

Statement of
The Honorable Orrin Hatch

United States Senator
Utah
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Before the United States Senate Committee on the Judiciary
On the nomination of Judge Sonia Sotomayor to be
Associate Justice of the Supreme Court of the United States

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Thank you, Mr. Chairman.

This is the twelfth hearing for a Supreme Court nominee in which I have participated, and I am as struck today as I was the first time by the seriousness of our responsibility and its impact on America. I am confident that under this committee's leadership, from both you and the distinguished ranking member, this hearing will be both respectful and substantive.

Judge Sotomayor comes to this committee for the third time, having served on the first two levels of the federal judiciary, and now, being nominated to the third. She has a compelling life story and a strong record of educational and professional achievement. Her nomination speaks to the opportunities that America today provides for men and women of different backgrounds and heritage. The liberty we enjoy here in America makes those opportunities possible and requires our best efforts to protect that liberty. Our liberty rests on the foundation of a written Constitution that limits and separates government power, self-government by the people, and the rule of law. Those principles define the kind of judge our liberty requires, they define the role judges may play in our system of government.

I have described my basic approach to the judicial confirmation process in more detail elsewhere. I ask consent that my article published this year in the Harvard Journal of Law & Public Policy titled The Constitution as the Playbook for Judicial Selection be placed in the record. My approach includes three elements. First, the Senate owes some deference to the President's qualified nominees. Second, a judicial nominee's qualifications include not only legal experience but, more importantly, judicial philosophy. By that I mean a nominee's understanding of the power and proper role of judges in our system of government. Third, this standard must be applied to a nominee's entire record.

I have also found guidance from what may seem to some as an unusual source. On June 8, 2005, then-Senator Barack Obama explained his opposition to the appeals court nomination of Janice Rogers Brown, an African-American woman with a truly compelling life story who then served

as a Justice on the California Supreme Court. Senator Obama made three arguments that I find relevant today.

First, he argued that the test of a qualified judicial nominee is whether she can set aside her personal views and, as he put it, "decide each case on the facts and the merits alone....That is what our Founders intended....Judicial decisions ultimately have to be based on evidence and on facts. They have to be based on precedent and on law."

Second, Senator Obama extensively reviewed Justice Brown's speeches off the court for clues about what he called her "overarching judicial philosophy." There is even more reason to do so today. This is, after all, a nomination to the Supreme Court of the United States.

Judge Sotomayor, if confirmed, will help change the very precedents that today bind her as a U.S. Circuit Judge. In other words, the judicial position to which she has been nominated is quite different than the judicial position she now occupies.

This makes evidence, outside of her appeals court decisions, regarding her approach to judging more, not less, important. Judge Sotomayor has obviously thought, spoken, and written much on these issues and I think we show respect to her in taking that entire record seriously.

Third, Senator Obama said that while a nominee's race, gender, and life story are important, they cannot distract from the fundamental focus on the kind of judge she will be. He said then, as I have said today, that we should all be grateful for the opportunity that our liberty affords for Americans of different backgrounds.

We should applaud Judge Sotomayor's achievements and service to her community, her profession, and her country. Yet Senator Obama called it "offensive and cynical" to suggest that a nominee's race or gender can give her a pass for her substantive views. He proved it by voting twice to filibuster Judge Janice Rogers Brown's nomination, and then by voting against her confirmation. I share his hope that we have arrived at a point in our country's history where individuals can be examined and even criticized for their views, no matter what their race or gender. If those standards were appropriate when Senator Obama opposed Republican nominees, they should be appropriate now that President Obama is choosing his own nominees.

But today, President Obama says that personal empathy is an essential ingredient in judicial decisions. Today, we are urged to ignore Judge Sotomayor's speeches altogether and focus only on her judicial decisions. I do not believe that we should do that.

I wish that other current standards had been applied to past nominees. Democratic Senators, for example, offer as proof of Judge Sotomayor's moderation that she has agreed with her Republican-appointed Second Circuit colleagues 95 percent of the time. Joined by then-Senator Obama, however, many of those same Democratic Senators voted against Justice Samuel Alito's confirmation even though he had voted with his Democratic-appointed Third Circuit colleagues 99 percent of the time during a much longer appeals court career.

And although Justice Alito also received the ABA's highest rating, Senator Obama joined 24 other Democrats in even voting to filibuster that nomination. And then he joined a total of 42

Democrats in voting against Justice Alito's confirmation. In fact, Senator Obama never voted to confirm a Supreme Court Justice. He even voted against the man who administered the oath of presidential office, Chief Justice John Roberts, another distinguished and well qualified nominee.

If a compelling life story, academic and professional excellence, and a top ABA rating make a convincing confirmation case, Miguel Estrada would be a U.S. Circuit Judge today. He is a brilliant, universally respected lawyer, one of the top Supreme Court practitioners in America. But he was fiercely opposed by groups, and repeatedly filibustered by Democrat Senators, the ones who today say these same factors should count in Judge Sotomayor's favor. Whether I vote for or against Judge Sotomayor, it will be by applying the principles I have laid out, not by using such tactics and standards used against these nominees in the past.

Judicial appointments have become increasingly contentious. Some of the things that have been said about Judge Sotomayor have been intemperate and unfair. There are now newspaper reports that left-wing groups supporting Judge Sotomayor, specifically the extreme-left People for the American Way, are engaged in a smear campaign against the plaintiff in one of her more controversial cases, a man who will be testifying here later in the week. If that is true, and I hope it is not, it is beneath both contempt and the dignity that this process demands.

But there must be a vigorous debate about the kind of judge America needs because nothing less than our liberty is at stake. Must judges set aside, or may judges consider, their personal feelings in deciding cases? Is judicial impartiality a duty or an option? Does the fact that judicial decisions affect so many people's lives require judges to be objective and impartial, or does it allow them to be subjective and sympathetic? Judge Sotomayor's nomination raises these and other important issues and I look forward to a respectful and energetic debate.

The confirmation process in general, and this hearing in particular, must be both dignified and thorough. There are very different and strongly held views about the issues we will explore, in particular, the role that judges should play in our system of government.

The task before us is to determine whether Judge Sonia Sotomayor is qualified, by legal experience and especially by judicial philosophy, to sit on the Supreme Court of the United States. Doing so requires examining her entire record, her speeches and articles as well as her judicial decisions.

We must at the same time be thankful for the opportunity represented by Judge Sotomayor's nomination and focus squarely on whether she will be the kind of judge required by the very liberty that makes that opportunity possible.

Thank you, Mr. Chairman.