

Statement of
The Honorable Chuck Grassley

United States Senator
Iowa
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Prepared statement of Senator Chuck Grassley
Senate Committee on the Judiciary
Executive Business Meeting to Consider
the Nomination of Judge Sonia Sotomayor
To be an Associate Justice on the United States Supreme Court
Tuesday, July 28, 2009

Mr. Chairman, after much deliberation, I have come to the conclusion that I cannot support the nomination of Judge Sonia Sotomayor to be an Associate Justice on the United States Supreme Court.

The Senate must confirm to the Supreme Court individuals who possess a superior intellect, distinguished legal experience, unquestioned integrity, and even judicial demeanor and temperament. More importantly, the Senate has a tremendous responsibility to confirm individuals who truly understand the proper role of a Justice as envisioned by the Constitution.

This is the most critical qualification of a Supreme Court Justice - the capacity to faithfully interpret the law and Constitution without personal bias or prejudice. Our system of checks and balances demands that judges not take on the role of policy makers. That's because our great American tradition envisioned that political and social battles be fought in the legislative - not judicial - branch of government. Further, our American legal system requires that judges check their biases, personal preferences and politics at the door of the courthouse. Just as Lady Justice stands before the Supreme Court blindfolded, judges and Justices must wear blindfolds when they interpret the Constitution and administer justice.

As a member of the Senate Judiciary Committee, I have voted to confirm both Republican and Democrat Presidents' picks for the Supreme Court using this standard. Unfortunately, I believe that Judge Sotomayor's performance at her Judiciary Committee confirmation hearing left me with more questions than answers. It is imperative that the nominee persuade us that he or she will be able to set aside one's own feelings so he or she can blindly and dispassionately administer equal justice for all. Yet I am not convinced that Judge Sotomayor has the ability to wear that judicial blindfold, and resist having her personal biases and preferences dictate her judicial method on the Supreme Court.

President Obama clearly believes Judge Sotomayor measures up to his "empathy" standard, which encourages judges to make use of their personal politics, feelings and preferences. This radical "empathy" standard stands in stark opposition to what most of us understand to be the

proper role of the judiciary. To her credit, at the hearing Judge Sotomayor repudiated President Obama's "empathy" standard. But Judge Sotomayor's record, both in and outside of the courtroom, reveal to me a judicial philosophy that bestows a pivotal role to personal preferences and beliefs in her judicial method.

In speeches she gave and law review articles she wrote over the years, Judge Sotomayor doubted that a judge could ever be truly impartial. She argued it would be a "disservice both to the law and society" for judges to disregard personal views shaped by one's "differences as women or men of color." She proclaimed that the court of appeals is where "policy is made." She said that a "wise Latina would more often than not reach a better conclusion than a white male", and disagreed with a statement by Justice O'Connor that "a wise old woman and a wise old man would eventually reach the same conclusion in a case." She said that judges should look to foreign law so they can get their "creative juices" flowing.

At her confirmation hearing, Judge Sotomayor attempted to explain these statements away. However, I had problems harmonizing her answers with the statements she has repeated over and over again throughout the years. The statements made at the hearing and those made in speeches and law review articles outside the hearing are in mind polar opposites of each other - they are not compatible and cannot be reconciled. I also question the reliability of statements made at a formal hearing where a nominee is clearly prepared to answer questions as compared to statements that were made over the years in an unguarded manner, without any restrictions and without a set goal in mind - confirmation to the judicial bench.

In addition, Judge Sotomayor's record on the bench raises serious concerns. Hard cases say the most about a judge. And as we all know, the Supreme Court only takes on the hard cases. Well, those are the cases that raise the most concerns about this nominee and what she will do if she is confirmed to the Supreme Court. First, her record before the Supreme Court is not a particularly impressive one - she was reversed 8 out of 10 times, and was criticized in another of the 10 cases. So the Supreme Court disagreed with her 9 out of 10 times. In addition, some of her cases raise questions about whether she will adequately protect the Second Amendment's right to bear arms and Fifth Amendment property rights. Statements she made at the hearing raise concerns that she will inappropriately create or expand rights under the Constitution. Further, some of her cases raise questions about whether she will impose her personal policy decisions instead of those of the legislative or executive branch.

