should give the circuit court an opportunity to evaluate the evidence...
[ellipses in original]

KYL: Judge, I have to interrupt you there. The court didn't say, "If you're going to apply a new standard, you need to send it back." All nine justices said that summary judgment was inappropriate, that the case should have been decided on the facts.

There were three different tests: the test from your court, the test of the majority of the Supreme Court, and the test of the dissent. Irrespective of what test it was, they said that the case should not have been decided on summary judgment. All nine justices agreed with that, did they not?

SOTOMAYOR: I don't believe that's how I read the dissent. It may have to speak for itself, but I — Justice Ginsburg took the position that the Second Circuit's panel opinion should be affirmed. And she took it by saying that, no matter how you looked at this case, it should be affirmed. And so I don't believe that that was my conclusion reading the dissent, but obviously, it will speak for itself.

KYL: Well, it will. And I guess commentators can opine on it.

I could read commentary from people like Stuart Taylor, for example, who have an opinion different from yours. But let me ask you one final question in the minute-and-a-half that I have remaining.

I was struck by your response to a question that Senator Hatch asked you about yet another speech that you gave in which you made a distinction between the justice of a district court and the justice of a circuit court, saying that the district court provides justice for the parties, the circuit court provides justice for society.

Now, for a couple of days here, you've testified to us that you believe that not only do district and circuit courts have to follow precedent, but that the Supreme Court should follow precedent.

So it's striking to me that you would suggest -- and this goes back to another comment you made perhaps flippantly about courts of appeals making law -- but it -- it would lead one to believe that you think the circuit court has some higher calling to create precedent for society.

In all of my experience, you have *Smith v. Jones* in a district court. The court says, "The way we read the law, Smith wins." It goes to the court of appeals. The court has only one job to decide: Does Smith win or does Jones win?

It doesn't matter what the effect of the case is on society; that's for legislators to decide. You have one job: Who wins, Smith or Jones, based on the law? And you decide, "Yes, lower court was right. Smith wins."

You're applying precedent, and you're deciding the case between those parties. You're not creating justice for society, except in the most indirect sense, that any court that follows precedent and follows the rule of law helps to build on this country's reliance on the rule of law.

SOTOMAYOR: I think we're in full agreement. When precedent is set, it's set -- it follows the rule of law. And in all of the speeches where I've discussed this issue, I've described the differences between the two courts as one where precedents are set, that those precedents have policy ramifications, but not in the meaning that the legislature gives to it.

The legislature gives it a meaning in terms of making law. When I'm using that term, it's very clear that I'm talking about having a holding, it becomes precedent, and it binds other courts. You're following the rule of law when you're doing that.

Graham

GRAHAM: And here's what I will say about you. I don't know how you're going to come out on that case, because I think fundamentally, Judge, you're able, after all these years of being a judge, to embrace a right that you may not want for yourself, to allow others to do things that are not comfortable to you, but for the group, they're necessary. That is my hope for you.

That's what makes you, to me, more acceptable as a judge and not a activist, because an activist would be a judge who would be champing at the bit to use this wonderful opportunity to change America through the Supreme Court by taking their view of life and imposing it on the rest of us.

I think and believe, based on what I know about you so far, that you're broad-minded enough to understand that America is bigger than the Bronx, it's bigger than South Carolina.

Now, during your time as an advocate, do you understand identity politics? What is identity politics?

SOTOMAYOR: Politics based simply on a person's characteristics, generally referred to either race or ethnicity or gender, religion. It is politics based on...

GRAHAM: Do you embrace identity politics personally?

SOTOMAYOR: Personally, I don't as a judge in any way embrace it with respect to judging. As a person, I do believe that certain groups have and should express their views on whatever social issues may be out there. But as I understand the word "identity politics," it's usually denigrated because it suggests that individuals are not considering what's best for America.

GRAHAM: Do you think... [all ellipses are in original here and subsequent paragraphs]

SOTOMAYOR: That's my — and that I don't believe in. I think that whatever a group advocates, obviously, it advocates on behalf of its interests and what the group thinks it needs, but I would never endorse a group advocating something that was contrary to some basic constitutional right as it was known at the time...

GRAHAM: Do you...

SOTOMAYOR: ... although people advocate changes in the law all the time.

GRAHAM: Do you believe that your speeches properly read embrace identity politics?

SOTOMAYOR: I think my speeches embrace the concept that I just described, which is, groups, you have interests that you should seek to promote, what you're doing is important in helping the community develop, participate, participate in the process of your community, participate in the process of helping to change the conditions you live in.

I don't describe it as identity policies, because -- politics -- because it's not that I'm advocating the groups do something illegal.

GRAHAM: Well, Judge, to be honest with you, your record as a judge has not been radical by any means. It's, to me, left of center. But your speeches are disturbing, particularly to — to conservatives, quite frankly, because they don't talk about, "Get involved. Go to the ballot box. Make sure you understand that America can be whatever you'd like it to be. There's a place for all of us."

It really did, to suggest — those speeches to me suggested gender and racial affiliations in a way that a lot of us wonder, will you take that line of thinking to the Supreme Court in these cases of first precedent?

You have been very reassuring here today and throughout this hearing that you're going to try to understand the difference between judging and whatever political feelings you have about groups or gender.

Now, when you were a lawyer, what was the mission statement of the Puerto Rican Legal Defense Fund?

SOTOMAYOR: To promote the civil rights and equal opportunity of Hispanics in the United States.

GRAHAM: During your time on the board -- and you had about every job a board member could have -- is it a fair statement to say that all of the cases embraced by this group on abortion advocated the woman's right to choose and argued against restrictions by state and federal government on abortion rights?

SOTOMAYOR: I didn't — I can't answer that question because I didn't review the briefs. I did know that the fund had a health care docket...

GRAHAM: Judge?

SOTOMAYOR: ... that included challenges to certain limitations on a woman's right to terminate her pregnancy under certain circumstances.

GRAHAM: Judge, I -- I may be wrong, but every case I've seen by the Puerto Rican Legal Defense Fund advocated against restrictions on abortion, advocated federal taxpayer funding of abortion for low- income women. Across the board when it came to the death penalty, it advocated against the death penalty. When it came to employment law, it advocated against testing and for quotas.

I mean, that's just the record of this organization. And the point I'm trying to make is that whether or not you advocate those positions and how you will judge can be two different things. I haven't seen in your judging this advocate that I saw or this board member. But when it came to the death penalty, you filed a memorandum with the Puerto Rican Legal Defense Fund in 1981 -- and I would like to submit this to the record -- where you signed this memorandum.

LEAHY: Without objection.

GRAHAM: And you basically said that the death penalty should not be allowed in America because it created a racial bias and it was undue burden on the perpetrator and their family. What led you to that conclusion in 1981?

SOTOMAYOR: The question in 1991...

GRAHAM: '81.

SOTOMAYOR: I misspoke about the year -- was an advocacy by the fund taking a position on whether legislation by the state of New York outlawing or permitting the death penalty should be adopted by the state. I thank you for recognizing that my decisions have not shown me to be an advocate on behalf of any group. That's a different, dramatically different question than what -- whether I follow the law. And in the one case I had as a district court judge, I followed the law completely.

GRAHAM: The only reason we -- I mention this is when Alito and Roberts were before this panel, they were asked about memos they wrote in the Reagan administration, clients they represented. A lot to try to suggest that if you wrote a memo about this area of the law to your boss, Ronald Reagan, you must not be fit to judge. Well, they were able to explain the difference between being a lawyer in the Reagan administration and being a judge. And to the credit of many of my Democratic colleagues, they understood that.

I'm just trying to make the point that when you are an advocate, when you are on this board, the board took positions that I think are left of center. And you have every right to do it. Have you ever known a low-income Latina woman who was devoutly pro-life?

SOTOMAYOR: Yes.

GRAHAM: Have you ever known a low-income Latina family who supported the death penalty?

SOTOMAYOR: Yes.

GRAHAM: So the point is there are many points of view within groups based on income. You have, I think, consistently, as an advocate, took a point of view that was left of center. You have, as a judge, been generally in the mainstream.

The *Ricci* case, you missed one of the biggest issues in the country or you took a pass. I don't know what [sic] it is. But I am going to say this, that, as Senator Feinstein said, you have come a long way. You have worked very hard. You have earned the respect of Ken Starr. And I would like to put his statement in the record.

And you have said some things that just bugged the hell out of me.

SOTOMAYOR: May I... [ellipses in original]

GRAHAM: The last question on the "wise Latina woman" comment. To those who may be bothered by that, what do you say?

SOTOMAYOR: I regret that I have offended some people. I believe that my life demonstrates that that was not my intent to leave the impression that some have taken from my words.

GRAHAM: You know what, Judge? I agree with you. Good luck.

Cornyn

CORNYN: Judge, when we met the first time, as I believe I recounted earlier, I made a pledge to you that I would do my best to make sure you were treated respectfully and this would be a fair process. I just want to ask you upfront: Do you feel like you've been given a chance to explain your record and your judicial philosophy to the American people?

SOTOMAYOR: I have, sir. And every senator on both sides of the aisle that have made that promise to me have kept it fully.

CORNYN: And, Judge, you know, the test is not whether Judge Sonia Sotomayor is intelligent. You are. The test is not whether we like you. I think, speaking personally, I think we all do. The test is not even whether we admire you or we respect you, although we do admire you and respect what you've accomplished.

The test is really, what kind of justice will you be if confirmed to the Supreme Court of the United States? Will you be one that adheres to a written Constitution and written laws, that -- and respect the right of the people to make their laws through their elected

representatives, or will you pursue some other agenda, personal, political, ideological, that is something other than enforcing the law? I think those are the -- that is really the question.

And, of course, the purpose of these hearings is -- as you've gone through these tedious rounds of questioning, is to allow us to clear up any confusion about your record and about your judicial philosophy, yet so far I find there's still some confusion.

For example, in 1996, you said the idea of a stable, quote, "capital L Law" was a public myth. This week, you said that fidelity to the law is your only concern.

In 1996, you argued that indefiniteness in the law was a good thing because it allowed judges to change the law. Today you characterized that argument as being only that ambiguity can't exist and that it is Congress's job to change the law.

In 2001, you said that innate physiological differences of judges would or could impact their decisions. Yesterday, you characterized that argument as being only that innate physiological differences of litigants could change decisions. In 2001, you disagreed explicitly with Justice O'Connor's view of whether a wise man and wise woman would reach the same decision. Yet, during these hearings, you characterized your argument as being that you agreed with her.

A few weeks ago, in your speech on foreign law to the American Civil Liberties Union, you rejected the approach of Justices Alito and Thomas with regard to foreign law, and yet it seems to me, during these hearings, you have agreed with them.

So, Judge, what should I tell my constituents who are watching these hearings and saying to themselves, "In Berkeley and other places around the country, she says one thing, but at these hearings, you are saying something which sounds contradictory, if not diametrically opposed, to some of the things you've said in speeches around the country"?

SOTOMAYOR: I would tell them to look at my decisions for 17 years and note that, in every one of them, I have done what I say that I so firmly believe in. I prove my fidelity to the law, the fact that I do not permit personal views, sympathies or prejudices to influence the outcome of cases, rejecting the challenges of numerous plaintiffs with undisputably sympathetic claims, but ruling the way I have on the basis of law rejecting those claims, I would ask them to look at the speeches completely, to read what their context was and to understand the background of those issues that are being discussed.

I didn't disagree with what I understood was the basic premise that Justice O'Connor was making, which was that being a man or a woman doesn't affect the capacity of someone to judge fairly or wisely. What I disagreed was with the literal meaning of her words because neither of us meant the literal meaning of our words. My use of her words was pretty bad in terms of leaving a bad impression. But both of us were talking about the value of experience and the fact that it gives you equal capacity.

In the end, I would tell your constituents, Senators, look at my record and understand that my record talks about who I am as a person, what I believe in and my judgment and my opinion. But following the rule of law is the foundation of our system of justice.

CORNYN: Thank you for that -- for your answer, Judge. You know, I actually agree that your judicial record strikes me as pretty much in the mainstream of -- of judicial decision making by district court judges and by court of appeals judges on the federal bench. And while I think what is creating this cognitive dissidence for many of us and for many of my constituents who I've been hearing from is that you appear to be a different person almost in your speeches and in some of the comments that you've made. So I guess part of what we need to do is to try to reconcile those, as I said earlier.

You said that -- I want to pivot to a slightly different subject and go back to your statement that the courts should not make law. You've also said that the Supreme Court decisions that a lot of us believe made law actually were an interpretation of the law.

So I'm -- I would like for you to clarify that. If the Supreme Court in the next few years holds that there is a constitutional right to same-sex marriage, would that be making the law? Or would that be interpreting the law? I'm not asking you to classify -- excuse me. I'm not asking you to prejudge that case or the merits of the arguments, but just to characterize whether that would be interpreting the law or whether that would be making the law.

SOTOMAYOR: Senator, that question is so embedded with its answer, isn't it? Meaning if the court rules one way and I say that's making law, then it forecasts that I have a particular view of whatever arguments may be made on this issue, suggesting that it's interpreting the Constitution. I understand the seriousness of this question. I understand the seriousness of same-sex marriage.

But I also know, as I think all America knows, that this issue is being hotly debated on every level of our three branches of government. It's being debated in Congress. And Congress has passed an act relating to same-sex marriage. It's being debated in various courts on the state level. Certain higher courts have made rulings.

This is the type of situation where even the characterizing of whatever the court may do as one way or another suggests that I have both prejudged an issue and that I come to that issue with my own personal views suggesting an outcome. And neither is true. I would look at that issue in the context of the case that came before me with a completely open mind.

CORNYN: Forget the same-sex marriage hypothetical. Is there a difference, in your mind, between making the law and interpreting the law? Or is this a distinction without a difference?

SOTOMAYOR: Oh, no. It's a very important distinction. Laws are written by Congress. If has -- it makes factual findings. In determines, in its judgment, what the fit is between the law it's passing and the remedy. It's -- that its giving as a right.

The courts, when they're interpreting, always have to start with what does the Constitution say, what is the words of the Constitution, how has precedent interpreting those, what are the principles that it has discussed govern a particular situation.

CORNYN: How do you reconcile that answer with your statement that courts of appeals make policy?

SOTOMAYOR: In both cases in which I've used that word in two different speeches -- one was a speech, one was a remark to students -- this is almost like the discussion fundamental -- what does it mean to a non-lawyer and fundamental, what it means in the context of Supreme Court legal theory.

CORNYN: Are you saying it's only a discussion that lawyers could lot of?

SOTOMAYOR: Not love. But in the context in both contexts, it's very, very clear that I'm talking about completely the difference between the two judgments and that circuit courts, when they issue a holding, it becomes precedent on all similar cases.

In both comments, those -- that statement was made absolutely expressly that that was the context of the kind of policy I was talking about, which is the ramifications of a precedent on all similar cases. When Congress talks about policy, it's talking about someone totally

different. It's talking about making law, what are the choices that I'm going to make in law -- in making the law.

Those are two different things. I wasn't talking about courts making law. In fact, in the Duke speech, I said -- I used making policy in terms of its ramifications on existing cases. But I never said in either speech we make law in the sense that Congress would.

CORNYN: Let me turn to another topic. In 1996, when you -- after you'd been on the federal bench for four years, you wrote a law review article — the SUFFOLK UNIVERSITY LAW REVIEW. And this pertains to campaign financing.

You said, quote, "Our system of election financing permits extensive private, including corporate, financing of candidates' campaigns raising again and again the question of whether — of what the difference is between contributions and bribes and how legislators or other officials can operate objectively on behalf of the electorate."

You said, "Can elected officials say with credibility that they're carrying out the mandate of a democratic society representing only the generally public good when private money plays such a large role in their campaigns?"

Judge Sotomayor, what is the difference, to your mind, between a political contribution and a bribe?

SOTOMAYOR: The context of that statement was a question about what was perking through the legal system at the time and has been, as you know, before the Supreme Court since *Buckley v. Vallejo*. In *Buckley*... [ellipses in original]

CORNYN: I -- I agree, Your Honor. But what -- my question is, what, in your mind, is the difference between a political contribution and a bribe?

SOTOMAYOR: The question is, is a contributor seeking to influence or to buy someone's vote? And there are situations in which elected officials have been convicted of taking a bribe because they have agreed in exchange for a sum of money to vote on a particular legislation in a particular way. That is -- violates the federal law.

The question that was discussed there was a much broader question as to, where do you draw that line as a society? What choices do you think about in terms of what -- what Congress will do, what politicians will do?

I've often spoken about the difference between what the law permits and what individuals should use to guide their conduct. The fact that the law says you can do this doesn't always mean that you as a person should choose to do this.

And, in fact, we operate within the law. You don't -- you should not be a lawbreaker. But you should act in situations according to that sense of what's right or wrong.

We had the recent case that the Supreme Court considered of the judge who was given an extraordinary amount of money by a campaign contributor, dwarfing everything else in his campaign in terms of contributions, funding a very expensive campaign.

CORNYN: In fact -- in fact -- in fact, that was not a direct contribution to the judge, was it?

SOTOMAYOR: Well, it wasn't a direct contribution, but it was a question there where the Supreme Court said, the appearance of impropriety in this case would have counseled the judge to get off, because...

CORNYN: Let's get back to my question, if I can, and let me ask you this. Last year, President Obama set a record in fundraising from private sources, raising an unprecedented

amount of campaign contributions. Do you think, given your law review article, that President Obama can say with credibility that he's carrying out the mandate of a democratic society?

SOTOMAYOR: That wasn't what I was talking about in that speech. I don't know... [ellipses in original]

CORNBYN: Well, I realize he wasn't elected in 1996, but what I'm -- what I'm getting at is, are you basically painting with such a broad brush when it comes to people's rights under the First Amendment to participate in the political process, either to volunteer their time, make in-kind contributions, make financial contributions? Do you consider that a form of bribery or in any way improper?

SOTOMAYOR: No, sir.

