

Professor Rao clerked for Supreme Court Justice Clarence Thomas and Fourth Circuit Judge J. Harvey Wilkinson. I look forward to your testimony. Thank you for being here.

**STATEMENT OF NEOMI RAO, PROFESSOR, GEORGE MASON
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Ms. RAO. Thank you very much, Madam Chairman, Senator Sessions and other distinguished members of this Committee. It is an honor to testify at these historic hearings, which have provided the opportunity to have a respectful public dialog about the important work of the Supreme Court and the judicial philosophy of an accomplished nominee.

I have submitted more detailed written testimony and I should state at the outset that I take no position on the ultimate question of the confirmation of Judge Sotomayor.

In my opening remarks, I would like to highlight some points about the judicial role. During these hearings, Judge Sotomayor has expressed broad principles about fidelity to the law with which we can all agree. But fidelity to the law can mean very different things to different judges.

Although in her testimony she has distanced herself from some of her earlier remarks, her speeches and writings might still be helpful in understanding her view of the judicial process.

First, Judge Sotomayor has explicitly rejected the idea that there can be an objective stance in judging. She has explained that every case has a series of perspectives and thus requires an individual choice by the judge.

This goes beyond recognizing the need to exercise judgment in hard cases or the idea that reasonable judges may at times disagree. If there is no objective view, one can question whether there is any law at all apart from the judge's personal choices.

Second, there is the related issue of the role of personal experiences in judicial decision-making. It would be hard to deny that judges are human and made up of their unique life journeys. Many judges recognize this and explain how they strive to remain impartial by putting aside their personal preferences.

Judge Sotomayor's position, however, has suggested that her personal background, her race, gender and life experiences, should affect judicial decisions.

Throughout her testimony, Judge Sotomayor has reaffirmed that she decides cases by applying the law to facts and that she does not follow what is in her heart. Of course, all nominees to the Supreme Court honestly state their fidelity to the law.

Nonetheless, this leaves open the question of how a judge chooses to be faithful to the law. Judges go about this task in different ways. Following the law could mean, as formalists believe, that the judicial role and the privilege of political independence require judges to stick closely to the actual words of statutes and the Constitution. The basic idea is that by focusing on the written law, judges act as fair and impartial arbiters.

Other judges consider that they are following the law when they interpret it to conform to what is rational or coherent or just. They believe that following the law means trying to bring about what they consider to be the best outcome, all things considered. These

judges may be ruled by pragmatism or personal values, such as empathy.

Even with a sincere purpose of following the law, judges use very different methods for finding what the law requires. For example, some judges are far more likely to determine that the law is ambiguous and, therefore, requires the judge to fill in the gaps.

If the judge finds the law indeterminate, he or she may look to outside sources, such as international law, or to personal values about what is fair or rational. Pragmatic, flexible interpretation of the law allows significant room for individual assessments of what the law requires, as each judge will have his or her own conceptions about what is best.

If the law is really a series of perspectives, this suggests a very thin conception of law. Fidelity to law as a series of perspectives is something very different from fidelity to law as binding written commands of the legislature and Constitution. If law is simply one's own perspective, then fidelity to law is little more than fidelity to one's own views.

The Supreme Court gets a final word with regard to constitutional interpretation. A nominee's judicial philosophy is important, because on the Supreme Court, the only real restraint is self-restraint.

Our constitutional structure does not give judges political power. It gives them the judicial power to decide particular cases through an evenhanded application of the law; to fairly interpret statutes and the Constitution for all that they contain, not more, not less.

In our courts, the rule of law should prevail over the rule of what the judge thinks is best. Thank you for giving me the chance to testify today.

[The prepared testimony of Ms. Rao appear as a submission for the record.]

Senator KLOBUCHAR. Thank you very much, Ms. Rao, for your testimony. Next, we have John McGinnis. John McGinnis is a professor of law at Northwestern University. Previously, he was a deputy assistant attorney general in the Department of Justice's Office of Legal Policy; a graduate of Harvard Law School, where he was the editor of the Harvard Law Review, something he has in common with President Obama. That is not true?

Mr. *McGinnis*. He was president of the Harvard Law Review.

Senator KLOBUCHAR. You were editor. Well, we could just pretend for today. Professor McGinnis also clerked on the U.S. Court of Appeals for the District of Columbia.

Thank you for being here, Professor McGinnis. We look forward to your testimony.

**STATEMENT OF JOHN MCGINNIS, PROFESSOR,
NORTHWESTERN UNIVERSITY SCHOOL OF LAW**

Mr. MCGINNIS. Thank you so much, Chairman Klobuchar, Ranking Member Sessions, for the opportunity to address you. At the outset, I want to make clear that, like my colleague, I am not taking any position on Judge Sotomayor's nomination, although I will say she has my respect and good wishes.