

Statement of

The Honorable Sheldon Whitehouse

United States Senator
Rhode Island
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Opening Statement of Sheldon Whitehouse
Confirmation Hearing: Judge Sonia Sotomayor to be
an Associate Justice of the Supreme Court
As Delivered

Thank you, Mr. Chairman.

Judge Sotomayor, welcome, welcome to you and to your family. Your nomination caps what has already been a remarkable legal career. And I join many, many Americans who are so proud to see you here today. It is a great country isn't it? And you represent its greatest attributes.

Your record leaves no doubt that you have the intellectual ability to serve as a Justice. From meeting with you and from the outpouring of support I've experienced both personally and from organizations that have worked with you, your demeanor and your collegiality are well established. I appreciate your years as a prosecutor, working in the trenches of law enforcement. I am looking forward to learning more about the experience and judgment you are poised to bring to the Supreme Court.

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

It is fair to inquire into a nominee's judicial philosophy, and we will here have a serious and fair inquiry. But the pretence that Republican nominees embody modesty and restraint, or that Democratic nominees must be activists, runs starkly counter to recent history. I particularly reject the analogy of a judge to an "umpire" who merely calls "balls and strikes." If judging were that mechanical, we would not need nine Supreme Court Justices. The task of an appellate judge, particularly on a court of final appeal, is often to define the strike zone, within a matrix of Constitutional principle, legislative intent, and statutory construction.

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

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

For all the talk of "modesty" and "restraint," the right wing Justices of the Court have a striking record of ignoring precedent, overturning congressional statutes, limiting constitutional protections, and discovering new constitutional rights: the infamous Ledbetter decision, for instance; the Louisville and Seattle integration cases; the first limitation on *Roe v. Wade* that outright disregards the woman's health and safety; and the *DC Heller* decision, discovering a constitutional right to own guns that the Court had not previously noticed in 220 years. Some "balls and strikes." Over and over, news reporting discusses "fundamental changes in the law" wrought by the Roberts Court's right wing flank. The Roberts Court has not kept the promises of modesty or humility made when President Bush nominated Justices Roberts and Alito.

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

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

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

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

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

I believe that your diverse life experience, your broad professional background, your expertise as

a judge at each level of the system, will bring you that judgement. As Oliver Wendell Holmes, Jr. famously said, the life of the law has not been logic, it has been experience.

If your wide experience brings life to a sense of the difficult circumstances faced by the less powerful among us:
 the woman shunted around the bank from voicemail to voicemail as she tries to avoid foreclosure for her family;
 the family struggling to get by in the neighborhood where the police only come with raid jackets on;
 the couple up late at the kitchen table after the kids are in bed sweating out how to make ends meet that month;
 the man who believes a little differently, or looks a little different, or thinks things should be different;
 if you have empathy for those people in this job, you are doing nothing wrong.

The Founding Fathers set up the American judiciary as a check on the excesses of the elected branches, and as a refuge when those branches are corrupted, or consumed by passing passions. Courts were designed to be our guardians against what Hamilton in the Federalist Papers called "those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people . . . and which . . . have a tendency . . . to occasion ? serious oppressions of the minor party in the community." In present circumstances, those oppressions tend to fall on the poor and voiceless. But as Hamilton noted, "[c]onsiderate men, of every description, ought to prize whatever will tend to beget or fortify that temper in the courts: as no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer to-day."

The courtroom can be the only sanctuary for the little guy when the forces of society are arrayed against him, when proper opinion and elected officialdom will lend him no ear. This is a correct, fitting, and intended function of the judiciary in our constitutional structure, and the empathy President Obama saw in you has a constitutionally proper place in that structure. If everyone on the Court always voted for the prosecution against the defendant, for the corporation against the plaintiffs, and for the government against the condemned, a vital spark of American democracy would be extinguished. A courtroom is supposed to be a place where the status quo can be disrupted, even upended, when the Constitution or laws may require; where the comfortable can 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.