both a Federal trial court judge and a Federal appellate court judge.

Let me ask you the obvious one. What are the qualities that a judge should possess? You have had time on both the trial court and the appellate court. What qualities should a judge have, and how has that experience you have had, how does that shape your approach to being on the bench?

STATEMENT OF HON. SONIA SOTOMAYOR, TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

Judge SOTOMAYOR. Senator Leahy, yesterday many of the Senators emphasized their—the values they thought were important for judging, and central to many of their comments was the fact that a judge had to come to the process understanding the importance and respect the Constitution must receive in the judging process and an understanding that that respect is guided by and should be guided by a full appreciation of the limited jurisdiction of the Court in our system of Government, but understanding its importance as well. That is the central part of judging.

What my experience on the trial court and the appellate court have reinforced for me is that the process of judging is a process of keeping an open mind. It's the process of not coming to a decision with a prejudgment ever of an outcome, and that reaching a conclusion has to start with understanding what the parties are arguing, but examining in all situations carefully the facts as they prove them or not prove them, the record as they create it, and then making a decision that is limited to what the law says on the facts before the judge.

Chairman LEAHY. Let us go into some of the particulars. One of the things that I found appealing in your record is that you were a prosecutor, as many of us—both the Ranking Member and I had the privilege—and you worked on the front lines as assistant district attorney in the Manhattan DA's office. Your former boss, District Attorney Robert Morgenthau, the dean of the American prosecutors, said one of the most important cases you worked on was the prosecution of the man known as "the Tarzan burglar." He terrorized people in Harlem. He would swing on ropes into their apartments and rob them and steal and actually killed three people.

Your co-counsel, Hugh Mo, described how you threw yourself into every aspect of the investigation and the prosecution of the case. You helped to secure a conviction, a sentence of 62 years to life for the murders. Your co-counsel described you as "a skilled legal practitioner who not only ruthlessly pursued justice for victims of violent crimes, but understood the root causes of crime and how to curb it."

Did that experience shape your views in any way, as a lawyer and also as a judge? This case was getting into about as nitty-gritty as you could into the whole area of criminal law.

Judge SOTOMAYOR. I became a lawyer in the prosecutor's office. To this day, I owe who I have become as—who I became as a lawyer and who I have become as judge to Mr. Morgenthau. He gave

me a privilege and honor in working in his office that has shaped my life.

When I say I became a lawyer in his office, it's because in law school, law schools teach you in hypotheticals. They set forth facts for you. They give you a little bit of teaching on how those facts are developed, but not a whole lot. And then they ask you to opine about legal theory and apply legal theory to the facts before you.

Well, when you work in a prosecutor's office, you understand that the law is not legal theory. It's facts. It's what witnesses say and don't say. It's how you develop your position in the record. And then it's taking those facts and making arguments based on the law as it exists. That's what I took with me as a trial judge. It's what I take with me as an appellate judge. It is respect that each case gets decided case by case, applying the law as it exists to the facts before you.

You asked me a second question about the *Tarzan murderer* case, and that case brought to life for me, in a way that perhaps no other case had fully done before, the tragic consequences of needless death. In that case, Mr. Maddicks was dubbed "the Tarzan murderer" by the press because he used acrobatic feats to gain entry into apartments. In one case, he took a rope, placed it on a pipe on top of a roof, put a paint can at the other end, and threw it into a window in a building below, and broke the window. He then swung himself into the apartment and on the other side shot a person he found. He did that repeatedly, and as a result, he destroyed families.

I saw a family that had been intact with a mother living with three of her children, some grandchildren. They all worked at various jobs. Some were going to school. They stood as they watched one of their—the mother stood as she watched one of her children be struck by a bullet that Mr. Maddicks fired and killed him because the bullet struck the middle of his head. That family was destroyed. They scattered to the four winds, and only one brother remained in New York who could testify.

That case taught me that prosecutors, as all participants in the justice system, must be sensitive to the price that crime imposes on our entire society.

At the same time, as a prosecutor in that case, I had to consider how to ensure that the presentation of that case would be fully understood by jurors, and to do that it was important for us as prosecutors to be able to present those number of incidences that Mr. Maddicks had engaged in, in one trial so the full extent of his conduct could be determined by a jury.

There had never been a case quite like that where an individual who used different acrobatic feats to gain entry into an apartment was tried with all of his crimes in one indictment. I researched very carefully the law and found a theory in New York law, called the "Molineaux theory" then, that basically said if you can show a pattern that established a person's identity or assisted in establishing a person's identity—I'm simplifying the argument, by the way—then you can try different cases together. This was not a conspiracy under law because Mr. Maddicks acted alone, so I had to find a different theory to bring all his acts together.

Well, I presented that to the trial judge. It was a different application of the law. But what I did was draw on the principles of the Molineaux theory, and arguing those principles to the judge, the judge permitted that joint trial of all of Mr. Maddicks' activities.

In the end, carefully developing the facts in the case, making my record—our record, I should say—Mr. Mo's and my record complete, we convinced the judge that our theory was supported by law. That harkens back to my earlier answer, which is that's what being a trial judge teaches you.

Chairman LEAHY. So you see it from both ends, having obviously a novel theory as a prosecutor—a theory that is now well established in the law—but was novel at that time, and as a trial judge, you have seen novel theories brought in by prosecutors or by defense, and you have to make your decisions based on those theories. The fairly easy answer to that is you do see it from both ends, do you not?

Judge SOTOMAYOR. Well, it's important to remember that as a judge, I don't make law, and so the task for me as a judge is not to accept or not accept new theories. It's to decide whether the law as it exists has principles that apply to new situations.

Chairman LEAHY. Well, let's go into that, because obviously the *Tarzan* case was a unique case, and as I said, Mr. Morgenthau singled that out as an example of the kind of lawyer you are. And I find compelling your story about being in the apartment. I have stood in homes at 3 o'clock in the morning as they are carrying the body out from a murder. I can understand how you are feeling.

But in applying the law and applying the facts, you told me once that ultimately and completely the law is what controls, and I was struck by that when you did. And so there has been a great deal of talk about the *Ricci* case, *Ricci* v. *DeStefano*, and you and two other judges were reversed in this appeal involving firefighters in New Haven. The plaintiffs were challenging the city's decision to voluntarily discard the result of a paper-and-pencil test to measure leadership abilities.

Now, the legal issue that was presented to you in that case was not a new one—not in your circuit. In fact, there was a unanimous, decades-old Supreme Court decision as well. In addition, in 1991, Congress acted to reinforce that understanding of the law. I might note that every Republican member of this Committee still serving in the Senate supported that statement of the law. So you had a binding precedent. You and two other judges came to a unanimous decision. Your decision deferred to the district court's ruling allowing the city's voluntary determination that it could not justify using that paper-and-pencil test under our civil rights laws, you say it was settled judicial precedent. A majority of the Second Circuit later voted not to revisit the panel's unanimous decision; therefore, they upheld your decision.

So you had Supreme Court precedent. You had your circuit precedent. You were upheld within the circuit. Subsequently, it went to the Supreme Court, and five, a bare majority of five Justices reversed the decision, reversed their precedent, and many have said that they created a new interpretation of the law.

Ironically, if you had done something other than followed the precedent, some would be now attacking you as being an activist.

You followed the precedent, so now they attack you as being biased and racist. It is kind of a unique thing. You are damned if you do and damned if you don't.

How do you react to the Supreme Court's decision in the New Haven firefighters case?

Judge SOTOMAYOR. You are correct, Senator, that the panel, made up of myself and two other judges, in the Second Circuit decided that case on the basis of a very thorough, 78-page decision by the district court and on the basis of established precedent.

The issue was not what we would do or not do, because we were following precedent, and you—we're now on the circuit court—are obligated on a panel to follow established circuit precedent.

The issue in *Ricci* was what the city did or could do when it was presented with a challenge to one of its tests that—for promotion. This was not a quota case. This was not an affirmative action case. This was a challenge to a test that everybody agreed had a very wide difference between the pass rate of a variety of different groups.

The city was faced with the possibility, recognized in law, that the employees who were disparately impacted—that's the terminology used in the law, and that is a part of the civil rights amendment that you were talking about in 1991—that those employees who could show a disparate impact, a disproportionate pass rate, that they could bring a suit, and that then the employer had to defend the test that it gave.

The city here, after a number of days of hearings and a variety of different witnesses, decided that it wouldn't certify the test, and it wouldn't certify it in an attempt to determine whether they could develop a test that was of equal value in measuring qualifications, but which didn't have a disparate impact.

And so the question before the panel was: Was the decision of the city based on race or based on its understanding of what the law required it to do? Given Second Circuit precedent, *Bushey* v. *New York State Civil Services Commission*, the panel concluded that the city's decision in that particular situation was lawful under established law.

The Supreme Court, in looking and reviewing that case, applied a new standard. In fact, it announced that it was applying a standard from a different area of law, and explaining to employers and the courts below how to look at this question in the future.

Chairman LEAHY. But when you were deciding it, you had precedent from the Supreme Court and from your circuit that basically determined the outcome you had to come up with. Is that correct?

Judge SOTOMAYOR. Absolutely.

Chairman LEAHY. And if today, now that the Supreme Court has changed their decision, without you having to relitigate the case, it would lay open, obviously, a different result. Certainly the circuit would be bound by the new decision. Even though it is only a 5–4 decision, a circuit would be bound by the new decision of the Supreme Court. Is that correct?

Judge SOTOMAYOR. Absolutely, sir.

Chairman LEAHY. Thank you.

Judge SOTOMAYOR. That is now the statement of the Supreme Court of how employers and the Court should examine this issue.

Chairman 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. 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 being "a bigot." And to the credit of the Senators, the Republican Senators as well as Democratic Senators, they have not repeated those charges.

But you have not been able to respond to any of these things. You have 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 you "would hope that a wise Latina woman with the richness of her experiences would reach wise decisions." I remember other Justices, the most recent one Justice Alito, talking about the experience of the immigrants in his family and how that would influence his thinking and help him reach decisions.

And you also said in your speech that you "love America and value its lessons and great things could be achieved if 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 fairness and integrity based on the reason of law." And I will just throw one more quote in there—what you told me—that ultimately and completely, the law is what controls.

So tell us. You have heard all of these charges and countercharges, the wise Latina and on and on. Here is your chance. You tell us what is going on here, Judge.

Judge SOTOMAYOR. Thank you for giving me an opportunity to explain my remarks. No words I have ever spoken or written have received so much attention.

[Laughter.]

Judge SOTOMAYOR. 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 referenced, 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—a 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 an equal opportunity to be a good and wise judge regardless of their background or life experiences.

The words that I used, 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.

Chairman LEAHY. And isn't that what you, having been on the bench for 17 years, set as your goal, to be fair and show integrity based on the law?

Judge 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 explained to litigants why the law requires a result. And whether their position is sympathetic or not, I explain why the result is commanded by law.

Chairman LEAHY. And doesn't your oath of office actually require you to do that?

Judge SOTOMAYOR. That is the fundamental job of a judge.

Chairman LEAHY. Let me talk to you about another decision, *District of Columbia* v. *Heller*. In that case, the Supreme Court held that the Second Amendment guarantees to Americans the right to keep and bear arms and that it is an individual right. I have owned firearms since my early teen years. I suspect a large number of Vermonters do. I enjoy target shooting on a very regular basis at our home in Vermont, so I watched that decision rather carefully and found it interesting.

Is it safe to say that you accept the Supreme Court's decision as establishing that the Second Amendment right is an individual right? Is that correct?

Judge SOTOMAYOR. Yes, sir.

Chairman LEAHY. Thank you. And in the Second Circuit's decision in *Maloney* v. *Cuomo*, you, in fact, recognize the Supreme Court decided in *Heller* that the personal right to bear arms is guaranteed by the Second Amendment of the Constitution against Federal law restriction. Is that correct?

Judge SOTOMAYOR. It is.

Chairman LEAHY. And you accepted and applied the *Heller* decision when you decided *Maloney*?

Judge SOTOMAYOR. Completely, sir. I accepted and applied established Supreme Court precedent that the Supreme Court in its own opinion in *Heller* acknowledged answered a different question.

Chairman LEAHY. Well, in fact, let me refer to that, because Justice Scalia's opinion in the *Heller* case expressly left unresolved and expressly reserved as a separate question whether the Second Amendment guarantee applies to the States and laws adopted by the States. Earlier this year, you were on a Second Circuit panel in a case posing that specific question, analyzing a New York State law restriction on so-called chukka sticks, a martial arts device.

Now, the unanimous decision of your court cited Supreme Court precedent as binding on your decision, and the longstanding Supreme Court cases have held that the Second Amendment applies only to the Federal Government and not to the States. And I notice

that the panel of the Seventh Circuit, including Judge Posner, one of the best-known, very conservative judges, cited the same Supreme Court authority and agreed with the Second Circuit decision.

We all know that not every constitutional right has been applied to the States by the Supreme Court. I know that one of my very first cases as a prosecutor was the question whether the Fifth Amendment guaranteed a grand jury indictment has been made applicable to the States. The Supreme Court has not held that applicable to the States.

The Seventh Amendment right to a jury trial and the Eighth Amendment prohibition against excessive fines also have not been made applicable to the States.

I understand that petitions seeking to have the Supreme Court apply the Second Amendment to the States are pending. So obviously I am not going to ask you, if that case appears before the Supreme Court and you are there, how you are going to rule. But would you have an open mind on the Supreme Court in evaluating the legal proposition whether the Second Amendment right should be considered a fundamental right and, thus, applicable to the States?

Judge SOTOMAYOR. Like you, I understand how important the right to bear arms is to many, many Americans. In fact, one of my godchildren is a member of the NRA, and I have friends who hunt. I understand the individual right fully that the Supreme Court recognized in *Heller*.

As you pointed out, Senator, in the *Heller* decision the Supreme Court was addressing a very narrow issue, which was whether an individual right under the Second Amendment applied to limit the Federal Government's rights to regulate the possession of firearms. The Court expressly, Justice Scalia in a footnote, identified that there was Supreme Court precedent that has said that that right is not incorporated against the States. What that term of "incorporation" means in the law is that that right doesn't apply to the States in its regulation of its relationship with its citizen.

In Supreme Court parlance, the right is not fundamental. It's a legal term. It's not talking about the importance of the right in a legal term. It's talking about is that right incorporated against the States.

When *Maloney* came before the Second Circuit, as you indicated, myself and two other judges read what the Supreme Court said, saw that it had not explicitly rejected its precedent on application to the States, and followed that precedent, because it's the job of the Supreme Court to change it.

Chairman LEAHY. Well——

Judge SOTOMAYOR. You asked me—I'm sorry, Senator. I didn't mean to cut you off.

Chairman LEAHY. No, no. Go ahead.

Judge SOTOMAYOR. You asked me whether I have an open mind on that question. Absolutely. My decision in *Maloney* and on any case of this type would be to follow the precedent of the Supreme Court when it speaks directly on an issue, and I would not prejudge any question that came before me if I was a Justice on the Supreme Court.

Chairman LEAHY. Let me just ask—and I just asked Senator Sessions if he minded. I want to ask one more question, and it goes to the area of prosecution. You have heard appeals in over 800 criminal cases. You affirmed 98 percent of the convictions for violent crimes, including terrorism cases; 99 percent of the time at least one Republican-appointed judges of the panel agreed with you. Let me just ask you about one, *United States* v. *Giordano*.

That was a conviction against the mayor of Waterbury, Connecticut. The victims in that case were the young daughter and niece of a prostitute, young children who, as young as 9 and 11, were forced to engage in sexual acts with the defendant. The mayor was convicted under a law passed by Congress prohibiting the use of any facility or means of interstate commerce to transmit contact information about a person under 16 for the purpose of illegal sexual activity.

You spoke for the unanimous panel of the Second Circuit, which included Judge Jacobs and Judge Hall. You upheld that conviction against the constitutional challenge that the Federal criminal statute in question exceeded Congress' power under the Commerce Clause. I mention that only because I appreciate your deference to the constitutional congressional authority to prohibit illegal conduct.

Did you have any difficulty in reaching the conclusion you did in the *Giordano* case?

Judge SOTOMAYOR. No, sir.

Chairman LEAHY. Thank you. I am glad you reached it.

And I appreciate Senator Sessions' forbearance.

Senator SESSIONS. It is good to have you back, Judge, and your family and friends and supporters, and I hope we will have a good day today. I look forward to a dialog with you.

I have got to say that I liked your statement on the fidelity of the law yesterday and some of your comments this morning. And I also have to say had you been saying that with clarity over the last decade or 15 years, we would have a lot fewer problems today, because you have evidenced, I think it is quite clear, a philosophy of the law that suggests that a judge's background and experiences can and should—even should and naturally will impact their decision, which I think goes against the American ideal and oath that a judge takes to be fair to every party, and every day when they put on that robe, that is a symbol that they are to put aside their personal biases and prejudices.

So I would like to ask you a few things about it. I would just note that it is not just one sentence, as my Chairman suggested, that causes us difficulty. It is a body of thought over a period of years that causes us difficulty. And I would suggest that the quotation he gave was not exactly right of the "wise Latina" comment that you made. You have said, I think, six different times, "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion . . ." So that is a matter that I think we will talk about as we go forward.

Let me recall that yesterday you said, "It's simple: fidelity to the law. The task of a judge is not to make law. It's to apply law." I heartily agree with that.

However, you previously have said, "The court of appeals is where policy is made." And you said on another occasion, "The law that lawyers practice and judges declare is not a definitive, capital 'L' law that many would like to think exists." So I guess I am asking today what do you really believe on those subjects: that there is no real law—that judges do not make law, or that there is no real law and the court of appeals is where policy is made? Discuss that with us, please.

Judge SOTOMAYOR. I believe my record of 17 years demonstrates fully that I do believe that law—that judges must apply the law and not make the law. Whether I've agreed with a party or not, found them sympathetic or not, in every case I have decided I have done what the law requires.

With respect to judges' making policy, I assume, Senator, that you were referred to a remark that I made in a Duke law student dialog. That remark in context made very clear that I wasn't talking about the policy reflected in the law that Congress makes. That's the job of Congress to decide what the policy should be for society.

In that conversation with the students, I was focusing on what district court judges do and what circuit court judges do, and I noted that district court judges find the facts and they apply the facts to the individual case. And when they do that, their holding, their finding doesn't bind anybody else.

Appellate judges, however, establish precedent. They decide what the law says in a particular situation. That precedent has policy ramifications because it binds not just the litigants in that case; it binds all litigants in similar cases, in cases that may be influenced by that precedent.

I think if my speech is heard outside of the minute and a half that YouTube presents and its full context examined, it is very clear that I was talking about the policy ramifications of precedent and never talking about appellate judges or courts making the policy that Congress makes.

Senator SESSIONS. Judge, I would just say I don't think it is that clear. I looked at that tape several times, and I think a person could reasonably believe it meant more than that. But yesterday you spoke about your approach to rendering opinions and said, "I seek to strengthen both the rule of law and faith in the impartiality of the justice system," and I would agree. But you had previously said this: "I am willing to accept that we who judge must not deny differences resulting from experiences and heritage, but attempt, as the Supreme Court suggests, continuously to judge when those opinions, sympathies, and prejudices are appropriate."

So, first, I would like to know, Do you think there is any circumstance in which a judge should allow their prejudices to impact their decision making?

Judge SOTOMAYOR. Never their prejudices. I was talking about the very important goal of the justice system is to ensure that the personal biases and prejudices of a judge do not influence the outcome of a case. What I was talking about was the obligation of judges to examine what they're feeling as they're adjudicating a case and to ensure that that's not influencing the outcome.

Life experiences have to influence you. We're not robots to listen to evidence and don't have feelings. We have to recognize those feelings and put them aside. That's what my speech was saying. That's our job.

Senator SESSIONS. But the statement was, "I willingly accept that we who judge must not deny the differences resulting from experience and heritage, but continuously to judge when those opinions, sympathies, and prejudices are appropriate." That is exactly opposite of what you are saying, is it not?

Judge SOTOMAYOR. I don't believe so, Senator, because all I was saying is because we have feelings and different experiences, we can be led to believe that our experiences are appropriate. We have to be open-minded to accept that they may not be and that we have to judge always that we're not letting those things determine the outcome. But there are situations in which some experiences are important in the process of judging because the law asks us to use those experiences.

Senator SESSIONS. Well, I understand that. But let me just follow up. You say in your statement that you want to do what you can to increase the faith in the impartiality of our system. But isn't it true this statement suggests that you accept that there may be sympathies, prejudices, and opinions that legitimately influence a judge's decision? And how can that further faith in the impartiality of the system?

Judge SOTOMAYOR. I think the system is strengthened when judges don't assume they're impartial but when judges test themselves to identify when their emotions are driving a result or their experiences are driving a result and the law is not.

Senator SESSIONS. I agree with that. I know one judge that says that if he has a feeling about a case, he tells his law clerks to, "Watch me. I do not want my biases, sympathies, or prejudices to influence this decision, which I have taken an oath to make sure is impartial."

I just am very concerned that what you are saying today is quite inconsistent with your statement that you willingly accept that your sympathies, opinions, and prejudices may influence your decision making.

Judge SOTOMAYOR. Well, as I have tried to explain, what I try to do is to ensure that they're not. If I ignore them and believe that I'm acting without them, without looking at them and testing that I'm not, then I could, unconsciously or otherwise, be led to be doing the exact thing I don't want to do, which is to let something but the law command the result.

Senator SESSIONS. Well, yesterday you also said that your decisions have always been made to serve the larger interest of impartial justice. A good aspiration, I agree. But in the past, you have repeatedly said this: "I wonder whether achieving the goal of impartiality is possible at all in even most cases, and I wonder whether by ignoring our differences as women, men, or people of color we do a disservice to both the law and society."

Aren't you saying there that you expect your background and heritage to influence your decision making?

Judge SOTOMAYOR. What I was speaking about in that speech was—harkened back to what we were just talking about a few min-

utes ago, which is life experiences do influence us, in good ways. That's why we seek the enrichment of our legal system from life experiences. That can affect what we see or how we feel, but that's not what drives a result.

The impartiality is an understanding that the law is what commands the result. And so to the extent that we are asking the question—because most of my speech was an academic discussion—about what should we be thinking about, what should we be considering in this process, and accepting that life experiences could make a difference, but I wasn't encouraging the belief or attempting to encourage the belief that I thought that that should drive the result.

Senator SESSIONS. Judge, I think it is consistent in the comments I have quoted to you and your previous statements that you do believe that your background will affect the result in cases, and that is troubling me. So that is not impartiality. Don't you think that is not consistent with your statement that you believe your role as a judge is to serve the larger interest of impartial justice?

Judge SOTOMAYOR. No, sir. As I've indicated, my record shows that at no point or time have I ever permitted my personal views or sympathies to influence an outcome of a case. In every case where I have identified a sympathy, I have articulated it and explained to the litigant why the law requires a different result——

Senator SESSIONS. Well, Judge——

Judge SOTOMAYOR. I do not permit my sympathies, personal views, or prejudices to influence the outcome of my cases.

Senator SESSIONS. Well, you said something similar to that yesterday, that "in each case I have applied the law to the facts at hand." But you have repeatedly made this statement: "I accept the proposition"—"I accept the proposition that a difference there will be by the presence of women and people of color on the bench and that my experiences affect the facts I choose to see as a judge."

First, that is troubling to me as a lawyer. When I present evidence, I expect the judge to hear and see all the evidence that gets presented. How is it appropriate for a judge ever to say that they will choose to see some facts and not others?

Judge SOTOMAYOR. It's not a question of choosing to see some facts or another, Senator. I didn't intend to suggest that, and in the wider context, what I believe I was—the point that I was making was that our life experiences do permit us to see some facts and understand them more easily than others. But in the end, you are absolutely right; that's why we have appellate judges that are more than one judge, because each of us from our life experiences will more easily see different perspectives argued by parties. But judges do consider all of the arguments of litigants. I have. Most of my opinions, if not all of them, explain to parties why the law requires what it does.

Senator SESSIONS. Well, do you stand by your statement that "My experiences affect the facts I choose to see"?

Judge SOTOMAYOR. No, sir. I don't stand by the understanding of that statement that I will ignore other facts or other experiences because I haven't had them. I do believe that life experiences are important to the process of judging; they help you to understand

and listen; but that the law requires a result, and it will command you to the facts that are relevant to the disposition of the case.

Senator SESSIONS. Well, I would just note you made that statement in individual speeches about seven times over a number-of-years' span, and it is concerning to me. So I would just say to you I believe in Judge Cedarbaum's formulation, and she said—and you disagreed, and this was really the context of your speech, and you used 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 is possible. You then argued that you do not think it is 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 push back from that. You say you do not think that is 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 mere aspiration which may not be possible in all or even most cases with your oath that you have taken twice, which requires impartiality?

