United States Senate Committee on the Judiciary Hearing:
The Nomination of Sonia Sotomayor
to be an Associate Justice of the United States Supreme Court

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Prepared Statement of
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Thank you Mr. Chairman, Senator Sessions, and distinguished members of this Committee for inviting me today. It is an honor to testify at this hearing on the nomination of Judge Sonia Sotomayor to the United States Supreme Court.

My testimony seeks to further the public dialogue about the appropriate role of a judge in our constitutional democracy. Judge Sotomayor is accomplished and hard-working, and this process should give respectful and serious consideration to the jurisprudential principles she has articulated during her tenure as a federal judge. I take no position on the ultimate question of whether Judge Sotomayor should be confirmed. My testimony will explain how her speeches and writings express a view of the judicial role that is personal and consequentialist and at times suggests a position beyond even mainstream pragmatic judicial philosophies.

Each vacancy on the Supreme Court invariably leads to a public dialogue about how courts and judges fit into our democratic system of government. I have seen this process from a variety of perspectives, including as Counsel to this Committee and as Associate White House Counsel during the nominations of Chief Justice John Roberts and Justice Samuel Alito. The process has its familiar rhythms and arguments, but it also serves as a reminder of the important work of the Supreme Court and the high stakes of each appointment.

I want to consider for a moment some reasons why the stakes are so high. We can begin with the common observations that Supreme Court justices serve for life and decide many of the country's most difficult and controversial issues. Behind this observation is an important assumption, so widely accepted, that it is often taken for granted. This assumption is that each Supreme Court justice

matters because Supreme Court judgments are treated as final and supreme in matters of constitutional interpretation.

In recent years, there are numerous examples of the Supreme Court reviewing and limiting congressional and executive branch powers. For example, in *Boumediene v. Bush*, the Supreme Court for the first time invalidated a wartime policy that had the joint support of Congress and the President. [1] In *Boumediene* and other cases, the President and Congress have accepted and followed the Court's decisions.

This supremacy, however, is not a constitutional necessity, but largely results from prudent political acquiescence.[2] The Framers said fairly little about what they expected from judges. Article III of the Constitution vests the "judicial power" in the federal judiciary, but does not articulate its scope.[3] Alexander Hamilton noted that the limits on the judiciary were primarily structural. He explained that the Supreme Court has "no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."[4] This weakness of the Supreme Court, as well as other structural factors, casts doubt on the idea that judicial supremacy is *required* by the constitutional structure.[5]

The Constitution gives Congress and the President various tools by which they can restrain the Court. For example, Congress could reduce the budget of the courts, or cut back on its jurisdiction in certain types of cases. In extreme circumstances, it could seek impeachment and removal of overreaching judges. The President could decline to implement a decision he considered

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[1] Boumediene v. Bush, 128 S. Ct. 2229 (2008).

[2] *See* Neomi Rao, *The President's Sphere of Action*, 45 WILLAMETTE L. REV. 527, 531 (2009). *See also* John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 VA. L. REV. 333 (1998) (explaining that "[t]he propriety of judicial review in light of the text is of considerable theoretical but, at the moment, little practical importance").

[3] U.S. CONST. art. III, § 1.

[4] THE FEDERALIST NO. 78, at 402 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

[5] THE FEDERALIST NO. 49, at 261 (James Madison) (George W. Carey & James McClellan eds., 2001) ("The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers."). *See also* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 228 (1994) (explaining the constitutional basis for coordinacy of the branches, or the idea that each branch of the federal government has an independent duty to interpret the Constitution).

unconstitutional. I am not recommending any of these actions, only noting some possibilities. Indeed, the Congress and the President virtually never exercise these checks. Political reprisals against the Court are highly disfavored and viewed as interfering with judicial independence.