CORNBYN: OK. Thank you.

SOTOMAYOR: No, sir.

CORNBYN: Thank you for your answer.

In the short time we have remaining, let me return to -- to the New Haven firefighter case briefly. As you know, two witnesses, I believe, will testify after you're through, and I'm sure you will welcome being finished with this period of questioning.

A lot of attention has been given to the lead plaintiff, Frank Ricci, who is a dyslexic and the hardship he's endured in order to prepare for this competitive examination only to see the competitive examination results thrown out.

But I was struck on July the 3rd in the New York Times, when they featured another firefighter, who will testify here today, and that was Benjamin Vargas. Benjamin Vargas is the son of Puerto Rican parents, as you probably know, and he found himself in the odd position, to say the least, of being discriminated against based on his race, based on the decisions by the circuit court panel that you sat on.

The closing of the article, because Lieutenant Vargas -- who hopes to be Captain Vargas as a result of the Supreme Court decision because he scored sixth on the comprehensive examination -- at the very last paragraph in this article, he -- it says, "Gesturing toward his three sons, Lieutenant Vargas explained why he had no regrets. He said, 'I want to give them a fair shake. To get a job on the merits, not because they're Hispanic or to fill a quota.' He said, 'What a lousy way to live.'" That's his testimony.

So I want to ask you, in conclusion, do you agree with Chief Justice John Roberts when he says, "The best way to stop discriminating based on race is to stop discriminating based on race"?¹²

SOTOMAYOR: The best way to live in our society is to follow the command of the Constitution, provide equal opportunity for all. And I follow what the Constitution says, that is, how the law should be structured and how it should be applied to whatever individual circumstances come before the court.

¹² *Parents Involved in Community Schools v. Seattle School Dist. Nr. 1*, 127 S.Ct. 2738, 2768 (2007) (Roberts, C.J., plurality opinion) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."). Note that Justice Roberts did *not* include the word "best". See also *Parents Involved*, 127 S.Ct. at 2833-2834 (2007) (Breyer, J., dissenting).

CORNYN: With respect, Judge, my question was do you agree with Chief Justice John Roberts's statement, or do you disagree?

SOTOMAYOR: The question of agreeing or disagreeing suggests an opinion on what the ruling was in the case he used it in, and I accept the court's ruling in that case. And that was a very recent case.

There is no quarrel that I have, no disagreement. I don't accept that, in that situation, that statement the court found applied. I just said the issue is a constitutional one - equal opportunity for all under the law.

CORNYN: I understand that you might not want to comment on what Chief Justice John Roberts wrote in an opinion, even though I don't think he was speaking of a specific case but rather an approach to the law which would treat us all as individuals with equal dignity and equal rights.

But let me ask you whether you agree with Martin Luther King when he said he dreamed of a day when his children would be judged not by the color of their skin, but by the content of their character. Do you agree with that?

SOTOMAYOR: I think every American agrees with that (inaudible).

CORNYN: Amen.

Hatch

During questioning by Senator Hatch on 16 July, beginning at 12:51 EDT, Sotomayor denied under oath any knowledge of the content of briefs filed in cases by the PRLDEF, because she was a board member, not an attorney.

http://www.washingtonpost.com/wp-dyn/content/article/2009/07/16/AR2009071602193_pf.html

Cornyn

Senator Cornyn asked a third set of questions beginning at 13:22 EDT on 16 July:

<http://www.washingtonpost.com/wp-dyn/content/article/2009/07/16/AR2009071602353.html> .

CORNYN: You're almost through, Judge. I just want to ask three relatively quick items just to — that I was not able to get to earlier just for your brief comment.

You wrote in 2001 that neutrality and objectivity in the law are a myth. You said that you agreed that, quote, "there is no objective stance, but only a series of perspectives, no neutrality, no escape from choice in judging." Would you explain what that means?

SOTOMAYOR: In every single case, and Senator Graham gave the example in his opening statement, there are two parties arguing different perspectives on what the law means. That's what litigation is about. And what the judge has to do is choose the perspective that's going to apply to that outcome.

So there is a choice. You're going to rule in someone's favor. You're going to rule against someone's favor. That's the perspective of the lack of neutrality. It's that you can't just

throw up your hands and say, "I'm not going to rule." Judges have to choose the answer to the question presented to them.

And so that's what that part of my talking was about, that there is choice in judging. You have to rule.

CORNYN: You characterized in your opening statement that your judicial philosophy is one of fidelity to the law. Would you agree that both the majority and the dissenting justices in last year's landmark gun rights case, the *D.C. v. Heller* case, were each doing their best to be faithful to the text and the history of the Second Amendment? In other words, do you believe that they were exhibiting fidelity to the law?

SOTOMAYOR: I think both were looking at the legal issue before them, looking at the text of the Second Amendment, looking at its history, looking at the court's precedent over time and trying to answer the question that was before them.

CORNYN: Do you think it's fair to characterize the five justices who affirmed the right to keep and bear arms as engaged in right-wing judicial activism?

SOTOMAYOR: It's -- that -- I don't use that word for judging. I eschew labels of any kind. That's why I don't like analogies and why I prefer, in brief writing, to talk about judges interpreting the law.

CORNYN: What about the 10 Democratic senators, including Senator Feingold, who's been mentioned earlier, who joined the brief, the amicus brief to the U.S. Supreme Court urging the court to recognize the individual right to keep and bear arms? Do you think, by encouraging an individual right to keep and bear arms, that somehow these senators were encouraging the court to engage in right-wing judicial activism?

SOTOMAYOR: I don't describe people's actions with those labels.

CORNYN: I appreciate that. You testified earlier today that you would not use foreign law in interpreting the Constitution [and?] statutes. I'd like to contrast that statement with an earlier statement that you made back in April. And I quote, "International law and foreign law will be very important in the discussion of how to think about unsettled issues in our legal system. It is my hope that judges everywhere will continue to do this," close quote.

Let me repeat the words that you used three months ago. You said, "Very important," and you said, "Judges everywhere." This suggests to me that you consider the use of foreign law to be broader than you indicated in your testimony earlier today. Do you stand by the testimony you gave earlier today? Is it -- or do you stand by the speech you gave three months ago, or can you reconcile those for us?

SOTOMAYOR: Stand by both, because the speech made very clear in any number of places where I said you can't use it to interpret the Constitution or American law, and I went through -- not a lengthy because it was a shorter speech -- but I described the situations in which American law looks to foreign law by its terms, meaning, it's counseled by American law.

My part of the speech said people misunderstand what the word "use" means. And I noted that use appears to be -- to people to mean if you cite a foreign decision, that's means it's controlling an outcome or that you are using it to control an outcome. And I said, no. You think about foreign law as a -- and I believe my words said this -- you think about a foreign law the way judges think about all sources of information, ideas. And you think about them as

ideas both from law review articles and from state court decisions and from all the sources, including, Wikipedia, that people think about ideas. OK?

They don't control the outcome of the case. The law compels that outcome. And you have to follow the law. But judges think. We engage in academic discussions. We talk about ideas. Sometimes, you'll see judges who choose -- I haven't -- it's not my style, OK? But there are judges who will drop a footnote and talk about an idea. I'm not thinking that they're using that idea to compel a result. It's an engagement of thought.

But the outcome, as in, you know, you could always find an exception, I assume if I looked hard enough. But in my review, judges are applying American law.

CORNYN: Well, Your Honor, why would a judge cite foreign law unless it somehow had an impact on their decision on their decision making process?

SOTOMAYOR: I don't know why other judges do it. As I explained, I haven't. But I look at the structure of what the judge has done and explained and go by what that judge tells me. There are situations -- that's as far as I can go.

CORNYN: You said at another occasion that you find foreign law useful because it, quote, "gets the creative juices flowing," close quote. What does that mean?

SOTOMAYOR: To me, I am a part academic. Please don't forget that I taught at two law schools. I do speak more than I should. (LAUGHTER) And I think about ideas all the time. And so, for me, it's fun to think about ideas. You sit at a lunchroom among judges, and you'll often hear them saying, did you see what that law school professor said. Or did you see what some other judge wrote and what do you think about it and -- but it's just talking. It's just sharing ideas. What you're doing in each case -- and that's what my speech said, you can't use foreign law to determine the American Constitution. It can't be used neither as a holding or precedent.

CORNYN: Do you agree with me that if the American people want to change the Constitution, that is a right reserved to them under the Constitution to amend it and change it rather than to have judges, under the guise of interpreting the law, in effect, change the Constitution by judicial fiat?

SOTOMAYOR: In that regard, the Constitution is abundantly clear. There is amendment process set forth there. It controls how you change the Constitution.

CORNYN: And I would just say, if academics or legislators or anybody else who's got creative juices flowing from the invocation of foreign law, if they want to change the Constitution, my contention is the most appropriate way to do that is for the American people to do it through the amendment process, rather than for judges to do it by relying on foreign law.

SOTOMAYOR: We have no disagreement.

CORNYN: Thank you very much, your honor.

Commentary

The Associated Press news stories about Sotomayor's testimony at her confirmation hearings were, in my opinion, surprisingly superficial and not worth quoting here. There was surprisingly little legal commentary on the confirmation hearings reported by the mainstream media. After many frustrating hours searching Google News, on the morning of 18 July I made a cursory inspection of recent posts in:

- the <http://althouse.blogspot.com/> blog by law professor Ann Althouse,
- the <http://www.newyorkcourtwatcher.com/> blog by law professor Vincent Bonventre,
- the <http://www.powerlineblog.com/> blog by three conservative lawyers, and
- <http://www.volokh.com/>, a blog by a nationwide group of law professors.

The sparse mentions of Sotomayor's hearings in these four blogs confirms my impression that there is little public commentary on these hearings. There also seems to be a consensus that Sotomayor made a good performance in the sense that she did not derail her confirmation, but the legal community was *not* impressed by her technical performance. There is also the cynical view — which I believe is correct — that the hearings were generally *not* a genuine inquiry into her competence, but only a mere publicity stunt by senators, so many law professors may have avoided commenting on what they believed was a meaningless procedure.

Prof. Seidman 14 July

A professor of constitutional law at Georgetown University wrote the following terse comment in an online debate during the Sotomayor hearings:

Speaking only for myself (I guess that's obvious), I was completely disgusted by Judge Sotomayor's testimony today. If she was not perjuring herself, she is intellectually unqualified to be on the Supreme Court. If she was perjuring herself, she is morally unqualified.¹³ How could someone who has been on the bench for seventeen years possibly believe that judging in hard cases involves no more than applying the law to the facts? First year law students understand within a month that many areas of the law are open textured and indeterminate—that the legal material frequently (actually, I would say always) must be supplemented by contestable presuppositions, empirical assumptions, and moral judgments. To claim otherwise—to claim that fidelity to uncontested legal principles dictates results—is to claim that whenever Justices disagree among themselves, someone is either a fool or acting in bad faith. What does it say about our legal system that in order to get confirmed Judge Sotomayor must tell the lies that she told today? That judges and justices must live these lies throughout their professional careers?

¹³ Standler's comment: I explain below, beginning at page 73, why it is *not* likely that perjury charges will be brought against any judge for alleged false statements in her confirmation testimony.

Perhaps Justice Sotomayor should be excused because our official ideology about judging is so degraded that she would sacrifice a position on the Supreme Court if she told the truth. Legal academics who defend what she did today have no such excuse. They should be ashamed of themselves.

Louis Michael Seidman, *The Sotomayor Nomination, Part II The Federalist Society* (14 July 2009) <http://www.fed-soc.org/debates/dbtid.30/default.asp> .

Those are harsh words, but I think Prof. Seidman has great courage to say the Truth publicly. Note that in two earlier posts in this debate, Prof. Seidman defends Sotomayor, so he is fair to her.

Washington Post 14 July

An opinion writer for *The Washington Post* wrote in an online blog at their website:

I'm surprised and disturbed by how many times today [14 July] Sonia Sotomayor has backed off of or provided less-than-convincing explanations for some of her more controversial speeches about the role of gender and ethnicity in judicial decision-making.

Sotomayor's most quoted comment is, "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." Under often very effective questioning by Sen. Jeff Sessions of Alabama, the ranking Republican on the Senate Judiciary Committee, she essentially disavowed her statement. She explained that she was trying to play off of former Supreme Court Justice Sandra Day O'Connor's assertion that a wise old man and a wise old woman should be able to reach the same conclusion in a case. "My play...fell flat," Sotomayor said in response to Session's question. "It was bad, because it left an impression that I believed that life experiences commanded a result in a case, but that's clearly not what I do as a judge."

A fair reading of Sotomayor's record on the federal trial and appellate courts clearly shows that that is not what she's done thus far. But Sessions' questions were aimed at understanding how she would implement this judicial philosophy if she's confirmed to the Supreme Court, where she would be far less restrained by precedent. I found it hard to believe that Sotomayor has now come to the realization that her words left a wrong impression. After all, she delivered similar lines in roughly half a dozen speeches throughout the years. Her explanation came across as dodgy at best and disingenuous at worst.

....

Eva Rodriguez, "Sotomayor's Unconvincing Backpedaling," *The Washington Post* (noon, 14 July 2009)

http://voices.washingtonpost.com/postpartisan/2009/07/sotomayors_unconvincing_backpe.html .

Prof. Adler 15 July

On Wednesday morning, 15 July, a law professor at Case Western Reserve University wrote in *The Washington Post*:

Sonia Sotomayor has started to sound more like the sort of nominee we would have expected from a President McCain than a President Obama. When questioned about President Obama's "empathy" standard for judging by Sen. Jon Kyl (R-Ariz.) late Tuesday afternoon, she bluntly replied, "I wouldn't approach the issue of judging in the way the president does. He has to explain what he meant by judging." These words could just as easily have come from Bush judicial nominees Samuel Alito or John Roberts.

Wednesday morning, Sotomayor continued to back away from the clear meaning of her various speeches, downplaying the role personal experience plays in judging and further distancing herself from an explicitly liberal or progressive view of the law. Her speeches, she told Sen. John Cornyn (R-Texas) were more about inspiring female and minority students and young lawyers to pursue their potential.

In response to further questions, she denied any role to judges in changing the law and suggested justices should be reluctant to rely or refer to foreign or international law, again disclaiming reasonable interpretations of her prior speeches. It is no wonder that some liberal academics, such as Georgetown's Louis Michael Seidman, are upset with her performance.

....

At one level, Sotomayor's caution is understandable, as a defensive posture may be the surest way to prevent a "meltdown" — the only thing that could keep her from the court. It is almost as if she and her White House handlers believe that a more forthright explication of a liberal judicial philosophy — a philosophy like that articulated in her speeches and defended by the president — would pose an obstacle to her confirmation.

Jonathan H. Adler, *The Washington Post* (10:45 EDT 15 July 2009)

<http://www.washingtonpost.com/wp-dyn/content/article/2009/07/15/AR2009071501416.html> .

Prof. Althouse 15 July

Prof. Ann Althouse of the University of Wisconsin Law School wrote in her blog on 15 July while traveling:

That was at 9:25 CT, when Sotomayor was in the middle of talking about some Ginsburg opinion. SS had already voiced the word "wrote" and then she changed it to "authored," as if "wrote" was a mistake. I know there are people who think "wrote" and then make a point to say "authored" — and do all sorts of other hoity-toity substitutions — but, jeez, if the simple word has already slipped out, move on. Don't let people hear that you do that.

....

Back to my Sotomayor notes.
strategy: boring us to death

+ avoiding creating highlights for the nightly news

no one has ever said "precedent" so many times in a confirmation hearing

And I remember saying something like: "She's talking about precedent so much because it's her way to nullify anything that she ever did as a Court of Appeals judge. She did it because of precedent, so she's not really responsible for anything." But there's room to maneuver within the limitations of precedent, and in the things that she did — while citing precedent — we can perceive her leanings, and we quite properly want to know what her leanings are.

Other techniques she's using: speaking very slowly, laying out the basics of case law, and repeating the most innocuous platitudes about judging.

Ann Althouse, "Hello, from the road." (14:38 CDT 15 July 2009)

<http://althouse.blogspot.com/2009/07/hello-from-road.html> .

I agree completely with Prof. Althouse's comments. On the issue of using "authored" in place of "wrote", that is an example of "verbing a virtuous noun" <*grin*> — something that I condemned in my handout on technical writing¹⁴ that I distributed to my students in the 1980s. Moreover, it is pretentious to use a fancy word when there is an equivalent, common word. Legal writing is full of slogans, clichés, hideously long sentences, and trite phrases.

Prof. Gerken 15 July

A professor at Yale Law School wrote in a blog at *The New York Times* website:

I have always believed in confirmation hearings. The Constitution belongs to all Americans, and confirmation hearings offer dramatic proof of that fact. The problem is that what appears to be emerging from the hearings is a depiction of judging that is unrecognizable to lawyers of any jurisprudential stripe.

A New York Times reporter [<http://www.nytimes.com/2009/07/15/us/politics/15judge.html>] has already observed that the hearings seem to have drained all the life out of Judge Sotomayor. My worry is that confirmation hearings will inevitably drain the life out of the law itself, at least in the public's eyes. Judge Bork was once criticized for thinking of the job as an "intellectual feast," but we now seem to have reached the point where nominees must claim that the job involves an intellectual famine.

The turning point may have been the confirmation hearings of Chief Justice Roberts, where he compared the Justice to an umpire, calling balls and strikes. Judge Sotomayor now appears to be out-Robertsing Roberts. Her answers sometimes suggest that the job involves even less discretion.

It's hard to know whom to blame in all of this. Nominees like Chief Justice Roberts and Judge Sotomayor have been thrust into an untenable position. It's hard to give the right answer when you are asked the wrong question.

¹⁴ Standler, Technical Writing, <http://www.rbs0.com/tw.htm>

The inexorable logic of politics has led both senators and nominees to depict judging as an either/or choice: either the law involves the technocratic application of rules to fact, or it involves free-form democratic engineering. But there is a vast space between those two positions, and somewhere in that space lies the reality of judging. It's too bad that Americans watching the hearing will never catch a glimpse of that reality.

