Statement of

The Honorable Orrin Hatch

United States Senator
Utah
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Statement of Senator Orrin G. Hatch
Before the Senate Judiciary Committee
On the nomination of Sonia Sotomayor to be an Associate Justice of the Supreme Court
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Thank you, Mr. Chairman. I want to commend you and the distinguished ranking member, Senator Sessions, for conducting a fair and thorough confirmation hearing on the nomination of Judge Sonia Sotomayor to replace Justice David Souter. I was especially pleased when Judge Sotomayor said the hearing was as gracious and fair as she could have asked for.

I come to the confirmation process wanting to vote for a President's nominees and the prospect of a woman of Puerto Rican heritage serving on the Supreme Court says a lot about America. President Obama could have chosen a Hispanic nominee that all Senators could support. He chose not to do so and I regret that I cannot support this nominee.

Qualifications for judicial service include legal experience and Judge Sotomayor has an impressive record of academic and professional achievement. She has a compelling life story and an obvious commitment to public service. But qualifications also include the more important element of judicial philosophy, or a nominee's understanding of the power and proper role of judges in our system of government. Judge Sotomayor's approach to judging is more important to me than her resume.

In her opening statement at the hearing, Judge Sotomayor said that her judicial philosophy is simply fidelity to the law. Unfortunately, that phrase begs rather than answers the important questions. Her hearing testimony and answers to post-hearing written questions must be viewed against the rest of her record including her speeches, articles, and cases.

Some have encouraged us to selectively consider Judge Sotomayor's record, looking only at her cases and ignoring her speeches and articles. Judge Sotomayor, however, certainly took great care and gave great thought to her speeches and articles, and I believe that the respect she deserves requires taking her entire record seriously. We must, of course, look at each part of her record in its proper context for what it properly can provide. But it is particularly appropriate to consider Judge Sotomayor's entire record because, on the Supreme Court, she will help determine the very precedents that today bind her as an appeals court judge. Because she will not in the future have the same judicial constraints she has had in the past, her views about judicial power and process, expressed in other settings such as articles and speeches, become more rather than less relevant.

Judge Sotomayor has given speeches directly addressing how judges should approach deciding cases. She gave one particular speech more than half a dozen times over nearly a decade while she was a sitting judge. It is, therefore, a particularly useful source of her views on this important subject. In that speech, Judge Sotomayor acknowledged that race and gender affect how judges

decide cases generally, and "the facts I choose to see" specifically. She embraced the notion that there is no objectivity or neutrality in judging and that impartiality is merely an aspiration which judges probably cannot achieve, and perhaps should not attempt.

These are troubling statements that appear to conflict with the impartiality that I believe is essential, that most Americans expect, and that the oath of judicial office requires. As a result, Judge Sotomayor and her advocates have tried to blunt this speech's more controversial edges. They have, for example, emphasized its audience or its purpose rather than its content. The claim that she used the speech solely to inspire law students, however, is both false and irrelevant. It is false because she also gave the speech to other audiences, such as the Princeton Women's Network, and published it in a law journal certain to be read by a broader audience. More importantly, the claim is irrelevant because the controversy comes from its content, not from its audience.

In another speech that she gave just a few months ago, Judge Sotomayor discussed the relevance of foreign law to the interpretation and application of American law. The Supreme Court has begun using foreign law to shape its interpretation of constitutional provisions related to the death penalty, privacy, and other issues. In my view, this is simply another means judges use to change the meaning of the Constitution from what the people intended. Changing the Constitution's meaning is changing the Constitution itself, something judges have no authority to do. Judge Sotomayor was quite candid in this speech, saying that foreign law will be "very important" in thinking about legal issues and that judges may look to what "anyone has said to see if it has persuasive value" in deciding cases.

Once again, Judge Sotomayor's advocates have attempted to minimize the significance of such controversial views. At the hearing and in answers to post-hearing questions, for example, she appeared to take a narrower position than in her speech, stating that judges may not use foreign law as "binding or controlling precedent" in deciding cases. No one, however, argues otherwise. The issue is not whether a foreign court's decision can literally or formally bind an American court. It cannot. The issue has always been whether decisions by foreign courts may influence the interpretation, or may be used to shape the meaning, of American statutes or the Constitution. On that question, Judge Sotomayor said in answers to post-hearing questions that decisions of foreign courts can indeed be "a source of ideas informing our understanding of our own constitutional rights."

Analysts such as Byron York and Tony Mauro have observed what I found frustrating, that the position Judge Sotomayor took at the hearing appeared to conflict with the positions she had taken on such issues in her speeches and articles. Even while supporting her confirmation, the Washington Post editorialized that Judge Sotomayor's attempts to explain away or distance herself from past statements "were unconvincing and at times uncomfortably close to disingenuous, especially when she argued that her reason for raising questions about gender or race was to warn against injecting personal biases into the judicial process. Her repeated and lengthy speeches on the matter do not support that interpretation." This left me with the speeches and articles themselves and the troubling picture they paint of an activist approach to judging.

Turning to her cases, I would note first that the Supreme Court has disagreed with Judge Sotomayor in nine out of ten cases it has reviewed, and affirmed her in the remaining case by the slimmest 5-4 margin. Those reversals include significant criticism of her decisions. In one case, for example, the Court said that Judge Sotomayor had failed to follow its caution "consistently and repeatedly recognized for three decades" in creating a right to sue private corporations for violating the Constitution. Even the dissenters, who voted to affirm Judge Sotomayor's result,

rejected her expansive reasoning.