Because these checks on the Court's power are rarely exercised, the Supreme Court faces no effective challenge to its authority. The Court has assumed the right to define its constitutional limits and there are few issues that it considers to be outside of the judicial role.[6] This testimony is not the place to discuss the difficult and controversial questions about whether such independence is desirable or consistent with our constitutional structure. I merely wish to call attention to the prevailing view in the Supreme Court, Congress, and the Executive Branch about the essential finality and supremacy of Supreme Court decisions in constitutional matters.

In the practical absence of external constraints, each justice remains constrained primarily by his or her conception of the judicial role. Self-restraint is the primary restraint for Supreme Court justices – this is why a nominee's judicial philosophy is so important.

At the heart of debates about judicial philosophy is a longstanding disagreement between formalism, on the one hand, and a more flexible, pragmatic, or perhaps in the parlance of the day, empathetic decision-making. I will consider briefly the range of this spectrum in order to situate Judge Sotomayor's stated judicial philosophy in this traditional debate.[7]

First, some judges believe the judicial role and the privilege of political independence require a corresponding obligation to follow the law, not personal beliefs or public opinion. In order to pursue this ideal, they follow a more formalist approach to interpretation, which often means close textualism for statutes and historical or originalist readings of the Constitution. The basic idea is that by focusing closely on the written law, judges act as fair and impartial arbiters and avoid exercising personal discretion or imposing values and goals outside of the law.

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[6] This lack of oversight is a privilege given neither to the President nor to Congress, as the Supreme Court robustly enforces the constitutional limits on congressional and executive branch power. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997); Boumediene v. Bush, 128 S. Ct. 2229 (2008).

[7] I recognize that the brevity of this discussion necessarily omits some detail and nuance, but my discussion is intended to capture the essential jurisprudential dispute, not all of its variants.

As a constitutional matter, this approach recognizes that judges should implement the "judicial power," not a legislative one. On a practical level, formalism recognizes that judges have limited capacity for assessing facts, gathering data, and judging consequences.[8] These tasks belong to the political branches. Justice Antonin Scalia and Judge Frank Easterbrook of the Seventh Circuit Court of Appeals exemplify this approach in their jurisprudence and scholarly writings.[9]

Formalists may be criticized and caricatured as wooden literalists. But judges who adopt formalist methods are not naive about their role.[10] They understand that judges are human and come to the bench with individual experiences.[11] Indeed, it is in part to limit human biases and prejudices that they seek to follow the law as closely as possible. As Justice Scalia has explained, "To be a textualist in good standing, one need not be too dull to perceive the broader social purposes that a statute is designed, or could be designed, to serve; or too hide-bound to realize that new times require new laws. One need only hold the belief that judges have no authority to pursue those broader purposes or write those new laws."[12]

In my view, proper respect for the judicial role requires an intelligent formalism in which judges interpret, without rewriting, our laws and the Constitution. This approach allows us to remain a society governed by laws and not men.

On the other side of this debate, pragmatic judges largely reject the restraints of formalism. They believe that the privilege of judicial independence also confers the privilege of interpreting the law to conform to substantive

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[8] *See, e.g.*, ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006).

[9] *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J. L. PUB. POL'Y 61 (1994).

[10] James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) ("I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law. But they make it *as judges make it*, which is to say *as though* they were 'finding' it – discerning what the law *is*, rather than decreeing what it is today *changed to* or what it will *tomorrow* be.") (emphasis in original).

[11] To take a recent example, Chief Justice Roberts explained at his confirmation hearings that "we all bring our life experiences to the bench," but the ideal for each judge is to follow the rule of law, not their own preferences. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the U.S. Before the S. Comm. on the Judiciary*, S. Hrg. 109-158, at 205 (2005) (statement of John G. Roberts, Jr.).

[12] SCALIA, *supra* note 9, at 23.

purposes and practical consequences – these judges seek to reach the best outcome all things considered. Justice Stephen Breyer and Judge Richard Posner are articulate proponents of legal pragmatism.[13]

In this view, judges can address the problems to be solved and interpret statutes and the Constitution to serve broader purposes and goals. For example, Justice Breyer has recently explained that our Constitution has a basic democratic objective and that the courts must help secure this objective.[14] They do this in part by focusing on the purposes of laws and the consequences of particular interpretations.[15]

These judges celebrate the individual wisdom of each jurist, who should try, in part, to resolve cases pragmatically, a concept that will be "relative to the prevailing norms of particular societies."[16] Often these judges go further and suggest that judges can interpret statutes and the Constitution to make them fairer or more just – to reach substantive results more in line with modern sensibilities as understood by the judge. In this view, through interpretation judges can promote what is right and good.