At her confirmation hearing, Judge Sotomayor was questioned at length about her understanding of rights under the Constitution - including the Second and Fifth Amendments and the right to privacy - and the rationale for her decisions in Ricci, Maloney, Didden and other cases. She was also asked about how she views precedent and how she applies it in cases before her. Unfortunately, I wasn't satisfied with Judge Sotomayor's responses about her cases or her general understanding of rights under the U.S. Constitution. Moreover, I wasn't reassured that Judge Sotomayor would disregard her strong personal sympathies and prejudices when ruling on hard cases dealing with important Constitutional rights.

For example, I wasn't persuaded by Judge Sotomayor's claims that she followed precedent in Ricci, nor her explanation as to why she could dismiss such a significant case with absolutely no legal analysis. I was concerned with Judge Sotomayor's explanation of her decision in Maloney

holding that the Second Amendment is not "fundamental," and her refusal at the hearing to affirm that Americans have a right of self-defense. If Maloney is upheld by the Supreme Court, the Second Amendment will not apply against state and local governments, thus permitting potentially unrestricted limitations on this important Constitutional right. I was troubled with Judge Sotomayor's failure to understand that her decision in Didden dramatically and inappropriately expands the ability of state local and federal governments to seize private property under the Constitution, and that she mischaracterized the Supreme Court's holding in Kelo. Judge Sotomayor's discussion of landmark Supreme Court cases and her own decisions on the Second Circuit did not convince me that she understands the rights given to Americans under the Constitution, or will refrain from expanding or restricting those rights based on her personal preferences. I was not persuaded that Judge Sotomayor will not allow those personal beliefs and preferences to steer her judicial method and the outcome of cases.

Nearly 20 years ago, in his confirmation hearing, then-Judge Souter spoke about courts "filling vacuums" in the law. That concept greatly worried me, because courts should never fill voids in the law left by Congress. Justice Souter's decisions on the Supreme Court, I believe, demonstrate that he does believe courts do indeed fill vacuums in the law - and I've regretted my vote to confirm him ever since. So I've asked several Supreme Court nominees about courts filling vacuums at their hearings. Judge Sotomayor's lukewarm answer left me with the same pit in my stomach I've had with Justice Souter's rulings that I had hoped to have cured with his retirement, and it reinforced my concerns with her hearing testimony, cases and speeches.

In conclusion, all judges must have a healthy respect for the Constitutional separation of powers and the exercise of judicial restraint. All judges must be bound by the word of the Constitution and legal precedent. However, Supreme Court Justices are in a very special position with respect to their decision-making process. The Supreme Court has the final say on the law. Justices on the Supreme Court have fewer constraints on their judging than judges on the district and appellate courts. So it's critical that we ensure nominees to the Supreme Court will resist the temptation to mold the Constitution to their personal beliefs and preferences. As one witness testified at the hearing, the judicial restraint of a Supreme Court Justice is self restraint.

Judge Sotomayor is a remarkable woman. She is a talented woman, a woman of substance and personality, a true trail blazer. There is no doubt that Judge Sotomayor is intelligent, possesses integrity, and has a distinguished legal background. We are all proud of her many accomplishments. However, I don't believe that Judge Sotomayor possesses the critical ingredients of a Supreme Court Justice. Unfortunately, I'm not convinced that Judge Sotomayor will be able to set aside her personal biases and prejudices and decide cases in an impartial manner based upon the Constitution. I'm not convinced that Judge Sotomayor will protect important Constitutional rights, nor am I convinced that she will refrain from creating new rights under the Constitution. I'm not convinced that Judge Sotomayor understands the proper role of a judge in our system of checks and balances, and I'm not convinced that she will not allow her own personal beliefs and preferences to dictate the outcome of cases before her.

Which Judge Sotomayor will sit on the Supreme Court? Is it the judge who proclaimed that the court of appeals is where "policy is made," or is it the nominee who pledged "fidelity to the law?" Is it the judge who disagreed with Justice O'Connor's statement that a wise woman and a

wise man will ultimately reach the same decision, or is it the nominee who rejected President Obama's empathy standard?

Only time will tell. But for now, my vote must be based on the nominee's respect for and adherence to the Constitution and judicial restraint. Based on her answers at the hearing and her decisions, writings and speeches, I'm not convinced that Judge Sotomayor has the right judicial philosophy for the Supreme Court. I must vote against her nomination.

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