Heather K. Gerken, "A False Depiction of Judging," *The New York Times* (16:21 EDT 15 July 2009) <http://roomfordebate.blogs.nytimes.com/2009/07/15/the-sotomayor-hearings-a-waste-of-time/?hp#heather>

Prof. Bonventre 15 July

Prof. Vincent Bonventre, a liberal law professor at Albany Law School, wrote in his blog:

For a court junkie, there are few shows better than the Senate confirmation hearings for a Supreme Court nominee. They're the Sinatra concert of current events.

So C-Span and CNN have been on non-stop. And like all true devotees of these events (i.e., judicial watching geeks), I've spent virtually all my time watching, taking notes, discussing and arguing.

As I'm writing this, the Senators are engaged in their second round of questioning Judge Sotomayor. The questioning is supposed to finish today. Possibly this evening at the current pace. To be blunt, I hope someone can finally get Sotomayor to respond with something beyond the banalities and superficialities she's been offering up so far.

I know this is heresy for my fellow liberals and Democrats, but let's be frank. This is the weakest performance of a Supreme Court nominee in a long time. She has provided virtually no discussion of the judicial role (except the utter nonsense that judges don't make law or policy), the vital issues (except to say that they all depend upon the specific facts of the case and the precedents), or constitutional principles (except to cite a relevant Supreme Court or 2d Circuit decision).

Sotomayor will likely vote the way I would in most cases. Justice Alito and Chief Justice Roberts usually do not. But their performances before the Senate Judiciary Committee were light years more impressive than hers. They showed themselves to be extremely knowledgeable, to have a command of Supreme Court jurisprudence and the Constitution, and well thought views about the proper role of the Court in our tripartite democratic republic. And before them, Justices Ginsburg and Breyer did the same. Agree with any of them or not, they were extraordinary and they proved themselves highly qualified for the Supreme Court. Sotomayor has not done that. Not close.

Sotomayor may turn out to be a fine, even great Justice. But there has been very little evidence of that at the hearings. Come on, let's put the cards on the table. Her performance (other than avoiding a politically destructive bombshell) has been abysmal.

Beginning tomorrow, some more specific analysis of the substance of Sotomayor's remarks.

Vincent Marvin Bonventre, "Sotomayor — Let's Put the Cards on the Table (The Hearings — Disappointing at Best)," *New York Court Watcher* (16:28 EDT 15 July 2009)

<http://www.newyorkcourtwatcher.com/2009/07/sotomayor-lets-put-cards-on-table.html> .

Mirengoff 16 July

A conservative legal blog says:

Roger Clegg reports that, under questioning by Senator Kyl about the *Ricci* case, Judge Sotomayor offered up a howler that raises serious questions about either her competence or her honesty. Specifically, Clegg reports that Sotomayor claimed it was difficult to tell whether all nine Justices rejected her position in *Ricci* because “there are a lot of opinions in that case.”¹⁵

What nonsense. First, the existence of multiple opinions doesn't make it hard to tell where the Justices stand. All you have to do is read the opinions. If the Justices are clear, it becomes easy to tell whether all of them have rejected a given position.

Second, in *Ricci*, there were four opinions, but two of them (Scalia's and Alito's) concur in full with the majority opinion and say so up front. The majority opinion, of course, is a clear rejection of Sotomayor's position. Sotomayor affirmed judgment in favor of the City of Haven. The majority directed that judgment be entered in favor of Ricci and the other plaintiffs. Nothing tricky about that.

This leaves one opinion, Justice Ginsburg's dissent. As I have explained [<http://www.powerlineblog.com/archives/2009/06/023927.php>], that opinion clearly rejects Sotomayor's approach, as well. Unlike both Sotomayor and the majority, Ginsburg would have remanded the case to the district court for further consideration. And she would have done so to enable the district court to apply a standard that differs from Sotomayor's.

To be sure, you have to read the footnotes [<http://www.powerlineblog.com/archives/2009/07/024053.php>] to determine this (perhaps Ginsburg was trying to obscure her rejection of Sotomayor's approach). But it's not too much to expect a potential Supreme Court Justice to read the footnotes.

Paul Mirengoff, “Surely the Senate Has the Right to Demand Better Than This,” *Powerline* (10:19, 16 July 2009) <http://www.powerlineblog.com/archives/2009/07/024064.php> .

This observation adds to my suspicion that the three-judge panel decided to dispose of the politically controversial *Ricci* case in a terse, one-paragraph summary order, to avoid harming Sotomayor's chances of being nominated to the U.S. Supreme Court. Sotomayor still refuses to recognize that what she — and her two colleagues — did was wrong.

Federalist Society Debate 16 July

In the continuing online debate at the Federalist Society website, Louis Michael Seidman, a liberal law professor wrote:

Although the Senate Judiciary Committee has not yet finished its work, this seems like a good time to take stock. The performance of both the Senators and the nominee has been disgraceful. If we are to give Judge Sotomayor the benefit of the doubt, she very substantially misrepresented her own views. It is virtually impossible to give the Senators the benefit of the doubt. Their questioning was at once frivolous, hectoring, and deeply ignorant.

¹⁵ See Sotomayor's testimony, quoted at page 36, above.

None of this is to say that these hearings are unique. The performance of both the nominees and the Committee was at least as bad in the Roberts and Alito hearings. Judge Sotomayor is not even the first nominee to mislead the Committee while under oath. Both Chief Justice Rehnquist and Justice Thomas also prevaricated, and, in their cases, the lies were about hard facts in the world, rather than something as amorphous as judicial philosophy. (Rehnquist almost certainly misrepresented his role in Justice Jackson's chambers with regard to *Brown v. Board* and in vote suppression activity in Arizona; even if we put to one side the Anita Hill mess, Thomas swore under oath to the preposterous claim that he had never in his life talked with anyone about *Roe v. Wade*.)

We can take no solace from the fact that hearings of this sort are a recurring rather than an isolated episode. For believers in popular constitutionalism, this has to be a disappointment. The hearings might, instead, be an occasion for serious public deliberation about constitutional law. How could they be made better? I have two practical suggestions. First, the Senators have no one to blame but themselves for the evasiveness of the nominees. There should be a bipartisan agreement not to confirm any nominee who is not forthcoming about her views concerning important constitutional questions. Second, if the Senators are unwilling or unable to ask intelligent questions of the nominees, they should turn over at least part of the task to committee counsel who might do a better job.

In a thoughtful analysis in the *New York Times* yesterday, Peter Baker and Charlie Savage suggested that the Republicans had established a precedent with the Sotomayor hearings: No nominee will be confirmed unless she embraces the simplistic view of constitutional law that conservative constitutionalists pretend to adhere to. On reflection, I think that they got it almost exactly backwards. What the hearings in fact establish is that President Obama can nominate almost anyone to the Supreme Court so long as the nominee is willing to humiliate herself by misrepresenting her views and kowtowing to the bullies on the committee. This conclusion needs to be qualified slightly. It was important that the Sotomayor nomination is unlikely to change the balance on the Court. Things will be much messier if one of the conservative Justices leaves the bench. Still, the Sotomayor experience demonstrates that hypocrisy, oversimplification, and cowardice go a long way toward achieving a seat on the Supreme Court. Unfortunately, there seems to be no shortage of ambitious federal judges willing to learn this lesson.

Then M. Edward Whelan III, a conservative attorney, wrote in reply:

The confirmation hearing was surely an excruciating fiasco for all the liberal progressives, like Mike [Prof. Seidman], who were reasonably hoping and expecting that Judge Sotomayor would provide an ardent defense of their constitutional vision. Mike states that Sotomayor "embrace[d] the simplistic view of constitutional law that conservative constitutionalists pretend to adhere to." But there are few if any conservative constitutionalists who would endorse her ridiculously wooden description of the judicial role, and even Chief Justice Roberts's umpire metaphor—which was, after all, just a metaphor—would seem to have the richness and depth of a learned treatise by comparison.

Judge Sotomayor deserves an A+ for brazen doublespeak. She emphatically rejected the lawless "empathy" standard for judging that President Obama used to select her, but she denied the plain import of her many statements contesting the possibility and desirability of judicial impartiality. She hid behind her empty clichés about judging, but she never recognized any meaningful bounds on the role of a Supreme Court justice. She gave a series of confused statements about the use of foreign law that are inconsistent with each other and that contradict a speech that she gave just three months ago.

The primary question that Judge Sotomayor's testimony raises is whether her thinking is really so muddled or whether she was being savvily deceptive—or both.

With overwhelming support in the Senate and no serious doubt that she would be confirmed, why did Sotomayor testify as she did? One theoretical possibility (perhaps the one that would scare progressives the most) is that she actually believes what she said. Another (among the many possibilities) is that her White House handlers persuaded her to take that path. If so, that would be a remarkable testament to their perception of how deeply unpopular and unconvincing the progressive view of the Constitution is.

The Sotomayor Nomination, Part III, The Federalist Society Online Debate Series (16-17 July 2009) <http://www.fed-soc.org/debates/dbtid.31/default.asp> .

I disagree with some of Prof. Seidman's assertion that the senators' questioning was "frivolous, hectoring, and deeply ignorant". Compared with previous hearings over the past twenty years, these questions were gracious, and *not* "hectoring". I thought that Senators Cornyn and Kyl asked good questions that showed careful preparation, although they were only 2 senators on a committee of 19 senators. Senator Graham was also good, but he was not persistent when Sotomayor was evasive. The six senators who never attended law school can be expected to be "deeply ignorant" of constitutional law — putting nonlawyers on the Judiciary Committee is stupidity by design. Senator Specter's repeated assertions about "super precedent" preventing the overruling of *Roe v. Wade* shows his deep ignorance of constitutional law, despite the fact that Specter was a prosecutor in the 1970s.

Prof. Seidman mentions "kowtowing to the bullies on the committee." The only Republican on the Judiciary Committee who I would call a bully is Senator Hatch, who is famous for his demagoguery¹⁶ to eradicate "judicial activism". There are other Republican bullies who are not on the Judiciary Committee, such as Mitch McConnell.

The Washington Post 16 July

A columnist for *The Washington Post* wrote:

Listening to Sonia Sotomayor a few years ago, say at a legal conference, one would have heard a mainstream liberal — emphasizing the superiority of her bottom-up minority experience, hinting at the role of judges in making policy and expressing skepticism about the "aspiration to impartiality."

Listening to Sotomayor before the Senate Judiciary Committee this week, I heard what often sounded like a card-carrying member of the Federalist Society. (Though I'm not sure if they carry cards in addition to the secret handshake.) The judge's role, Sotomayor said, is "not to make law. It is to apply the law" — echoing a common Republican applause line used against judicial activism. The law must command "the result in every case." The Constitution is an "immutable" document. Her "wise Latina" comment was "bad because it left an impression that I believed that life experiences commanded a result in a case, but that's

¹⁶ See, e.g., Standler, Is Judicial Activism Bad?, (Sep 2005) <http://www.rbs0.com/judact.pdf> ; Sol Wachtler and David Gould, "The myth of judicial activism," *Newsday* (21:33 EDT 10 July 2009) <http://www.newsday.com/news/opinion/ny-opwac1212959279jul10,0,7645808.story> .

clearly not what I do as a judge." Judges should "test themselves to identify when their emotions are driving a result, or their experiences are driving a result, and the law is not." And again: "It is very clear that I don't base my judgments on my personal experiences — or my feelings or my biases." And again: "My record shows that at no point or time have I ever permitted my personal views or sympathies to influence the outcome of a case."

At some point, it all became more than a liberal law professor could bear. Louis Seidman of Georgetown University Law School vented:

I was completely disgusted by Judge Sotomayor's testimony today. If she was not perjuring herself, she is intellectually unqualified to be on the Supreme Court. If she was perjuring herself, she is morally unqualified. How could someone who has been on the bench for seventeen years possibly believe that judging in hard cases involves no more than applying the law to the facts? First year law students understand within a month that many areas of the law are open textured and indeterminate -- that the legal material frequently (actually, I would say always) must be supplemented by contestable presuppositions, empirical assumptions, and moral judgments. To claim otherwise -- to claim that fidelity to uncontested legal principles dictates results -- is to claim that whenever Justices disagree among themselves, someone is either a fool or acting in bad faith.

[full quotation and citation to Prof. Seidman given on page 49, above]

What are the implications of Sotomayor's retreat from liberal judicial theory?

First, it makes for an uninteresting confirmation process. No prospective Supreme Court justice, liberal or conservative, is going to comment directly on abortion or gay rights during his or her nomination hearing. But a serious discussion of the principles of judicial interpretation would have been instructive. Because Sotomayor generally adopted conservative language on these matters, that discussion was short circuited. A hearing with the vivid Professor Seidman would have been more intellectually satisfying.

Second, Sotomayor's retreat involved a kind of confession that conservative legal theory is on the ascendant. To gain an easy confirmation, Sotomayor had to sound, at key moments, like John Roberts. Even facing an overwhelmingly Democratic committee and Senate, it would have been controversial for Sotomayor to sound like Thurgood Marshall or William Brennan. The political and intellectual center of gravity seems to lie with the Federalist Society — at least when it comes to the theory of judicial interpretation.

Third, if Sotomayor eventually judges on the high court like Marshall or Brennan, it will mean that her testimony was deceptive. A blogger over at the liberal American Prospect, Adam Serwer, assumes such cynicism: "Seidman is accusing Sotomayor of dishonesty, and I think he's right: Sotomayor has been saying what she needs to say, backtracking on her previous insights, in order to get confirmed." I hope this is not the case. But if it is, it will be the worst kind of precedent.

Michael Gerson, "The Meaning of Sotomayor's Retreat," *The Washington Post* (12:20 EDT 16 July 2009)

http://voices.washingtonpost.com/postpartisan/2009/07/the_meaning_of_sotomayors_retr.html .

Politico 17 July

An article at the *Politico* website on Friday morning, 17 July, said:

Asked to define her legal philosophy, Supreme Court nominee Judge Sonya Sotomayor boiled it down on Monday: “fidelity to the law.” The phrase made headlines, as if she had said something profound. In fact, it is a legal cliché, a go-to judicial confirmation phrase.

...

What does “fidelity to the law” mean? “It can mean anything you want it to mean,” says Anita Allen, a deputy dean at the University of Pennsylvania Law School. “If you are a staunch conservative, it appeals to you because it sounds like you are not a political person, not an activist, somebody who uses the law to guide you. But if you are a liberal activist, you can also subscribe to this attractive notion because it can mean following the spirit of law.”

The phrase was popularized by the legal philosopher Ronald Dworkin, who penned a 1997 article in the *Fordham Law Review* titled “The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe and Nerve.”

“The phrase means nothing, because there are so many contesting views about how to discover what the law is that ‘fidelity to law’ means fidelity to your own conception of law,” Dworkin tells *POLITICO*. “The phrase is useful for nominees, because they are not then asked the jurisprudential question: Well, what is your conception? What does ‘fidelity’ mean in interpreting the very abstract clauses of the Constitution? Does it mean originalism? Making the Constitution the best it can be? What else might it mean?”

Daniel Libit, “Sonia Sotomayor and ‘fidelity to the law’,” *Politico* (04:42 EDT 17 July 2009) <http://www.politico.com/news/stories/0709/25051.html> .

Los Angeles Times 17 July

A reporter for the *Los Angeles Times* summarized the hearings:

Supreme Court nominee Sonia Sotomayor maneuvered through three days of an often-antagonistic confirmation hearing by portraying herself as a legal mechanic who would stick to precedent and never “make law.” But in doing so she revealed almost nothing about the philosophy that would guide her on the high court.

It is not clear whether this play-it-safe strategy was a political calculation, perhaps dictated by the White House, or an accurate reflection of her background as a lower court judge who has not formed broader views on the law.

Either way, it seemed to have worked. By the last day of the hearing, even skeptical Republicans softened toward President Obama’s nominee.

They assured her they would not try to block her confirmation, and some conservatives said they might vote for her. A Senate vote on her nomination is expected by early August.

But some prominent legal experts on the left and the right panned her performance.

“Her mantra — ‘I just follow the law, I just follow the law’ — is an insult to the intelligence of the American public,” said Abigail Thernstrom, a conservative analyst at the American Enterprise Institute.

Yale Law School professor Heather Gerken said Sotomayor's testimony "drained the life out of the law" and turned it into a "witless, mechanical exercise. . . . It's too bad that what is perhaps the law's most public moment gives the public so little sense of what a remarkable institution it is."

Unlike lower courts, the Supreme Court usually hears cases only when judges are divided on the law and legal precedents. There is no mechanical right answer.

....

UC Davis School of Law professor Vikram Amar said the hearing was "less than useless. If Judge Sotomayor won't meaningfully discuss any legal topics in front of the Senate, then what's the point of the hearings?"

The sad state of Supreme Court confirmation hearings is usually traced to the 1987 defeat of Judge Robert H. Bork, a scholarly conservative. To no avail, he tried to explain and defend his many legal writings that had condemned the Supreme Court as too liberal on abortion and civil rights.

Four years later, Clarence Thomas won a close battle in the Senate by portraying himself as a blank slate with no views on the law. He told senators he had not discussed *Roe vs. Wade* or formed an opinion on the controversial abortion ruling.

Ever since, Supreme Court nominees have assumed it is more dangerous to explain too much, rather than too little, when talking about what they think of the Constitution and the law.

....

Liberals had hoped an Obama nominee would bring a larger vision of the Constitution and the role of the high court. That explains some of their disappointment.

"Sotomayor stayed to the Roberts script," said Erwin Chemerinsky, dean of UC Irvine School of Law. "She described judging as mechanical. I understand why this is the script now, but I am troubled that it paints such a disingenuous and false impression of judging."

Even those who were disappointed said it was not fair to blame her.