Pragmatic, flexible interpretation of the law allows significant room for individual assessments of what the law requires, as each individual will have his or her own conceptions of what is coherent, rational, or just. Judge Posner has argued that most American judges are pragmatists. Nonetheless, pragmatism as a method of judging places insufficient attention on the requirements of the law. Although pragmatists disclaim judicial willfulness,[17] flexible and evolving interpretations of statutes and the Constitution will turn, to some extent by necessity, on the individual perceptions of particular judges.

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[13] *See, e.g.*, STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2006); RICHARD POSNER, HOW JUDGES THINK (2008); RICHARD POSNER, PROBLEMS OF JURISPRUDENCE (1990).

[14] BREYER, *supra* note 13, at 37.

[15] *Id.* at 18.

[16] POSNER, HOW JUDGES THINK, *supra* note 13, at 241.

[17] Most pragmatists are quick to acknowledge that they should not impose their personal or political will through judicial decisions. For example, Justice Breyer acknowledges the imperative that judges should avoid being "willful, in the sense of enforcing individual views." BREYER, *supra* note 13, at 18 (internal quotation marks omitted). Judge Posner explains, "A pragmatic judge assesses the consequences of judicial decisions for their bearing on sound public policy as he conceives it. But it need not be policy chosen by him on political grounds as normally understood." POSNER, HOW JUDGES THINK, *supra* note 13, at 13.

This testimony provides only a brief sketch of these different perspectives. No doubt in actual cases such views may be practiced on a continuum, with justices balancing concerns of formalism with other consequences or substantive values. Nonetheless, most judges have strongly felt views on these matters and such views crucially affect the outcomes of cases. Formalism and pragmatism reflect different attitudes about the role of the judge, appropriate sources for judicial decision-making, and methods for deciding cases.

In her writings and speeches, Judge Sotomayor has set out important aspects of her judicial philosophy, identifying where a judge should be on this spectrum. I focus here on her writings and speeches because these are the fullest articulation of her judicial philosophy over a long career in which she repeated many of the same remarks. Judge Sotomayor's judicial record may provide a somewhat different picture, but judges at the court of appeals, bound by Supreme Court precedent, are limited in the extent to which they can exercise personal discretion. Lower court judges infrequently discuss explicitly the judicial role in their opinions.

On the Supreme Court, however, justices enjoy more freedom and consequently can exercise their personal judicial philosophies to a greater degree. Thus, it may be revealing that outside of particular cases, when discussing the judicial role, Judge Sotomayor has quite candidly and consistently articulated a personal, consequentialist approach to judging. She has repeatedly disavowed formalism, and furthermore, in numerous remarks has suggested a position beyond where even many pragmatic jurists would go.

First, Judge Sotomayor has explicitly and repeatedly rejected the idea that there can be an objective stance in judging.[18] She has explained that every judgment requires an individual choice by the judge. She recognizes that there may be a "danger embedded in relative morality," but that this relativity is

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[18] Sonia Sotomayor, *Raising the Bar: Latino and Latina Presence in the Judiciary and the Struggle for Representation: Judge Mario G. Olmos Memorial Lecture: A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87, 91 (2002) (accepting Martha Minnow's proposition that "there is no objective stance but only a series of perspectives—no neutrality, no escape from choice in judging"); Sonia Sotomayor, Address at the Woman's Bar Association of the State of New York: Women in the Judiciary 8 (Apr. 30, 1999) ("there is 'no objective stance but only a series of perspectives. ... [N]o neutrality, no escape from choice' in judging, I further accept that our experiences as women will in some way affect our decisions. In short, as aptly stated by Professor Minnow, 'Th[e] aspiration to impartiality ... is just that an aspiration rather than a description because it may suppress the inevitable existence of a perspective ... .'") (citing Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1905 (1988)) (internal citation omitted).

inherent in the judicial role.[19] This goes much further than recognizing that interpretation *may be* affected by the position of the interpreter and instead strongly implies that judging is often a series of personal choices by the judge.

