

agreed with the City of New Haven's decision to change the promotion rules in the middle of the game. Incredibly, her opinion consisted of just one substantive paragraph of analysis.

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

While the nominee was Chair of that fund's Litigation Committee, the organization aggressively pursued racial quotas in city hiring and, in numerous cases, fought to overturn the results of promotion exams. It seems to me that in *Ricci*, Judge Sotomayor's empathy for one group of firefighters turned out to be prejudice against another.

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

Judge Sotomayor, we will inquire into how your philosophy, which allows subjectivity in the courtroom, affects your decision-making like, for example, in abortion, where an organization in which you were an active leader argued that the Constitution requires taxpayer money to fund abortions; and gun control, where you recently noted it is "settled law" that the Second Amendment does not prevent a city or State from barring gun ownership; private property, where you have ruled recently that the Government could take property from one pharmacy developer and give it to another; capital punishment, where you personally signed a statement opposing the reinstatement of the death penalty in New York because of the "inhuman[e] psychological burden" it places on the offender and the family.

So I hope the American people will follow these hearings closely. They should learn about the issues and listen to both sides of the argument, and at the end of the hearing ask: "If I must one day go to court, what kind of judge do I wish to hear my case?"

"Do I want a judge that allows his or her social, political, or religious views to change the outcome? Or do I want a judge that impartially applies the law to the facts and fairly rules on the merits, without bias or prejudice?"

It is our job to determine on which side of that fundamental divide the nominee stands.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Another housekeeping thing. We are going to try to keep these opening statements to 10 minutes. I will recognize Senators on the Democratic side based on seniority. I have told Senator Sessions I will—

Senator SESSIONS. Likewise.

Chairman LEAHY. That is what you want on your side. Then they will be recognized on your side by the same way. So the next Senator is Senator Kohl.

STATEMENT OF HON. HERB KOHL, A U.S. SENATOR FROM WISCONSIN

Senator KOHL. Thank you, Mr. Chairman.

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

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

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

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

Our democracy, our rights, and everything we hold dear about America are built on the foundation of our Constitution. For more than 200 years, the Court has interpreted the meaning of the Constitution and, in so doing, guaranteed our most cherished rights: the right to equal education regardless of race; the right to an attorney and a fair trial for the accused; the right to personal privacy; the right to speak, vote, and worship without interference from the Government. Should you be confirmed, you and your colleagues will decide the future scope of our rights and the breadth of our freedoms. Your decisions will shape the fabric of American society for many years to come.

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

Some believe that the confirmation process has become thoroughly scripted and that nominees are far too careful in cloaking their answers to important questions in generalities and with caveats about future cases. I recognize this concern, but I also hope that you recognize our need to have a frank discussion about these important issues.

And these are not just concepts for law books. They are issues Americans care about. As crime plagues our communities, we navigate the balance between individual rights and the duty of law enforcement to protect and maintain order. As families struggle to make ends meet in these difficult times, we question the permissible role for Government in helping get the economy back on track. As we continue to strive for equal rights in our schools and workplaces, we debate the tensions between admissions policies and hiring practices that acknowledge diversity, and those that attempt to be colorblind.

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

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

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

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

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

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

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

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

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

As you have acknowledged, "My experiences in life unquestionably shape my attitudes." And I hope that we on this Committee can appreciate and relate to ourselves what you said next: ". . . but I am cognizant enough that mine is not the only experience." You will have an opportunity before this Committee to assure us that your life experiences will impact but not overwhelm your duty to follow the law and Constitution.

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

and respectful debate, and I look forward to the opportunity to learn more about you and what sort of Justice you aspire to be.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you, Senator.

Senator HATCH. Also a former Chairman of this Committee.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM UTAH

Senator HATCH. Well, thank you, Mr. Chairman. Judge, welcome to you and your good family. We are grateful to have all of you here.

Now, this is the 12th hearing for a Supreme Court nomination in which I have participated, and I am as struck today as I was the first time by the seriousness of our responsibility and its impact on America. I am confident that under this Committee's leadership, from both you, Mr. Chairman, and the distinguished Ranking Member, this hearing will be both respectful and substantive.

Judge Sotomayor comes to this Committee for the third time, having served in the first two levels of the Federal judiciary and now being nominated to the third. She has a compelling life story and a strong record of educational and professional achievement. Her nomination speaks to the opportunities that America today provides for men and women of different backgrounds and heritage.

The liberty we enjoy here in America makes these opportunities possible and requires our best efforts to protect that liberty. Our liberty rests on the foundation of a written Constitution that limits and separates government power, self-government by the people, and the rule of law. Those principles define the kind of judge our liberty requires. They define the role judges may play in our system of government.

I have described my basic approach to the judicial confirmation process in more detail elsewhere, so I ask unanimous consent that my article published this year in the Harvard Journal of Law and Public Policy, entitled "The Constitution Is the Playbook for Judicial Selection," be placed in the record, Mr. Chairman, if I can.

Chairman LEAHY. Without objection.

[The article appears as a submission for the record.]

Senator HATCH. My approach includes three elements:

First, the Senate owes some deference to the President's qualified nominees;

Second, a judicial nominee's qualifications include not only legal experience but, more importantly, judicial philosophy. By that I mean a nominee's understanding of the power and proper role of judges in our system of government;

Third, this standard must be applied to the nominee's entire record. I have also found guidance from what may seem to be as an unusual source. On June 8, 2005, then-Senator Barack Obama explained his opposition to the appeals court nomination of Janice Rogers Brown, an African American woman with a truly compelling life story, who then served as a justice on the California Supreme Court. Senator Obama made three arguments that I find relevant today.

First, he argued that the test of a qualified judicial nominee is whether she can set aside her personal views and, as he put it, "de-