President Obama has said that only a small portion of a judge's decisions - he claims it is just five percent - are truly hard cases. If he is correct, these best reflect a judge's own views about how to approach and decide cases, that is, how to exercise judicial power. And the Supreme Court decides only the hardest cases, accepting barely one percent of the cases appealed to it for review and deciding two-thirds of those by split decisions.

The Ricci v. DeStefano case has received significant attention, not simply because it is one of those decisions in which the Supreme Court reversed Judge Sotomayor. In this case, she approved a city's decision to throw out the results of a fairly designed and administered promotion exam because too few minorities passed it. This case presents troubling questions of both process and substance. Judge Sotomayor initially used a summary order that did not have to be circulated to the full Second Circuit, and then a per curiam opinion that is permissible only when the law is entirely settled and its application is clear. Each was but one paragraph long and neither appears to have been an appropriate vehicle for handling this case.

It is important to point out that this case involved both kinds of racial discrimination covered by Title VII of the 1964 Civil Rights Act, disparate treatment which focuses on motivation and disparate impact which focuses on consequences. The city claimed that its disparate treatment of those who passed the promotion exam was justified by the fear of a disparate impact lawsuit brought by those failed it.

Judge Sotomayor and her advocates assert that this decision was based squarely on settled and longstanding Second Circuit and Supreme Court precedent. Contrary to her statement to me at the hearing, however, the one-paragraph Second Circuit opinion cited no such precedent at all, but only district court opinion in that case. But the district court actually acknowledged that this was a very unusual case in which those who passed a promotion exam challenged the refusal to use the results rather than those who failed challenging the decision to use them. None of the precedents cited by the district court involved this kind of case.

For this obvious reason, six of Judge Sotomayor's Second Circuit colleagues believed that the full circuit should have reviewed her decision, arguing that the case raised "important questions of first impression in our Circuit--and indeed, in the nation." When it reversed Judge Sotomayor, the Supreme Court similarly observed that there were "few, if any, precedents in the courts of appeals discussing the issue."

On its face, Justice Kennedy's opinion belies Judge Sotomayor's claim at the hearing that the lack of precedent was limited to the new legal standard she said the Court was creating. Not only did the opinion plainly state that there are "few, if any, precedents...discussing the issue," but these words followed the Court's description of the facts, before it had even begun addressing the appropriate legal standard.

Judge Sotomayor's decisions in cases involving the Second Amendment right to keep and bear arms are also troubling. Last year, in District of Columbia v. Heller, the Supreme Court clearly identified the proper analysis for deciding whether the Second Amendment binds states as well as the federal government. Several months later, in Maloney v. Cuomo, Judge Sotomayor ignored that directive and clung to her previous insistence, following a different analysis the Supreme Court had long ago discarded, that the right to bear arms does is protected only against the federal government. In the process, she also stuck with the notion that the right to bear arms is so insignificant that virtually any conceivable reason for restricting it is permissible.

I asked her about these decisions at the hearing and found that she either could not remember or simply would not acknowledge even the most obvious answers to basic questions. She would

not, for example, acknowledge that the Supreme Court's so-called rational basis standard, which she used post-Heller to uphold a weapons restriction, is the most permissive standard under which courts uphold virtually any statute. Her own opinion in Maloney said that under this standard, legislation "merely must find some footing in the realities addressed by the law" to be upheld by the courts. But while Maloney was issued only a few months ago, Judge Sotomayor seemed unable or unwilling to acknowledge in the hearing what she had put in writing.

She likewise gave short shrift to the fundamental right to private property. In Didden v. Village of Port Chester, Judge Sotomayor affirmed dismissal of a property owner's lawsuit after the village condemned his property and gave it to a developer. The Supreme Court, incorrectly in my view, had previously held that economic development can constitute the "public use" for which the Fifth Amendment allows the taking of private property with just compensation. In Didden, however, the village had only announced a general plan for economic development. This may have made takings of specific property within the development area possible, but no taking had in fact occurred. Mr. Didden sued after the village later condemned his property.

In yet another cursory opinion, Judge Sotomayor denied Mr. Didden even a chance to argue his case. She said that the three-year period for filing suit began not when the village actually took his property, but when the village earlier merely announced its general development plan. In other words, Mr. Didden should have sued over the taking of his property before his property had been taken. But had he done so then, he would certainly have been denied his day in court because his legal rights had not yet been violated. This catch-22 amounts to a case of dismissed if he did, and dismissed if he did not. Along the way, Judge Sotomayor gave inadequate protection to yet another fundamental constitutional right.

Let me emphasize that I like Judge Sotomayor and believe she is a good person. I would like to be able to support her nomination. I believe, however, that a nominee's approach to judging is more important than her resume, especially on the Supreme Court where Justices operate with the fewest constraints. Each nominee comes to the Senate with her own record, and it is that record that we must examine for clues about her judicial philosophy. Judge Sotomayor's speeches and articles outline a troubling judicial philosophy which her appeals court cases, hearing testimony, and answers to post-hearing written questions do not neutralize.

My colleagues know that I take quite a generous approach to the confirmation process, believing that the Senate owes some deference to the President's qualified nominees. I have rarely voted against a judicial nominee and took very seriously whether to do so now. I read and studied Judge Sotomayor's speeches, articles, and cases. I met with and considered the opinion of legal experts and advocates of various perspectives. I participated in all three question rounds during the confirmation hearing. In the end, however, neither general deference to the President nor a specific desire to support a Hispanic nominee overcame my concerns. There remained too many conflicts between Judge Sotomayor's record and principles about the judiciary in which I deeply believe. I wish President Obama had taken a different course. But that is the decision I have to make in this case.

Thank you, Mr. Chairman.