Judge SOTOMAYOR. My friend Judge Cedarbaum 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.

Senator SESSIONS. Well, I can see that perhaps as a lay person's approach to it, but as a judge who has taken this oath, I am very troubled that you would repeatedly over a decade or more make 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.

Judge, so philosophy can't impact your judging. I think it is much more likely to reach full flower if you sit on the Supreme Court than it will on a lower court where you are subject to review by your colleagues on the higher Court. So with regard to how you approach law and your personal experiences, let's look at the New Haven firefighters case, the *Ricci* case.

In that case, the city of New Haven told firefighters that they would take an exam, set for the process for it, that would determine who would be eligible for promotion. The city spent a good deal of time and money on the exam to make it a fair test of a per-

son's ability to serve as a supervisory fireman, which, in fact, has the awesome responsibility at times to send their firemen into a dangerous building that is on fire. And they had a panel that did oral exams—it was not all written—consisting of one Hispanic and one African American 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 the city saw the results of the exam, it threw out those results because "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 predominant rationale for the city's refusal to certify the results."

So you have 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?

Judge SOTOMAYOR. No, sir. The panel was composed of me and two other judges. In a very similar case, the Seventh Circuit, in an opinion authored 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 have confused some statements that Senator Leahy made with this case, and I apologize.

In a very similar case, the Sixth 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 Second 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 is a different test——

Senator SESSIONS. Judge, there was apparently unease within your panel. 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 is a legitimate criticism of what you did. But it appears, according to Stuart Taylor, the respected legal writer for the National Journal, that—Stuart Taylor concluded that it appears that Judge Cabranes was concerned about the outcome of the case, was not aware of it because it was a per curiam unpublished opinion, but it began to raise the question of whether rehearing should be granted.

You say you are bound by the superior authority, but the fact is when the question of rehearing that Second 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 could have changed that case. So, in truth, you weren't bound by that case had you seen it 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.

Let me just mention this: In 1997——

Chairman LEAHY. Was that a question or——

Senator SESSIONS. Well, that was a response to some of what you said, Mr. Chairman, because you misrepresented factually the posture of the case. In 19——

Chairman LEAHY. Well, I obviously will disagree with that, but we will have a chance to vote on this issue.

Senator 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, quota, or set-aside, will you follow the Supreme Court decision in *Adarand* and subject racial preferences to the strictest judicial scrutiny?"

In other words, I asked you would you follow the Supreme Court's binding decision in *Adarand* v. *Pena*? In *Adarand*, the Supreme Court held that all governmental discrimination, including affirmative action programs, that discriminated by race of an applicant must face strict scrutiny in the courts. In other words, this is not a light thing to do. When one race is favored over another, you must have a really good reason for it, or it is not acceptable.

After *Adarand*, the Government agencies must prove there is a compelling state interest in support of any decision to treat people differently by race.

This is what you answer: "In my view, the *Adarand* Court correctly determined that the same level of scrutiny, strict scrutiny, applies for the purpose of evaluating the constitutionality of all government classifications, whether at the State or Federal level, based on race." So that was your answer, and it deals with the government being the city of New Haven.

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" completely missing from any of your panel's discussion of this decision?

Judge 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 is a city to do when there is proof that its test disparately impacts a particular group?

And the Supreme Court decided, not on the 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.

Senator SESSIONS. This case was recognized pretty soon as a big case. I noticed what perhaps kicked off Judge Cabranes' 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 a rehearing. Your vote made the difference in not having a rehearing en banc. And he said, "Municipal employers could reject the results"—and 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., failed to satisfy a racial quota."

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?

Judge SOTOMAYOR. The panel decision was based on a 78-page District Court opinion. The opinion referenced it. In its per curiam, the Court incorporated it directly, but it was referenced by the circuit. And it relied 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 an employer should address what no one disputed, was prima facie evidence that its test disparately impacted on a group. That was undisputed by everyone, but the case law did permit employees that had been disparately impacted to bring a suit.

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

Senator SESSIONS. Well, Your Honor, I think it is not fair to say that a majority—I guess it is fair to say a majority voted against rehearing, but it was 6 to 6, unusual that one of the judges had to challenge a panel decision. And your vote made the majority not to rehear it.

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

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?

Judge SOTOMAYOR. We were very sympathetic and expressed our 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. 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, that along 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 relied on our precedent.

Senator SESSIONS. Thank you, Judge, and I appreciate this opportunity. I would just say, though, had the per curiam opinion stood without a rehearing requested by one of the judges in the whole circuit and kicked off the discussion, it is very, very unlikely that we would have heard about this case or the Supreme Court would have taken it up.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Obviously, we can talk about your speeches, but, ultimately, will it determine how you act as a judge and how you make decisions? And I will put into the record the American Bar Association, which has unanimously given you the highest rating.

I put into the record the New York City Bar, which said you are extremely well credentialed to sit on the Supreme Court. I will put that in there.

I will put in the Congressional Research Service report analyzing your cases and found that you consistently deal with the law and with stare decisis, upholding past judicial precedents.

I will put in that the nonpartisan Brennan Center found you solidly in the mainstream. And then in another analysis of more than 800 of your cases, which found you called a traditional consensus judge on criminal justice issues.

[The statements appear as a submission for the record.]

Chairman LEAHY. I thought I would put those in. It is one thing to talk about speeches you might give. I am more interested about cases you might decide.

Senator Kohl.

Senator KOHL. Thank you very much, Mr. Chairman, and good morning, Judge Sotomayor.

Judge SOTOMAYOR. Good morning.

Senator KOHL. Just spent a great deal of time on the New Haven case, so I would like to see if we can put it into some perspective.

Isn't it true that *Ricci* was a very close case? Isn't it true that 11 of the 22 judges that reviewed the case did agree with you, and

that it was only reversed by the Supreme Court by a one vote 5 to 4 margin?

Do you agree, Judge, that it was a close case and that reasonable minds could have seen it in one way or another and not be seen as prejudiced or unable to make a clear decision?

Judge SOTOMAYOR. To the extent that reasonable minds can differ on any case, that's true as to what the legal conclusion should be in a case. But the panel, at least as the case was presented—was relying on the reasonable views that Second Circuit precedent had established.

And so, to the extent that one, as a judge, adheres to precedents, because it is that which dies and gives stability to the law, then those reasonable minds, who decided the precedent and the judges who apply it, are coming to the legal conclusion they think the facts and laws require.

Senator KOHL. All right.

Judge, we have heard several of our colleagues, now, particularly on the other side, criticize you because they believe some things that you have said in speeches show that you will not be able to put your personal views aside. But I believe rather than pulling lines out of speeches, oftentimes out of context, there are better ways to examine your record as a judge.

In fact, when I ask now Justice Alito what sort of a justice he was going to make, he said, "If you want to know what sort of justice I would make, look at what sort of judge I've been."

So you have served now as a Federal judge for the past 17 years, the last 11 as an appellate court judge. We examined the record. I believe it is plain that you are a careful jurist, respectful of precedent, and author of dozens of moderate and carefully reasoned decisions.

The best evidence I believe is the infrequency with which you have been reversed. You have authored over 230 majority opinions in your 11 years on the Second Circuit Court of Appeals. But in only three out of those 230 plus cases have your decisions been reversed by the Supreme Court, a very, very low reversal rate of 2 percent.

Doesn't this very low reversal rate indicate that you do have, in fact, an ability to be faithful to the law and put your personal opinions and background aside when deciding cases, as you have in your experience as a Federal judge?

Judge SOTOMAYOR. I believe what my record shows is that I follow the law, and that my small reversal rate, vis-a-vis the vast body of cases that I have examined—because you've mentioned only the opinions I've authored. But I've been a participant in thousands more that have not been either reviewed by the Supreme Court or reversed.

Senator KOHL. Well, I agree with what you are saying. And I would like to suggest that this constant criticism of you in terms of your inability to be an impartial judge is totally refuted by the record that you have compiled as a Federal judge up to this point.

We have heard much recently about Chief Justice Roberts' view that judges are like umpires simply calling balls and strikes. So finally, would you like to take the opportunity to give us your view about this sort of an analogy?

Judge SOTOMAYOR. Few judges could claim they love baseball more than I do, for obvious reasons. But analogies are always imperfect, and I prefer to describe what judges do, like umpires, is to be impartial and bring an open mind to every case before them. And by an open mind, I mean a judge who looks at the facts of each case, listens and understands the arguments of the parties, and applies the law as the law commands.

It's a refrain I keep repeating because that is my philosophy of judging, applying the law to the facts at hand. And that's my description of judging.

Senator KOHL. Thank you.

Judge, which current one or two Supreme Court justices do you most identify with and which ones might we expect you to be agreeing with most of the time in the event that you are confirmed?

Judge SOTOMAYOR. Senator, to suggest that I admire one of the sitting Supreme Court justices would suggest that I think of myself as a clone of one of the justices. I don't. Each one of them brings integrity, their sense of respect for the law, and their sense of their best efforts and hard work to come to the decisions they think the law requires.

Going further than that would put me in the position of suggesting that by picking one justice, I was disagreeing or criticizing another, and I don't wish to do that. I wish to describe just myself.

I'm a judge who believes that the facts drive the law and the conclusion that the law will apply to that case. And when I say drives the law, I mean determines how the law will apply in that individual case.

If you would ask me—instead, if you permit me to tell you a justice from the past that I admire for applying that approach to the law, it would be Justice Cardozo.

Now, Justice Cardozo didn't spend a whole lot of time on the Supreme Court; he had an untimely passing. But he had been a judge on the New York Court of Appeals for a very long time. And during his short tenure on the bench, one of the factors that he was so well known for was his great respect for precedent, and his great respect for respect and deference to the legislative branch, and to the other branches of government and their powers under the Constitution.

In those regards, I do admire those parts of Justice Cardozo, which he was most famous for, and think that that is how I approach the law, as a case-by-case application of law to facts.

Senator KOHL. Thank you. Appreciate that.

Judge Sotomayor, many of us are impressed with you in your nomination and we hold you in great regard. But I believe we have a right to know what we are getting before we give you a lifetime appointment to the highest court in the land.

In past confirmation hearings, we have seen nominees who tell us one thing during our private meetings and in the confirmation hearings, and then go to the Court and become a justice that is quite different from the way they portrayed themselves at the hearing.

So I would like to ask you questions about a few issues that have generated much discussion. First, affirmative action.

Judge, I would like to discuss the issue of affirmative action. We can all agree that it is good for our society when employers, schools and government institutions encourage diversity. On the other hand, the consideration of ethnicity or gender should not trump qualifications or turn into a rigid quota system.

Without asking you how you would rule in any particular case, what do you think of affirmative action?

Do you believe that affirmative action is a necessary part of our society to date?

Do you agree with Justice O'Connor that she expects in 25 years the use of racial preferences will no longer be necessary to promote diversity?

Do you believe affirmative action is more justified in education than in employment or do you think it makes no difference?

Judge SOTOMAYOR. The question of whether affirmative action is necessary in our society or not and what form it should take is always first a legislative determination in terms of legislative or government employer determination in terms of what issue it is addressing and what remedy it is looking to structure.

The Constitution promotes and requires the equal protection of law of all citizens in its Fourteenth Amendment. To ensure that protection, there are situations in which race in some form must be considered. The courts have recognized that. Equality requires effort, and so there are some situations in which some form of race has been recognized by the Court.

It is firmly my hope, as it was expressed by Justice O'Connor in her decision involving the University of Michigan Law School admissions criteria, that in 25 years, race in our society won't be needed to be considered in any situation. That's the hope, and we've taken such great strides in our society to achieve that hope.

But there are situations in which there are compelling state interests. And the admissions case that Justice O'Connor was looking at, the Court recognized that in the education field. And the state is applying a solution that is very narrowly tailored. And there the Court determined that the law school's use of race as only one factor among many others, with no presumption of admission whatsoever, was appropriate under the circumstances.

In another case, companion case, the Court determined that a more fixed use of race that didn't consider the individual was inappropriate, and it struck down the undergraduate admissions policy.

That is what the Court has said about the educational use of race in a narrow way.

The question, as I indicated, of whether that should apply in other contexts has not been looked at by the Supreme Court directly. The holdings of that case have not been applied or discussed in another case. That would have to await another state action that would come before the Court, where the state would articulate its reasons for doing what it did, and the Court would consider if those actions were constitutional or not.

Senator KOHL. Thank you.

Judge, *Bush* v. *Gore*. Many critics saw the *Bush* v. *Gore* decision as an example of the judiciary improperly injecting itself into a political dispute.

In your opinion, should the Supreme Court even have decided to get involved in *Bush* v. *Gore*?

Judge SOTOMAYOR. That case took the attention of the nation, and there's been so much discussion about what the Court did or didn't do.

I look at the case, and my reaction as a sitting judge is not to criticize it or to challenge it, even if I were disposed that way, because I don't take a position on that; that the Court took and made the decision it did.

The question for me as I look at that sui generis situation—it's only happened once in the lifetime of our country—is that some good came from that discussion. There's been and was enormous electoral process changes in many states as a result of the flaws that were reflected in the process that went on.

That is a tribute to the greatness of our American system, which is whether you agree or disagree with a Supreme Court decision, that all of the branches become involved in the conversation of how to improve things. And as I indicated, both Congress, who devoted a very significant amount of money to electoral reform in its legislation—and states have looked to address what happened there.

Senator KOHL. Judge, in a 5:4 decision in 2005, the Supreme Court ruled in *Kelo* v. *City of New London*, that it was constitutional for local government to seize private property for private, economic development.

Many people, including myself, were alarmed about the consequences of this landmark ruling because, in the words of dissenting Justice O'Connor, under the logic of the *Kelo* case, "Nothing is to prevent the state from replacing any Motel 6 with a Ritz Carlton, any home with a shopping mall, or any farm with a factory."

This decision was a major shift in the law. It said that private development was a permissible "public use," according to the Fifth Amendment, as long as it provided economic growth for the community.

What is your opinion of the *Kelo* decision, Judge Sotomayor? What is an appropriate "public use" for condemning private property?

Judge SOTOMAYOR. *Kelo* is now a precedent of the Court. I must follow it. I am bound by a Supreme Court decision as a Second Circuit judge. As a Supreme Court judge, I must give it the deference that the doctrine of the stare decisis would suggest.

The question of the reach of *Kelo* has to be examined in the context of each situation. And the Court did in *Kelo* note that there was a role for the courts to play in ensuring that takings by a state did, in fact, intend to serve the public—a public purpose and public use.

I understand the concern that many citizens have expressed about whether *Kelo* did or did not honor the importance of property rights, but the question in *Kelo* was a complicated one about what constituted public use. And there the Court held that a taking to develop an economically blighted area was appropriate.

Senator KOHL. Yes. That is what they decided in *Kelo*. I asked you your opinion, and apparently you feel that you are not in a po-

sition to offer an opinion because it is precedent, and now you are required to follow precedent as an appellate court judge.

But I asked you if you would express your opinion, assuming that you became a Supreme Court justice, and assuming that you might have a chance someday to review the scope of that decision.

Judge SOTOMAYOR. I don't prejudge issues.

Senator KOHL. All right.

Judge SOTOMAYOR. That is actually—I come to every case with an open mind.

Senator KOHL. All right.

Judge SOTOMAYOR. Every case is a new for me.

Senator KOHL. That is good. All right. Let's leave that.

As you know, Judge, the landmark case of *Griswold* v. *Connecticut* guarantees that there is a fundamental constitutional right to privacy as it applies to contraception.

Do you agree with that? In your opinion, is that settled law?

Judge SOTOMAYOR. That is the precedent of the Court, so it is settled law.

Senator KOHL. Is there a general constitutional right to privacy, and where is the right to privacy, in your opinion, found in the Constitution?

Judge SOTOMAYOR. There is a right of privacy. The Court has founded in various places in the Constitution, has recognized rights under those various provisions of the Constitution. It's founded in the Fourth Amendment's right and prohibition against unreasonable search and seizures.

Most commonly, it's considered—I shouldn't say most commonly because search and seizure cases are quite frequent before the Court. But it's also found in the Fourteenth Amendment of the Constitution when it is considered in the context of the liberty interest protected by the due process clause of the Constitution.

Senator KOHL. All right.

Judge, the Court's ruling about the right to privacy in Griswold laid the foundation for *Roe* v. *Wade*. In your opinion, is *Roe* settled law?

Judge SOTOMAYOR. The Court's decision in *Planned Parenthood* v. *Casey* reaffirmed the core holding of *Roe*. That is the precedent of the Court and settled in terms of the holding of the Court.

Senator KOHL. Do you agree with Justices Souter, O'Connor and Kennedy in their opinion in *Casey*, which reaffirmed the core holding in *Roe*?

Judge SOTOMAYOR. As I said, *Casey* reaffirmed the holding in *Roe*. That is the Supreme Court's settled interpretation of what the core holding is and its reaffirmance of it.

Senator KOHL. All right. Let's talk a little bit about cameras in the court.

You sit on a court of appeals, which does allow cameras in the court. And from all indications, your experience with it has not been negative. In fact, I understand it has been somewhat positive.

So how would you feel about allowing cameras in the Supreme Court, where the country would have a chance to view discussions and arguments about the most important issues that the Supreme Court decides with respect to our Constitution, our rights and our future?

Judge SOTOMAYOR. I have had positive experiences with cameras. When I have been asked to join experiments using cameras in the courtroom, I have participated. I have volunteered.

Perhaps it would be useful if I explained to you my approach to collegiality on a court.

[Laughter.]

Judge SOTOMAYOR. It is my practice when I enter a new enterprise, whether it's on a court or in my private practice or when I was a prosecutor, to experience what those courts were doing, or those individuals doing that job were doing, understand and listen to the arguments of my colleagues about why certain practices were necessary or helpful, or why certain practices shouldn't be done, or new procedures tried, and then spend my time trying to convince them.

But I wouldn't try to come in with prejudgments, so that they thought that I was unwilling to engage in a conversation with them, or unwilling to listen to their views. I go in and I try to share my experiences, to share my thoughts, and to be collegial and come to a conclusion together.

And I can assure you that if this august body gives me the privilege of becoming a justice of the Supreme Court, that I will follow that practice with respect to the tall issues of procedures on the Court, including the question of cameras in the courtroom.

Senator KOHL. No. I appreciate the fact that if you cannot convince them, it will not happen. But how do you feel——

[Laughter.]

Senator KOHL [continuing]. How do you feel about permitting cameras in the Supreme Court, recognizing that you cannot decree it by fiat?

Judge SOTOMAYOR. You know, I'm pretty good——

Senator KOHL. Do you think it is a good idea?

Judge SOTOMAYOR [continuing]. I'm a pretty good litigator. I was a really good litigator. And I know that when I work hard at trying to convince my colleagues of something after listening to them, they'll often try it for a while. I mean, we'll have to talk together. We'll have to figure out that issue together.

Senator KOHL. All right.

Judge SOTOMAYOR. I would be, again, if I was fortunate enough to be confirmed, a new voice in the discussion, and new voices often see things, and talk about them, and consider taking new approaches.

Senator KOHL. All right.

Judge, all of us in public office, other than Federal judges, have specific fixed terms, and we must periodically run for reelection if you want to remain in office. Even most state court judges have fixed terms of office. The Federal Judiciary, as you know, is very different. You have no term of office; instead, you serve for life.

So I would like to ask you, would you support term limits for Supreme Court justices, for example, 15, 20 or 25 years? Would this help ensure that justices do not become victims of a cloistered, ivory tower existence, and that you will be able to stay in touch with the problems of ordinary Americans?

Term limits for Supreme Court justices?

Judge SOTOMAYOR. All questions of policy are within the providence of Congress first. And so, that particular question would have to be considered by Congress first. But it would have to consider it in light of the Constitution and then of statutes that govern these issues. And so, that first step and decision would be Congress'.

I can only note that there was a purpose to the structure of our Constitution, and it was a view by the Founding Fathers that they wanted justices who would not be subject to political whim or to the emotions of a moment. And they felt that by giving them certain protections, that that would ensure their objectivity and their impartiality over time.

I do know, having served with many of my colleagues who have been members of the court, sometimes for decades, I had one colleague who was still an active member of the court in his nineties. And at close to 90, he was learning the Internet and encouraging my colleagues of a much younger age to participate in learning the Internet.

So I don't think that it's service or the length of time. I think there's wisdom that comes to judges from their experience that helps them in the process over time. I think in the end, it is a question of, one, of what the structure are of our government is best served by. And as I said, the policy question will be considered first by Congress and the processes set forth by the Constitution. But I do think there is a value in the services of judges for long periods of time.

Senator KOHL. All right, Judge. Finally, I would like to turn to antitrust law. Antitrust law is not some mysterious legal theory, as you know, that only lawyers can understand. Antitrust is just an old-fashioned word for fair competition, Judge, and it is a law we use to protect consumers and competitors alike from unfair and illegal trade practices.

A prominent antitrust lawyer named Carl Hittinger was quoted in an AP story recently as saying that, "Judge Sotomayor has surprisingly broke the pro-business record in the area of antitrust. In nearly every case in which she was one of the three judges considering a dispute, the court ruled against the plaintiff bringing an antitrust complaint."

I would like you to respond to that and to one other thing I would like to raise.

In 2007, *Leegin* case, in a 5–4 decision. Supreme Court overturned a 97-year-old precedent and held that vertical price fixing no longer automatically violated antitrust law. In effect, this means that a manufacturer is now free to set minimum prices at retail for its products, and thereby, prohibit discounting of its products.

What do you think of this decision? Do you think it was appropriate for the Supreme Court, by judicial fiat, to overturn a nearly century-old decision, on the meaning of this Sherman Act, that businesses and consumers had come to rely on and which had been never altered by Congress?

Those two things, antitrust.

Judge SOTOMAYOR. I cannot speak, Senator, to whether Leegins was right or wrong; it's now the established law of the Court. That case in large measure centered around the justices, different views

of the effects of stare decisis on a question which none of them seemed to dispute, that there were a basis to question the economic assumptions of the Court in this field of law.

Leegins is the Court's holding, its teachings and holding. And I will have to apply in new cases, so I can't say more than what I know about it and what I thought the Court was doing there.

With respect to my record, I can't speak for why someone else would view my record as suggesting a pro or anti approach to any series of cases. All of the business cases, as with all of the cases, my structure of approaching is the same; what is the law requiring?

I would note that I have cases that have upheld antitrust complaints and upheld those cases going forward. I did it in my Visa/MasterCard antitrust decision, and that was also a major decision in this field.

All I can say is that with business and the interest of any party before me, I will consider and apply the law as it is written by Congress and informed by precedent.

Senator KOHL. Thank you very much, Judge Sotomayor, and thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Judge Sotomayor, this is probably an appropriate place to take a short break, and we will. And then we will come back. At some point, we will break for both the Republicans and the Democrats to be in caucus lunch, but also gives you a chance to have lunch.

So we will take a 10-minute, flexible 10-minute, break. And I thank you for your patience here, Judge Sotomayor, and we will be back.

[Whereupon, at 11:08 a.m., the hearing was recessed.]

After Recess [11:27 a.m.]

Chairman LEAHY. There has been some question during the break from the press about what our schedule will be, and I fully understand that they have to work out their own schedules. What I would suggest—Senator Kohl asked questions. We will go to—next is Senator Hatch, a former chairman of this committee. Following Senator Hatch, we will go to Senator Feinstein. And that will bring us to roughly 12:30.

Because of the caucuses, we will break at 12:30, but then resume right at 2, which will mean—I have talked to Republicans and Democrats. It means everybody that wants to come back will leave their caucus a few minutes early. But I think everybody will understand that.

Senator Hatch is a former chairman of this committee and a friend of many years. I recognize Senator Hatch.

Senator HATCH. Well, thank you, Mr. Chairman.

Welcome, again, and to your lovely family. We are grateful to have you all here.

Now, let me ask you a question about settled law. If a holding in the Supreme Court means that it is settled, you believe that *Gonzalez* v. *Carhart*, upholding the partial birth abortion ban, is settled law.

Judge SOTOMAYOR. All precedents of the Supreme Court I consider settled law subject to the deference with doctrine of stare decisis would counsel.

Senator HATCH. Now, I want to begin here today by looking at your cases in an area that is very important to many of us, and that is the Second Amendment, the right to keep and bear arms, and your conclusion that the right is not fundamental.

Now, in the 2004 case entitled *United States* v. *Sanchez-Villar*, you handled the Second Amendment issue in a short footnote. You cited the Second Circuit's decision in *United States* v. *Toner* for the proposition of the right to possess a gun is not a fundamental right.