"I do think she was boxed in," said Gerken, a former clerk to Justice David H. Souter, whose seat Sotomayor would fill. "Virtually any answer other than the answer she gave ends up evoking cries of judicial activism. The result, unfortunately, is that judges are portrayed as automatons or activists, when most are neither."

....

David G. Savage, "A mechanic in a black robe," *Los Angeles Times* (17 July 2009)

<http://www.latimes.com/news/nationworld/nation/la-na-sotomayor17-2009jul17,0,7388549.story>

Prof. Althouse 17 July

Prof. Ann Althouse of the University of Wisconsin Law School read the article titled "A mechanic in a black robe" in the *Los Angeles Times*. There, Prof. Heather Gerken is quoted as saying:

"I do think she was boxed in," said Gerken, a former clerk to Justice David H. Souter, whose seat Sotomayor would fill. "Virtually any answer other than the answer she gave ends up evoking cries of judicial activism. The result, unfortunately, is that judges are portrayed as automatons or activists, when most are neither."

Prof. Althouse's terse response was:

She was only boxed in by the limitations of her own intellect, expressive skill, and nerve.
So explain to me why she belongs on the Supreme Court.

Ann Althouse, " 'I do think she was boxed in,' said lawprof Heather Gerken about Sonia Sotomayor." (10:08 CDT 17 July 2009)

<http://althouse.blogspot.com/2009/07/i-do-think-she-was-boxed-in-said.html> .

Mirengoff, 17 July

An entry at a conservative legal blog reflected on the decision of Republicans in the Senate not to filibuster the Sotomayor confirmation:

There will be no filibuster of Judge Sotomayor's nomination. That's not an unreasonable result. The prevailing standard for a filibuster (to the extent there is a standard) requires that "special circumstances" be present. But Sotomayor is a garden-variety competent left-liberal appellate judge. Neither her left-liberalism nor her lack of excellence as a judge constitutes a special circumstance.

Sotomayor's speeches in which she embraced judging that is not ethnic and/or gender neutral would be a special circumstance. But Sotomayor has disavowed such judging. Moreover, there is insufficient evidence that her judging has failed to be ethnic and/or gender neutral (which is not the same thing as saying that her judging is, in fact, neutral in these respects).

The closest thing I see to a special circumstance is the dishonest way in which Sotomayor testified about her speeches and related matters. But we are talking here about how to interpret a speech, not about a false statement about a straightforward factual matter.

If the Republican Senators were sufficiently disgusted with Sotomayor's lack of candor to try and mount a filibuster, I wouldn't be opposed. But I don't think that her lack of candor compels them to filibuster, an effort that would be futile in any event.

Voting for Sotomayor is another matter. Even in the absence of her speeches and her lack of candor, Sotomayor's left-liberal judging should cause conservative Senators to vote "no" (and moderate Senators strongly to consider voting "no") under existing standards.

Paul Mirengoff, "A Clear Path to the Supreme Court," *Powerline* (13:25 CDT 17 July 2009)

<http://www.powerlineblog.com/archives/2009/07/024072.php> .

Politico 18 July

An article at the *Politico* website on Saturday morning, 18 July, said:

Sonia Sotomayor's measured confirmation performance may have served her well, but it left the bases of both parties feeling that they've missed an opportunity.

Liberals are concerned that Sotomayor's non-controversial approach – she largely declined to take positions on major issues, and seemed to side with conservatives on some constitutional matters – cost the Democratic party a critical opportunity to effectively express and advocate for its bedrock judicial philosophies.

The question, to some, is: Why retreat now when the nomination was a sure bet since Democrats have a supermajority in the Senate, and Republicans haven't put up a united front of opposition?

"It's troubling," said Louis Michael Seidman, professor of constitutional law at Georgetown University and a former law clerk to the late Supreme Court Justice Thurgood Marshall. "I don't think that she had to do this."

On the right, conservatives are asking: If Republicans won't fight tooth-and-nail to derail a Supreme Court nominee they find out of the mainstream, what will they fight over?

"You just really don't have the sense there is fire in the belly on this one," said Linda Chavez, head of the Center for Equal Opportunity, who testified against Sotomayor at the hearings. "They just didn't seem to have the toughness."

....

To win GOP support, she stuck to the playbook of recent Supreme Court nominees of both parties: avoid taking personal positions; largely agree with skeptical senators; decline to comment when there's a matter in litigation; and repeatedly affirm that a judge's job is to apply the law like a machinist.

"I can only explain what I think judges should do, which is judges can't rely on what's in their heart," Sotomayor said in appearing to break from Obama's so-called "empathy" standard for judges. "They don't determine the law. Congress makes the laws. The job of a judge is to apply the law."

Sotomayor described the Constitution as a "timeless document" and said that "what changes is society," and "what facts a judge may get presented."

....

Manu Raju, "Left and right both let down by Sonia Sotomayor hearings," *Politico* (07:06 EDT 18 July 2009) <http://www.politico.com/news/stories/0709/25098.html> .

Mr. Raju — and earlier Mr. Savage at the *Los Angeles Times* — chose the wrong word: Sotomayor is *not* like a machinist. A machinist is a person who can be creative and resourceful. Instead, Sotomayor claims she is like a machine, that mechanically produces the one correct ruling based on application of law to the facts of the case. Such a mechanical process is unworthy of an educated person.

Fineman in Newsweek 18 July

A lawyer turned journalist and commentator wrote:

.... We need to stop holding Supreme Court confirmation hearings. Put them out of their misery. They have no clear purpose—or at least no useful one. They make everyone involved look bad. They are worse than a waste of time, because they confuse the public about what the Supreme Court does and undermine respect for law and judges. They aren't even good television anymore.

.... The first hearing to become a TV soap opera was Sandra Day O'Connor's in 1981—not coincidentally, a year after CNN invented the cable news business. Six years later, the Democrats savaged the hapless (and unrehearsed) Judge Robert Bork. A verb was invented. To bork: to deny a nominee a seat on the high court by portraying him or her as a mentally unstable wingnut.

.... But now—recognizing the viral danger of YouTube and the like—the nominees arrive on the Hill encased in hard, shrink-wrapped plastic, the kind you can't open without pointed scissors and a kitchen knife. The game (and it is one) becomes an atavistic search for an emotional gotcha moment, a test more appropriate to a hockey goalie than a Supreme Court justice. As long as she did not have a "meltdown," said Sen. Lindsey Graham, Sotomayor would be confirmed. A worthy standard, indeed.

....

... Supreme Court confirmation hearings consist primarily of people saying things they do not mean, or not saying what they do mean, or ignoring the obvious. This is not good advertising for the basic honesty of judges, which is presumably what we are looking for. In carefully rehearsed sentences, Sotomayor recanted (sort of) her assertion that a "wise Latina" is likely to render "better" rulings than a white male judge. Republicans accepted her semi-apology (sort of), but everyone in the room assumed that she believes it. Similarly, no one professes to favor an "activist" judge, and Sotomayor dutifully denied that she was one. Howard Fineman, "Advise and Shut Up Already Let's end confirmation hearings," *Newsweek* (18 July, magazine dated 27 July) <http://www.newsweek.com/id/207411> .

The Washington Post 19 July

On Sunday, 19 July, *The Washington Post* reflected on the political significance of the recent hearings:

The hearings were a moment of history that liberals had awaited for 15 years: an opportunity for a Democratic president's Supreme Court nominee to inject into the public dialogue fresh ideas about the Constitution and the law, beginning to recalibrate a court that has gravitated to the right.

Yet Sotomayor did not articulate such a vision. In answering Cardin, and in scores of other times during four intense days in the witness chair, she eluded efforts of Democrats and Republicans alike to draw out any statement of liberal thought.

Sotomayor's inscrutability last week has raised fundamental questions: about the Obama administration's approach to future nominations, the direction of the court, the way Senate Democrats are using the benefits of their majority and the influence of the American left.

At the heart of those questions is another one, which has ignited a debate among legal scholars, advocates and members of Congress. Did the hearings reveal a true absence of liberal ideas in the 55-year-old judge President Obama chose to fill his first Supreme Court vacancy? Or did they reflect sheer political pragmatism by someone, coached by White House staff members and following the model of other recent nominees, seeking to maximize support by avoiding controversy?

Either way, Sotomayor's reticence, if not her nomination, has disappointed legal thinkers on the left. The hearings "did serious damage to the cause of progressive thought in constitutional law," said Geoffrey R. Stone, a University of Chicago Law School professor who was dean there when Obama joined its faculty. Doug Kendall, president of the Constitutional Accountability Center, a liberal think tank, called them "a totally missed opportunity. . . . The progressive legal project hit rock bottom [last] week."

Amy Goldstein and Paul Kane, "Little for Liberals in Confirmation Hearings As Sotomayor and White House Avoid Ideology, Some on Left See Wasted Chance," *The Washington Post* (19 July 2009) <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/18/AR2009071801787.html> .

editorial, *The Washington Post* 19 July

The Washington Post published an anonymous editorial endorsing Sonia Sotomayor for the U.S. Supreme Court, but noting:

Much of the four-day hearing was focused on Judge Sotomayor's controversial speeches, particularly those in which she proclaimed that a wise Latina woman, because of the richness of her experience, should be able to make better decisions than a white male. 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.

It's too bad that she felt she had to disavow her true intent, because, though a wise Latina won't necessarily judge better than a white man would, diversity on the bench is indeed important. Judge Sotomayor's rise from modest beginnings in the Bronx to almost certainly become the first Hispanic justice is testament to her intelligence, fortitude and perseverance and should serve as inspiration to all Americans. And life experiences do matter in fairly and thoroughly assessing different situations — from the impact of regulation on business to the effect of a strip search on a 13-year-old girl to the damage done by discrimination in all facets of life. The key — as Judge Sotomayor explained and seems to have demonstrated in her life's work — is never to allow personal prejudices or preferences to trump the clear commands of the law.

editorial, "Confirm Sonia Sotomayor Despite less than candid exchanges on diversity, her hearings reveal a well-qualified candidate for the court." *The Washington Post* (19 July 2009)

<http://www.washingtonpost.com/wp-dyn/content/article/2009/07/18/AR2009071801679.html> .

The liberal *Post* editorial admits the obvious: Sotomayor's attempt to explain her "wise Latina" remark was "unconvincing and at times uncomfortably close to disingenuous". I disagree with the *Post* that her speeches "do not support that interpretation", instead some of her speeches clearly justify a judge's use of personal biases. Why would Sotomayor's ethnicity, gender, and

personal experience matter if she will be an impartial judge and ignore her ethnicity, gender, and personal experience?

Should a nominee for the U.S. Supreme Court testify honestly and tell the whole truth, according to her oath? The *Post* ignores the issue. Why have hearings, when the nominee will be confirmed despite her *uncredible* testimony that not even her liberal supporters believe?

I do not share the *Post's* optimism that Judge Sotomayor “never to allow personal prejudices ... to trump the clear commands of the law.” Sotomayor’s improper disposal of the *Ricci* case may be one example of her using her personal opinions for affirmative action and against merit by white men. I say *may* because she has refused to explain *why* the three-judge panel disposed of the case in a summary order.

The Washington Post 20 July

Howard Kurtz, the news media columnist for *The Washington Post*, wrote on the Monday following the confirmation hearings:

Thirty years from now, when today's hot headlines are a distant memory, we may well be debating the impact of Sonia Sotomayor as the Supreme Court's first Hispanic justice. But while her confirmation hearings drew plenty of coverage last week, the level of media excitement hardly matched that surrounding Mark Sanford’s Argentine affair, Sarah Palin’s Alaskan exit or Michael Jackson’s untimely departure.¹⁷

Sure, the dry legal debate over a judicial nominee is never going to be as exciting as a sex scandal, surprise resignation or celebrity death. But are news organizations increasingly losing sight of what's important, as opposed to what gets tongues wagging? Or — let's be blunt — are these Senate hearings increasingly empty exercises?¹⁸

The whole affair lacked a key element — suspense — as Republicans quickly conceded the judge was a lock for confirmation. There was no hint of personal impropriety. The focus has been squarely on a few Sotomayor rulings and off-the-bench comments, particularly her clumsy "wise Latina" remark.

Such hearings are rarely great theater. The first day featured five hours of senatorial bloviation before Sotomayor got to read a short statement. The next two days were filled with substantive but repetitive questioning and evasive answers, prompting the cable networks to keep cutting away to their pundit panels. Detailed discussions of “disparate impact” and “stare decisis” are not big ratings-grabbers, and indeed, the Nielsen numbers dropped.

....

¹⁷ For the benefit of readers in future years, Sanford was the governor of South Carolina, Michael Jackson was a popular music singer and dancer who died of a drug overdose on 25 June 2009, and Palin was the governor of Alaska who suddenly and *unexpectedly* resigned on 3 July 2009 with 18 months remaining her elected term.

¹⁸ Mr. Kurtz never answered his rhetorical question about “empty exercises”.

[Kurtz said that Sotomayor's confirmation hearings lacked excitement.]

.... The 1987 brawl over Robert Bork's nomination was fought squarely on ideological grounds, and there was genuine drama over whether the Democrats could defeat him. The most riveting Supreme Court battle of modern times was, of course, the Clarence Thomas hearings, which wound up being about alleged sexual remarks more than judicial philosophy.
....

....

Sotomayor's rise from a Bronx public housing project was a stirring story at first, but that narrative quickly ran its course. The "wise Latina" remark had its YouTube moment. With no new revelations to stoke public interest, last week's hearings were mundane enough that, on the first day of questioning, ABC's "World News" led instead with a Southwest plane that developed a hole in its fuselage in flight, and "Nightline" led with the late King of Pop [i.e., Michael Jackson], as it had on 10 of the previous 13 nights. There was undoubtedly more interest in the new Harry Potter movie than the likely next Supreme Court justice.

In the Twitter age, we all hear the din of overlapping conversations. Journalists can hardly grab people by the lapels and demand that they pay attention to some long-winded political ritual. When it comes to mesmerizing the media marketplace, Sonia Sotomayor is no Sarah Palin.

Howard Kurtz, "Snoozing Through Sotomayor," *The Washington Post* (10:56 EDT, 20 July 2009) <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/20/AR2009072000735.html> .

Mr. Kurtz correctly says "Detailed discussions of 'disparate impact' and 'stare decisis' are not big ratings-grabbers, and indeed, the Nielsen numbers dropped." However, if hearing an unfamiliar technical phrase makes americans refuse to listen to lawyers, then americans will not only stop learning, but also remain ignorant of law. Indeed, I am appalled at the lack of technical detail and the low-level vocabulary used not only on television, but also in the best american newspapers (e.g., *The Washington Post*.) Too often, so-called news is merely a slogan, often only a cliché. With the exception of C-SPAN, all one finds on television news is so-called "sound bites", a terse one-sentence remark that is usually more rhetoric than substance.

A lawyer often needs to read judicial opinions for tens of hours before understanding some detail. In contrast, the MTV generation refuses to read a book, and gets bored if something takes longer than three minutes to understand.

I noticed that Sotomayor's confirmation was **not** on the front page of *The Washington Post* for either Sunday, 19 July, or Monday, 20 July.

Prof. Bonventre 20-21 July

I am quoting a few excerpts from Prof. Bonventre's articulate description and analysis of Sotomayor's testimony during her confirmation hearings.

Judge Sonia Sotomayor's performance at the Senate Judiciary hearings was a success only in the barest, crassest political sense. She avoided saying anything useful as ammunition for conservative Republicans to use against her. But in a substantive sense, her performance was dreadful.

Her testimony was devoid of virtually any meaningful legal, judicial or governmental content. Were she a student of mine, I could not honestly give her a passing grade.

Assuming that Sotomayor was being honest in her testimony, she utterly failed to demonstrate an understanding of, or even much familiarity with, the Constitution, constitutional law, Supreme Court jurisprudence, the role of the Court in safeguarding rights and liberties, or the Court's position in the American tripartite and federal form of government. Indeed, again assuming her honesty in testifying, she affirmatively demonstrated an appalling lack of understanding or familiarity with these absolutely essential matters.

I know that my saying this is upsetting to many fellow liberals, Democrats, and supporters of President Obama. But what's true is true. Sotomayor's performance was simply the weakest — by a wide margin — of any recent Supreme Court nominee to appear before the Senate Judiciary Committee.

....

If I sound frustrated, it's because I am. Let me be clear. I am thrilled to have an Hispanic Justice on the Court. I am thrilled to have another woman. I have wanted to support Sotomayor for those reasons. As well as because I believe she will largely vote the way I would. And because I want to believe that President Obama made a good choice. But Sotomayor's performance at the hearings was nothing short of abysmal. And that added to the general mediocrity of her opinions as an appellate judge on the 2d Circuit makes me very disappointed — and, yes, frustrated — with this pick of Obama's.

Vincent Bonventre, "Sotomayor — Let's Put the Cards on the Table (A Dreadful Success at the Hearings)," *New York Court Watcher* (12:01 EDT, 19 July 2009)

http://www.newyorkcourtwatcher.com/2009/07/sotomayor-lets-put-cards-on-table_19.html .

The following day, Prof. Bonventre wrote:

Sotomayor was unwilling or unable to offer anything but a grade school account of what judges do. They only look at the facts and apply the law. They make no law and they make no policy. The legislature does that. The judges simply apply the law and policy already made by the legislature. Or they apply precedents. And precedents are apparently nothing more than the judges' past applications of law and policy pre-determined by the legislature.

Can Sotomayor possibly believe that the role of judges is so simplistic? Can she possibly believe that law and policy are so clear and consistent and dictate one particular result in cases that come before appellate judges? Can she possibly not understand that many cases that come before appellate courts, and virtually all that come before the Supreme Court, have no pre-determined result? That they can legitimately be decided in more than one way? That there are virtually always law and policy and precedents supporting each of the different possible

results? That judges, and especially Supreme Court Justices, must pick and choose among the law and policy and precedents? That judges, and especially Supreme Court Justices, choose (usually with disagreements among them) which law and policy and precedents will prevail over the others? That in doing so they are creating new precedents? And that in doing so they are necessarily making law and policy? (That at the absolute least, this is true for landmark decisions?)

