

or laws may require; where the comfortable can sometimes be afflicted and the afflicted find some comfort, all under the stern shelter of the law. It is worth remembering that judges of the United States have shown great courage over the years, courage verging on heroism, in providing that sanctuary of careful attention, what James Bryce called "the cool dry atmosphere of judicial determination," amidst the inflamed passions or invested powers of the day.

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

Chairman LEAHY. Thank you.

Senator Coburn.

STATEMENT OF HON. TOM COBURN, A U.S. SENATOR FROM OKLAHOMA

Senator COBURN. Thank you.

Judge, welcome. It is truly an honor to have you before us. It says something remarkable about our country that you are here, and I assure you during your time before this Committee you will be treated with the utmost respect and kindness. It will not distinguish, however, that we will be thorough as we probe the areas where we have concerns.

There is no question that you have a stellar résumé, and if résumés and judicial history were all that we went by, we wouldn't need to have this hearing. But, in fact, other things add into that.

Equally important to us providing consent on this nomination is our determination that you have a judicial philosophy that reflects what our Founders intended. There is great division about what that means. I also wanted to note that I thought this was your hearing, not Judge Roberts' hearing, and that the partial-birth abortion ban was a law passed by the United States Congress and was upheld by the Supreme Court. So I have a different point of view on that.

As I expressed to you in our meeting, I think our Nation is at a critical point. I think we are starting to see cracks, and the reason I say that is because I think the glue that binds our Nation together is not our political philosophies. We have very different political philosophies. The thing that binds us together is an innate trust that you can have fair and impartial judgment in this country, that we better than any other nation, when we have been wrong, have corrected the wrongs of our founding; but we have instilled the confidence that, in fact, when you come before it, there is blind justice. And that, in fact, allows us the ability to overlook other areas where we are not so good because it instills in us the confidence of an opportunity to have a fair hearing and a just outcome.

I am concerned, as many of my colleagues, with some of your statements, and I do not know if the statements were made to be provocative or if they are truly heart-felt in what you have said. But I know that some of those concerns will guide my questioning when we come to the questioning period. And you were very straightforward with me in our meeting, and my hope is that you will be there as well.

I am deeply concerned by your assertion that the law is uncertain—that goes completely against what I just said about the rule of law being the glue that binds us together—and your praise for an unpredictable system of justice. I think we want it to be predictable. We want it to be predictable in its fairness and the fact in how cases are viewed. And it shouldn't matter which judge you get. It should matter what the law is and the facts are.

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

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

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

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

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

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

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

With regard to your judicial philosophy, the burden of proof rests on you, but in this case, that burden has been exaggerated by some of your statements and also by some of President Obama's stated intent to nominate someone who is not impartial but instead favors certain groups of people.

During the campaign, he promised to nominate someone who has got the heart and the empathy to recognize what it is like to be

a young teenage mom. The implication is that our judges today do not have that. Do you realize how astounding that is? The empathy to understand what it is like to be poor, to be African American or gay or disabled or old. Most of our judges understand what it is like to be old.

[Laughter.]

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

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

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

Judge Sotomayor, you must prove to the Senate that you will adhere to the proper role of a judge and only base your opinions on the Constitution, statutes, and, when appropriate, treaties. That is your oath. That is what the Constitution demands of you. You must demonstrate that you will strictly interpret the Constitution and our laws and will not be swayed by your personal biases or your political preferences—which you are entitled to.

As Alexander Hamilton stated in Federalist Paper No. 78, “The interpretation of the law is the proper and peculiar province of the courts. The Constitution, however, must be regarded by the judges as fundamental law.” He further stated it was indispensable in the courts of justice that judges have “an inflexible and uniform adherence to the rights of the Constitution.” A nominee who does not adhere to these standards necessarily rejects the role of a judge as dictated by the Constitution and should not be confirmed.

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

I thank you for being here, and I applaud your accomplishments. May God bless you.

Chairman LEAHY. Thank you, Senator.

We have been joined by the Deputy Majority Leader, Senator Durbin, and just so everyone can plan, especially you, Judge, we will hear from Senator Durbin. We will then recess until 2 o’clock, and we will come back at 2 o’clock, at which point Senator Klobuchar will be recognized.

Senator Durbin.

**STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR
FROM ILLINOIS**

Senator DURBIN. Thank you very much, Mr. Chairman.