Toner in turn relied on the Supreme Court's decision in *United States* v. *Miller*. Last year, in the *District of Columbia* v. *Heller*, the Supreme Court examined *Miller* and concluded that, "The case did not even purport to be a thorough examination of the Second Amendment," and that *Miller* provided "no explanation of the content of the right."

You are familiar with that.

Judge SOTOMAYOR. I am, sir.

Senator HATCH. Okay. So let me ask you, doesn't the Supreme Court's treatment of *Miller* at least cast doubts on whether relying on *Miller*, as the Second Circuit has done for this proposition, is proper?

Judge SOTOMAYOR. The issue——

Senator HATCH. Remember, I am saying at least cast doubts.

Judge SOTOMAYOR [continuing]. Well, that is what I believe Justice Scalia implied in his footnote 23, but he acknowledged that the issue of whether the right, as understood in Supreme Court jurisprudence, was fundamental. It's not that I considered it unfundamental, but that the Supreme Court didn't consider it fundamental so as to be incorporated against the states.

Senator HATCH. Well, it did not decide that point.

Judge SOTOMAYOR. Well, it not only didn't decide it, but I understood Justice Scalia to be recognizing that the Court's precedent had held it was not—his opinion with respect to the application of the Second Amendment to government regulation was a different inquiry, and a different inquiry as to the meaning of U.S. Miller with respect to that issue.

Senator HATCH. Well, if *Heller* had already been decided, would you have addressed that issue differently than *Heller* or would you take the position that the doctrine of incorporation is inapplicable with regard to state issues?

Judge SOTOMAYOR. That's the very question that the Supreme Court is more than likely to be considering. There are three cases addressing this issue, at least I should say three cases addressing this issue in the circuit courts. And so, it's not a question that I can address. As I said, bring an open mind to every case.

Senator HATCH. I accept that.

In *Sanchez-Villar*, you identified the premise that a right to possess a gun is not fundamental, and the conclusion that New York's ban on gun possession was permissible under the Second Amendment, but it is not a word actually connecting the premise to the conclusion.

Without any analysis at all, that footnote that you wrote leaves the impression that unless the right to bear arms is considered fundamental, any gun restriction is necessarily permissible under the Second Amendment.

Is that what you believe?

Judge SOTOMAYOR. No, sir, because that's not—I'm not taking an opinion on that issue because it's an open question. Sanchez is——

Senator HATCH. So you admit it is an open question.

Judge SOTOMAYOR. Well, I admit that Justice—I admit—I—the courts have been addressing that question. The Supreme Court in the opinion authored by Justice Scalia suggested that it was a question that the Court should consider. I am just attempting to explain that *U.S.* v. *Sanchez* was using fundamental in its legal sense, that whether or not it had been incorporated against the states.

With respect to that question, moreover, even if it's not incorporated against the states, the question would be would the states have a rational basis for the regulation it has in place. And I am—I believe that the question there was whether or not a prohibition against felons possessing firearms was at question, if my memory serves me correctly. If it doesn't—but even Justice Scalia in the majority opinion in *Heller* recognized that that was a rational basis regulation for a state under all circumstances, whether or not there was a Second Amendment right.

Senator HATCH. Well, in the *District of Columbia* v. *Heller*, the Supreme Court observed that, "It has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a preexisting right." And the Court also observed this, "By the time of the founding, the right to have arms had become fundamental for English subjects."

Now, the Court also described the right to bear arms is a natural right.

Do you recall that from that decision?

Judge SOTOMAYOR. I do remember that discussion.

Senator HATCH. All right.

In what way does the Court's observation that the Second Amendment codified the preexisting, fundamental right to bear arms affect your conclusion that the Second Amendment does not protect a fundamental right?

Judge SOTOMAYOR. My conclusion in the *Maloney* case or in the *U.S. Sanchez-Villar* was based on precedence and the holding of precedence that the Second Circuit did not apply to the states.

Senator HATCH. Well, what is—excuse me. I am sorry. I did not mean to interrupt you.

What is your understanding of the test or standard the Supreme Court has used to determine whether a right should be considered fundamental? I am not asking a hypothetical here. I am only asking about what the Supreme Court has said in the past on this question.

I recall, for instance, the Court emphasizing that a right must be deeply rooted in our Nation's history and tradition, that it is necessary to an Anglo-American regime of ordered liberty or that it is an enduring American tradition.

I think I have cited that pretty accurately on what the Court has held with regard to what is a fundamental right. Now, those are different formulations from the Supreme Court's decisions, but I think the common thread there is obvious.

Now, is that your understanding of how the Supreme Court has evaluated whether a right should be deemed fundamental?

Judge SOTOMAYOR. The Supreme Court's decision with respect to the Second Circuit incorporation—Second Amendment incorporation doctrine is reliant on old precedent of the Court.

Senator HATCH. Right.

Judge SOTOMAYOR. And I don't mean to use that as precedent that doesn't bind when I call it old. I'm talking about precedent that was passed in the 19th century.

Since that time, there is no question that different cases addressing different amendments of the Constitution have applied a different framework. And whether that framework and the language you quoted are precise or not, I haven't examined that framework in a while to know if that language is precise or not. I'm not suggesting it's not, Senator. I just can't affirm——

Senator HATCH. Sure.

Judge SOTOMAYOR [continuing]. That description.

My point is, however, that once there's Supreme Court precedent directly on point and Second Circuit precedent directly on point on a question, which there is on this incorporation doctrine and how it uses the word fundamental, then my panel, which was unanimous on this point—there were two other judges and at least one other—or one other panel on the Seventh Circuit by Justice—by Justice—by Judge Easterbrook, has agreed that once you have settled precedent in an area, on a precise question, then the Supreme Court has to look at that.

And under the deference one gives to stare decisis and the factors one considers in deciding whether that older precedent should be changed or not, that's what the Supreme Court will do.

Senator HATCH. All right. As I noted, the Supreme Court put the Second Amendment in the same category as the First and the Fourth Amendments as preexisting rights that the Constitution merely codified.

Now, do you believe that the First Amendment rights, such as the right to freely exercise religion, the freedom of speech, or the freedom of the press, are fundamental rights?

Judge SOTOMAYOR. Those rights have been incorporated against the states. The states must comply with them. So to the extent that the Court has held that, then they are—they have been deemed fundamental as that term is understood legally.

Senator HATCH. What about the Fourth Amendment about unreasonable searches and seizures?

Judge SOTOMAYOR. As well.

Senator HATCH. Same?

Judge SOTOMAYOR. But with respect to the holding as it relates to that particular amendment.

Senator HATCH. I understand.

Let me turn to your decision in *Maloney* v. *Cuomo*. And this is the first post-*Heller* decision about the Second Amendment to reach any Federal court, or Federal appeals court. I think I should be more specific.

In this case, you held that the Second Amendment applies only to the Federal Government and not to the states. And this was

after *Heller*. And am I right that your authority for that proposition was the Supreme Court's 1886 decision in *Presser* v. *Illinois*?

Judge SOTOMAYOR. That plus some Second Circuit precedent that had held that it had not—that the amendment had not been——

Senator HATCH. But *Plesser* was definitely one of the cases you relied on.

Judge SOTOMAYOR. It was.

Senator HATCH. All right. In that case—or I should say, that case involved the Fourteenth Amendment's privileges and immunities clause.

Now, is that correct? Are you aware of that?

Judge SOTOMAYOR. It may have. I haven't read it recently enough to remember exactly.

Senator HATCH. You can take my word on it.

Judge SOTOMAYOR. Okay. I'll accept——

Senator HATCH. Thank you.

Last year's decision in *Heller* involved the District of Columbia, so it did not decide the issue of whether the Second Amendment applies to the states or is incorporated. But the Court did say that its 19th century cases about applying the Bill of Rights to the states "did not engage the sort of Fourteenth Amendment inquiry required by our later cases."

Now, here is my question.

Am I right that those later cases to which the Court referred involved the Fourteenth Amendment's due process clause rather than its privileges and immunities clause?

Judge SOTOMAYOR. As I said, I haven't examined those cases recently enough to be able to answer your question, Senator. But what I can say is that regardless of what those pieces address or didn't address, the Second Circuit had very directly addressed the question of whether the Second—whether it viewed the Second Amendment as applying against the states.

To that extent, if that precedent got the Supreme Court's teachings wrong, it still would bind my court.

Senator HATCH. I understand that.

Judge SOTOMAYOR. And to the extent that——

Senator HATCH. I am talking about something beyond that. I am talking about what should be done here.

Isn't the *Presser* case that you relied on in *Maloney*—to say that the Second Amendment does not apply to the states, one of those 19th century cases where they have used the privileges and immunities clause, not the Fourteenth Amendment due process clause, to incorporate—see, the late cases have all used the Fourteenth Amendment, as far as I can recall.

Judge SOTOMAYOR. As I said, Senator, I just haven't looked at those cases to analyze it. I know what *Heller* said about them. In *Maloney*, we were addressing a very, very narrow question.

Senator HATCH. Right.

Judge SOTOMAYOR. And in the end, the issue of whether that precedent should be followed or not is a question the Supreme Court's going to address if it accepts certiorari in one of the three cases in which courts have looked at this question, the Court of Appeals has.

Senator HATCH. The reason I am going over this is I believe you applied the wrong line of cases in *Maloney*, because you were applying cases that used the privileges and immunities clause and not cases that used the Fourteenth Amendment due process clause.

Let me just clarify your decision in *Maloney*. As I read it, you held that the Second Amendment does not apply to the state or local governments. You also held that since the right to bear arms is not fundamental, all that is required to justify a weapons restriction is some reasonably conceivable state of facts that could provide a rational basis for it.

Now, am I right that this is a very permissive standard that would be easily met, the rational basis standard?

Judge SOTOMAYOR. Well, all standards of the Court are attempting to ensure that government action has a basis.

Senator HATCH. Right.

Judge SOTOMAYOR. In some situations, the Court looks at the action and applies a stricter scrutiny to the government's action. In others, if it's not a fundamental right in the way the law defines that, but it hasn't been incorporated against the states, then standard of review is of rational basis.

Senator HATCH. And my point is, it is a permissive standard that can be easily met; isn't that correct?

Judge SOTOMAYOR. Well, the government can remedy a social problem that it is identifying or difficulty—it's identifying in conduct, not in the most narrowly tailored way. But one that reasonably seeks to achieve that result, in the end, it can't be arbitrary and capricious. That's a word that is not in the definition.

Senator HATCH. Maybe I can use the words "more easily met"? How is that?

Judge SOTOMAYOR. As I said, the rational basis does look more broadly than strict scrutiny may——

Senator HATCH. That is my point. That is my point.

As a result of this very permissive legal standard, and it is permissive, doesn't your decision in *Maloney* mean that virtually any state or local weapons ban would be permissible?

Judge SOTOMAYOR. Sir, in *Maloney* we were talking about nunchuck sticks.

Senator HATCH. I understand.

Judge SOTOMAYOR. Those are martial art sticks.

Senator HATCH. Two sticks bound together by rawhide or some sort of a——

Judge SOTOMAYOR. Exactly. And when the sticks are swung, which is what you do with them, if there's anybody near you, you're going to be seriously injured because that swinging mechanism can break arms, it can bust someone's skull——

Senator HATCH. Sure.

Judge SOTOMAYOR [continuing]. It can cause not only serious but fatal damage.

So to the extent that a state government would choose to address this issue of the danger of that instrument by prohibiting its possession in the way New York did, the question before our court, because the Second Amendment has not been incorporated against the state, was did the state have a rational basis for prohibiting the possession of this kind of instrument.

So it's a very narrow question. Every kind of regulation would come to a court with a particular statute, which judicial—legislative findings as to why a remedy is needed. And that statute would then be subject to rational basis review.

Senator HATCH. Well, the point that I am really making is, is that the decision was based upon a 19th century case that relied on the privileges and immunities clause, which is not the clause that we use to invoke the doctrine of incorporation today. And that is just an important consideration for you as you see these cases in the future.

But let me just change the subject. In the *Ricci* case—and I am very concerned about that because of a variety of reasons—the Court split 5 to 4 on whether to grant summary judgment to the firefighters. And it was a summary judgment, meaning it didn't have to be distributed to the other judges on the Court.

The other reason that Judge Cabranes raised the issue is that he read it in the newspaper, and then said I want to see that case. Then he got it, and he realized, my gosh, this is a case of first impression.

So the Court split 5 to 4 on whether to grant summary judgment to the firefighters. Now, even the four dissenters said that the firefighters deserved their day in court to find more facts. But all nine justices disagreed with your handling of that particular case.

Now, thus, your decision in—I mean, even though it was a 5 to 4 decision, all nine of them disagreed with your handling. All right. But, as you know, your decision in *Ricci* v. *DeStefano* has become very controversial. People all over the country are tired of courts imposing their will against one group or another without justification.

Now, the primary response or defense so far seems to be that you have no choice because you were bound by clear and longstanding precedent. Most say you were bound by Second Circuit precedent; some say it was Supreme Court precedent.

So I need to ask you about this. To be clear, this case involved not only disparate impact discrimination, but both disparate treatment and disparate impact. That is what made it a case of first impression. The city says that they had to engage in disparate treatment or they would have been sued for disparate impact. So it was how these two concepts of discrimination, disparate treatment and disparate impact, relate in the same case?

The fact of the issue of whether you were bound by clear, longstanding precedent, as I recall your opinion in this case, whether it was the summary order or the per curiam opinion, did not cite any Supreme Court or Second Circuit Court precedent at all.

Is that right?

Judge SOTOMAYOR. I believe they cited the *Bushey* case.

Senator HATCH. All right. The only case citation in your opinion was to the District Court opinion, because you were simply adopting what the District Court had said rather than doing your own analysis of the issues. And I think that is right, but you can correct me if I am wrong. I would be happy to be corrected.

But didn't the District Court say that this was actually a very unusual case? This is how the District Court put it. "This case presents the opposite scenario of the usual challenge to an employ-

ment or promotional examination as plaintiffs attack not the use of allegedly racially discriminatory exam results, but defendants' reason for their refusal to use those results."

Now, this seems complicated I know, but you know more about it than probably anybody here in this room.

The District Court cited three Second Circuit precedents, but did not two of them, the *Kirkland* and the *Bushey* cases—didn't they deal with race norming of test scores, which did not occur in this case?

Judge SOTOMAYOR. They dealt with when employees could prove a disparate impact of a case, and it would be——

Senator HATCH. But based upon race norming.

Judge SOTOMAYOR [continuing]. But the principles underlying when employees could bring a case are the same when they establish a *prima facie* case, which is can an employee be sued—employer be sued by employees who can prove a disparate impact. And the basic principles of those cases were the same regardless of what form the practice at issue took.

Senator HATCH. All right. Well, the third case, the *Hayden* case, didn't it present a challenge to the design of the employment test rather than the results of the test?

Judge SOTOMAYOR. I'm sorry. Say this again.

Senator HATCH. The *Hayden* case, didn't it actually present a challenge to the design of the case rather than the results of the—design of the employment test rather than the results of the test?

Judge SOTOMAYOR. Again, regardless of what the challenge is about, what test is at issue, the core holding of that precedent was that if an employee could show a disparate impact from a particular practice or test or activity by an employer, then that employee had a *prima facie* case of liability under Title VII.

So the question is, was the city subject to potential liability because the employees, the city of New Haven, because the employees could bring a suit under established law challenging that the city of New Haven had violated Title VII. So that was the question.

Senator HATCH. All right, as one of the reasons why. It is a very important case.

When the Second Circuit considered whether to review the decision en banc, didn't you join an opinion admitting that the case presents "difficult issues?"

Judge SOTOMAYOR. Well, the District Court noted that it was a different scenario, but it evaluated its decision—it evaluated the case in a 78-page decision, and gave a full explanation, one which the panel agreed with my adopting the opinion of the District Court.

Those questions, as I indicated, are always whether, given the risk the city was facing, the fact that it could face a lawsuit and its conclusion that perhaps a better test could be devised that would not have a disparate impact, whether it was liable for discrimination—disparate—not disparate—different treatment under the law.

The Supreme Court came back and said, new standard. As I understood the dissenters in that case, what they were saying is, to the majority, if you're going to apply a new standard, then give the Second Circuit a chance to look at the record and apply that stand-

ard. It wasn't disagreeing that the circuit wasn't applying the law as it was understood at the time. The dissenters, as I read what they were doing, were saying, send it back to the circuit and let them look at this in the first instance.

Senator HATCH. Well, as I understand it, Judge Cabranes basically did not know the decision was done until he read it in the newspaper and then asked to look at it. His opinion, joined by five other judges, supporting en banc review, opens with these words, "This appeal raises important questions of first impression in our circuit, and, indeed, in the Nation, regarding the implication of the Fourteenth Amendment and Title VII's prohibition on discriminatory employment practices."

Was he wrong?

Judge SOTOMAYOR. That was his view. He expressed it in his opinion on his vote. I can't speak for him. I know that the panel——

Senator HATCH. I am just asking you to speak for you.

Look, when the Supreme Court reversed you, Justice Kennedy wrote, "This action presents two provisions of Title VII to be interpreted and reconciled with few, if any, precedents in the Courts of Appeals discussing the issue."

He was referring to the lack of precedent anywhere in the country, not just the Second Circuit.

Was he wrong?

Judge SOTOMAYOR. He was talking about whether—I understood him to be talking about not whether the precedent that existed would have determined the outcome as the panel did, but whether the Court should be looking at these two provisions in a different way to establish a choice—a different choice in considerations by the city.

As I indicated, that argument about what new standard or new approach to the questions that the city should consider before it denies certification of a test, yes, had not been addressed by other courts. But the ability of a city, when presented with a *prima facie* case, to determine whether or not it would attempt to reach a nondisparate impact have been recognized by the courts.

Senator HATCH. Even the District Court felt that this was an unusual case. And if there was little or no Second Circuit precedent directly on point for a case like this—one of the questions I had is why did your panel not just do your own analysis and your own opinion?

Judge Cabranes pointed out that the per curiam approach that simply adopts the District Court's reasoning is reserved for cases that involve only "straightforward questions that do not require explanation."

As I asked you about a minute ago, you yourself joined an opinion regarding rehearing, saying the case raised difficult questions.

Now, the issue I am raising is why did you not analyze the issues yourself and apply what law existed to the difficult and perhaps unprecedented cases or issues in the case? And whether you got it right or wrong—and the Supreme Court did find that you got it wrong because they reversed—I just can't understand the claim that you were just sticking to binding, clear, longstanding precedent when all of that was part of the total decision and all nine

justices found it to be a flaw that you did not give serious, adequate consideration to what really turned out to be a case at first impression.

It is easy always to look at these things in retrospect, and you are under a lot of pressure here. But I just wanted to cover that case because I think it is important that that case be covered. And I think it is also important for you to know how I feel about these type of cases, and I think many here in the U.S. Senate. These are important cases. These are cases where people are discriminated against.

Let me just make one last point here. You have nothing to do with this, I know. But there is a rumor that people for the American Way, that this organization has been smearing Frank Ricci, who is only one of 20 plaintiffs in this case, because he may be willing to be a witness in these proceedings.

I hope that is not true, and I know you have nothing to do with it. So don't think I am trying to make a point against you. I am not. I am making a point that that is the type of stuff that does not belong in Supreme Court nomination hearings, and I know you would agree with me on that.

Judge SOTOMAYOR. Absolutely, Senator. I would never, ever endorse, approve or tolerate, if I had any control over individuals, that kind of conduct.

Senator HATCH. I believe that, and I want you to know I have appreciated this little time we have had together.

Judge SOTOMAYOR. Thank you, Senator.

Senator FEINSTEIN. Thank you very much, Mr. Chairman. I'm puzzled why Mr. Estrada keeps coming up.

Mr. Estrada had no judicial experience. The nominee before us has considerable judicial experience. Mr. Estrada wouldn't answer questions presented to him. This nominee I think has been very straightforward. She has not used catchy phrases, she has answered the questions directly the best she could, and to me that gets points.

I must say that if there is a test for judicial temperament, you pass it with an A++. I want you to know that because I wanted to respond and my adrenaline was moving along and you have just sat there very quietly and responded to questions that in their very nature are quite provocative. So I want to congratulate you about that.

Now, it was just said that all nine Justices disagreed with you in the *Ricci* case. But I want to point out that Justice Ginsburg and three other Justices stated in the dissent that the Second Circuit decision should have been affirmed. Is that correct?

Judge SOTOMAYOR. Yes.

Senator FEINSTEIN. Thank you very much. Also a Senator made a comment about the Second Circuit not being bound in the *Ricci* case that I wanted to follow up on because I think what he said was not correct.

You made the point that the unanimous *Ricci* panel was bound by Second Circuit precedent, as we have said. The Senator said that you easily could have overruled that precedent by voting for the case to be heard en banc.

First, my understanding is that a majority of the Second Circuit voted not to rehear the case. Is that correct?

Judge SOTOMAYOR. That's correct.

Senator FEINSTEIN. Second, it took a significant change in disparate impact law to change the result of the Second Circuit reached in this case. The Supreme Court itself in *Ricci* recognized that it was creating a new standard. Is my understanding correct?

Judge SOTOMAYOR. Yes, Senator.

Senator FEINSTEIN. You see? So what is happening here, ladies and gentlemen and members, is that this very reserved and very factual and very considered nominee is being characterized as being an activist when she is anything but.

I have a problem with this because some of it is getting across out there, calls begin to come into my office. Wow, she's an activist. In my view because you have agreed with your Republican colleagues on constitutional issues some 98 percent of the time, I don't see how you can possibly be construed to be an activist.

By your comments here, and as I walked in the room earlier, somebody asked you how you see your role and you said, 'to apply the law as it exists with the cases behind it.' That's a direct quote. It's a very clear statement. It does not say oh, I think it's a good idea or it does not say any other cliche. It states a definitive statement.

Later you said, 'Precedent is that which gives stability to the law.' I think that's a very important statement.

What we are talking about here is following precedent. So let me ask you in a difficult area of the law a question.

The Supreme Court has decided on more than seven occasions that the law cannot put a woman's health at risk. It said it in *Rowe* in '73, in *Danforth* in '76, in *Planned Parenthood* in '83, in *Thornburg* in '86, in *Casey* in '92, in *Carhart* in 2000 and in *Ayotte* in 2006.

With both Justices Roberts and Alito on the court, however, this rule seems to have changed because in 2007 in *Carhart 2*, the court essentially removed this basic constitutional right from women.

Now here is my question. When there are multiple precedents and a question arises, are all the previous decisions discarded or should the court reexamine all the cases on point?

Judge SOTOMAYOR. It is somewhat difficult to answer that question because before the court in any one case is a particular factual situation. So how the court's precedent applies to that unique factual situation because often what comes before the court is something that's different than its prior decision. Not always, but often.

In the *Carhart* case, the court looked to its precedence, and as I understood that case, it was deciding a different question which was whether there were other means, safer means and equally effective means for a woman to exercise her right, the procedure at issue in the case.

That was, I don't believe, a rejection of its prior precedence. Its prior precedence are still the precedence of the court. The health and welfare of a woman must be a compelling consideration.

Senator FEINSTEIN. So you believe that the health of the woman still exists?

Judge SOTOMAYOR. You mentioned many cases. It has been a part of the court's jurisprudence and a part of its precedence. Those precedents must be given deference in any situation that arises before the court.

Senator FEINSTEIN. Thank you very much. I appreciate that.

I'd also like to ask you your thoughts on how a precedent should be reviewed. In a rare rebuke of his colleagues, Justice Scalia has sharply criticized Chief Justice Roberts and Justice Alito for effectively overruling the court's precedence without acknowledging that they were doing so.

Scalia wrote in the *Hein* case, 'Overruling prior precedent is a serious undertaking and I understand the impulse to take a minimalist approach. But laying just claim to be honoring Stare Decisis requires more than beating a prior precedent to a pulp and then sending it out to the lower courts weakened, denigrated, more incomprehensible than ever and yet somehow technically alive.'

In Wisconsin, *Right to Life* v. *FEC*, he said that Chief Justice Roberts' opinion, 'Effectively overruled a 2003 decision without saying so,' and said this kind of quote follow judicial restraint was really 'judicial obfuscation.'

Here is the question. When the court decides to overrule a previous decision, is it important that it do so outright and in a way that is clear to everyone?

Judge SOTOMAYOR. The Doctrine of Starry Decisis which means stand by a decision, stand by a prior decision, has a basic premise. That basic premise is that there is a value in society to predictability, consistency, fairness, evenhandedness in the law.