Is it really possible Sotomayor believes anything as simplistic as she claimed? Really possible that she does not understand the reality of judge-made law and policy? There are 2 possibilities. Either she really believes what she was saying, or she does not. It's hard to say which would be worse.

....

Of course the reality of judges making law is understood by every serious judge and student of the judicial process.

But Sotomayor was insisting — repeatedly, till *ad nauseam* — the opposite. In doing so, she avoided having to explain the judicial role in terms more sophisticated than 3d grade social studies. (She didn't even demonstrate that she could have.) And she helped to keep public discourse about the judiciary at the lowest possible level. More than that, she helped to keep the American public — as well, apparently, as many Senators — misled and blind about what judges, especially those on the Supreme Court, actually do.

Vincent Bonventre, “Sotomayor — Let's Put the Cards on the Table (More on the Dreadful Success: SS on Judging),” *New York Court Watcher* (12:22 EDT, 20 July 2009)

<http://www.newyorkcourtwatcher.com/2009/07/sotomayor-lets-put-cards-on-table-more.html> .

Associated Press 23 July

A news article on Thursday, 23 July, mentioned that the National Rifle Association had opposed Sotomayor last week and the U.S. Chamber of Commerce had endorsed her.

Republicans are deeply divided on Sotomayor's nomination, torn between a desire to please their conservative base by opposing Obama's nominee and a fear that doing so would alienate women and particularly Hispanic voters who represent a fast-growing part of the electorate. Some GOP moderates have announced they'll back Sotomayor, and she picked up support Wednesday [22 July] from conservative Sen. Lindsey Graham of South Carolina, which could provide some measure of cover to others in his party considering voting yes. Julie Hirschfeld Davis, Associated Press, “NRA steps up Sotomayor fight as Chamber backs her,” *The Washington Post* (14:40 EDT 23 July 2009)

<http://www.washingtonpost.com/wp-dyn/content/article/2009/07/23/AR2009072301718.html> .

What I find interesting in this news article is that the decision is now about whether or not to “alienate women and particularly Hispanic voters”. This decision is no longer about Sotomayor’s credentials, impartiality, or her opinions on controversial topics. Instead, it is about gender and ethnicity. Actually, gender and ethnicity seem to have been President Obama’s main criteria, when

he overlooked dozens of better qualified white males, and when he overlooked at least several better qualified white women, in selecting Sotomayor.¹⁹

Prof. Bonventre 30 July

Ten days after his previous post (see page 65, above), Prof. Bonventre continued his analysis of the Senate confirmation of Sotomayor:

Not surprisingly, the Senate Judiciary Committee approved the nomination of Judge Sonia Sotomayor to the Supreme Court. Not *despite* her dreadful performance at the hearings. But according to most of the Senators, *because* of her performance.

Of course, there is little reason to ascribe candor to such assertions.

First: let's assume the Senators are at least sentient human beings, with some understanding of their questions and of Sotomayor's responses. They surely must recognize that she offered virtually nothing of substance about constitutional law, about particular precedents, or about the judicial process. That her answers evinced only the most superficial and simplistic familiarity with the bare-bones holding of some cases, and a grade school recitation of what judges do. Such a performance could not really impress the Senators who claimed it did.

Second: unless, of course, the assumption is unwarranted. It *is* possible that the Senators who questioned Sotomayor know even less about the law and understand even less about what judges actually do than Sotomayor's responses suggested about her. It *is* possible that the Senators' familiarity — let alone understanding — of the matters about which they were questioning Sotomayor is even more superficial and even more simplistic than what she showed in her responses. Is that the explanation? Well, there are some who are insisting just that.

But regardless of the foregoing, or of any other variation on those possibilities, let's consider this. A reality —or lack of it — in the fascinating world of senatorial partisan politics.

[Prof. Bonventre suggests the votes on the Sotomayor confirmation are purely partisan politics.]

....

The reality of it all is plain. Party and ideology. A liberal Democratic President nominated Sotomayor. The Democratic Senators on the Judiciary Committee voted for her because of their party allegiance to the President, and because they are basically liberal like him and his nominee. Additionally, Sotomayor's performance was not a *political* disaster that would have made it too risky to vote for her.

....

Vincent Bonventre, "Sotomayor — Let's Put the Cards on the Table (Judiciary Committee Approves the Dreadful Success)," *New York Court Watcher* (15:16 EDT, 30 July 2009) http://www.newyorkcourtwatcher.com/2009/07/sotomayor-lets-put-cards-on-table_30.html .

¹⁹ Standler, The Nomination of Justice Sotomayor, <http://www.rbs0.com/sotomayor.pdf> .

In his fourth paragraph, Prof. Bonventre raises the possibility that the senators know *less* about the law than Judge Sotomayor. Above, at page 20, I mentioned that 6 of the 19 senators on the Judiciary Committee never attended law school. Obviously, Judge Sotomayor knows more about law than those 6 senators. I am impressed by Senator Feingold (D-Wisc.), as well as Senators Kyl (R-Ariz.) and Cornyn (R-Tex.). Cornyn is a former judge in Texas state courts. But most of the senior senators on the Judiciary Committee seem to have a weak understanding of law, probably because they are professional politicians who have not actively practiced law in the past twenty years. Of the senators who attended law school, I am particularly critical of Senator Specter for his bogus assertion that respect for precedent will somehow prevent the overruling of *Roe v. Wade*, see page 29, above. So I believe that it is true that most of the senators on the Judiciary Committee know less about law than the nominees. But I also agree with the main point of Prof. Bonventre's commentary: that the confirmation process is essentially political, with little consideration of merit.

Supplementary Q & A

At the conclusion of the hearing, five Republican senators on the Judiciary Committee submitted written follow-up questions for Judge Sotomayor. On 20 July, she sent her answers to the Committee with a cover letter on stationery of the U.S. Court of Appeals. The Committee posted her answers at

<http://judiciary.senate.gov/nominations/SupremeCourt/Sotomayor/SoniaSotomayor-QFRs.cfm> .

The final question asked by Senator Sessions was:

[Q.] Please describe with particularity the process by which these questions were answered.

Response: Responses to these questions were drafted by legal staff of the White House based on my guidance. I edited these draft responses, and gave final approval to all answers. Sotomayor's Responses to Questions by Senator Sessions, p. 26 (20 July 2009)

<http://judiciary.senate.gov/nominations/SupremeCourt/Sotomayor/upload/QFRsSessions.pdf> .

At least two journalists reported that "her" answers were actually prepared by puppet handlers in the White House:

In an answer to a question from Sessions, Sotomayor said the "legal staff of the White House" had drafted the written answers to the senators' question, which she then edited and gave final approval to.

Tony Mauro, "Sotomayor Responds to GOP Follow-Up Questions," *Blog of Legal Times* (19:01 EDT 20 July 2009)

<http://legaltimes.typepad.com/blt/2009/07/sotomayor-responds-to-gop-followup-questions.html> .

Sotomayor submitted follow-up written questions to the Judiciary Committee on Monday evening, and Kyl said he would decide whether to support her after reviewing her answers. In her answers to the committee, which were written by White House lawyers but reviewed, approved and edited by her, Sotomayor hewed largely to the same script at her

hearings, saying she would avoid taking a position on several thorny issues because of the possibility they could come before the court.

Manu Raju, "Susan Collins says she supports Sonia Sotomayor," *Politico* (noon, 21 July 2009) <http://www.politico.com/news/stories/0709/25202.html> .

Apparently, no one found it strange that Judge Sotomayor, who has been an attorney for thirty years, needed to have the White House staff prepare "her" answers for the Senate Judiciary Committee. Either she is incompetent or she is already arrogantly treating senators with disdain, as if she is too important to waste more of her time answering their questions.

These follow-up questions are important, because the level of technical legal detail is higher than in the public hearings. On the other hand, the answers in the public hearings obviously came from Sotomayor, while the answers in the written follow-up came from her handlers in the White House.

Senator Sessions

[Q.] In *Ricci v. DeStefano*, you initially joined a summary order dismissing the novel claims of white and Hispanic firefighters who had been discriminated against after they scored higher than other groups on a promotional exam. You failed to cite any precedent and issued a brief one-paragraph summary order, then a one-paragraph per curiam opinion. The Supreme Court reversed your opinion.

- a. Please explain the process for circulating summary orders on the Second Circuit and how that circulation process differs from the circulation of other opinions such as per curiam opinions, authored opinions, concurrences, or dissents.
- b. At your hearing, you repeatedly said²⁰ that in *Ricci* you relied on a 78-page district court opinion. The district court's opinion was actually 48 pages (and as published in the federal reporter, only 21 pages). Where did you come up with your number of 78 pages?
- c. Why did you choose to withdraw your summary order and instead make the district court's analysis binding precedent in the Second Circuit?
- d. Was there a vote taken to issue a summary order by the panel? How did you vote on that decision?
- e. Press reports indicate that there was disagreement amongst the panel members—what was the nature of that disagreement?

Response: The practice of the Second Circuit has changed over the years. Currently, and when *Ricci v. DeStefano*, 264 Fed. Appx. 106 (2d Cir. 2008), was decided, the primary method by which decisions of the Court are circulated is through an email sent each morning by the library of the Second Circuit that lists the cases decided that day and provides a clickable link to the full text of each case's decision, whether it is a signed opinion, a per curiam, or a summary order. The decisions also are posted on the Court's website, which is accessible both to Court staff and to the public. Printed copies of the signed opinions and per curiams are then sent to each Judge, and printed copies of the summary orders are sent to the members of the panels that issued them. In addition, a signed opinion, per curiam, or summary order is sent to the chambers of each active Judge upon the filing of a motion for

²⁰ Standler's comment: There are *four* occurrences quoted above.

rehearing en banc, along with the motion, pursuant to Interim Local Rule 35(a) of the Local Rules of the Second Circuit.

You are correct that the district court's decision was 48 pages long as issued by that court, not 78 pages as I had thought. It is possible that the decision was 78 pages as initially reproduced by Lexis and Westlaw, using those services' "star" pagination, but those original versions of the district court's decision are no longer available.

Rule 32.1(a) of the Local Rules of the Second Circuit provides that a case may be decided by summary order when the decision of the panel is unanimous and "each judge of the panel believes that no jurisprudential purpose would be served by an opinion." The decision of the panel in *Ricci* to issue a summary order was made in accordance with that Rule. The decision to issue a per curiam followed the vote of the Court not to rehear the case en banc. Panel members of the Second Circuit do not discuss the internal deliberations of the panels.

Sotomayor's Responses to Questions by Senator Sessions, pp. 2-3 (20 July 2009)

<http://judiciary.senate.gov/nominations/SupremeCourt/Sotomayor/upload/QFRsSessions.pdf> .

In her answer to question (b), she admitted she exaggerated the length of the trial judge's opinion during her testimony at the Senate Judiciary Committee. She refused to answer questions (c), (d), and (e), citing confidentiality of the Court — see the last sentence of her response.

Overall, Senators Sessions pointed out many contradictions between her testimony during 14-16 July and statements in her speeches. In my view there is no satisfactory resolution for these contradictions, and I believe her speeches cast doubt on the veracity of her testimony under oath. Such doubt is a strong reason not to confirm her. I think it is less important whether or not a particular person agrees with her substantive position on her speeches, because there is no requirement that a competent judge conform to dogma of any one group.

Senator Kyl

Senator Kyl asked her to supplement her responses to his questions about the *Ricci* case.

[Q.] Appended here are the relevant transcript pages (Appendix A) of our discussion of *Ricci v. DeStefano*. Later in the hearing, I said that I would provide you with an opportunity to review your answers and to provide any supplemental explanation that you felt appropriate. If you would like to supplement your answers to my questions regarding *Ricci*, please do.

Response: I would supplement my response to your question regarding the precedent governing the Second Circuit panel's decision in *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008), with the following excerpt from Judge Barrington Parker's opinion—joined by me and by Judges Calabresi, Pooler, and Sack—concurring in the denial of rehearing en banc:

The district court correctly observed that this case was unusual. Nonetheless, the district court also recognized that there was controlling authority in our decisions—among them, *Hayden v. County of Nassau*, 180 F.3d 32 (2d Cir. 1999) and *Bushey v. N.Y. State Civil Serv. Comm'n*, 733 F.2d 220 (2d Cir. 1984), *cert. denied*, 469 U.S. 1117, 105 S. Ct. 803, 83 L. Ed. 2d 795 (1985). These cases clearly establish for the circuit that a public employer, faced with a prima facie case of disparate-impact liability under Title VII, does not violate Title VII or the Equal Protection Clause by taking facially neutral, albeit race-conscious, actions to avoid such liability.

Ricci v. DeStefano, 530 F.3d 88, 90 (2d Cir. 2008) (Parker, J., concurring in the denial of rehearing en banc).

Sotomayor's Responses to Questions by Senator Kyl, p. 37 (20 July 2009)

<http://judiciary.senate.gov/nominations/SupremeCourt/Sotomayor/upload/QFRsKyl.pdf> .

This short quotation from a published opinion is an *inadequate* response by Sotomayor, because her response does not address the legal issues raised by the dissenting opinion by Judge Cabranes in the same proceeding, and because it does not address the failure of the U.S. Supreme Court to find applicable precedent. Sotomayor is being evasive about her decision in *Ricci*.

Irrelevant Rubbish About Clothing

On Sunday, 19 July, *The Washington Post* published an article on the clothing worn by Judge Sotomayor at her confirmation hearings. (!)

This week, Supreme Court nominee Sonia Sotomayor did not appear to have been swayed by the fashion industry's argument. Not in the least. Her wardrobe, as she sat for her daily grilling by the Senate Judiciary Committee, did not reflect the fashion industry's constant refrain. In fact, it did not even appear to have been influenced by the 21st century. Instead, Sotomayor's clothes evoked authority in the manner of a 1980s lady power broker. She embraced that period in fashion when femininity had no place in the executive suite.

On the first day, she wore a cobalt blue jacket that cinched asymmetrically with the help of four big black buttons. She paired it with a black shell, a black skirt and sheer black pantyhose. The color of her jacket was simple and bold. It was not a complicated shade of blue — the kind of color that people struggle to describe because it can look different depending on the light — nor was it subtle. Instead, it was akin to the cheerful hue made famous by Barbara Bush back in the late 1980s and early '90s.

The next day, Sotomayor wore a bright red jacket with black topstitching. She paired the three-button blazer with a black skirt and again, sheer black pantyhose. By Day 3, she had stepped away from the bright colors and instead wore a black pinstriped skirt suit that could easily have been used to illustrate the old John T. Molloy "Woman's Dress for Success" book — a manual whose heyday was in the 1980s.

....

Aside from her decision to emphasize skirts instead of trousers and the shoulder-length dark curls framing her face, there was nothing in Sotomayor's style that acknowledged her femininity in a significant way. Instead, her style seemed studiously constructed to deliver the least punch. It offered no hints of personality. There were neither pins — flag or otherwise — on her lapel, nor any kind of personal frippery that might have drawn the eye. Her lipstick was a neutral pink gloss. Even her nails had been stripped bare; there was no hint of the cherry-red manicure that she has, on occasion, worn.

....

In recent years, it's been men in Sotomayor's position, with their hands raised as they promise to tell the truth. In matters of aesthetics they've had it easy. They needed only to wear a tidy dark suit with an unstained tie and a crisp dress shirt. A fresh haircut was always a wise move. Meeting these meager requirements has sometimes been a struggle. Still, both

Samuel Alito and John Roberts were mostly unremarkable when they appeared before the Judiciary Committee.

....

.... Sotomayor channeled Hillary Clinton during the Ohio primaries; she looked like a high school principal.

Robin Givhan, "Opening a Conventional Closet In Quest for a Supreme Robe," *The Washington Post* (19 July 2009)

<http://www.washingtonpost.com/wp-dyn/content/article/2009/07/16/AR2009071604706.html> .

I find this kind of article demeaning to Judge Sotomayor. Sotomayor is not being evaluated on her choice of fashionable clothing, she is being evaluated for one of the most intellectual jobs in the legal profession. But the journalist for *The Washington Post* is concerned that Sotomayor did not "acknowledge her femininity". Note that this article is *not* written by some male chauvinist pig — it was written by a female journalist.

The above article reminds me of a recent article in *The New York Times Magazine* about Justice Ginsburg, in which a female journalist wrote about how she interviewed Justice Ginsburg in her chambers at the U.S. Supreme Court.

This time, we talked for 90 minutes in the personal office of Ginsburg's temporary chambers (she is soon moving to the chambers that Justice David Souter is vacating).

Ginsburg, who was wearing an elegant cream-colored suit, matching pumps and turquoise earrings, spoke softly, and at times her manner was mild, but she was forceful about why she thinks Sotomayor should be confirmed and about a few of the court's recent cases.

Emily Bazelon, "The Place of Women on the Court," *The New York Times Magazine* (7 July 2009) <http://www.nytimes.com/2009/07/12/magazine/12ginsburg-t.html> .

Note that this article in the *Times* is not written by some male chauvinist pig — it was written by a female journalist, who received a law degree from Yale Law School in the year 2000 and who is currently a Senior Research Scholar in Law at Yale Law School. Despite the fact that Justice Ginsburg — a professor of law for 17 years, followed by 29 years of experience as a federal appellate judge — had earned the right to be taken seriously, the woman journalist thought it important that we know that Justice Ginsburg "was wearing an elegant cream-colored suit, matching pumps and turquoise earrings".

Journalists rarely describe the clothing that a male judge wears, and female judges should get the same freedom from irrelevant remarks about clothing. We do *not* hire judges to wear fashionable clothing, we hire them because of their knowledge of law and their commitment to impartiality.

Perjury Hypothetical

In this section I explore a purely hypothetical scenario, with a conclusion that may surprise senators.

