

a few lines from a 2001 speech, taken out of context, have prompted some to charge that she is a racist. I believe that no one who reads the whole Berkeley speech could honestly come to that conclusion. The speech is actually a remarkably thoughtful attempt to grapple with difficult issues not often discussed by judges: How does a judge's personal background and experiences affect her judging? And Judge Sotomayor concludes her speech by saying the following: "I am reminded each day that I render decisions that affect people concretely and that I owe them constant and complete vigilance in checking my assumptions, presumptions and perspectives and ensuring that to the extent that my limited abilities and capabilities permit me, that I reevaluate them and change as circumstances and cases before me require."

Mr. Chairman, these are the words of a thoughtful, humble, and self-aware judge striving to do her very best to administer impartial justice for all Americans, from New York City to Spooner, Wisconsin. It seems to me that is a quality we want in our judges.

Judge Sotomayor is living proof that this country is moving in the right direction on the issue of race, that doors of opportunity are finally starting to open to all of our citizens. And I think that nomination will inspire countless children to study harder and dream higher, and that is something we should all celebrate.

Let me again welcome and congratulate you. I look forward to further learning in these hearings whether you have the knowledge, the wisdom, the judgment, the integrity, and yes, the courage, to serve with distinction on our nation's highest court. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much. I will recognize Senator Kyl, the Deputy Republican Leader of the United States Senate.

Senator Kyl.

**STATEMENT OF HON. JON KYL, A U.S. SENATOR FROM
ARIZONA**

Senator KYL. Thank you, Mr. Chairman. I would hope that 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 rather who in her personal opinion, should win. The factors that will influence her decisions apparently include her gender and Latina heritage and foreign legal concepts that as she said, 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," he said. "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 his 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 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 "the aspiration to impartiality is just that. It's an aspiration," she says, "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?

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.

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 should not 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 on the rule of law.

Chairman LEAHY. Somewhat differently than normal, Senator Schumer will be recognized for five minutes and will reserve his other five minutes for later on when he will be introducing Judge Sotomayor.

So Senator Schumer, you are recognized for five minutes.

**STATEMENT OF HON. CHARLES SCHUMER, A U.S. SENATOR
FROM NEW YORK**

Senator SCHUMER. Thank you, Mr. Chairman and Ranking Member Sessions.

I want to welcome Judge Sotomayor. We in New York are so proud of you and to your whole family, who I know are exceptionally proud to be here today to support this historic nomination.

Now, our presence here today is about a nominee who is supremely well-qualified with experience on the District Court and the Appellate Court benches that is unmatched in recent history. It is about a nominee who, in 17 years of judging, has authored opinion after opinion that is smart, thoughtful, and judicially modest.

In short, Judge Sotomayor has stellar credentials. There's no question about that. Judge Sotomayor has twice before been nominated to the bench and gone through confirmation hearings with bipartisan support. The first time, she was nominated by a Republican President.

But most important, Judge Sotomayor's record bespeaks judicial modesty, something that our friends on the right have been clamoring for in a way that no recent nominee's has. It is the judicial record, more than speeches and statements, more than personal background, that most accurately measures how modest a judicial nominee will be.

There are several ways of measuring modesty in the judicial record. Judge Sotomayor more than measures up to each of them.

First, as we will hear in the next few days, Judge Sotomayor puts rule of law above everything else. Given her extensive and even-handed record, I am not sure how any member of this panel can sit here today and seriously suggest that she comes to the bench with a personal agenda. Unlike Justice Alito, she does not come to the bench with a record number of dissents.

Instead, her record shows that she is in the mainstream. She has agreed with Republican colleagues 95 percent of the time, she has ruled for the government in 83 percent of immigration cases against the immigration plaintiff, she has ruled for the government