This society has an important expectation that judges won't change the law based on personal whim or not. But they will be guided by a humility they should show and the thinking of prior judges who have considered weighty questions and determined as best as they could given the tools that they had at the time to establish precedent.

There are circumstances under which a court should reexamine precedent and perhaps change its direction or perhaps reject it. But that should be done very, very cautiously and I keep emphasizing the verys because the presumption is in favor of deference to precedent.

The question then becomes what are the factors you use to change it, and then courts have looked at a variety of different factors, applying each in a balance in determining where that balance falls at a particular moment.

It is important to recognize, however, that the development of the law is step by step, case by case. There are some situations in which there is a principled way to distinguish precedent from application to a new situation.

No, I do not believe a judge should act in an unprincipled way, but I recognize that both the Doctrine of Starry Decisis starts from a presumption that deference should be given to precedence and that the development of the law is case by case. It is always a very fine balance.

Senator FEINSTEIN. Thank you very much. I appreciate that.

I wanted to ask a question on Executive Power and national security. We have seen the executive branch push the boundaries of

power claiming sweeping authority, to disregard acts of Congress. That's one way to collect communications of Americans without warrants and to detain people indefinitely without due process.

Now, the President and literally hundreds of signing statements affixed to a signature on a bill indicated part of a bill that he would in essence disregard. He didn't veto the bill, he signed the bill and said but there are sections that I—in so many words, will disregard.

Most egregiously in 2005 when Congress passed a bipartisan bill banning torture, President Bush signed it. But he also issued a signing statement saying he would only enforce the law, 'Consistent with the Constitutional authority of the President to supervise the unitary executive branch consistent with the Constitutional limitations on the judicial power.'

In other words, although he signed the bill, it was widely interpreted that he was asserting the right not to follow it.

Does the Constitution authorize the President to not follow parts of laws duly passed by the Congress that he is willing to sign that he believes are an unconstitutional infringement on executive authority.

Judge SOTOMAYOR. That's a very broad question.

Senator FEINSTEIN. It is one that we are grappling with, though.

Judge SOTOMAYOR. And that is why I have to be very cautious in answering it.

Senator FEINSTEIN. That's fine.

Judge SOTOMAYOR. Because not only is Congress grappling with this issue, but so are courts by claims being raised by many litigants who are asserting whether they are right or wrong would need to be addressed in each individual case that the President in taking some activity against the individual has exceeded Congress' authorizations or his powers.

The best I can do in answering your question because there is so many pending cases addressing this issue in such a different variety of ways is to say that the best expression of how to address this in a particular situation was made by Justice Jackson in his concurrence in the Youngstown seizure cases. That involved President Truman's seizure of seal factories.

There, Justice Jackson has sort of set off the framework and articulation that no one has thought of a better way to make it.

He says that you always have to look at an assertion by the president that he or she is acting within executive power in the context of what Congress has done or not done. He always starts with first you look at whether Congress has expressly or implicitly addressed or authorized the president to act in a certain way.

If the President has, then he is acting at his highest statute of power.

If the President is acting in prohibition of an express or implied act of Congress, then he is working at his lowest edge. If he is acting where Congress hasn't spoken, then we are in what Justice Jackson called the Zone of Twilight.

The issue in any particular case is always starting with what Congress says or has not said and then looking at what the Constitution has, what it says about the powers of the President minus Congress' powers in that area.

You can't speak more specifically than that in response to your statement that we are part of your question, other than to say the President can't act in violation of the Constitution. No one is above the law.

But what that is in a particular situation has to be looked at in the factual scenario before the court.

Senator FEINSTEIN. Thank you very much. This is really very relevant to what we do and we have often discussed this *Jackson* case or the steel case. But we just recently passed a Foreign Intelligence Surveillance Act and one of the amendments, because I did the amendment, was to strengthen the exclusivity clause of the law which has been in the bill since the beginning but that there are no exceptions from which the President can leave the four corners of this bill. So it will remain to be seen how that works out over time.

But I can certainly say to you that it's a most important consideration as we've looked at these matters of national security.

So let me ask you this. You joined a second circuit opinion last year that held that the executives should not forbid companies that received national security letters to tell the public about those letters.

The panel's opinion in the case said, 'The national security context in which NSL are authorized imposes on courts a significant obligation to defer to the judgments of executive branch officials.' But also that under no circumstance should the judiciary become the hand maiden of the executive. That's *Doe* v. *Mukasey*.

Given that the executive branch has responsibility of protecting the national security, how should courts balance the executive branch's expertise in national security matters with the judicial branches constitutional duty to enforce the Constitution and prevent abuse of power.

Judge SOTOMAYOR. I can talk about what we did in *Doe* as reflective of the approach that we used in that case. It is difficult to talk about an absolute approach in any case.

Senator FEINSTEIN. I understand.

Judge SOTOMAYOR. Because each case presets its own actions by parties in its own set of competing considerations often.

In Doe, the District Court had invalidated the Congressional statute all together, reasoning that the statute violated the Constitution in a number of different ways and that those violations did not authorize Congress to act in the manner it did.

As the panel said that decision recognizing that deference to the executive is important in national security questions. In deference to Congress because the District Court was validating an Act of Congress. We had, as an appellate court, to be very cautious about what we were doing in this area and to balance and keep consistent with constitutional requirements the actions that were being taken.

Giving back due deference, we upheld most of the statute. What we did was address two provisions of the statute that didn't pass in our judgment, constitutional muster.

One of them was that the law as Supreme Court precedence had commanded required that if the government was going to stop an individual from speaking in this particular context, that the gov-

ernment had to come to court immediately to get court approval of that step.

The statute instead required the individual who was restricted to come and challenge the restriction. We said no, government is acting. You have a right to speak. If you have a right to speak, you should know what the grounds for that right are and you should be told or brought to court to be given an opportunity to have that restriction lifted.

The other was a question of who wore the burden of supporting that restriction and the statute held that it was the individual who was being burdened who had to prove that there wasn't a reason for it.

The government agreed with our court that that burden violated Supreme Court precedent and the premises of freedom of speech and agreed that the burden should not be that way and we read the statute to explain what the proper burden was.

There is in all of these cases a balance and deference that is needed to be given to the executive and to Congress in certain situations. But we are a court that protects the Constitution and the rights of individuals under it and we must ensure and act with caution whenever reviewing a claim before us.

Senator FEINSTEIN. Thank you very much. One question on the Commerce clause in the Constitution.

That clause as you well know is used to pass laws in a variety of contexts, from protecting schools from guns to highway safety to laws on violent crime, child pornography, laws to prevent discrimination and to protect the environment, to name just a few examples.

When I questioned now Chief Justice Roberts, I talked about how for 60 years the court did not strike down a single Federal law for exceeding Congressional power under the Commerce clause.

In the last decade, however, the court has changed its interpretation of the Commerce clause and struck down more than three dozen case.

My question to the Chief Justice and now to you is do you agree with the direction the Supreme Court has moved in more narrowly interpreting Congressional authority to enact laws under the Commerce clause? General, not relating to any one case.

Judge SOTOMAYOR. No, I know. But the question assumes a prejudgment by me of what is an appropriate approach or not in a new case that may come before me as a Second Circuit judge or again if I'm fortunate enough to be a Justice on the Supreme Court. So it is not a case I can answer in a broad statement.

I can say that the court in reviewing congressional acts as it relates to an exercise of powers under the Commerce clause has looked at a wide variety of factors and considered that in different areas.

But there is a framework that those cases have addressed, and that framework would have to be considered with respect to each case that comes before the court.

Now, I know that you mentioned a number of different cases and if you have one in particular that concerns you, perhaps I could talk about what the framework is that the court established in those cases.

Senator FEINSTEIN. I will give you one very quickly. Restricting the distance that somebody could bring a gun close to a school.

Judge SOTOMAYOR. The Gun Free Zone School Act which the court struck down with *Lopez*.

Senator FEINSTEIN. Right, *Lopez*.

Judge SOTOMAYOR. In that case and in some of its subsequent cases, the court was examining as I mentioned a wide variety of factors. They included whether the activity that the government was attempting to regulate was economic or non-economic, whether it was an area in which states traditionally regulated, whether the statute at issue had an interstate commerce provision as an element of the crime and then considered whether there was a substantial effect on commerce.

It looked at the congressional findings on that last element, the court did, and determined that there weren't enough in the factors that it was looking at to find that that particular statute was within Congress' powers.

That is the basic approach it has used to other statutes it has looked at. I would note that its most recent case in this area, the *Raich* case. The court did uphold a crime that was non-economic in the sense of that it involved just the possession of marijuana.

There it looked at the broader statute in which that provision was passed and the intent of Congress to regulate a market in illegal drugs.

So the broad principles established in those cases have been the court's precedent. Its most recent holding suggests that another factor purports to look at and each situation will provide a unique factual setting that the court will apply those principles to.

Senator FEINSTEIN. One last question on that point. One of the main concerns is that this interpretation which is much more restrictive now could impact important environmental laws, whether it be the Endangered Species Act, the Clean Air Act, the Clean Water Act or anything that we might even do with cap and trade.

Judge SOTOMAYOR. In fact there are cases pending before the courts raising those arguments. So those are issues that the courts are addressing. I can't speak much more further than that because of the restrictions on me.

Senator FEINSTEIN. I understand. It is just that Congress has to have the ability to legislate. In those general areas it is the Commerce clause that enables that legislation.

Now as you pointed out, you did revise the *Lopez* case and make specific findings and perhaps with more care toward the actual findings that bring about the legislative conclusion that we might be able to continue to legislate in these areas, but my hope is that you would go to the court with the sensitivity that this body has to be able to legislate in those areas. They involve all of the states and they are very important questions involving people's well being, control of the environment, the air, the water, et cetera.

Judge SOTOMAYOR. I do believe that in all of the cases the court has addressed this issue that it pays particular attention to congressional findings.

I know that individuals may disagree with what the court has done in individual cases, but it has never disavowed the impor-

tance of deference to legislative findings with respect to legislation that it is passing within its powers under the Constitution.

Senator FEINSTEIN. Thank you. I wish you best of luck. Thank you very much.

Senator SESSIONS. Mr. Chairman, I want to correct one thing. I said I had a letter earlier from Miguel Estrada. That was not correct. It wasn't a letter.

Chairman LEAHY. If we could have a copy of whatever you put in the record. I did send Mr. Estrada a note last night about my earlier statement.

Senator SESSIONS. Well, we both made an error talking about it.

Chairman LEAHY. We should remember that Mr. Estrada is not the nominee here, just as with all the statements made about President Obama's philosophy, his confirmation hearing was last November, not now. It is just you, Judge Sotomayor, and have a good lunch and we will come back. Who is next? Senator Grassley will be recognized when we come back in and we will start right at 2:00.

[Whereupon, at 12:32 p.m., the hearing was recessed.]

After Recess [2 p.m.]

Chairman LEAHY. Judge, I once, on a television interview, said if I could do anything I wanted to do in life, I said, well, if I ever have to work for a living I want to be a photographer, because I do. At which point, 2 minutes after the interview, the phone rings. My mom was still alive. She called. She said, don't you ever say that. They'll think you don't work!

[Laughter.]

Chairman LEAHY. Actually, I don't. I just recognize Senators here. You're doing all the work, and I appreciate how well you're doing it.

I turn, next, to Senator Grassley, and then after Senator Grassley, to Senator Feingold.

Senator Grassley.

Senator GRASSLEY. Yes. Welcome once again, Judge. I hope you had a good break. I appreciate very much the opportunity to ask you some questions.

I'd like to start off my round with some questions about your understanding of individual property rights and how they're protected by the Constitution. And let me say, as I observe property rights around the world, there's a big difference between developed nations and developing nations, and respect for private property has a great deal to do with the advancement of societies.

So I believe all Americans care about this right. They want to protect their homes and anything they own from unlawful taking by government. But this is also a right that is important for agricultural interests. As you know, besides being a Senator, I come from an agricultural State in Iowa and am a farmer as well. I'm sure that ordinary Americans, besides the economic interests that might be involved, are all very well concerned about where you stand on property rights.

So some of these issues have been discussed, but I want to go into a little more depth on *Kelo*, as an example. Could you explain what your understanding is of the state of the Fifth Amendment's Taking Clause jurisprudence after the Supreme Court decision in

Kelo? Senator Brownback said this, aptly, when Chief Justice Roberts was before this committee: "Isn't it now the case that it is much easier for one man's home to become another man's castle?" Your general understanding of the Taking Clause.

Judge SOTOMAYOR. Good afternoon, Senator Grassley. And it's wonderful to see you again.

Senator GRASSLEY. Thank you.

Judge SOTOMAYOR. I share your view of the importance of property rights under the Constitution. As you know, I was a commercial litigator that represented national and international companies, and it wasn't even the case that it was a difference between developed and under-developed countries. Many of my clients who were from developed countries chose to, in part, to invest in the United States because of the respect that our Constitution pays to property rights in its various positions, in its various amendments.

With respect to the *Kelo* question, the issue in *Kelo*, as I understand it, is whether or not a State who had determined that there was a public purpose to the takings under the Takings Clause of the Constitution that requires the payment of just compensation when something is—is condemned for use by the government, whether the Takings Clause permitted the State, once it's made a proper determination of public purpose and use according to the law, whether the State could then have a private developer do that public act, in essence. Could they contract with a private developer to effect the public purpose? And so the holding, as I understood it in *Kelo*, was a question addressed to that issue.

With respect to the importance of property rights and the process that the State must use, I just point out to you that in another case involving that issue that came before me in a particular series of cases that I had involving a village in New York, that I—I ruled in favor of the property rights—the property owner's rights to challenge the process that the State had followed in his case and to hold that the State had not given him adequate notice of their intent to use the property—well, not adequate notice not to use the property, but to be more precise, that they hadn't given him an adequate opportunity to express his objection to the public taking in that case.

Senator GRASSLEY. Could I zero in on two words in the *Kelo* case? The Constitution uses the word "use", "public use", whereas the *Kelo* case talked about taking private property for public purpose. In your opinion, is public use and public purpose the same thing?

Judge SOTOMAYOR. Well, as I understood the Supreme Court's decision in *Kelo*, it was looking at the court's precedents over time and determining that its precedents had suggested that the two informed each other, that public purpose in terms of developing an area that would have a public improvement and use, that the two would inform each other.

Senator GRASSLEY. Do you believe that the Supreme Court overstepped their constitutional authorities when they went beyond the words of the Constitution, in other words, to the word "purpose", and thus expanded the ability of government to take an individual's private property? Because I think everybody believes that *Kelo* was an expansion of previous precedent there.

Judge SOTOMAYOR. I know that there are many litigants who have expressed that view, and in fact there's been many State legislators that have passed State legislation not permitting State governments to take in the situation that the Supreme Court approved of in *Kelo*.

The question of whether the Supreme Court overstepped the Constitution, as I've indicated, the court—at least my understanding of the majority's opinion—believed and explained why it thought not. I have to accept, because it is precedent, that as precedent and so I can't comment further than to say that I understand the questions and I understand what State legislatures have done——

Senator GRASSLEY. Okay.

Judge SOTOMAYOR. And would have to await another situation, or the court would, to apply the holding in that case.

Senator GRASSLEY. Then I think that answers my next question, but it was going to be to ask you whether you think that *Kelo* improperly undermines the constitutionally protected private property rights. I presume you're saying that you believe that's what the court said and it doesn't undermine property rights?

Judge SOTOMAYOR. I can only talk about what the—the court said in the context of that particular case and to explain that it is the court's holding, and so it's entitled to stare decisis effect and deference.

Senator GRASSLEY. Okay. Okay.

Judge SOTOMAYOR. But the extent of that has to await the next step, the next cases.

Senator GRASSLEY. Okay. Well, then maybe it would be fair for me to ask you, what is your understanding of the constitutional limitations then on government entity—any government entity taking land for a public purpose?

Judge SOTOMAYOR. Well, that was the subject of much discussion in the *Kelo* case among the Justices, and with certain Justices in the dissent, hypothesizing that the limits were difficult to see, the majority taking the position that there were limits. As I've indicated to you, opining on a hypothetical is very, very difficult for a judge to do.

Senator GRASSLEY. Okay.

Judge SOTOMAYOR. And as a potential—as a potential Justice on the Supreme Court, but more importantly as a Second Circuit Judge still sitting, I can't engage in a question that involves hypotheses.

Senator GRASSLEY. Let me ask you a couple obvious, then. Does the—does the Constitution allow for takings without any compensation?

Judge SOTOMAYOR. Well, it—the Constitution provides that when the government takes it has to pay compensation. As you know, the question of what constitutes an actual taking is a very complex one because there is a difference between taking a home and regulation that may or may not constitute a taking. So I'm not at all trying to not answer your question, Senator.

Senator GRASSLEY. Okay. Well, then let me ask you another question that maybe you can answer. Would you strike down a takings that provided no compensation at all?

Judge SOTOMAYOR. Well, as I explained, if the taking violates the Constitution, I would be required to—to strike it down.

Senator GRASSLEY. Okay. Let me move on to the *Didden case* v. *Village of Port Chester*. It raised serious concerns about whether you understand the protection provided by the Constitution for individual property rights. In this case, Mr. Didden alleged that his local village government violated his Fifth Amendment rights when it took his property to build a national-chain drugstore. At a meeting with a government agency, another developer, Mr. Didden was told that he could give the developer $800,000 or a 50 percent interest in his pharmacy project, and if Mr. Didden did not accept either condition, the government would simply take his property.

Two days after Mr. Didden refused to comply with these demands, the government began proceeding to take his land. The District Court denied Mr. Didden his day in court, and your panel affirmed that decision in a five-paragraph opinion.

Why did you deny Mr. Didden his day in court? How can these facts—in essence, allegations of extortion—at least not warrant the opportunity to call witnesses to see if Mr. Didden was telling an accurate story?

Judge SOTOMAYOR. The *Didden* case presented a narrow issue that the court below——

[Interruption by the audience.]

Chairman LEAHY. Officer, remove that man immediately. We will stand in order. We will stand in order. Officers will remove that man.

[Laughter.]

Chairman LEAHY. Again, both Senator Sessions and I have said, as all previous Chairs and Ranking Members of this have said, this is a hearing of the U.S. Senate. The judge deserves respect. Senators asking questions deserve respect. I will order the removal of anyone who disrupts it, whether they are supportive of the nominee or opposed to the nominee, whether they are supportive of a position I take, or opposed to it. We will have the respect that should be accorded to both the nominee and to the U.S. Senate.

Senator SESSIONS. Thank you, Mr. Chairman. I think you've handled this well throughout, and I support you 100 percent.

Chairman LEAHY. Thank you.

Senator Grassley, we did stop the clock there so it did not take from your time.

Senator GRASSLEY. Thank you. People always say I have the ability to turn people on.

[Laughter.]

Senator GRASSLEY. Maybe you could start over again with your—with your sentence, please.

Judge SOTOMAYOR. Yes.

Chairman LEAHY. Now, where were we?

Judge SOTOMAYOR. I hope I remember where we were.

[Laughter.]

Senator GRASSLEY. Okay.

Judge SOTOMAYOR. Senator, the right of property owners to have their day in court is a very important one, but there is a corollary to the right to have your day in court, which is that you have to bring it to court in a timely manner.

Senator GRASSLEY. Okay.

Judge SOTOMAYOR. Because people who are relying on your assertion of rights should know when you're going to make them. And so there's a doctrine called the Statute of Limitations that says if a party knows, or has reason to know, of their injury, then that party has to come in to court and raise their arguments within that statute that sets the limits of the action.

Senator GRASSLEY. I——

Judge SOTOMAYOR. In the *Didden* case—oh, I'm sorry.

Senator GRASSLEY. No. No, no, no.

Judge SOTOMAYOR. No, no, no.

Senator GRASSLEY. Please, I interrupted you. I shouldn't have interrupted you.

Judge SOTOMAYOR. No. I—I——

Senator GRASSLEY. Please go——

Judge SOTOMAYOR. In the *Didden* case——

Senator GRASSLEY. Yeah.

Judge SOTOMAYOR [continuing]. The question was whether Mr. Didden knew that the State was intending to take his property, and for what it, the State, claimed was a public use and that it had plans to have a private developer take his—they take his property and the private developer develop the land.

So there was a full hearing by the village on this question of whether there was a public use of the land. Mr. Didden didn't claim in the action before the courts that he didn't have notice of that hearing, he did not raise a challenge in that hearing to the public taking, and he didn't raise a challenge to the State's intent to have a private developer develop the land.

Now, in that case the developer was developing not just Mr. Didden's property, it was one piece of property in a larger development project and that larger development project had been based on the village's conclusions, from its very lengthy hearings in accordance with New York law, that the area was blighted and that the area needed economic development.

So, too, that issue became the issue before the court in the sense of, had Mr. Didden, knowing that he could be injured by the State's finding of public use and the State's decision to let a private developer develop this land, did he bring his lawsuit in a timely manner?

Senator GRASSLEY. Well——

Judge SOTOMAYOR. And the court below, and our court, ruled on that basis, that he hadn't because he had reason to know about the injury that could occasion—that could come to him.

Senator GRASSLEY. Well, since Mr. Didden's claim was based on conduct of the developer, how could he ever have filed a successful claim under the standard that you just mentioned?

Judge SOTOMAYOR. Mr. Didden alleged in his complaint that the private developer had extorted him. Extortion, under the law, is defined as "an unlawful demand for money". On this one piece of property within a larger development that the private developer was actively engaged in doing what he had contracted with the State to do, to revive the economic base by making investments in it, the private developer knew that Mr. Didden has his claims.

The private developer had his agreement with the State, and so he was doing, in—at least this was the private developer's argument—what he was entitled to do, which is to say, we disagree. I'm claiming that I have a right under contract, you're claiming that you have a right under the Takings Clause. Let's settle this. I am going to lose X amount of money, so you pay me back for me not to do what I'm entitled to do under the law.

That, however, was—those were the claims of the parties in the action. In the end, the decision of the court was, if you believe that the takings of your property were not proper under the public use, under the Takings Clause, and you knew that the State had entered a contract with this private developer, then you had knowledge that you could be injured and you should have come to court earlier.

Senator GRASSLEY. Why was the situation in *Didden* not the kind of prohibited pretextual taking articulated in *Kelo*? How was this not some sort of form of extortion? And if there wasn't a pretext in the *Didden* case where the developer says "give me the money personally or we'll take your land", then what is a pretext?

Judge SOTOMAYOR. Well, as I—as I have described the case——

Senator GRASSLEY. Yes, I understand.

Judge SOTOMAYOR. The question comes up in the context of, what did Mr. Didden know? Did he have enough to know he could be injured? Was there no public use to which the property would apply, and what rights did the private developer have with the State? And so the extortion question came up in a legal context surrounding the relative rights of the parties. So as I said, extortion is a term, a legal term, which is someone demanding money with no lawful claim to it. I'm simplifying this because there's different definitions of extortion that apply to different situations.

Senator GRASSLEY. Sure.

Judge SOTOMAYOR. But in the context of this case, that's the simplest description of the case, I believe.

Senator GRASSLEY. The Second Circuit panel in *Didden* took over a year to issue its ruling, suggesting that you understood the novelty and importance of this case. Yet your opinion dealt with Mr. Didden's Fifth Amendment claim in just one paragraph. Did you believe that this was an ordinary takings case?

Judge SOTOMAYOR. Well, cases present claims by parties, and to the extent that Mr. Didden was raising claims that sounded in the issues the court was looking at in *Kelo*, certainly if *Kelo* had not come out and the court had to—for whatever reason, determined that somehow the *Kelo* decision affected the Statute of Limitations question, it may have had to reach the question.

But courts do often wait for Supreme Courts to act on cases that are pending in order to see if some form of its analysis changes or not, or inform whether a different look should be given to the case. But on the bottom-line issue, *Kelo* didn't change, in the judgment of the panel, the Statute of Limitations question.

Senator GRASSLEY. Okay. Regardless of the Statute of Limitations, I am curious why you didn't elaborate on your *Kelo* analysis, and why wasn't this opinion published?

Judge SOTOMAYOR. Well, *Kelo* didn't control the outcome, the Statute of Limitations did, so there was no basis to go into an

elaborate discussion of *Kelo*. The discussion of *Kelo*, really, was to say that we had understood the public taking issue that Mr. Didden had spent a lot of time in his argument about, but the ruling was based on the narrow Statute of Limitations ground so the *Kelo* discussion didn't need to be longer because it wasn't the holding of the case. The holding of the case was the Statute of Limitations.