Suppose that a nominee for the U.S. Supreme Court testifies under oath before the Senate Judiciary Committee and that nominee makes some precise, definite statement. The exact nature of the statement is not critical for purposes of this hypothetical scenario, but examples that come to mind include:

- I will (or will not) overrule *Roe v. Wade*.
- I will not allow law of foreign countries to influence my decisions, except in interpreting a contract or international treaty that specifically mentions foreign law.
- I will faithfully follow the exact words of the U.S. Constitution.

Then suppose the nominee is confirmed by a vote of 78 to 22, becomes a Justice of the U.S. Supreme Court, and then — perhaps a few years later — does the exact opposite of what she promised under oath that she would do.

question

The *only* way to remove a federal judge is for Congress to impeach them. On the basis of the facts in this scenario, could Congress impeach a Justice for alleged perjury during her confirmation hearings?

answer

The offense of perjury has three elements:

- (1) a false statement under oath,
- (2) concerning a material matter,
- (3) with the willful intent to provide false testimony — rather than as a result of confusion, mistake, or faulty memory.

United States v. Dunnigan, 507 U.S. 87, 94 (1993) (interpreting 18 U.S.C. § 1621).

Still current, see *U.S. v. Miller*, 527 F.3d 54, 79, n.21 (3dCir. 2008).

The Justice would likely say in her defense: “the statement was true when I made it during the confirmation hearings.” And that defense defeats the first element of a perjury charge, unless the prosecutor can find at least *two* credible witnesses to testify that she testified falsely during the confirmation hearings.²¹

Another possible defense is for the Justice to say she did not expect a particular question about a fact many years ago, she had not prepared to answer that question, and her memory was faulty. This is a good defense, because her false statement was *not* willful, as required by the third element in the definition of perjury.

Note that most examples of perjury involve false *facts*. Statements of opinion are exempt from perjury, because opinion can not be proven false.

To be false, “the statement must be with respect to a fact or facts” and “(t)he statement must be such that the truth or falsity of it is susceptible of proof.” See *Kolaski v. U. S.*, 362 F.2d 847, 848 (4th Cir. 1966). At common law and under many state statutes, statements which present legal conclusions are considered opinion, and cannot form the basis of a perjury conviction. See, e. g., *People v. Longemire*, 57 Mich.App. 395, 275 N.W.2d 12 (Mich.App. 1978).

U.S. v. Endo, 635 F.2d 321, 323 (4th Cir. 1980).

It is legally permissible for a Justice to have one belief during her confirmation hearings, and later — during her service on the Supreme Court — have a different belief on the same issue. And basic concepts of separation of powers prevents Congress from removing a Justice only because Congress disagrees with the decisions of the Justice. Something more than mere disagreement is needed to impeach a Justice, for example a criminal act such as bribery or perjury.

Furthermore, what is a material statement in this factual context? I suggest that senators must testify that they relied on the false statement when they decided to vote for her confirmation. For a senator who served during the confirmation process, but is not a member of the senate during the impeachment, there is no problem. But for a senator to be both a witness and also vote on conviction would seem to violate basic notions of due process that prohibit a witness from serving on a jury in the same trial. Perhaps this problem could be overcome by first having a criminal trial in a federal court where the senators are *not* jurors, and then using the result of the criminal trial in the impeachment trial in the Senate.

²¹ *U.S. v. Freedman*, 445 F.2d 1220, 1226 (2d Cir. 1971) (“It is a deeply implanted rule of our jurisprudence that perjury convictions should not rest solely on an oath against an oath, ... therefore a conviction under [18 U.S.C.] § 1621 must be proved by the testimony of two witnesses, or the testimony of one witness corroborated by independent evidence [citations omitted].”).

If only one senator relied on the false statement when he decided to vote for her confirmation, then that one senator's vote was not decisive, and the false statement may not be material. But if at least 29 of the 78 votes for confirmation relied on the false statement, then it is definitely material, because the reliance on the false statement changed the result of the vote.²²

conclusion

This analysis shows that it is extraordinarily unlikely that a Justice would ever be impeached and convicted for perjury in her confirmation testimony. On 20 July 2009 I made a quick search of the Westlaw database of all federal court cases for the query

(Senate Congress! confirm!) /s hearing /s perjur!

and I found no prosecutions for perjury by a nominee during a confirmation hearing for a federal judge, but I did find one case involving perjury by a nominee for a job in the executive branch. *U.S. v. Dean*, 55 F.3d 640 (C.A.D.C. 1995) (Dean was charged with perjury in violation of 18 U.S.C. § 1621 for four statements she made in August 1987, before the Senate Committee on Banking, Housing and Urban Affairs regarding her nomination for Assistant Secretary for Community Planning and Development.) In *Dean* there was also criminal conduct (accepting an illegal gratuity, conspiracy to defraud the government) by the defendant *before* she was nominated. In addition, my quick search of Westlaw found at least eight cases involving alleged perjury by a witness at a congressional hearing since 1935.

This hypothetical exercise brings us to an important realization. Having a judicial nominee testify at hearings is meaningless, because senators can *not* rely on the testimony of the nominee in predicting what the nominee will do *after* confirmation. There is no way to hold a Justice accountable for saying one thing during her confirmation hearings and doing something different after she is confirmed and serving on the Court. Therefore, the testimony of the judicial nominee during confirmation is worthless.

Instead, I think the Senate Judiciary Committee should continue its long-standing practice of sending a Questionnaire (i.e., Interrogatories to be answered under penalty of perjury) to a judicial nominee about her publications, speeches, membership in organizations, and other items on her c.v. The Senate Judiciary Committee might also invite or subpoena character witnesses with personal knowledge of the nominee. I suggest the Senate should confirm any judicial nominee who is well qualified on the basis of her past accomplishments and past performance.

²² By analogy with perjury by a witness in a criminal trial and a later request by the convicted defendant for a new trial:

Where ... the government [or prosecutor] was not aware of the perjury, a new trial is "warranted only if the testimony was material and the court is left with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted."

U.S. v. Zandi, 280 Fed.Appx. 56, 58 (2dCir. 2008) (quoting *United States v. Wallach*, 935 F.2d 445, 456 (2dCir. 1991) and *Sanders v. Sullivan*, 863 F.2d 218, 226 (2dCir. 1988).). See also *U.S. v. Stewart*, 433 F.3d 273, 297 (2dCir. 2006); *U.S. v. Sasso*, 59 F.3d 341, 350 (2dCir. 1995).

Trying to predict what the nominee will do *after* confirmation is futile. The judicial requirement of impartiality prevents the nominee from answering questions about issues that are likely to come before the Court. And it is legally permissible for a nominee to change her belief in some issue after she is confirmed by the Senate. I think the Senate should abandon any attempt to predict future performance by a Justice.

Votes

Three days before the hearings in the Senate Judiciary Committee began, the ranking Republican on that Committee bravely said the Sotomayor nomination might not be approved.

Think Sonia Sotomayor's confirmation is a *fait accompli*? The top Republican on the Senate Judiciary Committee says think again. "I don't think the outcome of this hearing is a foregone conclusion," Sen. Jeff Sessions (R-Ala.), the ranking Republican on the committee, told reporters Friday [10 July]. "Judge Sotomayor has made some troubling statements. ... She has ruled in some cases that are troubling and need to be examined."

Manu Raju, "Sessions: Sonia Sotomayor not a done deal," *Politico* (18:26 EDT 10 July 2009)
<http://www.politico.com/news/stories/0709/24779.html> .

On 6 August, she was confirmed by the Senate with a majority of votes, plus 17 additional votes.

Schumer's prediction, 12 July

On Sunday, 12 July, the day before the confirmation hearings began, Senator Schumer, Democrat from New York, appeared on NBC television show "Meet the Press", and he predicted that Judge Sotomayor would be confirmed as a Justice with at least 78 votes for her.

MR. GREGORY: A couple of quick points. Judge Sotomayor, will she be approved?

SEN. SCHUMER: I believe she'll be approved and I think there's a very good chance she's going to get as many or if not more votes than Judge Roberts got, which was 78. She has wowed people. People meet her and they are impressed, Democrats and Republicans, not just with her story, but she's smart but also practical. She's down to earth.

"'Meet the Press' transcript for July 12, 2009"

http://www.msnbc.msn.com/id/31865401/ns/meet_the_press/page/3/ .

See also: Jeremy P. Jacobs, *The Hill* (12:13 EDT 12 July 2009)

<http://briefingroom.thehill.com/2009/07/12/schumer-sotomayor-may-get-78-votes/> .

Senator Schumer was wrong, only 68 senators voted for her, see page 92 below.

McConnell

On Friday, 17 July, the day after the hearings concluded, the leader of the Republicans in the Senate announced he would vote against Sotomayor.

Mitch McConnell, press release "McCONNELL TO OPPOSE SOTOMAYOR

NOMINATION," (17 July 2009) <http://mccconnell.senate.gov/record.cfm?id=315926&start=1> .

On Monday, 20 July, Senator McConnell made a long speech on the Senate floor about criteria for selection of Justices and his opposition to the confirmation of Sotomayor. His final

two paragraphs said:

From the beginning of the confirmation process, I have said that Americans expect one thing when they walk into a courtroom, whether it is a traffic court or the Supreme Court, and that is equal treatment under the law. Over the years, Americans have accepted significant ideological differences in the kinds of men and women various Presidents have nominated to the Supreme Court, but one thing Americans will never tolerate in a nominee is a belief that some groups are more deserving of a fair shake than others. Nothing could be more offensive to the American sensibility than that.

Judge Sotomayor is a fine person with an impressive story and a distinguished background. But above all else, a judge must check his or her personal or political agenda at the courtroom door and do justice evenhandedly, as the judicial oath requires. This is the most basic and therefore the most fundamental standard of all upon which judges in our country must be judged. Judge Sotomayor does not meet the test.

Mitch McConnell, CONGRESSIONAL RECORD at S7670-S7671 (20 July 2009).

Martinez 17 July

On 17 July, the only Hispanic Republican in the U.S. Senate, Mel Martinez of Florida, announced he would vote for Sotomayor. One of the three paragraphs in his press release said:

Judge Sotomayor's rise to the Supreme Court is testimony to the fact that the American dream continues to be attainable. As an Hispanic American, I take great pride in Judge Sotomayor's historic achievement. Given her qualifications and testimony this week, I intend to vote in favor of her confirmation.

Mel Martinez, "Martinez Statement on the Confirmation of Judge Sotomayor," (17 July 2009)

http://martinez.senate.gov/public/?p=NewsReleases&ContentRecord_id=12a53cbf-4952-4937-a422-ac1318d512f7 .

The statement of Senator Martinez shows the importance of Sotomayor's ethnicity in his decision to confirm her.

See also: Lesley Clark, "Sen. Martinez to support Sotomayor for Supreme Court," *The Miami Herald* (18 July 2009) <http://www.miamiherald.com/news/nation/story/1146863.html> ;

Carl Hulse, "Republicans Are Splitting on Sotomayor Confirmation," *The New York Times* (18 July 2009) <http://www.nytimes.com/2009/07/18/us/politics/18court.html> .

Kyl's speech 22 July

On Wednesday, 22 July, Senator Jon Kyl of Arizona gave a speech on the floor of the Senate in which he announced he would oppose the confirmation of Sotomayor:

Judge Sotomayor's most widely known speech is, of course, her "wise Latina woman" speech, which was given in various fora over the years. It is clear that the often-quoted phrase is not just a comment out of context but is the essence of those speeches.

Judge Sotomayor's central theme was to examine whether gender and ethnicity bias a judge's decision. Judge Sotomayor concludes they do, that it is unavoidable. She develops this theme throughout the speech, including examining opposing arguments and examining evidence that suggests that gender makes a difference. She then quotes former Justice Sandra Day O'Connor's statement that men and women judges will reach the same decision and, in effect, disagrees, saying she is not so sure. That is when she says she thinks a "wise Latina" would reach a better decision.

Her attempt to recharacterize these speeches at the committee hearing strained credulity. I will address this issue at greater length during the confirmation debate, but suffice to it say that I remain unconvinced that she believes judges should set aside these biases, including those based on race and gender, and render the law impartially and neutrally.

....

I have looked at Judge Sotomayor's record in these hard cases and have found cause for concern. The U.S. Supreme Court has reviewed directly 10 of her decisions—8 of those decisions have been reversed or vacated, another sharply criticized, and 1 upheld in a 5 to 4 decision.

The most recent reversal was *Ricci v. DeStefano*, a case in which Judge Sotomayor summarily dismissed before trial the discrimination claims of 20 New Haven firefighters, and the Supreme Court reversed 5 to 4, with all nine Justices rejecting key reasoning of Judge Sotomayor's court.

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 did not 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.

Some have speculated that 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?

Judge Sotomayor was asked about her *Ricci* decision at length during the confirmation hearing. Her defense, that she was just following "established Supreme Court and Second Circuit precedent," as I said, is belied by the Supreme Court's opinion noting "few, if any" circuit court opinions addressing the issue.

When I pressed Judge Sotomayor to identify those controlling Supreme Court and Second Circuit precedents that allegedly dictated the outcome in *Ricci*, she dissembled and ran out the clock. Her “answers” answered nothing and, in my opinion, violated her obligation to be forthcoming with the Judiciary Committee.

....

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 PRLDEF is in tension with the evidence that we have. 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.”

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*.

Unfortunately, I have not been persuaded that Judge Sotomayor is absolutely committed to setting aside her biases and impartially deciding cases based upon the rule of law.

And I cannot ignore her unwillingness to answer Senators’ questions straightforwardly.

For these reasons, I oppose her nomination

Jon Kyl, CONGRESSIONAL RECORD, S7827-S7828 (22 July 2009).

In the 2000 census, approximately 1/4 of Kyl’s constituents were Hispanic, so he takes a political risk in voting against Sotomayor.

Graham’s speech 22 July

On Wednesday, 22 July, Senator Lindsey Graham of South Carolina gave a lengthy speech on the Senate floor that explained why he would vote for the confirmation of Justice Sotomayor, despite his disagreement with her positions, because “elections have consequences.” See CONGRESSIONAL RECORD at pages S7829-S7831 (22 July 2009). It seems to me that Senator Graham effectively said: “ah, shucks, the voters made a mistake in electing this president, so now the voters deserve to be afflicted — maybe punished — with this president’s nominee on the Court for the next twenty or thirty years.” Senator Graham either glossed over or ignored all of the deficiencies in Sotomayor that had been mentioned by Senators Sessions, Kyl, Cornyn, and other Republicans, including Graham himself.

Politicians often stress that federal judicial appointments are a *lifetime* appointment. However, because of judicial respect for precedent, the effects of an appointment to the U.S. Supreme Court can be much longer than the lifetime of a Justice, because it can take tens of years to overrule her wrongly decided cases. While deference to the president may be appropriate for senators considering confirmation of a president’s nomination to the executive branch of the government, judicial nominations should receive a higher scrutiny because of judges’ longer duration of service and the duration of judicial precedent extends beyond the active service of a judge.

In September 2005, during the confirmation of Chief Justice Roberts, the leader of the Democrats in the U.S. Senate famously declared that the president “is not entitled to much deference” in judicial nominations.

Some say that the President is entitled to deference from the Senate in nominating individuals to high office. I agree that such deference is appropriate in the case of executive branch nominees such as Cabinet officers. With some important exceptions, the President may generally choose his own advisors. In contrast, the President is not entitled to much deference in staffing the third branch of government, the judiciary. The Constitution envisions that the President and the Senate will work together to appoint and confirm federal judges. This is a shared constitutional duty. The Senate’s role in screening judicial candidates is especially important in the case of Supreme Court nominees, because the Supreme Court has assumed such a large role in resolving fundamental disputes in our civic life. As I see it, any nominee for the Supreme Court bears the burden of persuading the Senate and the American people that he or she deserves confirmation to a lifetime seat on the Court.

Harry Reid, Nomination of John Roberts to be Chief Justice, CONGRESSIONAL RECORD, S10214 (20 Sep 2005) reprinted at <https://democrats.senate.gov/newsroom/record.cfm?id=246139&> . The version at the URL says “very much deference”, while the official CONGRESSIONAL RECORD omits the “very”. Two days later, Reid amended his statement in a letter to *The Washington Post*:

The Post’s Sept. 21 editorial “Words That Will Haunt” made a fair point in criticizing one sentence of my floor statement on the nomination of Judge John G. Roberts Jr. to be chief justice of the United States. I said, “The president is not entitled to very much deference in staffing the third branch of government, the judiciary.”

What I should have said is that the president is entitled to less deference in staffing the judiciary than in staffing the executive branch.

Of course, I agree that the president is entitled to a measure of deference in judicial nominations. After all, the Senate has confirmed more than 200 of President Bush's nominees to the bench, including many who have a judicial philosophy with which Democrats disagree. But when the president nominates someone to serve as chief justice, deference does not entitle the nominee to a free pass. Senators have a constitutional duty to subject a nomination with such far-reaching consequences to heightened scrutiny.

Harry Reid, letter to the editor, “Deference to the President,” *The Washington Post*, p. A24 (22 Sep 2005).

I mention Senator Reid’s remarks because I agree with them. I especially agree with his original version. It would be a childish retaliation for the Republicans to vote against Democratic nominees, merely because Democrats voted against Republican nominees. Such a retaliation is *not* what is happening with Judge Sotomayor. This is a genuine effort by Republican Senators to evaluate and vote on each nominee, according to the criteria of each individual Senator. However, *all* of the Democrats are expected to vote for Sotomayor’s confirmation.

Hatch 24 July

On Friday, 24 July, Senator Orrin Hatch of Utah announced that he would vote against the confirmation of Judge Sotomayor. This is a significant move, because Senator Hatch — who has been a Senator for the past 33 years — has voted to confirm *all* of the previous nominations to the Supreme Court. His press release did not give details of why he opposed Sotomayor, but he did note her “judicial philosophy”:

....

