

It is likely that the Supreme Court will consider important protections in our Constitution for women, our environment and consumers, as well as voting rights, privacy, and the separation of church and state, among others, in coming years. The Supreme Court also has recently been active in imposing limits on executive power. It will continue to deal with the Constitutional rights in our criminal justice system, the rights of terror detainees and the rights of non-citizens.

All of these issues test our Nation's and the Supreme Court's commitment to our founding principles and fundamental values. For this reason, we need to know how our nominee might approach these issues and analyze these decisions.

Mr. Chairman, I look forward to hearing from Judge Sotomayor on these issues and I expect that she will share with this committee and the American people her judicial views and her thoughts on the protections in our Constitution.

Once again, Judge Sotomayor, I want to thank you for your public service and readiness to take on these great responsibilities for our nation. I also again want to thank your family for their clear support and sacrifice that has brought us to this hearing today.

Chairman LEAHY. Thank you, Senator Cardin. After discussion with Senator Sessions, we will take a 10-minute break and come back. We are trying to figure out a lunch hour time. You have been very, very patient, Judge.

One thing we will do in case the press wonders, there is a sign in front of you that has your name, which everybody knows here. It is angled in such a way that it is shining right in the eyes—no, don't you worry about it. The sign will be gone. That will not mean that that is not your place when you come back. Thank you. We stand recessed for 10 minutes.

[Recess 11:42 a.m. to 12:01 p.m.]

Chairman LEAHY. Judge, you may have a broken ankle, but you beat me back to the hearing room. I am looking, Senator Sessions. It will be Senator Cornyn next. Is that right?

Senator SESSIONS. Yes.

Chairman LEAHY. Senator Cornyn, and then Senator Whitehouse.

Senator Cornyn.

#### **STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM TEXAS**

Senator Cornyn. Thank you, Mr. Chairman.

Judge Sotomayor, you will recall Justice Jackson said of the Supreme Court, "We are not final because we are infallible. We are infallible only because we are final." Hence, the importance of these hearings and your nomination.

I want to join my colleagues in extending a warm welcome to you and your family and, of course, join my other colleagues who have noted your distinguished career. As I have said as often as I have been asked about your nomination in the weeks since it occurred, I said your nomination should make us all feel good as Americans that people of humble origin can work hard, through sacrifice and love and support of their families, achieve great things in America.

That makes me feel very good about our country and about the opportunity it provides to each of us.

In the history of the United States, there have only been 110 people who served on the Supreme Court—110. It is amazing to think about that. This means that each and every Supreme Court nomination is a historic moment for our Nation. Each Supreme Court nomination is a time for national conversation and reflection on the role of the Supreme Court.

We have to ask ourselves, those of us who have the constitutional obligation to provide advice and consent, what is the proper direction of the Supreme Court in deciding how we should vote and conduct ourselves during the course of the hearing. And, of course, I think it is always useful to recall our history, that the Framers created a written Constitution to make sure our constitutional rights were fixed and certain; that the State conventions who represented we, the people, looked at that written Constitution and decided to ratify it. And the idea was, of course, that our rights should not be floating in the ether but, rather, be written down for all to see so we could all understand what those rights, in fact, are.

This framework gave judges a role that is both unique and very important. The role of judges was intended to be modest—that is, self-restrained and limited. Judges, of course, are not free to invent new rights as they see fit. Rather, they are supposed to enforce the Constitution's text and to leave the rest up to "we, the people," through the elected representatives of the people, such as the Congress.

It is my opinion that over time the Supreme Court has often veered off the course established by the Framers. First, the Supreme Court has invented new rights not clearly rooted in any constitutional text. For example, the Supreme Court has micro managed the death penalty, recognized in 35 States and by the Federal Government itself, and created new rights spun from whole cloth. It has announced constitutional rules governing everything from punitive damages to sexual activity. It has relied on international law that you have heard some discussion about that the people have never adopted.

The Supreme Court has even taken on the job of defining the rules of the game of golf. If you are curious, that is *PGA Tour v. Martin* from 2001.

Some people have talked about judicial activism. In one sense, I think people say activism is a good thing if it is enforcing the rights and the laws that have been passed by the legislative branch. On the other hand, as you know, inventing new rights, veering off this course of enforcing a written text and pulling ideas out of the ether are pretty far from enforcing the written Constitution that the Framers proposed and that the people enacted.