Senator GRASSLEY. Okay. This—on another case, the Supreme Court reversed you 6:3 just 3 months ago in *Entergy Corporation* v. *Riverkeeper*. You had held that the Environmental Protection Agency, which is the agency with expertise, could not use a cost-benefit analysis in adopting regulations from the construction of water structures that had an impact on fish. Rather, you interpreted the Clean Water Act to hold that EPA had to require upgrades to technology that achieved the greatest reduction in adverse environmental impact, even when the cost of those upgrades were disproportionate to benefit.

Following long-established precedent, the Supreme Court held that the EPA was reasonable in applying a cost-benefit analysis when adopting regulations under the Clean Water Act. In reversing, the Supreme Court questioned your proper application of subtle law that agency regulations should be upheld so long as they're reasonable.

Under Chevron, agency interpretation of statutes are entitled to deference so long as they are reasonable, in other words, if they aren't capricious and arbitrary. Do you find it unreasonable that the EPA was willing to allow money to be spent in a cost-effective manner by not requiring billions of additional dollars to be spent to save a minimal number of additional fish?

Judge SOTOMAYOR. To be able to answer your question I would need to explain a little bit more about the background.

The Supreme Court has now ruled in that case that the conclusion of the Second Circuit would not be upheld on this narrow question, but the question the Second Circuit was looking at is, what did Congress intend or mean when, in the statute at issue, it said that the agency had to use the "best technology available to minimize an adverse environmental impact". Those were the statute's words. In looking at that, the Circuit applied general statutory construction principles, which is, in our judgment, what was the ordinary meaning of that? And——

Senator GRASSLEY. Are you saying you're not bound by Chevron, then?

Judge SOTOMAYOR. Oh, no. Absolutely not.

Senator GRASSLEY. Okay. Okay. Go ahead.

Judge SOTOMAYOR. Chevron speaks to agency action or interpretation, but ultimately the task of a court is to give deference to what Congress wants. That's the very purpose of Congress' legislation. And so what the court was trying to do there was to see if the agency's interpretation, in light of the words of the statute and how Congress has used cost-benefit analysis in other statutes in this area, and determine what Congress intended. And so we looked at the language and it said just what it said, "best technology available to minimize adverse environmental impact".

We looked at how Congress used cost-benefit in similar statutes and similar provisions—or I shouldn't say similar, in other provisions. We noted that under the statutes at issue when Congress wanted the agency to use cost-benefit analysis, it said so. In this provision, Congress was silent but the language, in the panel's judgment, was the language.

And so in trying to discern what Congress' intent was, we came to the conclusion not that cost had no role in the agency's evaluation, but that Congress had specified a more limited role that cost-benefit. We described it as cost-effectiveness. And, in fact, we voted to—voted past our decision, asked and sent the case back to describe to us exactly what the agency had done, and why. Had it used cost-benefit? Had it used cost-effectiveness? But cost was always going to be a part of what the agency could consider. The issue was more, in what approach did Congress' words intend? And so agency deference is important, but Congress is the one who writes the statutes so you have to start as a court with, what did Congress intend?

Senator GRASSLEY. It seems to me like you're saying, in ignoring the expertise of the statute, that the agency was being arbitrary and capricious in——

Judge SOTOMAYOR. Not—not at all, sir. We were trying to look at the statute as a whole and determine what Congress meant by words that appeared to say that "best technology available had to minimize environmental effect".

Senator GRASSLEY. Okay.

Judge SOTOMAYOR. As I said, that does have—and as our opinion said—considerations of cost. But given that Congress didn't use the cost-benefit—give the agency cost-benefit approval in the terms of this particular provision while it had in others, we determined that the agency and precedent interpreting provisions limited the use of cost-benefit analysis.

Senator GRASSLEY. In another 2004 administrative law case dealing with environmental issues, *NRDC* v. *Abraham*, you voted to strike down a Bush administration regulation and reinstate a Clinton administration environmental rule that had never even become final. In this case it appears you also fairly narrowly interpreted Chevron deference when striking down EPA adoptions of reasonable regulations.

If you are elevated to the Supreme Court, do you intend to replace an agency's policy decisions with your own personal policy opinions as it appears you did in both—in the *Abraham* case?

Judge SOTOMAYOR. No, sir. In that case we were talking about, and deciding, an issue of whether the agency had followed its own procedures in changing policy. We weren't substituting our judgment for that of the agency, we were looking at the agency's own regulations as to the procedure that it had to follow in order to change an approach by the agency. So, that was a completely different question. With respect to deference to administrative bodies, in case after case where Chevron deference required deference, I have voted in favor of upholding administrative—executive and administrative decisions.

Senator GRASSLEY. Okay. This will probably have to be my last question.

Since 2005, you have been presiding judge on the panel of an appeal filed by eight States and environmental groups, arguing that greenhouse gases are a public nuisance that warrant a court-imposed injunction to reduce emissions. Your panel, in *Connecticut* v. *American Electric Power*, has sat on that case for 45 months, or nearly three times the average of the Second Circuit. Why, after 4 years, have you failed to issue a decision in this case?

Judge SOTOMAYOR. The American Bar Association rule on Code of Conduct does not permit me to talk about a pending case. I can talk to you about one of the delays for a substantial period of time in that decision, and it was that the Supreme Court was considering a case, the *Massachusetts* case, that had some relevancy, or at least had relevancy to the extent that the panel asked the parties to brief further the applicability of that case to that decision.

Senator GRASSLEY. Okay. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you, Senator Grassley.

Senator Feingold.

Senator FEINGOLD. Judge, let me first say I don't mind telling you how much I'm enjoying listening to you, both your manner and your obvious tremendous knowledge and understanding of the law. In fact, I am enjoying it so much that I hope when you go into these deliberations about cameras in the courtroom, that you consider the possibility that I, and other Americans, would like the opportunity to observe your skills for many years to come in the comfort of our family rooms and living rooms. I think it's a——

[Laughter.]

Judge SOTOMAYOR. You were a very good lawyer, weren't you, Senator?

[Laughter.]

Senator FEINGOLD. But I'm not going to ask you about that one now; others have covered it. Let me get into a topic that I discussed at length with the two most recent Supreme Court nominees, Chief Justice Roberts and Justice Alito, and that's the issue of executive power.

In 2003, you spoke at a law school class about some of the legal issues that have arisen since 9/11. You started your remarks with a moving description of how Americans stood together in the days after those horrific events, and how people from small Midwestern towns and people from New York City found "their common threads as Americans," you said.

As you said in that speech, while it's hard to imagine that something positive could ever result from such a tragedy, there was a sense in those early days of coming together as one community that we would all help each other get through this. It was something that none of us had ever experienced before, and something I've often discussed as well.

But what I have also said is that, in the weeks and months that followed, I was gravely disappointed that the events of that awful day, the events that had brought us so close together as one nation, were sometimes used, Judge, to justify policies that departed so far from what America stands for.

So I'm going to ask you some questions that I asked now-Chief Justice Roberts at his hearing. Did that day, 9/11, change your

view of the importance of individual rights and civil liberties and how they can be protected?

Judge SOTOMAYOR. September 11th was a horrific tragedy, for all of the victims of that tragedy and for the nation. I was in New York. My home is very close to the World Trade Center. I spent days not being able to drive a car into my neighborhood because my neighborhood was used as a staging area for emergency trucks.

The issue of the country's safety and the consequences of that great tragedy are the subject of continuing discussion among not just Senators, but the whole nation. In the end, the Constitution, by its terms, protects certain individual rights. That protection is often fact-specific. Many of its terms are very broad: so what's an unreasonable search and seizure? What are other questions are fact-specific.

But in answer to your specific question, did it change my view of the Constitution, no, sir. The Constitution is a timeless document. It was intended to guide us through decades, generation after generation, to everything that would develop in our country. It has protected us as a nation, it has inspired our survival. That doesn't change.

Senator FEINGOLD. I appreciate that answer, Judge.

Are there any elements of the government's response to September 11th that you think, maybe 50 or 60 years from now, we as a nation will look back on with some regret?

Judge SOTOMAYOR. I'm a historian by undergraduate training. I also love history books. It's amazing how difficult it is to make judgments about one's current positions. That's because history permits us to look back and to examine the actual consequences that have arisen, and then judgments are made. As a Judge today, all I can do, because I'm not part of the legislative branch—it's the legislative branch who has the responsibility to make laws consistent with that branch's view of constitutional requirements in its powers. It's up to the President to take his actions, and then it's up to the court to just examine each situation as it arises.

Senator FEINGOLD. I can understand some hesitance on this. But the truth is that courts are already dealing with these very issues. The Supreme Court itself has now struck down a number of post-9/11 policies, and you yourself sat on a panel that struck down one aspect of the National Security Letter statutes that were expanded by the PATRIOT Act.

So I'd like to hear your thoughts a bit on whether you see any common themes or important lessons in the court's decisions in *Rasul*, *Hamdi*, *Hamdan*, and *Boumediene*. What is your general understanding of that line of cases?

Judge SOTOMAYOR. That the court is doing its task as judges. It's looking, in each of those cases, at what the actions are of either the military, and what Congress has done or not done, and applied constitutional review to those actions.

Senator FEINGOLD. And is it fair to say, given that line of cases, that we can say that, at least as regards the Supreme Court, it believes mistakes were made with regard to post-9/11 policies? Because in each of those cases there was an overturning of a decision made either by the Congress or the executive.

Judge SOTOMAYOR. I smiled only because that's not the way that judges look at that issue. We don't decide whether mistakes were made, we look at whether action was consistent with constitutional limitations or statutory limitations.

Senator FEINGOLD. And in each of those cases there was a problem with either a constitutional violation or a problem with a congressional action, right?

Judge SOTOMAYOR. Yes.

Senator FEINGOLD. That's fine.

As I'm sure you are aware, many of us on the Committee discussed at length with the prior Supreme Court nominees the framework for evaluating the scope of executive power in the national security context. You already discussed this at some length with Senator Feinstein, including Justice Jackson's test in the *Youngstown* case.

And I and others on the Committee are deeply concerned about the very broad assertion of executive power that has been made in recent years—an interpretation that has been used to authorize the violation of clear statutory prohibitions—from the Foreign Intelligence Surveillance Act, to the anti-torture statute.

You discussed with Senator Feinstein the third category, the lowest ebb category in the *Youngstown* framework, and that's where, as Justice Jackson said, the President's power is at its lowest ebb because Congress has, as you well explained it, specifically prohibited some action.

I take the point of careful scholars who argue that, hypothetically speaking, Congress could conceivably pass a law that is plainly unconstitutional. For example, if Congress passed a law that said that somebody other than the President would be the Commander-in-Chief of a particular armed conflict and not subject to Presidential direction, presumably that would be out of bounds.

But setting aside such abstract hypotheticals, as far as I'm aware—and I'm pretty sure this is accurate—the Supreme Court has never relied on the *Youngstown* framework to conclude that the President may violate a clear statutory prohibition. In fact, in *Youngstown* itself, the court rejected President Truman's plan to seize the steel mills.

Now, is that your understanding of the Supreme Court precedent in this area?

Judge SOTOMAYOR. I haven't had cases—or a sufficient a number of cases—in this area to say that I can remember every Supreme Court decision on a question related to this topic. As you know, in the *Youngstown* case, the court held that the President had not acted within his powers in seizing the steel mills in the particular situation existing before him at the time.

But the question or the framework doesn't change, which is, each situation would have to be looked at individually because you can't determine ahead of time with hypotheticals what a potential constitutional conclusion will be. As I may have said to an earlier question, academic discussion is just that. It's presenting the extremes of every issue and attempting to debate about, on that extreme of the legal question, how should the judge rule?

Senator FEINGOLD. I'll concede that point, Judge. I mean, given your tremendous knowledge of the law and your preparation, I'm

pretty sure you would have run into any example of where this had happened. And I just want to note that I am unaware of—and if anybody is aware of an example of where something was justified under the President's power under the lowest ebb, I'd love to know about it. But I think that's not a question of a hypothetical, that's a factual question about what the history of the case law is.

Judge SOTOMAYOR. I can only accept your assumption. As I said, I—I have not had sufficient cases to—to—to have looked at what I know in light of that particular question that you're posing.

Senator FEINGOLD. All right.

In August 2002, the Office of Legal Counsel at the Department of Justice issued two memoranda considering the legal limits on interrogation of terrorism detainees. One of these contained a detailed legal analysis of the criminal law prohibiting torture. It concluded, among other things, that enforcement of the anti-torture statute would be an unconstitutional infringement on the President's Commander-in-Chief authority.

Judge, that memo did not once cite to the *Youngstown* case or to Justice Jackson's opinion in *Youngstown*. We just learned on Friday, in a new Inspector General report, that a November 2001 OLC memo providing the legal basis for the so-called Terrorist Surveillance Program also did not cite *Youngstown*.

Now, I don't think you would have to be familiar with those memos to answer my question. Does it strike you as odd that a complex legal analysis of the anti-torture statute, or the FISA Act, that considers whether the President could violate those statutes would not even mention the *Youngstown* case?

Judge SOTOMAYOR. I have never been an advisor to a President. That's not a function I have served, so I don't want to comment on what was done or not done by those advisors in that case. And it's likely that some question—and I know some are pending before the court in one existing case, so I can't comment. All I can—on whether that's surprising or not. I can only tell you that I would be surprised if a court didn't consider the *Youngstown* framework in a decision involving this question because it is—that case's framework is how these issues are generally approached.

Senator FEINGOLD. Good. I appreciate that answer.

Let me go to a topic that Senator Leahy and Senator Hatch discussed with you at some length: the Second Amendment.

I have long believed that the Second Amendment grants citizens an individual right to own firearms. Frankly, I was elated when the court ruled in *Heller* last year, and unified what I think had been a mistake all along and recognized it as an individual right.

The question of whether Second Amendment rights are incorporated in the Fourteenth Amendment's guarantee of due process of law, and therefore applicable to the states, as you pointed out, was not decided in *Heller*. A Supreme Court decision in 1886 specifically held that the Second Amendment applies only to the federal government.

So in my view, it is unremarkable that, as a Circuit Court judge in the *Maloney* case, you would follow applicable Supreme Court precedent that directly controlled the case rather than apply your own guess of where the court may be headed after *Heller*. In other

words, I think that's would be an unfair criticism of a case, and I think you needed to rule that way, given the state of the law.

But let me move on from that, because many of my constituents would like to know more about how you would make such a decision as a member of the highest court, so I want to follow up on that. First of all, am I right that if you're confirmed and the court grants cert in the *Maloney* case, you would have to recuse yourself from its consideration?

Judge SOTOMAYOR. Yes, sir. My own judgment is that it would seem odd, indeed, if any Justice would sit in review of a decision that they authored. I would think that the Judicial Code of Ethics that govern recusals would suggest and command that that would be inappropriate.

Senator FEINGOLD. Fair enough.

What about if one of the other pending appeals comes to the court, such as the Seventh Circuit decision in *NRA* v. *Chicago*, which took the same position as your decision in *Maloney*? Would you have to recuse yourself from that one as well?

Judge SOTOMAYOR. There are many cases in which a Justice, I understand, has decided cases as a Circuit Court judge that are not the subject of review that raise issues that the Supreme Court looks at later. What I would do in this situation, I would look at the practices of the Justices to determine whether or not I—that would counsel to—to recuse myself. I would just note that many legal issues, once they come before the court, present a different series of questions than the one one addresses as a Circuit Court.

Senator FEINGOLD. Well, let's assume you were able to sit on one of these cases or a future case that deals with this issue of incorporating the right to bear arms as applied to the states.

How would you assess whether the Second Amendment, or any other amendment that has not yet been incorporated through the Fourteenth Amendment, should be made applicable to the States? What's the test that the Supreme Court should apply?

Judge SOTOMAYOR. That's always the issue that litigants are arguing in litigation. So to the extent that the Supreme Court has not addressed this question yet, and there's a strong likelihood it may in the future, I can't say to you that I've prejudged the case and decided this is exactly how I'm going to approach it in that case.

Senator FEINGOLD. But what would be the general test for incorporation?

Judge SOTOMAYOR. Well——

Senator FEINGOLD. I mean, what is the general principle?

Judge SOTOMAYOR. One must remember that the Supreme Court's analysis in its prior precedent predated its principles of—or the development of cases discussing the incorporation doctrine. Those are newer cases, and so the framework established in those cases may well inform.

Senator FEINGOLD. Okay.

Judge SOTOMAYOR. As I said, I—I am hesitant of prejudging and saying they will or won't, because that will be what the parties are going to be arguing in the litigation.

Senator FEINGOLD. Well, it——

Judge SOTOMAYOR. But it is—I'm sorry.

Senator FEINGOLD. No, no. Go ahead.

Judge SOTOMAYOR. No. I was just suggesting that I do recognize that the court's more recent jurisprudence in incorporation with respect to other amendments has taken—has been more recent, and those cases, as well as stare decisis and a lot of other things, will inform the court's decision on how it looks at a new challenge to a State regulation.

Senator FEINGOLD. And, of course, it is true that despite that trend that you just described, the Supreme Court has not incorporated several constitutional amendments as against the states, but most of those are covered by constitutional provisions and state constitutions, and the Supreme Court decisions that refuse to—incorporate the federal constitutional protections like the case involving the Second Amendment, a 19th century case, date back nearly a century.

So after *Heller*, doesn't it seem almost inevitable that when the Supreme Court again considers whether the Second Amendment applies to the states, it will find the individual right to bear arms to be fundamental, which is a word that we've been talking about today? After all, Justice Scalia's opinion said this: "By the time of the founding, the right to have arms—bear arms had become fundamental for English subjects."

Blackstone, whose works we have said constituted the preeminent authority on English law for the founding generation, cited the arms provision in the Bill of Rights as one of the fundamental rights of Englishmen. "It was," he said, "the natural right of resistance and self-preservation and the right of having and using arms for self-preservation and defense."

Judge SOTOMAYOR. As I said earlier, you are a very eloquent advocate. But a decision on what the Supreme Court will do and what's inevitable will come up before the Justices in great likelihood in the future, and I feel that I'm threading the line——

Senator FEINGOLD. Okay.

Judge SOTOMAYOR [continuing]. Of answering a question about what the court will do in a case that may likely come before it in the future.

Senator FEINGOLD. Let me try it in a more—less lofty way then.

[Laughter.]

Senator FEINGOLD. You talked about nunchucks before.

Judge SOTOMAYOR. Okay.

[Laughter.]

Senator FEINGOLD. That's an easier kind of case. But what *Heller* was about, was that there was a law here in DC that said you couldn't have a handgun if you wanted to have it in your house to protect yourself. It is now protected under the Constitution that the citizens of the District of Columbia can have a handgun.

Now, what happens if we don't incorporate this right and the people of the State of Wisconsin—let's say we didn't have a constitutional provision in Wisconsin. We didn't have one until the 1980s, when I and other State Senators proposed that we have a right to bear arms provision. But isn't there a danger here that if you don't have this incorporated against the States, that we'd have this result where the citizens of DC have a constitutional right to have a handgun, but the people of Wisconsin might not have that

right? Doesn't that make it almost inevitable that you would have to apply this to the states?

Judge SOTOMAYOR. It's a question the court will have to consider.

Senator FEINGOLD. I appreciate your patience.

Judge SOTOMAYOR. And it's meaning——

[Laughter.]

Judge SOTOMAYOR. Senator, the Supreme Court did hold that there is, in the Second Amendment, an individual right to bear arms, and that is its holding and that is the court's decision. I fully accept that. In whatever new cases come before me that don't involve incorporation as a Second Circuit judge, I would have to consider those—those issues in the context of a particular State regulation of firearms or other instruments.

Senator FEINGOLD. I accept that answer.

I'm going to move on to another area, what I'd like to call "secret law", that is, the development of controlling legal authority that has direct effects on the rights of Americans but that is done entirely in secret. There are two strong examples of that. First, the FISA court often issues rulings containing substantive interpretation of the Foreign Intelligence Surveillance Act, or FISA, that with very few exceptions have been kept from the public, and until a recent change in the law, many of them were not available to the full Congress either, meaning that members had been called upon to vote on statutory changes without knowing how the court had interpreted the existing statute. Second, the Office of Legal Counsel at the Justice Department issues legal opinions that are binding on the executive branch, but are also often kept from the public and Congress.

Now, I understand that these legal documents may sometimes contain classified operational details that would need to be redacted, but I'm concerned that the meaning of a law like FISA, which directly affects the privacy rights of Americans, could develop entirely in secret. I think it flies in the face of our traditional notion of an open and transparent American legal system.

Does this concern you at all? Can you say a little bit about the importance of the law itself being public?

Judge SOTOMAYOR. Well, the question for a judge as a judge would look at it, is to examine, first, what policy choices the Congress is making in its legislation. It is important to remember that some of the issues that you are addressing were part of congressional legislation as to how FISA would operate. And as you just said, there's been amendments subsequent to that, and so a court would start with what Congress has—what Congress has done and whether the acts of the other branch of government is consistent with that or not.

The issue of whether, and how, a particular document would affect national security or affect questions of that nature would have to be looked at in—with respect to an individual case. And as I understand it, there are review processes in the FISA procedure. I'm not a member of that court, so I am not intimately familiar with those procedures, but I know that this is part of the review process there, in part.

And so when you ask concern, there is always some attention paid to the issue of—of the public reviewing or looking at the ac-

tions that a court is taking, but that also is tempered with the fact that there are situations in which complete openness can't be had, for a variety of different reasons.

So courts—I did as a District Court judge and I have as a Circuit Court judge—looked at situations in which judges have to have determined whether juries should be empaneled anonymously, and in those situations we do consider the need for public actions, but we also consider that there may be, in some individual situations, potential threats to the safety of jurors that require an anonymous jury.

I am attempting to speak about this as—it's always a question of balance——

Senator FEINGOLD. What most concerns——

Judge SOTOMAYOR [continuing]. And you have to look at, first, what Congress says about that.

Senator FEINGOLD. The concerns you just raised, don't they have to do more with the facts that shouldn't be revealed than the legal basis? It's sort of hard for me to imagine a threat to national security by revealing properly redacted documents as simply referred to the legal basis for something. Isn't there a distinction between those two things?

Judge SOTOMAYOR. I can't—it's difficult to speak from the abstract, in large measure, because as I explained, I've never been a part of the FISA court and so I've never had the experience of reviewing what those documents are and whether they, in fact, can be redacted or not without creating risk to national security. One has to think about what the—what explanations the government has. There's so many issues a court would have to look at.

Senator FEINGOLD. Let me go to something completely different. There's been a lot of talk about this concept of empathy. In the context of your nomination, a judge's ability to feel empathy does not mean the judge should rule one way or another, as you well explained. But I agree with President Obama that it's a good thing for our country for judges to understand the real-world implications of their decisions and the effects on regular Americans, and to seek to understand both sides of an issue.

Judge, your background is remarkable. As you explained yesterday, your parents came to New York from Puerto Rico during World War II, and after your father died your mother raised you on her own in a housing project in the South Bronx. You are a lifelong New Yorker and a Yankee fan, as I understand it. But many Americans don't live in big cities. Many of my constituents live in rural areas and small towns—and they root for the Brewers and the Packers. Some might think that you don't have a lot in common with them.

What can you tell me about your ability as a judge to empathize with them—to understand the everyday challenges of rural and small-town Americans and how Supreme Court decisions might affect their lives?

Judge SOTOMAYOR. Yes, I live in New York City and it is a little different than other parts of the country, but I spend a lot of time in other parts of the country. I've visited a lot of States. I've stayed with people who do all types of work. I've lived on—not lived, I've visited and vacationed on farms. I've lived and vacationed in moun-

taintops. I've lived and vacationed in all sorts—not lived. I'm using the wrong word. I've visited all sorts of places.

In fact, one of my habits is, when I travel somewhere new, I try to find a friend I know to stay with them.

And it's often not because I can't afford a hotel—usually the people who are inviting me would be willing to pay—but it's because I do think it's important to know more than what I live and to try to stay connected to people and to different experiences.

I don't think that one needs to live an experience without appreciating it, listening to it, watching it, reading about it, all of those things, experiencing it for a period of time, help judges in appreciating the concerns of other experiences that they don't personally have. And as I said, I try very, very hard to ensure that, in my life, I introduce as much experience with other people's lives as I can.

Senator FEINGOLD. I realize I'm jumping back and forth to these issues, but the last one I want to bring up has to do with wartime Supreme Court decisions like *Korematsu* that we look back at with some bewilderment. I'm referring, of course, *Korematsu* v. *United States*, the decision in which the Supreme Court upheld the government policy to round up and detain more than 100,000 Japanese-Americans during World War II.