.... Qualifications for judicial service include not only legal experience but, more importantly, a nominee’s approach to judging. This makes Judge Sotomayor’s judicial philosophy more important than her stellar resume. I thoroughly examined her record with the more exacting focus appropriate for a Supreme Court nomination. This included reading and studying Judge Sotomayor’s speeches, articles, and cases; meeting with and hearing from legal experts and advocates from different perspectives; and actively participating in the confirmation hearing.

The duty of confirmation entrusted to all Senators requires we determine whether Judge Sotomayor has the legal experience and, more importantly, the judicial philosophy that properly equips her for service on the Supreme Court. I have done my best to leave politics aside and stay true to this standard during all twelve Supreme Court confirmations I have participated in. It saddens me to realize that after reviewing her record, I have reluctantly concluded that I cannot vote in favor of her confirmation. However, I wish her well in her future endeavors and believe she is a wonderful and talented American with much to offer this great country.

Orrin Hatch, HATCH WILL NOT SUPPORT SOTOMAYOR NOMINATION (24 July 2009)

http://hatch.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=ad642a49-1b78-be3e-e052-ab5f52b9bc7

Hatch’s final sentence is bizarre. His wishing “her well in her future endeavors” would be appropriate *if* Sotomayor were going to resign from the federal judiciary and pursue some other endeavor, such as being an attorney for a Hispanic organization. But Sotomayor will be confirmed by Senate and will serve on the U.S. Supreme Court. Senator Hatch’s vote against her is a futile gesture of integrity on Hatch’s part, but Hatch’s vote is irrelevant to the future of Justice Sotomayor.

Cornyn’s speech 24 July

On Friday, 24 July, Senator Cornyn gave a speech on the floor of the U.S. Senate and announced that he would vote against confirmation of Sotomayor.

Going into the hearings, I found much to admire about Judge Sotomayor’s record. She is an experienced judge with an excellent academic background. She appears to be a tough judge—which may be to her credit—and demands a lot of the lawyers who appear in oral argument before her court. For the most part, her decisions as a district court judge and as a member of the court of appeals were within the mainstream of American jurisprudence.

Yet going into the hearings I also had some very serious questions that I thought it was appropriate to ask her and that she needed to answer. While, as I said, her judicial record is

generally in the mainstream, several of her discussions demonstrated cause for concern about the kind of liberal judicial activism that has steered the courts in the wrong direction over the past few years,²³ and many of her public statements reflected a surprisingly radical view of the law.

Some have said we just have to ignore her public statements and speeches and just focus on her decisions as a lower court judge. I disagree with that position. Judges on the lower courts; that is, the district court and the court of appeals, have less room to maneuver than a Supreme Court Justice who is not subject to any kind of appellate review. Supreme Court Justices can thus more easily ignore precedents or reject them.

This is why Judge Sotomayor's speeches and writings on judicial philosophy should matter, and they concern me a great deal. These speeches and writings contain very radical ideas on the role of a judge. In her speeches she said things such as there is no objectivity, no neutrality in the law, just a matter of perspective. She said courts do, in fact, make policy and seemed to say that was an appropriate role for the courts of appeals. She even suggested that ethnicity and gender can and should impact on a judge's decisionmaking process.

For 13 years of my life I served as a State court judge, a trial judge, and a member of the Texas Supreme Court. I strongly disagree with the view of the law that says there is no impartiality, no objectivity, no Law, with a capital "L," that a judge can interpret. It is, to the contrary of Judge Sotomayor's statements, merely a matter of perspective. There is no impartial rule of law.

I don't know how one can reconcile her statement that there is no objectivity, no neutrality in the law, with the motto inscribed above the U.S. Supreme Court building which says "Equal Justice Under the Law." If there is no such thing as objectivity and neutrality, only a matter of perspective, how in the world can we ever hope to obtain that ideal of equal justice under the law? I just don't know how one can reconcile those.

....

.... The hearings were an opportunity for Judge Sotomayor to clear up these things and ultimately, in my view, resulted in a missed opportunity to do so.

Regarding her public statements about judging, I was surprised to hear her say she meant exactly the opposite of what she said; that she had been misunderstood every single time and that she doesn't believe any of these radical statements after all and that her views are aligned with those of Chief Justice John Roberts.

Regarding some of her most controversial decisions, she refused to explain them on the merits. She did not explain her legal reasoning or the constitutional arguments she found persuasive, instead choosing to explain those in terms of process and procedure whenever she could.

She assured us her decisions would be guided by precedent, even when many of her colleagues, both on the court of appeals and the majority of the Supreme Court of the United States, disagreed. At the end of the hearing, I found myself still wondering who is the real Sonia Sotomayor and what kind of judge will she be when she is confirmed to the Supreme Court.

....

²³ Senator Cornyn is minimizing the duration of so-called activist judges, who extend back to *Brown v. Board of Education* in 1954.

[Cornyn mentions, that on the Second Amendment, Sotomayor has “a restrictive view that is inconsistent with an individual right to keep and bear arms for all Americans”.]

The Court could fail to protect the fifth amendment private property rights of our people from cities and States that want to condemn their private property for nonpublic uses. Judge Sotomayor has rendered decisions on the Second Circuit Court of Appeals that tend to support the views that she has an opinion of the rights of the government to take private property for private uses, not for public uses, and that concerns me a great deal.

The Court could, in fact, invent new rights that appear nowhere in the Constitution, as they have done in the past, based on foreign law, a subject that Judge Sotomayor has spoken and written on, but she did not settle any concerns many of us had about what role that would play in her decisionmaking process when she is confirmed.

I believe the stakes are simply too high for me to vote for a nominee who can address all of these issues from a liberal activist perspective. And so I say it is with regret and some sadness that I will vote against the confirmation of Judge Sonia Sotomayor. I will vote with a certain knowledge, however, that she will be confirmed despite my vote.

I wish her well. I congratulate her on her historic achievement. I know she will be an inspiration to many young people within the Hispanic community and beyond. And I hope, I hope, she proves me wrong in my doubts.

The Justice she is replacing [Souter], after all, has proved to have a far different impact than the President who nominated that judge believed that judge would have. So perhaps Judge Sonia Sotomayor will surprise all of us.

Senator Cornyn, “Sotomayor Nomination,” CONGRESSIONAL RECORD, S8078 - S8079 (24 July 2009).

I am surprised that Senator Cornyn did not mention *Ricci* in his speech.

The following day, the *Houston Chronicle* noted the possible political cost to Cornyn for voting against a Hispanic nominee:

Texas Sen. John Cornyn announced Friday he will vote against Judge Sonia Sotomayor's confirmation as the first Hispanic on the U.S. Supreme Court, even though the decision could carry political risks among his Latino constituents.

....

By opposing Sotomayor, Cornyn potentially risked the support of some Hispanic supporters in Texas, where Hispanics make up 36 percent of the population. Cornyn swept to victory last November over Democrat Rick Noriega with 55 percent of the vote, buoyed in part by support from some Hispanic voters.

State Rep. Trey Martinez Fischer, D-San Antonio, chairman of the 44-member Mexican American Legislative Caucus, urged Cornyn to “reconsider the long-term implications of his decision” in light of Texas’ fast-growing Hispanic population.

Cornyn's “no vote will be a symbolic gesture to the largest growing demographic in Texas” — a group that will overtake Anglos in Texas by 2020, Fischer warned.

Brent Wilkes, executive director of LULAC [League of United Latin-American Citizens], the nation’s largest and oldest Hispanic organization, said Cornyn was more concerned about keeping his conservative credentials intact amid pressure by Republicans.

“But I don't think Hispanics were his intended audience,” said Wilkes, who received a call from Cornyn about his decision. “It would have been a tough vote for him to say, ‘I'm with Sotomayor.’ ”

Stewart M. Powell, “Cornyn: Record my vote as a ‘no’, Texas senator willing to risk the loss of Latino votes in opposing Sotomayor confirmation,” *Houston Chronicle* (15:40 CDT 25 July 2009)

<http://www.chron.com/disp/story.mpl/nation/6546450.html> .

Sessions 27 July

On Monday morning, 27 July, Senator Sessions announced in an op-ed article published in *USA Today* that he would vote against Sotomayor.

Elections have consequences: President Obama's first nominee to the Supreme Court, Judge Sonia Sotomayor, will likely be confirmed.

But supporters of liberal judicial philosophy might find it a Pyrrhic victory. During three days of careful questioning, Judge Sotomayor renounced the pillars of activist thinking.

She rejected the president's "empathy standard," abandoned her statements that a judge's "opinions, sympathies and prejudices" may guide decision-making, dismissed remarks that personal experiences should "affect the facts that judges choose to see," brushed aside her repeated "wise Latina" comment as "a rhetorical flourish," and championed judicial restraint.

Judge Sotomayor's attempt to rebrand her previously stated judicial approach was, as one editorial page opined, “uncomfortably close to disingenuous.”²⁴

Why not defend the philosophy she had articulated so carefully over the years?

Because the American people overwhelmingly reject the notion that unelected judges should set policy or allow their social, moral, or political views to influence the outcome of cases. Rather, the public wants and expects restrained courts, tethered to the Constitution, and judges who impartially apply the law to the facts.

In the end, her testimony served as a repudiation of judicial activism.

But pledging "fidelity to the law" and practicing judicial restraint are different things. Which Sotomayor will we get?

[Sessions mentions three of her judicial opinions.]

....

These rulings have three things in common. Each was contrary to the Constitution. Each was decided in a brief opinion, short on analysis. And each was consistent with liberal political thought.

I don't believe that Judge Sotomayor has the deep-rooted convictions necessary to resist the siren call of judicial activism. She has evoked its mantra too often. As someone who cares deeply about our great heritage of law, I must withhold my consent.

Jeff Sessions, “Opposing view: A confirmation conversion Nominee lacks deep convictions needed to resist judicial activism,” *USA Today* (00:21 EDT, 27 July 2009)

<http://blogs.usatoday.com/oped/2009/07/opposing-view-a-confirmation-conversion--nominee-lacks-deep-convictions-needed-to-resist-judicial-activism--by-jeff-session.html> .

²⁴ The quotation comes from *The Washington Post* for 19 July 2009, see page 62, above. Apparently, Senator Sessions did not learn in school how to cite a source.

I agree with Senator Sessions about Judge Sotomayor's lack of credibility before the Senate Judiciary Committee in which she repudiated her speeches and she advocated that judges mechanically apply law to facts. Instead of continuing on that serious issue of credibility, Sessions goes off on a tangent about "judicial activism", which is propaganda. Unlike Sessions, I would welcome "liberal political thought" in First and Fourth Amendment law and in privacy law.

Judiciary Committee Vote

On Tuesday, 28 July, the Senate Judiciary Committee met and voted on the Sotomayor nomination. There are 12 Democrats and 7 Republicans on the Committee. The vote was 13 to 6, in favor of recommending her confirmation. All of the Democrats voted for her, six of the Republicans — Lindsey Graham was the exception — voted against her.

Senator Feingold's (D-Wisc.) final three paragraphs of his remarks before the vote in the Senate Judiciary Committee said:

Mr. Chairman, all that being said, I do want to express a note of dissatisfaction. Not with you certainly, or with my colleagues, and not with Judge Sotomayor, but with a nominations process that I think fails to educate the Senate or the public about the views of potential Justices on the Supreme Court. I've said before that I do not understand why the only person who cannot express an opinion on virtually anything the Supreme Court has done in recent years is the person from whom the American public most needs to hear. It makes no sense to me that the current Justices can hear future cases notwithstanding the fact that we know their views on a legal issue because they wrote or joined an opinion in a previous case that raised a similar issue, but nominees for the Court can refuse to tell us what they think about that previous case under the theory that doing so would compromise their independence or their ability to keep an open mind in a future case.

I remain unconvinced that the dodge that all nominees now use – "I can't answer that question because the issue might come before me on the Court" – is justified. These hearings have become little more than theater, where Senators try to ask clever questions and nominees try to come up with cleverer ways to respond without answering. This problem certainly did not start with these hearings or this nominee, but perhaps it is inevitable. The chances of the Senate rejecting a nominee who adopts this strategy are very remote, based on the recent history of nominations. Nonetheless, I do not think it makes for meaningful advice and consent.

So I cannot say that I learned everything about Judge Sonia Sotomayor that I would have liked to learn. But what I did learn about her makes me believe that that she will serve with distinction on the Court, and that I should vote in favor of her confirmation.

Statement of U.S. Senator Russ Feingold on the Nomination of Sonia Sotomayor to be an Associate Justice of the Supreme Court of the United States, (28 July 2009)

<http://feingold.senate.gov/record.cfm?id=316266> .

I share Senator Feingold's frustration: I *want* to know how the nominee will vote on future cases on topics that are important to me (e.g., abortion, privacy rights, First and Fourth Amendment law, etc.). But there are several reasons why such knowledge of the future is not possible. Most importantly, concepts of an impartial judiciary and separation of powers prevent a judicial nominee

from promising to vote a certain way on controversial issues. Secondly, there is no way to enforce such promises, as explained above in my hypothetical on perjury. Furthermore, without knowing the facts of a future case, it would be unwise to enforce a general promise. So while I *want* to know the future, I accept the rule of law that promises to vote a certain way are unenforceable and therefore meaningless.

Reid's prediction 29 July

A news article on 29 July mentioned a revised prediction by the leader of the Democrats in the U.S. Senate:

Senate Majority Leader Harry Reid (D-Nev.) blasted Senate Republicans for being out of step with the country and conceded Wednesday that Supreme Court nominee Sonia Sotomayor would win fewer votes than Chief Justice John Roberts.

"It appears today we're going to get a handful of Republicans," Reid told reporters during a press conference with the leaders of civil rights groups. "I hope that my prediction is wrong. I hope we get half the Republicans. It would be great to get 20 Republicans."

....

So far only five Republicans have pledged to support the nominee: Sens. Susan Collins (Maine), Lindsey Graham (S.C.), Richard Lugar (Ind.), Mel Martinez (Fla.) and Olympia Snowe (Maine).

....

Sen. Charles Schumer (D-N.Y.), the vice chairman of the Senate Democratic Conference, predicted earlier this month that "there's a very good chance she's going to get as many, if not more, votes than Judge Roberts got, which was 78."

But those high hopes have come back down to Earth. Sotomayor, who would become the first Hispanic member of the high court, failed even to win the support of the two Republican senators from Texas, Sens. John Cornyn and Kay Bailey Hutchison. Both lawmakers said they would oppose her despite representing a state that is 32 percent Hispanic. Alexander Bolton, "Reid: Sotomayor to get fewer votes than Roberts," *The Hill* (13:26 EDT, 29 July 2009) <http://thehill.com/leading-the-news/reid-sotomayor-to-get-fewer-votes-than-roberts-2009-07-29.html> .

Senator Reid seems to have forgotten his declaration four years ago that the President is *not* entitled to deference in his nominees to the judiciary, see page 80, above.

identity politics

Approximately one week before the final vote in the U.S. Senate, the discussion of the confirmation of Justice Sotomayor had degenerated into a discussion of ethnicity.

The Senate debate over Supreme Court nominee Sonia Sotomayor turned bitter Wednesday, after Democrats warned the GOP it would pay a steep price for opposing the judge who would be the first Hispanic justice, and a top Republican charged they were playing destructive racial politics. Majority Leader Harry Reid implored Republicans Wednesday to join Democrats in voting to confirm Sotomayor next week, warning that GOP opposition would bring the same sort of public backlash that followed the party's spirited opposition to measures that would have given some illegal immigrants a chance to gain legal status. "I just think that their voting against this good woman is going to treat them about the same way that they got treated as a result of their votes on immigration," said Reid, D-Nev.

Sen. John Cornyn, R-Texas, the head of his party's Senate campaign committee and a Sotomayor opponent, shot back that Reid and other Democrats were trying to exploit the nomination and "giving cover to groups and individuals to nurture racial grievances for political advantage." "I don't think it influences people's votes, but what it does encourage is a very poisonous — indeed a very toxic — tone of destructive politics," Cornyn told The Associated Press. "They ought to be ashamed of themselves."

....

But the debate over her nomination has raised tricky questions of identity politics for both parties. Republicans are torn between a desire to please their conservative base by opposing Sotomayor and a concern that doing so could bring a Hispanic backlash. The dilemma is particularly vexing for senators from states like Cornyn's where more than one third of the population is Latino.

....

GOP leadership aides suggest there's little political ground to be lost for their party in opposing Sotomayor, saying Obama has slipped substantially among Hispanic voters in recent weeks, notwithstanding his selection of the judge. They note that Democrats vehemently denied they were being anti-Hispanic during their successful efforts in 2003 to block Honduran-born Miguel Estrada, named by GOP President George W. Bush, from a seat on the federal bench.

Brent Wilkes of the League of United Latin American Citizens said his group was targeting wavering Republicans with local and national campaigns designed to pressure them to vote for Sotomayor, and promised "repercussions" for GOP senators who vote no.

"It appears to me that they're deciding to play racial politics," Wilkes said. He singled out Cornyn and fellow Texas Sen. Kay Bailey Hutchison, who's seeking her party's 2010 gubernatorial nomination, as Republicans who "made a big mistake" in deciding to oppose Sotomayor, adding: "They will feel the heat from our community."

Julie Hirschfeld Davis, Associated Press, "Dems warn GOP of backlash for opposing Sotomayor," (00:24 EDT, 30 July 2009), published in: *The Washington Post*

<http://www.washingtonpost.com/wp-dyn/content/article/2009/07/29/AR2009072902319.html> ;
Atlanta Journal Constitution

<http://www.ajc.com/news/nation-world/dems-warn-gop-of-103462.html> ; and

San Francisco Chronicle

<http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2009/07/27/national/w085626D33.DTL> .

Why would Senator Reid, the leader of Democrats in the U.S. Senate, be concerned about Republicans losing votes amongst Hispanics? One would think that Reid would welcome defeat of Republicans. Instead, Reid appears to be advising Republicans how to win elections.