My opinion is that as the Supreme Court has invented new rights, it has often neglected others. This flip side is troubling to me, too. Many of the original important safeguards on Government power have been watered down or even ignored. Express constitutional limitations like the Takings Clause of the Fifth Amendment, designed to protect private property, and the Commerce Clause's limitations on federal power, as well as the Second Amendment right to keep and bear arms, I believe have been artificially lim-

ited, almost like they have been written out of the Constitution over time. On occasion, judges just have not enforced them like I believe the American people expected them to do.

So what is the future like? Where should the Supreme Court go from here? I think there are two choices.

First, the Supreme Court could try to get us back on course. That is, the Court could demonstrate renewed respect for our original plan of Government and return us slowly but surely to a written Constitution and written laws rather than judge-made laws. The Supreme Court's recent Second Amendment decision in *D.C. v. Heller* I think is a good example of that.

Or the Court could, alternatively, veer off course once again and follow its own star. It could continue to depart from the written Constitution. It could further erode the established rights that we have in the text of the Constitution, and it could invent even more brand-new rights not rooted in the text and not agreed to by the American people.

Your Honor, I think the purpose of this hearing is to determine which path you would take us on, if confirmed to the United States Supreme Court. Would you vote to return to a written Constitution and laws written by the elected representatives of the people? Or would you take us further away from the written Constitution and laws legitimized by the consent of the governed?

To help the American people understand which of these paths you would take us down, we need to know more about your record. We need to know more about the legal reasoning behind some of your opinions on the Second Circuit. And we need to know more about some of your public statements related to your judicial philosophy.

In looking at your opinions on the Second Circuit, we recognize that lower-court judges are bound by the Supreme Court and by circuit precedent. To borrow a football analogy, a lower-court judge is like the quarterback who executes the plays, not the coach that calls them. That means many of your cases do not really tell us that much about your judicial philosophy or what it would be in action, if confirmed to the United States Supreme Court. But a few of your opinions do raise questions that I intend to ask you about, and they do suggest, I think, the kinds of plays you would call if you were promoted to the coaching staff.

These opinions raise the question: Would you steer the Court in a direction of limiting the rights that generations of Americans have regarded as fundamental? So Americans need to know whether you would limit, for example, the scope of the Second Amendment and whether we can count on you to uphold one of the fundamental liberties enshrined in the Bill of Rights.

They need to know, we need to know, whether you would limit the scope of the Fifth Amendment and whether you would expand the definition of "public use" by which Government can take private property from one person and give it to another. And we need to know whether you will uphold the plain language of the Equal Protection Clause of the 14th Amendment, promising that, "No State shall..deny to any person within its jurisdiction the equal protection of the laws."

Judge, some of your opinions suggest that you would limit some of these constitutional rights, and some of your public statements that have already been mentioned suggest that you would invent rights that do not exist in the Constitution.

For example, in a 2001 speech, you argue that there is no objectivity in law, but only what you called “a series of perspectives rooted in life experience of the judge.”

In a 2006 speech, you said that judges can and even must change the law—even introducing what you called “radical change”—to meet the needs of an “evolving” society.

In a 2009 speech, you endorsed the use of foreign law in interpreting the American Constitution on the grounds that it gives judges “good ideas” that “get their creative juices flowing.”

Judge Sotomayor, no one can accuse you of not having been candid about your views. Not every nominee is so open about their views. Yet many Americans are left to wonder whether these various—what these various statements mean and what you are trying to get at with these various remarks. Some wonder whether you are the kind of judge who will uphold the written Constitution or the kind of judge who will veer us off course—and toward new rights invented by judges rather than ratified by the people.

These are some my concerns, and I assure you that you will have every opportunity to address those and make clear which path you would take us down if you are confirmed to the Supreme Court.

I thank you very much and congratulations once again.

Chairman LEAHY. Thank you very much, Senator Cornyn.

Senator Whitehouse.

**STATEMENT OF HON. SHELDON WHITEHOUSE, A U.S. SENATOR  
FROM RHODE ISLAND**

Senator WHITEHOUSE. Thank you, Mr. Chairman.

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

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

In the last 2½ months and today, my Republican colleagues have talked a great deal about judicial modesty and restraint. Fair enough to a point, but that point comes when these words become slogans, not real critiques of your record. Indeed, these calls for restraint and modesty, and complaints about “activist” judges, are often codewords, seeking a particular kind of judge who will deliver a particular set of political outcomes.

It is fair to inquire into a nominee's judicial philosophy, and we will here have a serious and fair inquiry. But the pretense that Republican nominees embody modesty and restraint, or that Demo-