It seems inconceivable that the U.S. Government would have decided to put huge numbers of citizens in detention centers based on their race, and yet the Supreme Court allowed that to happen. I asked Chief Justice Roberts about this, and I'll ask you as well: Do you believe that *Korematsu* was wrongly decided?

Judge SOTOMAYOR. It was, sir.

Senator FEINGOLD. Does a judge have a duty to resist the kind of war-time fears that people understandably felt during World War II, which likely played a role in the 1944 *Korematsu* decision?

Judge SOTOMAYOR. A judge should never rule from fear. A judge should rule from law and the Constitution. It is inconceivable to me today that a decision permitting the detention/arrest of an individual solely on the basis of their race would be considered appropriate by our government.

Senator FEINGOLD. Now, some of the great justices in the history of our country were involved in that decision. How does a judge resist those kind of fears?

Judge SOTOMAYOR. One hopes, by having the wisdom of a Harlan in *Plessy*, by having the wisdom to understand, always, no matter what the situation, that our Constitution has held us in good stead for over 200 years and that our survival depends on upholding it.

Senator FEINGOLD. Thank you, Judge.

Chairman LEAHY. Thank you. Thank you very much, Senator Feingold.

Senator KYL. Thank you, Mr. Chairman.

Could I return briefly to a series of questions that Senator Feingold asked at the very beginning relating to the *Maloney* decision relating to the Second Amendment?

Judge SOTOMAYOR. Sure. Good afternoon, by the way.

Senator KYL. I am sorry?

Judge SOTOMAYOR. Good afternoon, by the way.

Senator KYL. Yes, good afternoon. You had indicated, of course, if that case were to come before the Court, under the recusal statute you would recuse yourself from participating in the decision.

Judge SOTOMAYOR. In that case, yes.

Senator KYL. Yes, and you are aware that—or maybe you are not, but there are two other decisions both dealing with the same issue of incorporation, one in the Ninth Circuit and one in the Seventh Circuit. The Seventh Circuit decided the case similarly to your circuit. The Ninth Circuit has decided it differently, although that case is on rehearing.

If the Court should take all three—let's assume the Ninth Circuit stays with its decision so you do have the conflict among the circuits, and the Court were to take all three decisions at the same time, I take it the recusal issue would be the same. You would recuse yourself in that situation.

Judge SOTOMAYOR. I haven't actually been responding to that question, and I think you're right proposing it. I clearly understand that recusing myself from Maloney would be appropriate. The impact of the joint hearing by the Court would suggest that I would have to apply the same principle, but as I indicated, issues of recusal are left to the discretion of Justices because their participation in cases is so important. It is something that I would discuss with my colleagues and follow their practices with respect to a question like this.

Senator KYL. Sure. I appreciate that, and I agree with your reading of the law; 28 U.S.C. Section 455 provides, among other things, and I quote, "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." And that, of course, raises the judge's desire to consult with others and ensure that impartiality is not questioned by participating in a decision.

I would think—and I would want your responses. I would think that there would be no difference if the *Maloney* case is decided on its own or if it is decided as one of two or three other cases all considered by the Court at the same time.

Judge SOTOMAYOR. As I said, that is an issue that is different than the question that was posed earlier——

Senator KYL. Would you not be willing to make an unequivocal commitment on that at this time?

Judge SOTOMAYOR. It's impossible to say I will recuse myself on any case involving *Maloney*. How the other cert. is granted and whether joint argument is presented or not, I would have to await to see what happened.

Senator KYL. Let me ask you this: Suppose that the other two cases are considered by the Court, your circuit is not involved; or that the Court takes either the Seventh or Ninth Circuit and decides the question of incorporation of the Second Amendment. I gather that in subsequent decisions you would consider yourself bound by that precedent or that you would consider that to be the decision of the Court on the incorporation question.

Judge SOTOMAYOR. Absolutely. The decision of the Court in *Heller* is—its holding has recognized an individual right to bear arms as applied to the Federal Government.

Senator KYL. If as a result—I mean, that was the matter before your circuit, and if as a result of the fact that the Court decided one of the other or both of the other two circuit cases and resolved that issue so that the same matter would have been before the Court, would it not also make sense for you to indicate to this Committee now that should that same matter come before the Court and you are on the Court, that you would necessarily recuse yourself from its consideration?

Judge SOTOMAYOR. I didn't quite follow the start of your question, Senator. I want to answer precisely.

Senator KYL. Sure.

Judge SOTOMAYOR. But I'm not quite sure——

Senator KYL. You agreed with me that if the Court considered either the Seventh or Ninth Circuit or both decisions and decided the issue if incorporation of the Second Amendment to make it applicable to the States, you would consider that binding precedent of the Court. That, of course, was the issue in *Maloney*. As a result, since it is the same matter that you resolved in *Maloney*, wouldn't you have to, in order to comply with the statute, recuse yourself if either or both or all three of those cases came to the Court?

Judge SOTOMAYOR. Senator, as I indicated, clearly the statute would reach *Maloney*. How I would respond to the Court taking certiorari in what case and whether it held—it took certiorari in one or all three is a question that I would have to await to see what the Court decides to do and what issues it addresses in its grant of certiorari.

There is also the point that whatever comes before the Court will be on the basis of a particular State statute, which might involve other questions. It's hard to speak about recusal in the abstract because there's so many different questions that one has to look at.

Senator KYL. And I do appreciate that, and I appreciate that you should not commit yourself to a particular decision in a case. If the issue is the same, however, it is simply the question of incorporation, that is a very specific question of law. It does not depend upon the facts. I mean, it did not matter that in your case you were dealing with a very dangerous arm but not a firearm, for example. You still considered the question of incorporation.

Well, let me just try to help you along here. Both Justice Roberts and Justice Alito made firm commitments to this Committee. Let me tell you what Justice Roberts said. He said that he would recuse him, and I am quoting now, "from matters in which he participated while a judge on the court of appeals matters." And since you did acknowledge that the incorporation decision was the issue in your Second Circuit case, and the question that I asked was whether if that is the issue from the Ninth and Seventh Circuits, you would consider yourself bound by that. It would seem to me that you should be willing to make the same kind of commitment that Justice Roberts and Justice Alito did.

Judge SOTOMAYOR. I didn't understand their commitment to be broader than what I have just said, which is that they would certainly recuse themselves from any matter. I understood it to mean any case that they had been involved in as a circuit judge. If their practice was to recuse themselves more broadly, then obviously I would take counsel from what they did. But I believe, if my mem-

ory is serving me correctly—and it may not be, but I think so—that Justice Alito as a Supreme Court Justice has heard issues that were similar to ones that he considered as a circuit court judge.

So as I have indicated, I will take counsel from whatever the practices of the Justices are with the broader question of what——

Senator KYL. I appreciate that. "Issues which are similar" is different, though, from "an issue which is the same." And I would just suggest that there would be an appearance of impropriety. If you have already decided the issue of incorporation one way, that is the same issue that comes before the Court, and then you, in effect, review your own decision, that to me would be a matter of inappropriate—and perhaps you would recuse yourself. I understand your answer.

Let me ask you about what the President said and I talked about 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 what's in the judge's heart?

Judge SOTOMAYOR. No, sir. That's—I don't—wouldn't approach the issue of judging in the way the President does. 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.

Senator KYL. I appreciate that. And has it been your experience that every case, no matter how tenuous it has been, and every lawyer, no matter how good their quality of advocacy, that in every case every lawyer has had a legal argument of some quality to make, some precedent that he cited. It might not be the Supreme Court. It might not be the court of appeals. It might be a trial court somewhere. It might not even be a court precedent. It may be a law review article or something. But have you ever been in a situation where a lawyer said, "I don't have any legal argument to make, Judge. Please go with your heart on this, or your gut"?

Judge SOTOMAYOR. Well, I've actually had lawyers say something very similar to that.

[Laughter.]

Judge SOTOMAYOR. I have had lawyers where questions have been raised about the legal basis of their argument. I had one lawyer throw up his hands and say, "But it's just not right."

"But it's just not right" is not what judges consider. What judges consider is what the law says.

Senator KYL. You have always been able to find a legal basis for every decision that you have rendered as a judge.

Judge SOTOMAYOR. Well, to the extent that every legal decision has—this is what I do in approaching legal questions, is I look at

the law that's being cited. I look at how precedent informs it. I try to determine what those principles are of precedent to apply to the facts in the case before me and then do that.

And so one—that is a process. You use——

Senator KYL. Right, and all I am asking—this is not a trick question.

Judge SOTOMAYOR. No. I wasn't——

Senator KYL. I can't imagine that the answer would be otherwise than, yes, you have always found some legal basis for ruling one way or the other, some precedent, some reading of a statute, the Constitution, or whatever it might be. You haven't ever had to throw up your arms and say, "I can't find any legal basis for this opinion, so I am going to base it on some other factor."

Judge SOTOMAYOR. When you say, use the words "some legal basis," it suggests that a judge is coming to the process by saying I think the result should be here——

Senator KYL. No, no. I——

Judge SOTOMAYOR.—and so I'm going to use something to get there.

Senator KYL. No. I am not trying to infer that any of your decisions have been incorrect or that you have used an inappropriate basis. I am simply confirming what you first said in response to my question about the President; that in every case the judge is able to find a basis in law for deciding the case. Sometimes there are not cases directly on point. That is true. Sometimes it may not be a case from your circuit. Sometimes it may be somewhat tenuous, and you may have to rely upon authority like scholarly opinions in law reviews or whatever.

But my question was really very simple to you: Have you always been able to have a legal basis for the decisions that you have rendered and not have to rely upon some extra-legal concept such as empathy or some other concept other than a legal interpretation or precedent?

Judge SOTOMAYOR. Exactly, sir. We apply law to facts. We don't apply feelings to facts.

Senator KYL. Right. Now—thank you for that.

Let me go back to the beginning. I raise this issue about the President's interpretation because he clearly is going to seek nominees to this Court and other courts that he is comfortable with, and that would imply who have some commonality with his view of the law and judging. It is a concept that I also disagree with, but in this respect, it is—the speeches that you have given and some of the writings that you have engaged in have raised questions because they appear to fit into what the President has described as this group of cases in which the legal process or the law simply doesn't give you the answer. And it is in that context that people have read these speeches and have concluded that you believe that gender and ethnicity are an appropriate way for judges to make decisions in cases. That is my characterization.

I want to go back through the—I have read your speeches, and I have 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 the point of those speeches was to inspire young people, and I think there is some in

your speeches that certainly is inspiring. In fact, it is 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 are 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 Latina identity, where it came from, and the influence I perceive gender, race, and national origin representation will have on the development of the law."

And then after some preliminary and sometimes inspirational comments, you got back to the theme and said, "The focus of my speech tonight, however, is not about the struggle to get us where we are and where we need to go, but instead to discuss what it will mean to have more women and people of color on the bench."

You said, "No one can or should ignore asking and pondering what it will mean or not mean in the development of the law."

You cited some people who had a different point of view than yours, and then you came back to it and said, "Because I accept the proposition that, as Professor Resnick explains, to judge is an exercise of power; and because, as Professor Martha Minow of Harvard Law School explains, there is no objective stance but only a series of perspectives. No neutrality, no escape from choice in judging," you said. "I further accept that our experiences as women and people of color will in some way affect our decisions."

Now, you are deep into the argument here. You have agreed with Resnick that there is no objective stance, only a series of perspectives, no neutrality—which, just as an aside, it seems to me is relativism run amok. But then you say, "What Professor Minow's quote means to me is not all women or people of color or all in some circumstances or me in any particular case or circumstance, but enough women and people of color in enough cases will make a difference in the process of judging." You are talking here about different outcomes in cases. And you go on to substantiate your case by, first of all, citing a Minnesota case in which three women judges ruled differently than two male judges in a father's visitation case. You cited two excellent studies which tended to demonstrate differences between women and men in making decisions in cases. You said, "As recognized by legal scholars, whatever the cause is, not one woman or person of color in any one position, but as a group, we will have an effect on the development of law and on judging."

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 they would be better judgments or not.

But then you did. You quoted Justice O'Connor to say that a wise old woman and a wise old man would reach the same decision. And

then you said, "I am also not sure I agree with that statement." And that is when you made the statement that is 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 are reaching a judgment that not only will it make a difference but that it should make a difference. And you went on—and this is the last thing that I will 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 you acknowledged that they made a big difference in discrimination cases. But it took a long time, to understand 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."

As you said in your response to Senator Sessions, you said that you weren't encouraging that, and 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 seemed to be celebrating it. The clear inference is it is a good thing that this is happening.

So that is 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 that 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 that difference in concluding that you will make better decisions.

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

Judge 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 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 deals with those situations, and 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 a particular difficulty to a party or disapproval of a party's action and said, no, but the law requires this. So my views, I think, are demonstrated by what I do as a judge.

I am 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 is the very end of what I said to them—was, "I hope I see you in the courtroom 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, its 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 is 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 of 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 are pursuing and showing that all groups can be lawyers and judges, that's just reflecting the values of our society.

Senator KYL. And if I could just interrupt you right now, to me that is the key. It is good because it shows these young people that you are talking to that, with a little hard work, it doesn't matter where you came from; you can make it. And that is why you hope to see them on the bench. I totally appreciate that.

The question, though, is whether you leave them with the impression that it's good to make different decisions because of their ethnicity or gender, and it strikes me that you could have easily said in here, "Now, of course, Blind Lady Justice doesn't permit us to base decisions in cases on our ethnicity or gender. We should strive very hard to set those aside when we can." I found only one rather oblique reference in your speech that could be read to say that you warned against that. All of the other statements seem to embrace it, or certainly to recognize it and almost seem as if you are powerless to do anything about it. "I accept that this will happen," you said.

So while I appreciate what you are saying, it still doesn't answer to me the question of whether you think that these—that ethnicity or gender should be making a difference.

Judge SOTOMAYOR. There are two different, I believe, issues to address and to look at because various statements are being looked at and being tied together. But the speech, as it is structured, didn't intend to do that and didn't do that. Much of the speech about what differences there will be in judging was in the context of my saying or addressing an academic question, all the studies that you reference I cited in my speech, which is that studies, they were suggesting that there could be a difference. They were raising reasons why I was inviting the students to think about that question. Most of the quotes that you had and reference say that.

We have to ask this question: Does it make a difference? And if it does, how? And the study about differences in outcomes was in that context. There was a case in which three women judges went one way and two men went the other, but I didn't suggest that that was driven by their gender. You can't make that judgment until you see what the law actually said. And I wasn't talking about what law they were interpreting in that case. I was just talking about the academic question that one should ask.

Senator KYL. If I could just interrupt, I think you just contradicted your speech, because you said in the line before that, "Enough women and people of color in enough cases will make a difference in the process of judging." Next comment: "The Minnesota Supreme Court has given us an example of that."

So you did cite that as an example of gender making a difference in judging.

Now, look, I am not—I do not want to be misunderstood here as disagreeing with a general look into the question of whether people's gender, ethnicity, or background in some way affects their judging. I suspect you can make a very good case that that is true in some cases. You cite a case here for that proposition. Neither you nor I probably know whether for sure that was the reason, but one could infer it from the decision that was rendered. And then you cite two other studies.

I am not questioning whether the studies are not valuable. In fact, I would agree with you that it is important for us to be able to know these things so that we are on guard to set aside prejudices that we may not even know that we have, because when you do judge a case—let me just go back in time.

I tried a lot of cases, and it always depended on the luck of the draw what judge you got. Ninety-nine times out of a hundred, it didn't matter. So what? We got Judge Jones. Fine. We got Judge Smith. Fine. It didn't matter because you knew they would all apply the law.

In the Federal district court in Arizona, there was one judge you didn't want to get. All of the lawyers knew that, because they knew he had predilections that were really difficult for him to set aside. It is a reality. And I suspect you have seen that on some courts, too.

So it is a good thing to examine whether or not those biases and prejudices exist in order to be on guard and to set them aside. The fault I have with your speech is that you not only do not let these students know that you need to set it aside. You don't say that that is what you need this information for. But you almost celebrate it. You say if there are enough of us, we will make a difference—inferring that it is a good thing if we begin deciding cases differently.

Let me just ask you one last question here. Have you ever seen a case where, to use your example, the wise Latina made a better decision than non-Latina judges?

Judge SOTOMAYOR. No. What I've seen——

Senator KYL. I mean, I know you like all of your decisions, but——

[Laughter.]

Chairman LEAHY. Let her answer the——

Senator KYL. I was just saying that I know that she appreciates her own decisions, and I don't mean to denigrate her decisions, Mr. Chairman.

Judge SOTOMAYOR. I was using a rhetorical riff that harkened 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 am 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 noted, 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, in 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.

Chairman LEAHY. In fact——

Senator KYL. Excuse me, if I may, just for the record. I don't think it was your speech that said that, but that is what you said in response to Senator Sessions' question this morning.

Chairman LEAHY. When we get references made to Justice Alito, that was on January 11, 2006. When he said, "When I get a"—this is Justice Alito speaking. "When I get a case about discrimination, I have to think about people in my own family who suffered discrimination because of their ethnic background or because of religion or because of gender, and I do take that into account."

We will take a 10-minute break.

[Whereupon, at 3:37 p.m., the committee was recessed.]

After Recess [3:52 p.m.]

The CHAIRMAN. First off, Judge, I compliment your family. You cannot see them sitting behind you, because they have all been sitting there very attentively, and I have to think that after a while, they would probably rather just be home with you. But I do appreciate it.

So we are going to go to Senator Schumer, who did such a good job introducing you yesterday. Senator Schumer?

Senator SCHUMER. Thank you, Mr. Chairman. And thank all of my colleagues. First, I am going to follow-up on some of the line of questioning of Senators Sessions and Kyl, but I would like to, first, thank my Republican colleagues. I think the questioning has been strong, but respectful.

I would also like to compliment you, Judge. I think you have made a great impression on America today. The American people have seen today what we have seen when you have met with us one-on-one. You are very smart and knowledgeable, but down to earth. You are a strong person, but also a very nice person. And you have covered the questions thoughtfully and modestly.

So now I am going to go on to that line of questions. We have heard you asked about snippets of statements that have been used to criticize you and challenge your impartiality, but we have heard precious little about the body and totality of your 17-year record on the bench, which everybody knows is the best way to evaluate a nominee.

In fact, no colleague has pointed to a single case in which you said the court should change existing law, in which you have attempted to change existing law, explicitly or otherwise, and I had never seen such a case anywhere in your long and extensive record.

So if a questioner is focusing on a few statements or "those few words" and does not refer at all to the large body of cases where you have carefully applied the law, regardless of sympathies, I do not think that is balanced or down the middle.

By focusing on these few statements rather than your extensive record, I think some of my colleagues are attempting to try and suggest that you might put your experiences and empathies ahead of the rule of law. But the record shows otherwise and that is what I now want to explore.

Now, from everything I have read in your judicial record and everything I have heard you say, you put rule of law first. But I want to clear it up for the record, so I want to talk to you a little bit about what having empathy means and then I want to turn to your record on the bench, which I believe is the best way to get a sense of what your record will be on the bench in the future.

Now, I believe that empathy is the opposite of indifference, the opposite of, say, having ice water in your veins rather than the opposite of neutrality, and I think that is the mistake, in concept, that some have used.

But let us start with the basics. Will you commit to us today that you will give every litigant before the court a fair shake and that you will not let your personal sympathies toward any litigant overrule what the law requires?

Judge SOTOMAYOR. That commitment I can make and have made for 17 years.

Senator SCHUMER. Okay. Well, good. Let us turn to that record. I think your record shows extremely clearly that even when you might have sympathy for the litigants in front of you, as a judge, your fidelity is first and foremost to the rule of law, because as you know, in the courtroom of a judge who ruled based on empathy, not law, one would expect that the most sympathetic plaintiffs would always win.

But that is clearly not the case in your courtroom. I am going to take a few cases here and go over them with you. For example, in In re: Air Crash Off Long Island, which is sort of a tragic, but interesting name for a case, you heard the case of families of the 213 victims of a tragic TWA crash, which we all know about in New York.

The relatives of the victims sued manufacturers of the airplane, which spontaneously combusted in midair, in order to get some modicum of relief, though, of course, nothing a court could do would make up for the loss of the loved ones.

Did you have sympathy for those families?

Judge SOTOMAYOR. All of America did. That was a loss of life that was traumatizing for New York State, because it happened off the shores of Long Island. And I know, Senator, that you were heavily involved in ministering to the families during that case.

Senator SCHUMER. I was, right.

Judge SOTOMAYOR. Everyone had sympathy for their loss. It was absolutely tragic.

Senator SCHUMER. Many of them were poor families, many of them from your borough in the Bronx. I met with them. But, ultimately, you ruled against them, did you not?

Judge SOTOMAYOR. I didn't author the majority opinion in that case. I dissented from the majority's conclusion, but my dissent suggested that the court should have followed what I viewed as existing law and reject their claims or at least a portion of their claim.

Senator SCHUMER. Right. Your dissent said that, "The appropriate remedial scheme for deaths occurring off the United States coast is clearly a legislative policy choice which should not be made by the courts." Is that correct?

Judge SOTOMAYOR. Yes, sir.

Senator SCHUMER. That is exactly, I think, the point that my colleague from Arizona and others were making about how a judge should rule. How did you feel ruling against individuals who had clearly suffered a profound personal loss and tragedy and were looking to the courts and to you for a sense of justice?

Judge SOTOMAYOR. One, in a tragic, tragic, horrible situation like that, can't feel anything but personal sense of regret, but those personal senses can't command a result in a case. As a judge, I serve the greater interest and that greater interest is what the rule of law supplies.

As I mentioned in that case, it was fortuitous that there was a remedy and that remedy, as I noted in my case, was Congress and, in fact, very shortly after the second circuit's opinion, Congress amended the law, giving the victims the remedies that they had sought before the court. And my dissent was just pointing out that despite the great tragedy, that the rule of law commanded a different result.

Senator SCHUMER. And it was probably very hard, but you had to do it. Here is another case, *Washington* v. *County of Rockland*, Rockland is a county, a suburb of New York, which was a case involving black corrections officers who claimed that they were retaliated against after filing discrimination claims. Remember that case?

Judge SOTOMAYOR. I do.

Senator SCHUMER. Did you have sympathy for the officers filing that case?

Judge SOTOMAYOR. Well, to the extent that anyone believes that they had been discriminated on the basis of race, that not only violates the law, but one would have—I wouldn't use the word "sym-

pathy," but one would have a sense that this claim is of some importance and one that the court should very seriously consider.

Senator SCHUMER. Right, because I am sure, like Judge Alito said and others, you had suffered discrimination in your life, as well. So you could understand how they might feel, whether they were right or wrong in the outcome, in filing.

Judge SOTOMAYOR. I've been more fortunate than most. The discrimination that I have felt has not been as life-altering as it has for others. But I certainly do understand it, because it is a part of life that I'm familiar with and have seen others suffer so much with, as I have in my situation.

Senator SCHUMER. Now, let me ask you, again, how did you feel ruling against law enforcement officers, the kind of people you have told us repeatedly you have spent your career working with, DA's office and elsewhere, and for whom you have tremendous respect?

Judge SOTOMAYOR. As with all cases where I might have a feeling of some identification with because of background of because of experiences, one feels a sense of understanding what they have experienced. But in that case, as in the TWA case, the ruling that I endorsed against them was required by law.

Senator SCHUMER. Here is another one. It was called *Boykin* v. *Keycorp*. It was a case in which an African-American woman filed suit after being denied a home equity loan, even after her loan application was conditionally approved based on her credit report.

She claimed that she was denied the opportunity to own a home because of her race, her sex, and the fact that her prospective home was in a minority-concentrated neighborhood. She did not even have a lawyer or anyone else to interpret the procedural rules for her. She filed the suit on her own.

Did you have sympathy for the woman seeking a home loan from the bank?

Judge SOTOMAYOR. Clearly, everyone has sympathy for an individual who wants to own their own home. That's the typical dream and aspiration, I think, of most Americans. And if someone is denied that chance for a reason that they believe is improper, one would recognize and understand their feeling.

Senator SCHUMER. Right. In fact, you ruled that her claim was not timely. Rather than overlooking the procedural problems with the case, you held fast to the complicated rules that keep our system working efficiently, even if it meant that claims of discrimination could not be heard. We never got to whether she was actually discriminated against, because she did not file in a timely manner.

Is my summation there accurate? Do you want to elaborate?

Judge SOTOMAYOR. Yes, in terms of the part of the claim that we held was barred by the statute of limitation. In a response to the earlier question—to an earlier question, I indicated that the law requires some finality and that's why Congress passes or a state legislature passes statutes of limitations that require people to bring their claims within certain timeframes. Those are statutes and they must be followed if a situation—if they apply to a particular situation.

