Statement of

The Honorable Russ Feingold

United States Senator
Wisconsin
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Statement of U.S. Senator Russ Feingold
On the Nomination of Sonia Sotomayor to be an Associate Justice of the Supreme Court of the United States
Senate Judiciary Committee

As Prepared For Delivery

"The Supreme Court plays a unique and central role in the life of our nation. Those who sit as Justices have extraordinary power over some of the most important, and most intimate, aspects of the lives of American citizens. It is therefore not surprising at all that the nomination and confirmation of a Supreme Court Justice is such a widely anticipated and widely covered event. The nine men and women who sit on the court have enormous responsibilities, and those of us tasked with voting on the confirmation of a nominee have a significant responsibility as well. I consider this one of the most consequential things I must do as a United States Senator, and I am honored and humbled to have been given this role by the people of Wisconsin.

"The ultimate responsibility of the Supreme Court is to safeguard the rule of law, which defines us as a nation, and protects us all. In the past eight years, the Supreme Court has played a crucial role in checking some of the previous Administration's most egregious departures from the rule of law. Time after time in cases arising out of actions taken by the administration after September 11, the Court has said 'No. You have gone too far.'

"It said 'No' to the Bush Administration's view that it could set up a law-free zone at Guantanamo Bay. It said 'No' to the administration's view that it could hold a citizen in the United States incommunicado indefinitely, with no access to a lawyer. It said 'No' to the administration's decision to create military commissions without congressional authorization. And it said 'No' to the administration and to Congress when they tried to strip the constitutional right to habeas corpus from prisoners held at Guantanamo.

"These were courageous decisions, and in my opinion, they were correct decisions. They made plain, as Justice O'Connor wrote in the Hamdi decision in 2004, 'A state of war is not a blank check for the president when it comes to the rights of the nation's citizens.'

"These were also close decisions, some decided by a 5-4 vote. That fact underscores the unparalleled power that each Supreme Court justice has. In my opinion, one of the most important qualities that a Supreme Court justice must have is courage: courage to stand up to the president, and to Congress, in order to protect the constitutional rights of the American people and preserve the rule of law.

"I have touched on the crucial recent decisions of the Court in the area of executive power, but we know, of course, that there are countless past Supreme Court decisions that have had a major impact on many aspects of our national life. The Court rejected racial discrimination in education; it guaranteed the principle of 'one person, one vote'; it made sure that even the poorest person accused of a crime in this country can be represented by counsel; it made sure that newspapers can't be sued for libel by public figures for making a mistake; it protected the privacy of telephone conversations from unjustified government eavesdropping; it protected an individual's right to possess a firearm for private use, and it even decided a presidential election. It made these decisions by interpreting and applying open-ended language in our Constitution like 'equal protection of the laws,' 'due process of law,' 'freedom of ... the press,' 'unreasonable searches and seizures,' and 'the right to bear arms.' These momentous decisions were not simply the result of an umpire calling balls and strikes. Easy cases where the law is clear almost never make it to the Supreme Court. The great constitutional issues that the Supreme Court is called upon to decide require much more than mechanical application of universally accepted legal principles.

"That is why Justices need great legal expertise, but they also need wisdom, they need judgment, they need to understand the impact of their decisions on the parties before them and the country around them, from New York City to small towns like Spooner, Wisconsin, and they need a deep appreciation of and dedication to equality, to liberty, to democracy.

"That is why I suggest to everyone watching today that they be a little wary of a phrase they may hear at these hearings - 'judicial activism.' That term really has lost all usefulness, particularly since so many rulings of the conservative majority on the Supreme Court can fairly be described as 'activist' in their disregard for precedent and their willingness to ignore or override the intent of Congress. At this point, perhaps we should all accept that the best definition of a 'judicial activist' is a judge who decides a case in a way you don't like. Each of the decisions I mentioned earlier was undoubtedly criticized by someone at the time it was issued, and maybe even today, as being 'judicial activism.' Yet some of them are among the most revered Supreme Court decisions in modern times.

"Mr. Chairman, every senator is entitled to ask whatever questions he or she wants at these hearings and to look to whatever factors he or she finds significant in evaluating this nominee. I hope Judge Sotomayor will answer all questions as fully as possible. I will have questions of my own on a range of issues. Certainly, with the two most recent Supreme Court nominations, senators asked tough questions and sought as much information from the nominees as we possibly could get. I expect nothing less from my colleagues in these hearings. I'm glad, however, that Judge Sotomayor will finally have an opportunity to answer some of the unsubstantiated charges that have been made against her.

"One attack that I find particularly shocking is the suggestion that she will be biased against some litigants because of her racial and ethnic heritage. This charge is not based on anything in her judicial record because there is absolutely nothing in the hundreds of opinions she has written to support it. That long record - which is obviously the most relevant evidence we have to evaluate her - demonstrates a cautious and careful approach to judging. Instead, a few lines from a 2001 speech, taken out of context, have prompted some to charge that she is a racist. I believe

that no one who reads the whole Berkeley speech could honestly come to that conclusion. The speech is actually a remarkably thoughtful attempt to grapple with a difficult issue not often discussed by judges - how do a judge's personal background and experiences affect her judging. And Judge Sotomayor concludes her speech by saying the following:

'I am reminded each day that I render decisions that affect people concretely and that I owe them constant and complete vigilance in checking my assumptions, presumptions and perspectives and ensuring that to the extent that my limited abilities and capabilities permit me, that I reevaluate them and change as circumstances and cases before me require.'

"Mr. Chairman, those are the words of a thoughtful, humble, and self-aware judge striving to do her very best to administer impartial justice for all Americans, from New York City to Spooner, Wisconsin. It seems to me that is a quality we want in our judges.

"Judge Sotomayor is living proof that this country is moving in the right direction on the issue of race, that doors of opportunity are finally starting to open to all of our citizens. Just as the election of President Obama gave new hope and encouragement to African American children all over this country, Judge Sotomayor's nomination will inspire countless Hispanic American children to study harder and dream higher, and that is something we should all celebrate.

"Let me again welcome and congratulate the nominee. I look forward to learning in these hearings whether she has the knowledge, the wisdom, the judgment, the integrity, and yes, the courage, to serve with distinction on our nation's highest court. Thank you Mr. Chairman."