I suspect that few people, including Hispanics, now remember the opposition of Democrats to the nomination of Miguel Estrada six years ago, and voters will also forget about the opposition of Republicans to the nomination of Sotomayor. Indeed, the small amount of news coverage of the Senate's confirmation of Sotomayor suggests to me that few people care about nominations to the U.S. Supreme Court.

no schedule, 3 Aug

The U.S. Senate has been scheduled for many months to begin a ~~vacation~~ recess on Saturday, 8 August 2009. President Obama and the Democratic party majority in the Senate are committed to confirming Justice Sotomayor *before* that recess begins. But, as of noon on Monday, 3 August, the Senate had not yet scheduled a vote on the Sotomayor nomination. On Thursday night, 30 July, there was one news story about the lack of a scheduled vote:

There is little doubt that Supreme Court nominee Sonia Sotomayor will be confirmed next week. But it's unclear when it will happen. Senate Republicans have proposed the idea of a four-day debate on the nominee, with most of their 40 members planning to speak on Sotomayor's fitness for the court. But Democrats say no more than two days should be necessary — and that other Senate business will be on the chamber's to-do list as well.

Hanging over the negotiations between Minority Leader Mitch McConnell (R-Ky.) and Majority Leader Harry Reid (D-Nev.) is the Senate's precious deadline of adjourning for its monthlong August recess on or before Friday, Aug. 7. A prolonged schedule on Sotomayor could push that into the weekend, particularly since appropriations bills will also be vying for floor time.

....

Chief Justice John Roberts was debated for four days on the floor in September 2005, but Justice Samuel Alito — a much more controversial nominee — received five days of debate in January 2006.

J. Taylor Rushing, "Sotomayor vote date uncertain," *The Hill* (20:16 EDT, 30 July 2009)

<http://thehill.com/leading-the-news/sotomayor-vote-date-uncertain-2009-07-30.html> .

Just because the confirmation of Justice Sotomayor is a *fait accompli* does *not* justify depriving the opposition party of its right to speak on the Senate floor. The nomination and confirmation of a Justice to the U.S. Supreme Court is an important event that will influence law — and possibly politics — for tens of years into the future.

The big items scheduled on the Senate floor during 3-7 Aug are: (1) the Agriculture appropriations bill (HR2997); (2) a proposed federal program (S1023) by Senator Reid to promote tourism in the USA; and (3) an extension of the “cash for clunkers” program (HR3435), where government would give a rebate to people who purchased a new car to replace an old car that gets less than 18 miles/gallon of gasoline — a welfare program for automobile manufacturers. The Sotomayor confirmation is *not* scheduled, as of Monday noon.

As I write this at noon on Monday, 3 Aug, 6 Republican Senators had previously announced their support of Sotomayor, 16 had announced their opposition, and 18 had not announced their decision. The most recent announcement came on 30 July.

debate 4-6 Aug

Without any public advance warning, the U.S. Senate began its so-called “debate” on the confirmation of Justice Sotomayor on Tuesday, 4 Aug. I say “so-called”, because it was actually a series of speeches which were unlikely to convince anyone on the other side of the issue to change their opinion. Because of so many other items on the Senate’s agenda before beginning a month-long vacation, the so-called debate was begun on Tuesday evening. The Associated Press reported:

Despite the groundbreaking nature of Sotomayor's impending addition to the court, the certainty of her confirmation was in so little doubt that senators began the debate as evening fell, speaking into the night to a virtually empty Senate chamber in a mostly deserted Capitol long after visiting tourists had departed and at an hour when few Americans were likely to be watching on television.

There was so little suspense that the subject didn't even come up at the White House when senators met Obama for lunch Tuesday to discuss their progress on the president's top priorities, including health care and climate change legislation. "I mean, this is not even an issue," Leahy said of Sotomayor's confirmation as he returned from the midday gathering. "This one's done."

....

Meanwhile, Democrats are preparing to claim a big victory with Sotomayor's confirmation. They planned a midday rally Wednesday [5 Aug] on Capitol Hill with civil rights, minority and women's groups.

Julie Hirschfeld Davis, Associated Press, “Senate conducts historic debate on Sotomayor,” *The Washington Post* (21:57 EDT 4 Aug 2009)

<http://www.washingtonpost.com/wp-dyn/content/article/2009/08/04/AR2009080400206.html> .

The following day, the main topic amongst political commentators was Sotomayor's ethnicity.

The Washington Post reported:

Senate Republicans have lined up in staunch opposition to the confirmation of Supreme Court nominee Sonia Sotomayor, rejecting concerns about alienating the growing Hispanic vote.

Even before debate began Tuesday night, almost three-fourths of the Senate Republican Conference had already announced opposition to the first Latina ever nominated to the nation's highest court. The party's 2008 standard bearer, Sen. John McCain (Ariz.), joined the chorus of opposition this week, and no likely contender for the 2012 Republican presidential nomination has spoken in support of confirmation.

Sotomayor has the backing of every Senate Democrat and at least a half-dozen Senate Republicans, assuring her of confirmation by week's end. But the 28 already-pronounced no votes from Republicans would dwarf the single-digit opposition drawn by the two previous nominees from a Democratic president, Justices Ruth Bader Ginsburg and Stephen G. Breyer.

Most Senate Republicans say opposition to Sotomayor is a principled stand based on the belief that her public speeches reveal a personal bias in her judicial philosophy. Republicans have cited her views on Second Amendment cases, speeches she has given during her time as a federal judge and a key ruling on affirmative action — all issues that are of sharp interest to conservative-base voters.

But some senators and Republican strategists worry that efforts to shore up support from conservative voters who dominate the GOP primaries could become a missed opportunity to extend an olive branch to Latino voters, who gave just 31 percent of their ballots to McCain last fall.

Paul Kane & Perry Bacon Jr., "GOP Senators Seem Unconcerned About Hispanic Backlash 28 Say They Will Vote Against the First Latina Supreme Court Nominee," *The Washington Post* (5 Aug 2009)

<http://www.washingtonpost.com/wp-dyn/content/article/2009/08/04/AR2009080401691.html> .

A Latina (who personally supports the confirmation of Justice Sotomayor) columnist for *The Washington Post* wrote to explain why the ethnicity propaganda of the Democratic party was wrong:

We're not that stupid. Really. At least most of us aren't.

The full Senate on Tuesday began debating the Supreme Court nomination of Judge Sonia Sotomayor, and much is being made of possible Hispanic backlash against Republican senators who vote against her. In case you missed it, Sotomayor is the daughter of Puerto Ricans and would be the first Hispanic justice, if confirmed.

Top Democrats have generously warned colleagues from across the aisle that a vote against Sotomayor will be viewed by Hispanics as a vote against the entire community. Lionel Sosa, a political strategist, drove home that point in an interview with *The Post*: "Latinos see [Sotomayor] as a symbol of Hispanic leadership in America," he said. "If they vote against Sotomayor, it's a vote against Hispanic leadership in America. That's the way Latino voters will see it."

Oh really? All Latinos? Did I miss the memo? Good thing Sosa is himself Hispanic, otherwise he'd be vilified — and rightfully so — for perpetuating the most ridiculous and hurtful of stereotypes, namely that people who share a certain heritage, race or ethnicity all

think alike. (I strongly disliked Sotomayor's "wise Latina" speeches because she, too, seemed to be advancing a version of this notion.)

Sosa's comments also suggest that we Latinos will feel personally slighted by those who give her the thumbs down. A no vote against her is a no vote against us, he seems to say. Reading even further between Sosa's lines: We, Latinos, are ill-informed and have no idea what Sotomayor thinks about due process or preemption or disparate impact analysis under Title VII, but she's one of us and that's good enough!

....

Eva Rodriguez, opinion, "A Latino Backlash Against Sotomayor's Critics?" *The Washington Post* (15:47 EDT 5 Aug 2009)

http://voices.washingtonpost.com/postpartisan/2009/08/a_latino_backlash.html .

At night on Wednesday, 5 Aug, it was announced that the final vote on Sotomayor would be taken on Thursday afternoon, 6 Aug. The Associated Press reported the announcement at 21:04 EDT, along with an earlier report on the rally on Wednesday afternoon:

The Senate has agreed to vote Thursday on confirming Judge Sonia Sotomayor as the first Hispanic Supreme Court justice. The historic vote on President Barack Obama's first high court nominee will take place in midafternoon. The Senate will have debated her nomination to replace Justice David Souter for about two days.

....

[Republican senators'] comments came as Democrats were preparing to declare political victory on Sotomayor's confirmation and warning that Republicans who opposed Sotomayor would face a backlash from Hispanics, a large and fast-growing segment of the electorate.

"To say that you cannot vote for this qualified Latina to be on the United States Supreme Court sends a message to us as a community that we will not forget," said Sen. Robert Menendez of New Jersey, the Senate's lone Hispanic Democrat and his party's campaign committee chief. His comments, at a rally outside the Capitol with labor, civil rights and other liberal groups, were met with raucous cheers from a crowd waving signs bearing Sotomayor's picture and sporting "Sonia" buttons.

Julie Hirschfeld Davis, Associated Press, "Senate sets Thursday vote on Sotomayor" (21:04 EDT, 5 Aug 2009)

One wonders why the Democrats, labor, civil rights groups, etc. would waste their members' money on a public demonstration of support for a nominee who is certain to be confirmed.

I decided not to quote parts of the speeches in the U.S. Senate during 4-6 August. Quotations from these speeches that were reported by journalists showed that the senators often got their so-called "facts" wrong, and there was an appallingly low level of understanding of the deficiencies of Judge Sotomayor and the actual role of federal judges. Those who want to read the speeches can find them in the CONGRESSIONAL RECORD. I am disgusted with the political process during the nomination and confirmation of Justice Sotomayor.

final vote

The first sentence of *The Washington Post* story on the confirmation vote mentioned the ethnicity of Justice Sotomayor.

Sonia Sotomayor won confirmation Thursday afternoon as the nation's 111th Supreme Court justice and the first Hispanic on the court, a historic moment for the nation's fastest-growing minority group.

....

About 3 p.m., senators gathered in the chamber and took their seats behind their wooden desks, rising to say their vote during a formal roll call of names. Such formality is reserved for only the most significant of votes, including impeachment verdicts, war resolutions and the confirmation of justices to the nation's high court. The tally was read out loud by the Senate clerk at 3:15 p.m.

Paul Kane and Amy Goldstein, "Senate Confirms Sonia Sotomayor for Supreme Court," *The Washington Post* (16:02 EDT 6 Aug 2009)

<http://www.washingtonpost.com/wp-dyn/content/article/2009/08/06/AR2009080601706.html> .

The final score: 68 senators voted to confirm Justice Sotomayor, 31 voted against her confirmation. There was more opposition to Justice Sotomayor than to Chief Justice Roberts in 2005, but Sotomayor had less opposition than Justice Alito in 2006. The lesson from these recent three confirmations seems to be that candidates with long written records to scrutinize get more opposition in the Senate than stealth candidates (e.g., C.J. Roberts).

All of the Democrats, plus the two independents²⁵ who caucus with the Democrats, in the U.S. Senate voted to confirm her. On the Republican side, 31 voted against, 9 voted to confirm her. Note that the Democrats *talk* about bipartisanship, but they all voted as a monolithic block. Senator Edward Kennedy (D-Mass.) was the only Senator not voting, he was at home in Massachusetts suffering from brain cancer.

About a half-hour after Sotomayor's confirmation by the Senate, a Democratic Senator predicted that Hispanics would retaliate against Republicans who voted against Justice Sotomayor, even though Sotomayor's confirmation was *never* in doubt.

That was quick. Sen. Bob Menendez (D-N.J.), the chairman of the Democratic Senatorial Campaign Committee, seems poised to use the 31 Senate Republican "no" votes on Sonia Sotomayor against the GOP in the 2010 campaign. Asked whether the GOP will pay a price in 2010 among Hispanic voters, Menendez said: "For the Hispanic community, while it is not monolithic, it is monolithic about Sonia Sotomayor." "It sends a tough message to our community, and it's a message that will be viewed in the days ahead," he added.

²⁵ Joseph Lieberman of Connecticut and Bernard Sanders of Vermont.

Glenn Thrush & Martin Kady II, "Menendez predicts fallout from anti-Sotomayor votes," *Politico* (15:50 EDT 6 Aug 2009)

http://www.politico.com/blogs/glennthrush/0809/Menendez_predicts_fallout_from_antiSotomayor_votes.html .

As I said before, I think President Obama nominated Judge Sotomayor because she was the best Hispanic woman he could find for the job. And after her confirmation by the Senate, the political discussion is still mostly about her ethnicity. *If* she is biased in favor of Spanish-speaking litigants — and opposing white males in affirmative action cases — as her speeches indicate, then she is *not* impartial and she should not be a judge at any level. If she is truly impartial, then her gender and ethnicity do not matter. But it is Sotomayor herself — and her supporters — who continually tout her gender and ethnicity, as if those are her most important qualities. Furthermore, are Hispanics — and Democrats — really so vindictive that they will retaliate against the 31 Republicans who voted against Sotomayor, when Sotomayor's confirmation was *never* in doubt?

Later in the afternoon of Thursday, 6 August, it was announced that Chief Justice Roberts will administer the constitutional and judicial oaths at 11:00 EDT on Saturday, 8 August.

Conclusion

Senators Graham, Cornyn, and Kyl were very gracious, respectful, and polite, while asking some tough questions of Judge Sotomayor during the hearings in the Judiciary Committee. Overall, the hearings for Sotomayor were much less abrasive than some of the previous hearings for nominees to the U.S. Supreme Court.

I was absolutely astounded by Judge Sotomayor's repeated testimony about how judges follow precedent, and how it is *not* the job of judges to make law. As many commentators remarked, she sounded like Chief Justice Roberts at his confirmation hearings. Aside from sounding like a conservative Republican who believed in fidelity to the Constitution, she pretended that the job of judging was simply a mechanical application of law to the facts of the case. Many of her harshest critics were liberal law professors.²⁶ The method of following precedent is appropriate for judges in trial courts and intermediate appellate courts when precedent exists, but is *not* necessarily appropriate at the U.S. Supreme Court, where Justices are free to overrule any precedents and make new law.

²⁶ See Prof. Seidman on page 48, and Prof. Bonventre on pages 52 and 65.

Her explanation for her “wise Latina” remarks is difficult to believe. She initially²⁷ called it a “rhetorical flourish that fell flat” — but that only calls into question her fluency with the English language, given that she made the same remark in more than five speeches over a period of years. Then she said she “regretted” her remark,²⁸ the second time almost sounding like an apology.

Several senators mentioned that her judicial opinions seemed to be in the mainstream, but her speeches were troubling.²⁹ Sotomayor’s reply was to ignore her speeches and focus on her judicial opinions. (!) This is *not* a convincing way of disposing of some very controversial speeches that hint at her personal beliefs. I believe her speeches are more credible than her testimony under oath.

She never did adequately explain why the three-judge panel, of which she was one member, wrote an unsigned one-paragraph summary order to dispose of the *Ricci* case.³⁰ She claimed she was following precedent, but she *never* cited any precedent on which she relied. The U.S. Supreme Court found no precedent on the precise issue in *Ricci*.

I noticed during her confirmation hearings that Sotomayor has great difficulty in publicly admitting she made a mistake. She continued to defend her “wise Latina” remarks. She continued to defend her decision to dispose of *Ricci* with a terse, one-paragraph summary order. One would expect a human judge, during her 17-year career, to make some mistakes. Is Sotomayor *incapable* of admitting her mistakes? And she was under oath to tell the whole truth, when she stubbornly persisted in defending her acts that were clearly mistakes. I am *not* bothered by people who sometimes make mistakes. I *am* bothered by people who lie — especially when under oath to tell the whole truth — and who stubbornly deny they make mistakes.

There was significant coverage by journalists of the first two days of the hearings in the Senate Judiciary Committee, 13-14 July. Then the amount of coverage by the news media and by legal commentators seemed to decline. I am not certain of the reasons for the decline in coverage, but I suggest that (1) the hearings lacked fireworks that would capture the attention of Americans who were interested in scandalous, flamboyant, or vituperative conduct and (2) the legal issues

²⁷ See pages 11, 18, 21, 22.

²⁸ See pages 22 and 40.

²⁹ See pages 18, 20, 38, and 41.

³⁰ See pages 12-15, 26-28, and 31-36.

were too technical for Americans to understand.³¹ Furthermore, there was no doubt that she would be confirmed, because:

- (1) both President Obama (who nominated her) and the majority of the senators are members of the same political party,
- (2) she exceeded minimal standards of competency,³² and
- (3) it is not politically acceptable for white males on the Senate Judiciary Committee to criticize a Latina, especially when both political parties are courting votes from Hispanics.

The virtual certainty of her confirmation removed the drama from the hearings, which reduced the incentive for the news media to report the hearings.

During 29 July to 3 Aug, there was little coverage of the Sotomayor confirmation by the major news media. The big stories during this time were (1) the negotiations in the U.S. Congress on the so-called reform of health care and (2) the continuing efforts to stimulate the economy.

In the end, the Republicans who opposed her did not agree on why she was an unacceptable nominee.

- Was it because of her strong identity with her ethnicity and gender — as expressed in her “wise Latina” remark and her past memberships in PRLDEF and La Raza — makes her untrustworthy as an impartial judge?
- Was it because her testimony under oath at the Senate hearings lacked credibility, including unexplained contradictions between her speeches and her testimony?
- Was it because the Republicans disagreed with her decision in a few of the cases she decided?
- Was it because Republicans were worried about how she would vote on controversial issues *after* her confirmation as a Justice?
- Or was it some bogus propaganda about “judicial activism”?

This document is at www.rbs0.com/sotomayor2.pdf
first posted 13 July 2009, revised 7 Aug 2009

return to my homepage at <http://www.rbs0.com/>

³¹ See the analysis by Mr. Kurtz of *The Washington Post*, quoted above, beginning at page 63.

³² In acknowledging that Judge Sotomayor is competent, I am *not* retreating from my earlier conclusion that Sotomayor was *not* the *best* qualified candidate for the U.S. Supreme Court.