Senator SCHUMER. Finally, let us look at a case that cuts the other way, with a pretty repugnant litigant. This is the case called

Pappas v. *Giuliani*, and you considered claims of a police employee who was fired for distributing terribly bigoted and racist materials.

First, what did you think of the speech in question that this officer was distributing?

Judge SOTOMAYOR. Nobody, including the police officer, was claiming that the speech wasn't offensive, racist and insulting. There was a question about what his purpose was in sending the letter. But my opinion dissent in that case pointed out that offensiveness and racism of the letter, but I issued a dissent from the majority's affirmance of his dismissal from the police department because of those letters.

Senator SCHUMER. Right. As I understand it, you wrote that the actual literature that the police officer was distributing was "patently offensive, hateful and insulting." But you also noted that, and this is your words in a dissent, where the majority was on the other side, "Three decades of jurisprudence and the centrality of First Amendment freedom in our lives," that is your quote, the employee's right to speech had to be respected.

Judge SOTOMAYOR. In the situation of that case, that was the decision that I took, because that's what I believe the law commanded.

Senator SCHUMER. Even though, obviously, you would not have much sympathy or empathy for this officer or his actions. Is that correct?

Judge SOTOMAYOR. I don't think anyone has sympathy for what was undisputedly a racist statement, but the First Amendment commands that we respect people's rights to engage in hateful speech.

Senator SCHUMER. Right. Now, I am just going to go to a group of cases here rather than one individual case. We could do this all day long, where sympathy, empathy would be on one side, but you found rule of law on the other side and you sided with rule of law.

So, again, to me, analyzing a speech and taking words maybe out of context does not come close to analyzing the cases as to what kind of judge you will be, and that is what I am trying to do here.

Now, this one, my office conducted an analysis of your record in immigration cases, as well as the record of your colleagues. In conducting this analysis, I came across a case entitled *Chen* v. *Board of Immigration Appeals*, where your colleague said something very interesting. This was Judge Jon Newman. He is a very respected judge on your circuit.

He said something very interesting when discussing asylum cases. Specifically, he said the following, this is Judge Newman, "We know of no way to apply precise calipers to all asylum cases so that any particular finding would be viewed by any three of the 23 judges of this court as either sustainable or not sustainable. Panels will have to do what judges always do in similar circumstances—apply their best judgment, guided by the statutory standard governing review in the holdings of our precedents to the administrative decision and the record assembled to support it."

In effect, what Judge Newman is saying is these cases would entertain more subjectivity, let us say, because as he said, you could decide many of them as sustainable or not sustainable.

So given the subjectivity that exists in the asylum cases, it is clear that if you had wanted to be "an activist judge," you could certainly have found ways to rule in favor of sympathetic asylum-seekers, even when the rule of law might have been more murky and not have dictated an exact result.

Yet, in the nearly 850 cases you have decided in the second circuit, you ruled in favor of the government, that is, against the petitioner seeking asylum, immigrant seeking asylum, 83 percent of the time. That happens to be the exact statistical median rate for your court. It is not one way or the other.

This means that with regard to immigration, you were neither more liberal nor more conservative than your colleagues. You simply did what Judge Newman said. You applied your best judgment to the record at hand.

Now, can you discuss your approach to immigration cases, explain to this panel and the American people the flexibility that judges have in this context, and your use of this flexibility in a very moderate manner?

Judge SOTOMAYOR. Reasonable judges look at the same set of facts and may disagree on what those facts should result in. It harkens back to the question of wise men and wise women being judges. Reasonable people disagree. That was my understanding of Judge Newman's comment in the quotation you made.

In immigration cases, we have a different level of review, because it's not the judge making the decision whether to grant or not grant asylum. It's an administrative body.

And I know that I will—I'm being a little inexact, but I think using old terminology is better than using new terminology. And by that, I mean the agency that most people know as the Bureau of Immigration has a new name now, but that is more descriptive than its new name.

Senator SCHUMER. Some people think the new name is descriptive, but that is okay.

Judge SOTOMAYOR. In immigration cases, an asylum-seeker has an opportunity to present his or her case before an immigration judge. They then can appeal to the Bureau of Immigration and argue that there was some procedural default below or that the immigration judge or the bureau itself has committed some error or law.

They then are entitled by law to appeal directly to the second circuit. In those cases, because they are administrative decisions, we are required, under the Chevron Doctrine and other tests in administrative law, to give deference to those decisions.

But like with all processes, there are occasions when processes are not followed and an appellate court has to ensure that the rights of the asylum-seeker have been—whatever those rights may be—have been given. There are other situations in which an administrative body hasn't adequately explained its reasoning. There are other situations where administrative bodies have actually applied erroneous law.

No institution is perfect. And so that accounts for why, given the deference—and I'm assuming you're statistic is right, Senator, because I don't add up the numbers. Okay? But I do know that in immigration cases, the vast majority of the Bureau of Investigation

cases are—the petitions for review are denied. So that means that——

Senator SCHUMER. Right. The only point I am making here, if some are seeking to suggest that your empathy or sympathy overrules rule of law, this is a pretty good body of law to look at. A, it is a lot of cases, 850; B, one would think—I am not going to ask you to state it, but you will have sympathy for immigrants and immigration; and, third, there is some degree of flexibility here, as Judge Newman said, just because of the way the law is.

Yet, you were exactly in the middle of the second circuit. If empathy were governing you, I do not think you would have ended up in that position, but I will let everybody judge whether that is true. But the bottom line here, in the *Air Crash* case, in Washington, in Boykin, in this whole mass of asylum cases, you probably had sympathy for many of the litigants, if not all of them, ruled against them.

The cases we just discussed are just a sampling of your lengthy record, but they do an effective job of illustrating the fact that in your courtroom, rule of law always triumphs.

Would you agree? That seems to me, looking at your record, you know it much better than I do, that rule of law triumphing probably best characterizes your record in your 17 years as a judge.

Judge SOTOMAYOR. I firmly believe in the fidelity to the law. In every case I approach, I start from that working proposition and apply the law to the facts before it.

Senator SCHUMER. Has there ever been a case in which you ruled in favor of a litigant simply because you were sympathetic to their plight, even if rule of law might not have led you in that direction?

Judge SOTOMAYOR. Never.

Senator SCHUMER. Thank you. Let us go on here a little bit to foreign law, which is an issue that has also been discussed. Your critics have tried to imply that you will improperly consider foreign law and sources in cases before you.

You gave a speech in April that has been selectively quoted, discussing whether it is permissible to use foreign law or international law to decide cases. You stated clearly that, "American analytic principles do not permit us," that is your quote, to do so.

Just so the record is 100 percent clear, what do you believe is the appropriate role of any foreign law in the U.S. courts?

Judge SOTOMAYOR. American law does not permit the use of foreign law or international law to interpret the Constitution. That's a given, and my speech explained that, as you noted, explicitly.

There is no debate on that question. There is no issue about that question. The question is a different one, because there are situations in which American law tells you to look at international or foreign law, and my speech was talking to the audience about that.

In fact, I pointed out that there are some situations in which courts are commanded by American law to look at what others are doing. So, for example, if the U.S. is a party to a treaty and there's a question of what the treaty means, then courts routinely look at how other courts of parties who are signatories are interpreting that.

There are some U.S. laws that say you have to look at foreign law to determine the issue. So, for example, if two parties have

signed a contract in another country that's going to be done in that other country, then American law would say you may have to look at that foreign law to determine the contract issue.

The question of use of foreign law then is different than considering the idea that it may, on an academic level, provide. Judges—and I'm not using my words. I'm using Justice Ginsberg's words. You build up your story of knowledge as a person, as a judge, as a human being with everything you read. For judges, that includes law review articles and there are some judges who have opined negatively about that. You use decisions from other courts. You build up your story of knowledge.

It is important, in the speech I gave, I noted and agreed with Justices Scalia and Thomas that one has to think about this issue very carefully, because there are so many differences in foreign law from American law. But that was the setting of my speech and the discussion that my speech was addressing.

Senator SCHUMER. And you have never relied on a foreign court to interpret U.S. law nor would you.

Judge SOTOMAYOR. In fact, I know that in my 17 years on the bench, other than applying it in treaty interpretation or conflicts of law situations, that I have not cited to foreign law.

Senator SCHUMER. Right, and it is important. American judges consider many non-binding sources when reaching a determination. For instance, consider Justice Scalia's well known regard for dictionary definitions in determining the meaning of words or phrases or statutes being interpreted by a court.

In one case, *MCI* v. *AT&T*, that is a pretty famous case, Justice Scalia cited not one, but five different dictionaries to establish the meaning of the word "modify" in a statute.

Would you agree that dictionaries are not binding on American judges?

Judge SOTOMAYOR. They are a tool to help you in some situations to interpret what is meant by the words that Congress or a legislature uses.

Senator SCHUMER. Right. So it was not improper for Justice Scalia to consider dictionary definitions, but they are not binding, same as citing of foreign law, as long as you do not make it binding on the case.

Judge SOTOMAYOR. Yes. Well, foreign law, except in the situation——

Senator SCHUMER. Of treaties.

Judge SOTOMAYOR.—which we spoke about and even then is not binding. It's American principles of construction that are binding.

Senator SCHUMER. Right. Okay. Good. Now, we will go to a little easier topic, since we are close to the end here. That is a topic that you like and I like and, that is, we have heard a lot of discussions about baseball in metaphorical terms, judges as umpires. We had a lot of that yesterday, a little of that today.

But I want to talk about baseball a little more concretely. First, am I correct you share my love for America's past-time?

Judge SOTOMAYOR. It's often said that I grew up in the shadow of Yankee Stadium. To be more accurate, I grew up sitting next to my dad, while he was alive, watching baseball and it's one of my fondest memories of him.

Senator SCHUMER. So given that you lived near Yankee Stadium and you are from the Bronx, I was going to ask you, are you a Mets or a Yankee fan, but I guess you have answered that. Right?

Chairman LEAHY. Be careful. You want to keep the Chairman on your side.

[Laughter.]

Senator SCHUMER. No, no. As much as Judge Scalia might want to be nominated, I do not think she would adopt the Red Sox as her team as you have, Mr. Chairman. Judge Sotomayor, I am sorry. What did I say? I do not know who Judge Scalia roots for, but I know who Judge Sotomayor roots for.

Judge SOTOMAYOR. I know many residents of Washington, D.C. have asked me to look at the Senators for——

Senator SCHUMER. Anyway, I do want to ask you just about the 1995 players strike case, which comes up, but it is an interesting case for everybody. You will not have to worry about talking about it, because I do not think the *Mets* v. *Yankees* will come up or the *Red Sox* v. *the Yankees* will come up before the court, although the Yankees could use all the help they can get right now.

But could you tell us a little bit about the case and why you listed it in your questionnaire that you filled out as one of your 10 most important cases?

And that will be my last question, Mr. Chairman.

Judge SOTOMAYOR. That was and people often forget how important some legal challenges seem before judges decide the case. Before the case was decided, all of the academics and all of newspapers and others talking about the case were talking about the novel theory that the baseball owners had developed in challenging the collective bargaining rights of players and owner.

In that case, as with all the cases that I approach, I look at what the law is, what precedent says about it, and I try to discern it a new factual challenge how the principles apply, and that's the process I used in that case.

And it became too clear to me, after looking at that case, that that process led to affirming the decision of the National Labor Relationships Board, that it could and should issue an injunction on the grounds that it claimed.

So that, too, was a case where there's a new argument, a new claim, but where the application of the law came from taking the principles of the law and applying it to that new claim.

Chairman LEAHY. Thank you very much, Senator Schumer.

Senator Graham.

Senator GRAHAM. Thank you, Mr. Chairman.

Chairman LEAHY. And then we will go to Senator Durbin.

Senator GRAHAM. Okay. Thank you, Judge. I know it's been a long day, and we'll try to keep it moving here. I think you're one Senator after me away from taking a break.

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—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 trying—and I listen to you today, and 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 minds here to put the puzzle together to go that last line, is that you've 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 speech writer 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?

Now, legal realism. Are you familiar with that term?

Judge SOTOMAYOR. I am.

Senator GRAHAM. What does it mean, for someone who may be watching the hearing?

Judge SOTOMAYOR. To me it means that you are guided in reaching decisions in law by the realism of the situation, of the—the—it's less—it looks at the law through the——

Senator GRAHAM. It's kind of touchy-feely stuff.

[Laughter.]

Judge SOTOMAYOR. It's not quite words that I would use, because there are many academics and judges who have talked about being legal realists. I don't apply that label to myself at all. I—as I said, I look at law and—and precedent and discern its principles and apply it to the situation before me.

Senator GRAHAM. So you would not be a disciple of the legal realism school?

Judge SOTOMAYOR. No.

Senator GRAHAM. Okay. All right.

Would you be considered a strict constructionist, in your own mind?

Judge SOTOMAYOR. I don't use labels to describe what I do. There's been much discussion today about what various labels mean and don't mean.

Senator GRAHAM. Uh-huh.

Judge SOTOMAYOR. Each person uses those labels and gives it their own sense of what——

Senator GRAHAM. When Judge Rehnquist says he was a strict constructionist, did you know what he was talking about?

Judge SOTOMAYOR. I think I understood what he was referencing.

Senator GRAHAM. Uh-huh.

Judge SOTOMAYOR. But his use——

Senator GRAHAM. Uh-huh.

Judge SOTOMAYOR.—is not how I go about looking at——

Senator GRAHAM. What does "strict constructionism" mean to you?

Judge SOTOMAYOR. Well, it means that you look at the Constitution as it's written, or statutes as is—as they are written and you apply them exactly by the words.

Senator GRAHAM. Right. Would you be an originalist?

Judge SOTOMAYOR. Again, I don't use labels.

Senator GRAHAM. Okay.

Judge SOTOMAYOR. And—because——

Senator GRAHAM. What is an originalist?

Judge SOTOMAYOR. In my understanding, an originalist is someone who looks at what the founding fathers intended and what the situation confronting them was, and you use that to determine every situation presented—not every, but most situations presented by the Constitution.

Senator GRAHAM. Do you believe the Constitution is a living, breathing, evolving document?

Judge SOTOMAYOR. The Constitution is a document that is immutable to the sense that it's lasted 200 years. The Constitution has not changed, except by amendment. It is a process—an amendment process that is set forth in the document. It doesn't live, other than to be timeless by the expression of what it says. What changes, is society. What changes, is what facts a judge may get presented.

Senator GRAHAM. What's the—what's the best way for society to change, generally speaking?

Judge SOTOMAYOR. Well——

Senator GRAHAM. What's the—what's the most legitimate way for society to change?

Judge SOTOMAYOR. I don't know if I can use the word "change". Society changes because there's been new developments in technology, medicine, in—in society growing.

Senator GRAHAM. Do you think judges——

Judge SOTOMAYOR. There's——

Senator GRAHAM. Do you think judges have changed society by some of the landmark decisions in the last 40 years?

Judge SOTOMAYOR. Well, in the last few years?

Senator GRAHAM. Forty years.

Judge SOTOMAYOR. I'm sorry. You said the——

Senator GRAHAM. Forty. I'm sorry. Forty, 4–0. Do you think *Roe* v. *Wade* changed American society?

Judge SOTOMAYOR. *Roe* v. *Wade* looked at the Constitution and decided that the Constitution, as applied to a claimed right, applied.

Senator GRAHAM. Is there anything in the Constitution that says a State legislator or the Congress cannot regulate abortion or the definition of life in the first trimester?

Judge SOTOMAYOR. The holding of the court as——

Senator GRAHAM. I'm asking, the Constitution. Does the Constitution, as written, prohibit a legislative body at the State or Federal level from defining life or regulating the rights of the unborn, or protecting the rights of the unborn in the first trimester?

Judge SOTOMAYOR. The Constitution, in the Fourteenth Amendment, has a——

Senator GRAHAM. I'm talking about, is there anything in the document written about abortion?

Judge SOTOMAYOR. There—the word "abortion" is not used in the Constitution, but the Constitution does have a broad provision concerning a liberty provision under the due process——

Senator GRAHAM. And that gets us to the speeches. That broad provision of the Constitution that has taken us from no written prohibition protecting the unborn, no written statement that you can't voluntarily pray in school, and on, and on, and on, and on.

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And that's what drives us here, quite frankly. That's my concern. And when we talk about balls and strikes, maybe that's not the right way to talk about it.

But a lot of us feel that the best way to change society is to go to the ballot box, elect someone, and if they're not doing it right, get rid of them through the electoral process. And a lot of us are concerned, from the left and the right, that unelected judges are very quick to change society in a way that's disturbing. Can you understand how people may feel that way?

Judge SOTOMAYOR. Certainly, sir.

Senator GRAHAM. Okay.

Now, let's talk about you. I like you, by the way, for whatever that matters. Since I may vote for you, that ought to matter to you. One thing that stood out about your record is that when you look at the almanac of the Federal judiciary, lawyers anonymously rate judges in terms of temperament.

And here's what they said about you: "she's a terror on the bench"; "she's temperamental, excitable"; "she seems angry"; "she's overly aggressive, not very judicial"; "she does not have a very good temperament"; "she abuses lawyers"; "she really lacks judicial temperament"; "she believes in an out-of-control—she behaves in an out-of-control manner"; "she makes inappropriate outbursts"; "she is nasty to lawyers"; "she will attack lawyers for making an argument she does not like"; "she can be a bit of a bully".

When you look at the evaluation of the judges on the Second Circuit, you stand out like a sore thumb in terms of your temperament. What is your answer to these criticisms?

Judge SOTOMAYOR. I do ask tough questions at oral argument.

Senator GRAHAM. Are you the only one that asks tough questions in oral argument?

Judge SOTOMAYOR. No. No, not at all. I can only explain what I'm doing, which is, when I ask lawyers tough questions, it's to give them an opportunity to explain their positions on both sides and to persuade me that they're right. I do know that in the Second Circuit, because we only give litigants 10 minutes of oral argument each, that the processes in the Second Circuit are different than in most other circuits across the country, and that some lawyers do find that our court—which is not just me, but our court generally—is described as a "hot bench". It's a term of art lawyers use. It means that they're peppered with questions. Lots of lawyers who are unfamiliar with the process in the Second Circuit find that tough bench difficult and challenging.

Senator GRAHAM. If I may interject, Judge, they find you difficult and challenging more than your colleagues. And the only reason I mention this is that it stands out when you—you know, there are many positive things about you, and these hearings are—are—are designed to talk—talk about the good and the bad. And I—I never liked appearing before a judge that I thought was a bully. It's hard enough being a lawyer, having your client there to begin with, without the judge just beating you up for no good reason.

Do you think you have a temperament problem?

Judge SOTOMAYOR. No, sir. I can only talk about what I know of my relationship with the judges of my court and with the lawyers who appear regularly from our Circuit. And I believe that my rep-

utation is—is such that I ask the hard questions, but I do it evenly for both sides.

Senator GRAHAM. In fairness to you, there are plenty of statements in the record in support of you as a person that—that do not go down this line. But I would just suggest to you, for what it's worth, Judge, as you go forward here, that these statements about you are striking. They're not about your colleagues; you know, the 10-minute rule applies to everybody. Obviously you've accomplished a lot in your life, but maybe these hearings are a time for self-reflection. This is pretty tough stuff that you don't see from—about other judges on the Second Circuit.

Let's talk about the "wise Latino" comment yet again. And the only reason I want to talk about it yet again is that I think what you said—let me just put my biases on the table here. One of the things that I constantly say when I talk about the war on terror is that one of the missing ingredients in the Mideast is the rule of law that Senator Schumer talked about, that the hope for the Mideast, Iraq and Afghanistan, is that there will be a courtroom one day that, if you find yourself in that court, it would be about what you allegedly did, not who you are. It won't be about whether you're a Sunni, Shia, a Khurd or a Pastune, it will be about what you did.

And that's the hope of the world, really, that our legal system, even though we fail at times, will spread. And I hope one day that there will be more women serving in elected official and judicial offices in the Mideast, because I can tell you this from my point of view: one of the biggest problems in Iraq and Afghanistan is a mother's voice is seldom heard about the fate of her children. And if you wanted to change Iraq, apply the rule of law and have more women involved in having a say about Iraq. And I believe that about Afghanistan, and I think that's true here. I think for a long time a lot of talented women were asked, "Can you type," and we're trying to get beyond that and improve as a Nation.

So when it comes to the idea that we should consciously try to include more people in the legal process and the judicial process from different backgrounds, count me in. But your speeches don't really say that to me. They—along the lines of what Senator Kyl was saying, they kind of represent the idea, there's a day coming when there will be more of us, women and minorities, and we're going to change the law. And what I hope we'll take away from this hearing, is there needs to be more women and minorities in the law to make a better America, and the law needs to be there for all of us if, and when, we need it.

And the one thing that I've tried to impress upon you, through jokes and being serious, is the consequences of these words in the world in which we live in. You know, we're talking about putting you on the Supreme Court and judging your fellow citizens, and one of the things that I need to be assured of is that you understand the world as it pretty much really is, and we've got a long way to go in this country. And I can't find the quote, but I'll find it here in a moment, the "wise Latino" quote. Do you remember it?

[Laughter.]

Judge SOTOMAYOR. Yes.

Senator GRAHAM. Okay. Say it to me. Can you recite it from memory? I've got it. All right. "I would hope that a wise Latina 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, 1) 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?

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

Senator 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?

Judge 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 and the work we have done.

Senator 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.

Now, let's talk about the times in which we live in. You're from New York. Have you grown up in New York all your life?

Judge SOTOMAYOR. My entire life.

Senator GRAHAM. What did September 11, 2001 mean to you?

Judge SOTOMAYOR. It was the most horrific experience of my personal life, and the most horrific experience in imagining the pain of the families of victims of that tragedy.

Senator GRAHAM. Do you know anything about the group that planned this attack, who they are and what they believe? Have you read anything about them?

Judge SOTOMAYOR. I've followed the newspaper accounts, I've read some books in the area. So, I believe I have an understanding of that——

Senator GRAHAM. What would a woman's life be in their world if they can control a government or a part of the world? What do they have in store for women?

Judge SOTOMAYOR. I understand that some of them have indicated that women are not equal to men.

Senator GRAHAM. I think that's a very charitable statement.

Do you believe that we're at war?

Judge SOTOMAYOR. We are, sir. We have—we have tens and thousands of soldiers in the battlefields of Afghanistan and Iraq. We are at war.

Senator GRAHAM. Are you familiar with military law much at all? And if you're not, that's Okay.

Judge SOTOMAYOR. No, no, no, no. I—I'm thinking, because I've never practiced in the area. I've only read the Supreme Court decisions in this area.

Senator GRAHAM. Right.

Judge SOTOMAYOR. I've obviously examined, by referencing cases, some of the procedures involved in military law. But I—I'm not personally familiar with military law.

Senator GRAHAM. From which——

Judge SOTOMAYOR. I haven't participated.

Senator GRAHAM. I understand.

From what you've read and what you understand about the enemy that this country faces, do you believe there are people out there right now plotting our destruction?

Judge SOTOMAYOR. Given the announcements of certain groups and the messages that have been sent with videotapes, et cetera, announcing that intent, then the answer would be on—based on that, yes.

Senator GRAHAM. Under the Law of Armed Conflict—and this is where I may differ a bit with my colleagues—it is an international concept, the Law if Armed Conflict. Under the Law of Armed Conflict, do you agree with the following statement, that if a person is detained who is properly identified through accepted legal procedures under the Law of Armed Conflict as a part of the enemy force, there is no requirement based on a length of time that they be returned to the battle or released. In other words, if you capture a member of the enemy force, is it your understanding of the law that you have to at some point of time let them go back to the fight?

Judge SOTOMAYOR. I—it's difficult to answer that question in the abstract, for the reason that I indicated later. I've not been a student of the law of war.

Senator GRAHAM. Okay.

Judge SOTOMAYOR. Other than to——

Senator GRAHAM. We'll have another round. I know you'll have a lot of things to do, but try to—try to look at that. Look at that general legal concept. And the legal concept I'm espousing is that, under the law of war, Article 5, specifically, of the Geneva Convention, requires a detaining authority to allow an impartial decisionmaker to determine the question of status, whether or not you're a member of the enemy force. And see if I'm right about the law, that if that determination is properly had, there is no requirement under the Law of Armed Conflict to release a member of the enemy force that still presents a threat. I would like you to look at that.

Judge SOTOMAYOR. Senator——

Senator GRAHAM. Now, let's talk about—thank you.

Let's talk about your time as a lawyer. The Puerto Rican Legal Defense Fund. Is that right? Is that the name of the organization?

Judge SOTOMAYOR. It was then. I think it—I—I know it has changed names recently.

