

Statement of

The Honorable Jon Kyl

United States Senator
Arizona
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Kyl Opening Statement at Sotomayor Hearing

"Many of Judge Sotomayor's public statements suggest that she may, indeed, allow, and even embrace, decision-making based on her biases and prejudices"

WASHINGTON, D.C. -The U.S. Senate Judiciary Committee today began confirmation hearings on Judge Sonia Sotomayor, who was nominated to serve as an Associate Justice of the U.S. Supreme Court. U.S. Senate Republican Whip Jon Kyl, a member of the Judiciary Committee, delivered the following opening statement:

"I would hope every American is proud that a Hispanic woman has been nominated to sit on the Supreme Court. In fulfilling our advise and consent role, of course, we must evaluate Judge Sotomayor's fitness to serve on the merits, not on the basis of her ethnicity.

"With a background that creates a prima facie case for confirmation, the primary question I believe Judge Sotomayor must address in this hearing is her understanding of the role of an appellate judge. From what she has said, she appears to believe that her role is not constrained to objectively decide who wins based on the weight of the law, but who, in her opinion, should win. The factors that will influence her decisions apparently include her 'gender and Latina heritage' and foreign legal concepts that get her 'creative juices going.'

"What is the traditional basis for judging in America? For 220 years, presidents and the Senate have focused on appointing and confirming judges and justices who are committed to putting aside their biases and prejudices and applying law to fairly and impartially resolve disputes between parties.

"This principle is universally recognized and shared by judges across the ideological spectrum. For instance, Judge Richard Paez of the Ninth Circuit - with whom I disagree on a number of issues -explained this in the same venue where, less than 24 hours earlier, Judge Sotomayor made her now-famous remarks about a 'wise Latina woman' making better decisions than other judges. Judge Paez described the instructions that he gave to jurors who were about to hear a case. 'As jurors,' he said, 'recognize that you might have some bias, or prejudice. Recognize that it exists, and determine whether you can control it so that you can judge the case fairly. Because if you cannot--if you cannot set aside those prejudices, biases and passions--then you should not sit on the case.'

"And then Judge Paez said: 'The same principle applies to judges. We take an oath of office. At the federal level, it is a very interesting oath. It says, in part, that you promise or swear to do justice to both the poor and the rich. The first time I heard this oath, I was startled by its

significance. I have my oath hanging on the wall in the office to remind me of my obligations. And so, although I am a Latino judge and there is no question about that--I am viewed as a Latino judge--as I judge cases, I try to judge them fairly. I try to remain faithful to my oath.'

"What Judge Paez said has been the standard for 220 years--it correctly describes the fundamental and proper role for a judge.

"Unfortunately, a very important person has decided it is time for change--time for a new kind of judge; one who will apply a different standard of judging, including employment of his or her empathy for one of the parties to the dispute. That person is President Obama; and the question before us is whether his first nominee to the Supreme Court follows his new model of judging or the traditional model articulated by Judge Paez.

"President Obama, in opposing the nomination of Chief Justice Roberts, said that 'while adherence to legal precedent and rules of statutory or constitutional construction will dispose of 95 percent of the cases that come before a court . . . --what matters on the Supreme Court is those 5 percent of cases that are truly difficult. . . . In those 5 percent of hard cases, the constitutional text will not be directly on point. The language of the statute will not be perfectly clear. Legal process alone will not lead you to a rule of decision.'

"How does President Obama propose judges deal with these hard cases? Does he want them to use judicial precedent, canons of construction, and other accepted tools of interpretation that judges have used for centuries? No, President Obama says that 'in those difficult cases, the critical ingredient is supplied by what is in the judge's heart.'

"Of course, every person should have empathy, and in certain situations, such as sentencing, it may not be wrong for judges to be empathetic. The problem arises when empathy and other biases or prejudices that are 'in the judge's heart' become 'the critical ingredient' to deciding cases. As Judge Paez explained, a judge's prejudices, biases, and passions should not be embraced--they must be 'set aside' so that a judge can render an impartial decision as required by the judicial oath and as parties before the court expect.

"I respectfully submit that President Obama is simply outside the mainstream in his statements about how judges should decide cases. I practiced law for almost 20 years before every level of state and federal court, including the U.S. Supreme Court, and never once did I hear a lawyer argue that he had no legal basis to sustain his client's position, so that he had to ask the judge to go with his 'gut' or 'heart.' If judges routinely started ruling on the basis of their personal feelings, however well-intentioned, the entire legitimacy of the judicial system would be jeopardized.

"The question for this committee is whether Judge Sotomayor agrees with President Obama's theory of judging or whether she will faithfully interpret the laws and Constitution and take seriously the oath of her prospective office.

"Many of Judge Sotomayor's public statements suggest that she may, indeed, allow, and even embrace, decision-making based on her biases and prejudices.

"The 'wise Latina woman' quote, which I referred to earlier, suggests that Judge Sotomayor endorses the view that a judge should allow her gender-, ethnic-, and experience-based biases to guide her when rendering judicial opinions. This is in stark contrast to Judge Paez's view that these factors should be 'set aside.'

"In the same lecture, Judge Sotomayor posits that 'there is no objective stance but only a series of perspectives--no neutrality, no escape from choice in judging' and claims that '[t]he aspiration to impartiality is just that--it's an aspiration because it denies the fact that we are by our experiences making different choices than others.' No neutrality, no impartiality in judging? Yet, isn't that what the judicial oath explicitly requires?

"And according to Judge Sotomayor, 'Personal experiences affect the facts that judges choose to see. . . . I simply do not know exactly what that difference will be in my judging. But I accept there will be some based on my gender and my Latina heritage.'

"Judge Sotomayor clearly rejected the notion that judges should strive for an impartial brand of justice. She has already 'accepted' that her gender and Latina heritage will affect the outcome of her cases.

This is a serious issue, and it's not the only indication that Judge Sotomayor has an expansive view of what a judge may appropriately consider. In a speech to the Puerto Rican ACLU, Judge Sotomayor endorsed the idea that American judges should use 'good ideas' found in foreign law so that America does not 'lose influence in the world.'

"As I've explained on the floor of the Senate, the laws and practices of foreign nations are simply irrelevant to interpreting the will of the American people as expressed through our Constitution.

Additionally, the vast expanse of foreign judicial opinions and practices from which one might draw simply gives activist judges cover for promoting their personal preferences instead of the law. You can, therefore, understand my concern when I hear Judge Sotomayor say that unless judges take it upon themselves to borrow ideas from foreign jurisdictions, America is 'going to lose influence in the world.' That's not a judge's concern.

"Some people will suggest that we shouldn't read too much into Judge Sotomayor's speeches and articles--that the focus should instead be on her judicial decisions. I agree that her judicial record is an important component of our evaluation, and I look forward to hearing why, for instance, the Supreme Court has reversed or vacated 80 percent of her opinions that have reached that body, by a total vote count of 52 to 19.

"But we cannot simply brush aside her extrajudicial statements. Until now, Judge Sotomayor has been operating under the restraining influence of a higher authority--the Supreme Court. If confirmed, there will be no such restraint that would prevent her from--to paraphrase President Obama--deciding cases based on her heart-felt views. Before we can faithfully discharge our duty to advise and consent, we must be confident that Judge Sotomayor is absolutely committed to setting aside her biases and impartially deciding cases based upon the rule of law."

Sen. Jon Kyl is the Senate Republican Whip and serves on the Senate Finance and Judiciary committees. Visit his website at www.kyl.senate.gov.

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