Second, with objectivity discarded as unrealistic, Judge Sotomayor has explained that a judge's personal background, her race, gender, and life experiences, *should* affect judicial decisions. She has questioned the ideal that judges should transcend their personal sympathies and prejudices because by doing so men and women of color may "do a disservice both to the law and society."[20] She has extolled the fact that judges of color, both men and women, will have a collective effect on the development of the law. The effect she considered is not simply the inclusion of qualified women and minorities on the federal bench. Rather she predicted some substantive effect, some difference in the outcome of cases from minority representation. Moreover, she explained that judges "must not deny the differences resulting from experience and heritage" but must attempt "continuously to judge when those opinions, sympathies and prejudices are appropriate."[21]

Finally, given that legal decisions are relative and should depend on a judge's background, Judge Sotomayor repeatedly reiterated what may be a natural conclusion from this, that her particular background leads her to make, not just different, but *better* decisions than those who have not walked in her shoes. Or as she explains, her "hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life."[22]

As I explained at the outset, the Supreme Court enjoys effectively unchallenged supremacy and finality with regard to constitutional interpretation.

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[19] Sotomayor, *A Latina Judge's Voice*, *supra* note 18, at 93 ("There is always a danger embedded in relative morality, but since judging is a series of choices that we must make, that I am forced to make, I hope that I can make them by informing myself on the questions I must not avoid asking and continuously pondering.").

[20] *Id.* at 91.

[21] *Id.* at 93.

[22] *Id.* at 92. As has been widely reported, Judge Sotomayor made similar remarks in a number of speeches. *See, e.g.*, Judge Sonia Sotomayor, Panel Presentation at the 40th National Conference of Law Reviews: Women in the Judiciary 11 (Mar. 17, 1994) ("First, if Professor Martha Minnow is correct, there can never be a universal definition of 'wise.' Second, I would hope that a wise woman with the richness of her experience would, more often than not, reach a better conclusion. What is better? I, like Professor Resnik, hope that better will mean a more compassionate and caring conclusion."); *see also* John Dickerson, *More Better Judging*, SLATE, June 3, 2009, *available at* http://www.slate.com/id/2219699/ (discussing Judge Sotomayor's speech at the Conference of Law Reviews).

Accordingly, each Supreme Court justice remains constrained, in practice, only by his or her approach to the law. Judge Sotomayor's stated approach over many years as a federal court of appeals judge invokes a personal conception of the judicial role. If personal experience not only unconsciously shapes decision-making, but is essential to it, then the judicial process has few objective constraints of law. If one believes that a judge's race, gender, and life experiences should affect how a judge decides cases, then justice may turn on personal beliefs, not law. This is not only a rejection of formalist theories of interpretation, but a significant step beyond even pragmatic jurisprudence.

Our constitutional structure does not give judges political power – it gives them the judicial power to decide particular cases through an even-handed application of the law. Judges are human and the demand for impartiality imposes a difficult standard on those entrusted with the honor of serving on the federal judiciary. The difficulty of such objectivity and impartiality, however, does not suggest jettisoning the ideal. In our constitutional democracy, the rule of law should prevail over the rule of what the judge thinks is best.

This testimony is being submitted before the questioning of Judge Sotomayor by the Committee was completed. Judge Sotomayor's early statements before this Committee suggest a change of heart and express agreement with some the principles I have articulated. I hope that her testimony reflects a properly reconsidered view of the judicial role and the understanding that true "fidelity to the law" best suits the constitutional role of a judge and enhances the predictability and stability of our social and political arrangements.