Senator GRAHAM. Okay. How long were you a member of that organization?

Judge SOTOMAYOR. Nearly 12 years.

Senator GRAHAM. Okay.

Judge SOTOMAYOR. If not 12 years.

Senator GRAHAM. Right. During that time you were involved in litigation matters. Is that correct?

Judge SOTOMAYOR. The Fund was involved in litigations. I was a board member of the Fund.

Senator GRAHAM. Okay. Are you familiar with the position that the Fund took regarding taxpayer-funded abortion, the briefs they filed?

Judge SOTOMAYOR. No. I never reviewed those briefs.

Senator GRAHAM. Well, in their briefs they argued—and I will submit the quotes to you—that if you deny a low-income woman Medicaid funding, taxpayer funds to have an abortion, if you deny her that, that's a form of slavery. And I can get the quotes.

Do you agree with that?

Judge SOTOMAYOR. I wasn't aware of what was said in those briefs. Perhaps it might be helpful if I explain what the function of a board member is and what the function of the staff would be in an organization like the Fund.

Senator GRAHAM. Okay.

Judge SOTOMAYOR. In a small organization, as the Puerto Rican Legal Defense Fund was back then, it wasn't the size of—of other Legal Defense Funds, like the NAACP Legal Defense Fund——

Senator GRAHAM. Right.

Judge SOTOMAYOR [continuing]. Or the Mexican-American Legal Defense Fund, which are organizations that undertook very similar work to PRLDF. In an organization like PRLDF, a board member's main responsibility is to fund-raise, and I'm sure that a review of the board meetings would show that that's what we spent most of our time on. To the extent that we looked at the organization's legal work, it was to ensure that it was consistent with the broad mission statement of the Fund.

Senator GRAHAM. Is the mission statement of the Fund to include taxpayer-funded abortion?

Judge SOTOMAYOR. Our mission——

Senator GRAHAM. Was that one of the goals?

Judge SOTOMAYOR. Our mission statement was broad like the Constitution.

Senator GRAHAM. Yeah.

Judge SOTOMAYOR. Which meant that it—its focus was on promoting the equal opportunities of Hispanics in the United States.

Senator GRAHAM. Well, Judge, I've got—and I'll share them with you and we'll talk about this more—a host of briefs for a 12-year period where the Fund is advocating to the State court and to the Federal courts that to deny a woman taxpayer funds, low-income woman taxpayer assistance in having an abortion, is a form of slavery, it's an unspeakable cruel—cruelty to the life and health of a poor woman. Was it—was it or was it not the position of the Fund to advocate taxpayer-funded abortions for low-income women?

Judge SOTOMAYOR. I wasn't, and I didn't as a board member, review those briefs. Our lawyers were charged with——

Senator GRAHAM. Would it bother you if that's what they did?

Judge SOTOMAYOR. Well, I know that the Fund, during the years I was there, was involved in public health issues as it affected the Latino community. It was involved——

Senator GRAHAM. Is abortion a public health issue?

Judge SOTOMAYOR. Well, it was certainly viewed that way generally by a number of civil rights organizations at the time.

Senator GRAHAM. Do you personally view it that way?

Judge SOTOMAYOR. It wasn't a question of whether I personally viewed it that way or not. The issue was whether the law was settled on what issues the Fund was advocating on behalf of the community it represented. And——

Senator GRAHAM. Well, the Fund—I'm sorry. Go ahead.

Judge SOTOMAYOR. And so the question would become, was there a good-faith basis for whatever arguments they were making, as the Fund's lawyers were lawyers.

Senator GRAHAM. Well, yeah.

Judge SOTOMAYOR. They had an ethical obligation.

Senator GRAHAM. And quite frankly, that's—you know, lawyers are lawyers and people who have causes that they believe in have every right to pursue those causes. And the Fund, when you look—you may have been a board member, but I'm here to tell you, that filed briefs constantly for the idea that taxpayer-funded abortion was necessary and to deny it would be a form of slavery, challenged parental consent as being cruel, and I can go down a list of issues that the Fund got involved in, that the death penalty should be stricken because it has—it's a form of racial discrimination.

What's your view of the death penalty in terms of personally?

Judge SOTOMAYOR. The issue for me with respect to the death penalty is that the Supreme Court, since Gregg, has determined that the death penalty is constitutional under certain situations.

Senator GRAHAM. Right.

Judge SOTOMAYOR. I have rejected challenges to the Federal law and it's application in the one case I handled as a District Court judge, but it's a reflection of what my views are on the law.

Senator GRAHAM. As an advocate—as an advocate, did you challenge the death penalty as being an inappropriate punishment because the effect it has on race?

Judge SOTOMAYOR. I never litigated a death penalty case personally. The Fund——

Senator GRAHAM. Did you ever sign the memorandum saying that?

Judge SOTOMAYOR. I send the memorandum for the board to take under consideration what position, on behalf of the Latino community, the Fund should take on New York State reinstating the death penalty in the State. You—it's hard to remember because so much time has passed in the 30 years since I——

Senator GRAHAM. Yeah. Well, we'll give you a chance to look at some of the things I'm talking about because I want you to be aware of what I'm talking about.

Let me ask you this. We've got 30 seconds left. If a lawyer on the other side filed a brief in support of the idea that abortion is the unnecessary and unlawful taking of an innocent life and public

money should never be used for such a heinous purpose, would that disqualify them, in your opinion, from being a judge?

Judge SOTOMAYOR. An advocate advocates on behalf of the client they have, and so that's a different situation than how a judge has acted in the cases before him or her.

Senator GRAHAM. Okay. And the only reason I mention this, Judge, is that the positions you took, or this Fund took, I think, like the speeches, tell us some things, and we'll have a chance to talk more about your full life. But I appreciate the opportunity to talk with you.

Judge SOTOMAYOR. Thank you, sir.

Chairman LEAHY. Thank you very much, Senator Graham.

Senator Durbin.

Senator DURBIN. Thank you, Mr. Chairman. Judge, good to see you again.

Judge SOTOMAYOR. Hello, Senator. Thank you. And I thank you again for letting me use your conference room when I was as hobbled as I was.

Senator DURBIN. You were more than welcome there and there was more traffic of Senators in my conference room than I have seen since I was elected to the Senate.

This has been an interesting exercise today for many of us who have been on the Judiciary Committee for a while, because the people new to it may not know, but there has been a little bit of a role reversal here. The Democratic side is now, largely speaking, in favor of our president's nominee. The other side is asking questions more critical. In the previous two Supreme Court nominees, the tables were turned. There were more critical questions coming from the Democratic side.

There is also another obvious contrast. The two previous nominees that were considered while I was on the committee, Chief Justice Roberts and Justice Alito, are white males, and, of course, you come to this as a minority woman candidate.

When we asked questions of the white male nominees of a Republican president, we were basically trying to make sure that they would go far enough in understanding the plight of minorities, because, clearly, that was not in their DNA.

The questions being asked of you from the other side primarily are along the lines of: will you go too far in siding with minorities? It is an interesting contrast, as I watch this play out.

Two things have really been the focus on the other side, although a lot of questions have been asked. One was, your speeches, one or two speeches. I took a look here at your questionnaire. I think you have given hundreds of speeches. So that they would only find fault in one or two to bring up is a pretty good track record from this side of the table.

If, as politicians, all we had were one or two speeches that would raise some questions among our critics, we would be pretty fortunate. And when it came down to your cases, it appears that you have been involved, at least as a Federal judge, in over 3,000 cases and it appears that the *Ricci* case really is the focus of more attention than almost any other decision.

I think that speaks pretty well of you for 17 years on the bench and I want to join, as others have said, in commending the other

side, because although the questions have sometimes been pointed, I think they have been fair and I think you have handled the responses well.

I would like to say that on the speech which has come up time and again, the wise Latina speech, the next paragraph in that speech, I do not know if it has been read to the members, but it should be, because after you made the quote which has been the subject of many inquiries here, you went on to say, "Let us not forget that wise men like Oliver Wendell Holmes and Justice Cardozo voted on cases which upheld both sex and race discrimination in our society. Until 1972, no Supreme Court case ever upheld the claim of a woman in a gender discrimination case."

You went on to say, "I, like Professor Carter, believe that we should not be so myopic as to believe that others of different experiences or backgrounds are incapable of understanding the values and needs of people from a different group. Many are so capable."

"As Judge Cedarbaum," who may still be here, "pointed out to me, nine white men on the Supreme Court in the past have done so on many occasions and on many issues including Brown." That, to me, tells the whole story.

You are, of course, proud of your heritage, as I am proud of my own. But to suggest that a special insight and wisdom comes with it is to overlook the obvious. Wise men have made bad decisions. White men have made decisions favoring minorities. Those things have happened when people looked at the law and looked at the Constitution.

So I would like to get into two or three areas, if I might, to follow-up on, because they are areas of particular interest to me. I will return to one that Senator Graham just touched on and that is the death penalty.

A book, which I greatly enjoyed, I do not know if you ever had a chance to read, is "Becoming Justice Blackmun," a story of Justice Blackmun's career and many of the things that happened to him. Now, late in his career, he decided that he could no longer support the death penalty and it was a long, thoughtful process that brought him to this moment.

He made the famous statement, maybe the best known line attributed to him, in a decision, *Callins* v. *Collins*, "From this day forward, I no longer shall tinker with the machinery of death." The 1994 opinion said:

"Twenty years have passed since this court declared that the death penalty must be imposed fairly and with reasonable consistency, or not at all, see *Furman* v. *Georgia*, and despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice and mistake."

Judge Sotomayor, I know that you have thought about this issue. Senator Graham made reference to the Puerto Rican Legal Defense and Education Fund memo that you once signed on the subject. What is your thought about Justice Blackmun's view that despite our best legal efforts, the imposition of the death penalty in the United States has not been handled fairly?

Judge SOTOMAYOR. With respect to the position the fund took in 1980–1981 with respect to the death penalty, that was, as I noted,

a question of being an advocate and expressing views on behalf of the community on a policy choice New York State was making: Should we or should we not reinstitute the death penalty?

As a judge, what I have to look at and realize is that in 30 years or 40, actually, there has been—excuse me, Senator. I'm sorry——

Senator DURBIN. It is all right.

Judge SOTOMAYOR [continuing]. Enormous changes in our society, many, many cases looked at by the Supreme Court addressing the application of the death penalty, addressing issues of its application and when they're constitutional or not.

The state of this question is different today than it was when Justice Blackmun came to his views. As a judge, I don't rule in an abstract. I rule in the context of a case that comes before me and a challenge to a situation and an application of the death penalty that arises in an individual case.

I've been and am very cautious about expressing personal views since I've been a judge. I find that people who listen to judges give—express their personal views on important questions that the courts are looking at; that they have a sense that the judge is coming into the process with a closed mind; that their personal views will somehow influence how they apply the law.

It's one of the reasons why, since I've been a judge, I've always been very careful about not doing that and I think my record speaks more loudly than I can——

Senator DURBIN. It does.

Judge SOTOMAYOR [continuing]. About the fact of how careful I am about ensuring that I'm always following the law and not my personal views.

Senator DURBIN. Well, you handled one death penalty case as a district court judge, *United States* v. *Heatley*, after, you had signed on to the Puerto Rican Legal Defense and Education Fund memo in 1981 recommending that the organization oppose reinstituting the death penalty in New York.

After you had done that, some years later, you were called on to rule on a case involving the death penalty. Despite the policy concerns that you and I share, you denied the defendant's motion to dismiss and you paved the way for the first Federal death penalty case in Manhattan in more than 40 years.

Now, the defendant ultimately accepted a plea bargain to a life sentence but you rejected his challenge to the death penalty and found that he had shown no evidence of discriminatory intent. So that makes your point. Whatever your personal feelings, you, in this case at the district court level, ruled in a fashion that upheld the death penalty.

I guess I am trying to take it a step beyond and maybe you will not go where I want to take you, and some nominees do not, but I guess the question that arises, in my mind, is how a man like Justice Blackmun, after a life on the bench, comes to the conclusion that despite all our best efforts, the premise of your 1981 memo is still the same, that, ultimately, the imposition of the death penalty in our country is too arbitrary.

Minorities in America today have accounted for a disproportionate 43 percent of executions, that is a fact, since 1976. And while white victims account for about one-half of all murder vic-

tims, 80 percent of death penalty cases involve victims who are white.

This raises some obvious questions we have to face on this side of the table. I am asking you if it raises questions of justice and fairness on your side of the table.

Judge SOTOMAYOR. In the *Heatley* case, it was the first prosecution in the Southern District of New York of a death penalty case in over 40 years. Mr. Heatley was charged with being a gang leader of a crack and cocaine enterprise who engaged in over—if the number wasn't 13, it was very close to that—13 murders to promote that enterprise.

He did challenge the application of the death penalty, charges against him, on the ground that the prosecutor had made its decision to prosecute him and refused him a cooperation agreement on the basis of his race.

The defense counsel, much as you have Senator, raised any number of concerns about the application of the death penalty and in response to his argument, I held hearings not on that question, but on the broader question of what had—on the specific legal question—what had motivated this prosecutor to enter this prosecution and whether he was denied the agreement he sought on the basis of race. I determined that that was not the case and rejected his challenge.

With respect to the issues of concerns about the application of the death penalty, I noted for the defense attorneys that, in the first instance, one back question of the effects of the death penalty, how it should be done, what circumstances warrant it or don't in terms of the law, that that's a legislative question.

And, in fact, I said to him—I acknowledged his concerns, I acknowledged that many had expressed views about that, but that's exactly what I said, which is, "I can only look at the case that's before me and decide that case."

Senator DURBIN. There is a recent case before the Supreme Court I would like to make reference to, *District Attorney's Office* v. *Osborne*, involving DNA. It turns out there are only three states in the United States that do not provide state legislated post-conviction access to DNA evidence that might exonerate someone who is in prison.

I am told that since 1989, 240 post-conviction DNA exonerations have taken place across this country, 17 involving inmates on death row. Now, the Supreme Court, in the *Osborne* case, was asked, What about those three states? Is there a Federal right to post-conviction access to DNA evidence for someone currently incarcerated? It asked whether or not they were properly charged and convicted. And the court said, no, there was no Federal right. But it was a 5–4 case.

So though I do not quarrel with your premise that it is our responsibility on this side of the table to look at the death penalty, the fact is, in this recent case, this *Osborne* case, there was a clear opportunity for the Supreme Court, right across the street, to say, We think this gets to an issue of due process, regarding someone sitting on death row in Alaska, Massachusetts or Oklahoma, where their state law gives them no post-conviction right of access to DNA evidence.

So I ask you, either from the perspective of DNA or from other perspectives, is it not clear that the Supreme Court does have some authority in the due process realm to make decisions relating to the arbitrariness of the death penalty?

Judge SOTOMAYOR. The court is not a legislative body. It is a reviewing body of whether a particular act by a state in a particular case is constitutional or not.

In a particular situation, the court may conclude that the state has acted unconstitutionally and invalidate the act. But it's difficult to answer a question about the role of the court outside of the functions of the court, which is we don't make broad policies. We decide questions based on cases and the principles implicated by that particular case before you.

Senator DURBIN. I follow you and I understand the limitations on policy-related questions that you are facing. So I would like to go to another area relating to policy and ask your thoughts on it.

We have, on occasion, every 2 years here, a chance to go across the street for an historic dinner. The members of the U.S. Senate sit down with the members of the U.S. Supreme Court. We look forward to it. It is a tradition that is maybe six or 8 years old, Mr. Chairman, I do not think much older.

Chairman LEAHY. It is a great tradition.

Senator DURBIN. Great tradition, and we get to meet them, they get to meet us. I sat down with one Supreme Court justice, I won't name this person, but I said at the time that I was chairing the Crime Subcommittee in Judiciary and said to this justice, "What topic do you think I should be looking into as a Senator when it comes to justice in the United States?" And this justice said, "Our system of corrections and incarceration in America, it has to be the worst."

It is hard to imagine how it could be much worse if we tried to design it that way. Today, in the United States, 2.3 million people are in prison. We have the most prisoners of any country in the world, as well as the highest per capita rate of prisoners in the world.

In America today, African-Americans are incarcerated at six times the rate of white Americans. Now, there is one significant reason for this and you have faced at least an aspect of it as a judge, and that is the crack-powder disparity in sentencing.

I will readily concede I voted for it, as did many members of the House of Representatives, frightened by the notion of this new narcotic called crack that was so cheap and so destructive that we had to do something dramatic. We did. We established a 100-to-1 ratio in terms of sentencing.

Now, we realize we made a serious mistake. Eighty-one percent of those convicted for crack offenses in 2007 were African-American, although only about 25 percent of crack cocaine users are African-Americans. I held a hearing on this and Judge Reggie Walton, the former associate director of the Office of National Drug Control Policy, testified and he basically said that this sentencing disparity between crack and powder has had a negative impact in courtrooms across America.

Specifically, he stated that people come to view the courts with suspicion as institutions that mete out unequal justice, and the

moral authority of not only the Federal courts, but all courts, is diminished. I might say, for the record, that this administration has said they want to change this and make the sentencing ratio one-to-one. We are working on legislation on a bipartisan basis to do so.

You face this as a judge, at least some aspect of it. You sentenced Louis Gomez, a non-violent drug offender, to a 5-year mandatory minimum and you said, when you sentenced him, "You do not deserve this, sir. I am deeply sorry for you and your family, but I have no choice."

May I ask you to reflect for a moment, if you can, beyond this specific case or using this specific case, on this question of race and justice in America today? It goes to the heart of our future as a nation and whether we can finally come to grips and put behind us some of the terrible things that have happened in our history.

Judge SOTOMAYOR. It's so unsatisfying, I know, for you and probably the other Senators, when a nominee to the court doesn't engage directly with the societal issues that are so important to you, both as citizens and Senators. And I know they are important to you, because this very question you just mentioned to me is part of bipartisan efforts that you're making, and I respect that many have concerns on lots of different issues.

For me, as a judge, both on the circuit or potentially as a nominee to the Supreme Court, my role is a very different one. And in the Louis Gomez case, we weren't talking about the disparity. We were talking about the quantity of drug and whether I had to follow the law on the statutory minimum that Congress required for the weight of drugs at issue.

In expressing a recognition of the family's situation and the uniqueness of that case, it was at a time when Congress had not recognized the safety valve for first-time offenders under the drug laws. That situation had motivated many judges in many situations to comment on the question of whether the law should be changed to address the safety valve question, then make a statement, making any suggestions to Congress, I followed the law.

But I know that the attorney general's office, many people spoke to Congress on this issue and Congress passed a safety valve.

With respect to the crack-cocaine disparity, as you may know, the guidelines are no longer mandatory as a result of a series of recent Supreme Court—not so recent, but Supreme Court cases probably almost in the last 10 years. I think the first one, Apprendi, was in 2000, if my memory is serving me right, or very close to that.

At any rate, that issue was addressed recently by the Supreme Court in a case called *U.S.* v. *Kimbro* and the court noted that the Sentencing Commission's recommendation of sentences was not based on its considered judgment that the 100-to-1 ratio was an appropriate sentence for this conduct and the court recognized that sentencing judges could take that fact into consideration in fashioning an individual sentence for a defendant.

And, in fact, the Sentencing Commission, in very recent time, has permitted defendants who have been serving prior sentences, in certain situations, to come back to court and have the courts reconsider whether their sentences should be reduced in a way speci-

fied under the procedures established by the Sentencing Commission.

This is an issue that I can't speak further about, because it is an issue that's being so actively discussed by Congress and which is controlled by law. But as I said, I can appreciate why not saying more would feel unsatisfying, but I am limited by the role I have.

Senator DURBIN. One last question I will ask you. I would like to hear your perspective on our immigration courts. A few years ago, Judge Richard Posner from my home state of Illinois brought this problem to my attention.

In 2005, he issued a scathing opinion criticizing our immigration courts in America. He wrote, "The adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice."

For those who do not know this Judge Posner, he is an extraordinary man. I would not know where to put him exactly on the political spectrum, because I am not sure what his next book will be. He has written so many books. He is a very gifted and thoughtful person.

In 2002, then Attorney General John Ashcroft issued so-called streamlining regulations that made dramatic changes in our immigration courts, reducing the size of the Board of Immigration Appeals from 23 to 11. This board stopped using three-member panels and board members began deciding cases individually, often within minutes and without written opinions.

In response, immigrants began petitioning the Federal appellate court in large numbers. In 2004, immigration cases constituted 17 percent of all Federal appeals, up from 3 percent in 2001, the last year before the regulations under Attorney General Ashcroft.

I raised this issue with Justice Alito during his confirmation hearing and he told me, "I agree with Judge Posner that the way these cases are handled leaves an enormous amount to be desired. I have been troubled by this."

What has been your experience on the circuit court when it came to these cases and what is your opinion of Judge Posner's observation in this 2005 case?

Judge SOTOMAYOR. There's been 4 years since Judge Posner's comments and they have to be placed somewhat in perspective. Attorney General Ashcroft's—what you described as streamlining procedures have been by, I think, all of the circuit courts that have addressed the issue, affirmed and given Chevron deference.

So the question is not whether the streamlined procedures are constitutional or not, but what happened when he instituted that procedure is that, with all new things, there were many imperfections. New approaches to things create new challenges and there's no question that courts faced with large numbers of immigration cases, as was the second circuit—I think we had the second largest number of new cases that arrived at our doorsteps, the ninth circuit being the first, and I know the seventh had a quite significantly large number—were reviewing processes that, as Justice Alito said, left something to be desired in a number of cases.

I will say that that onslaught of cases and the concerns expressed in a number of cases by the judges, in the dialog that goes on in court cases, with administrative bodies, with Congress, re-

sulted in more cooperation between the courts and the immigration officials in how to handle these cases, how to ensure that the process would be improved.

I know that the attorney general's office devoted more resources to the handling of these cases. There's always room for improvement. The agency is handling so many matters, so many cases, has so many responsibilities, making sure that it has adequate resources and training is an important consideration, again, in the first instance, by Congress, because you set the budget.

In the end, what we can only do is ensure that due process is applied in each case, according to the law required for the review of ths cases.

Senator DURBIN. Do you feel that it has changed since 2005, when Judge Posner said the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice?

Judge SOTOMAYOR. Well, I wouldn't—I'm not endorsing his views, because he can only speak for himself. I do know that in, I would say, the last two or 3 years, the number of cases questioning the processes in published circuit court decisions has decreased.

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

Chairman LEAHY. Thank you very, very much Senator Durbin. I have discussed this with Senator Sessions and, as I told him earlier, also, at his request, we have not finished the first round, but once we finish the first round of questions, we will have 20-minute rounds on the second.

I am going to urge Senators, if they do not feel the need to use the whole round, just as Senator Durbin just demonstrated, that they not.

But here will be the schedule. We will break for today. We will begin at 9:30 in the morning. We will finish the first round of questions, the last round will be asked by Senator Franken, and then we will break for the traditional closed door session with the nominee.

So for those who have not seen one of these before, we do this with all Supreme Court nominees. We have a closed session just with the nominee. We go over the FBI report. We do it with all of them. I think we can generally say it is routine. We did it with Chief Justice Roberts and Justice Alito and Justice Breyer and everybody else.

Then we will come back for a round of 20 minutes each, but during that round, I will encourage Senators, if they feel all the questions have been asked—I realize sometimes all questions may have been asked, but not everybody has asked all of the questions—that we try to ask at least something new to keep up the interest and then we can determine whether we are prepared—depending on how late it is—whether we can do the panels or whether we have to do the panels on Thursday.

Senator SESSIONS. Thank you, Chairman Leahy. I do think that the scheme you arranged for this hearing is good, the way we have gone forward. I thank you for that. We have done our best to be ready in a short timeframe, and I believe the members on this side are ready.

Talking of questions, there is not any harm in asking. Is that not a legal rule? To get people to reduce their time. But there are still some important questions and I think we will certainly want to use—most members would want to use that 20 minutes.

I appreciate that and look forward to being with you in the morning.

Chairman LEAHY. That is why I asked the question. I probably have violated the first rule that I learned as a trial lawyer—you should not ask a question if you do not know what the answer is going to be. But then I also had that other aspect where hope springs eternal. As we have a whole lot of other things going on in the Senate, I would hope we might.

Senator Cardin, Senator Whitehouse, Senator Klobuchar, Senator Specter and Senator Franken, I am sorry that we do not get to you yet, but we will before we do the closed session.

Judge, thank you very much.

Judge SOTOMAYOR. Thank you.

Chairman LEAHY. We stand in recess.

[Whereupon, at 5:26 p.m., the Committee was recessed.]

[The biographical information of Sonia Sotomayor follows.]