

icy argument that the Second Amendment should not be incorporated because incorporation would prevent states from outlawing self-defense by people who are attacked in their own homes.

A wise judge demonstrates and builds respect for the rule of law by writing opinions which carefully examine the relevant legal issues, and which provide careful written explanations for the judge's decisions on those issues. Judge Sotomayor's record on arms rights cases has been the opposite. Her glib and dismissive attitude toward the right is manifest in her decisions and has been further demonstrated by her testimony before this Committee. In Sonia Sotomayor's America, the peaceful citizens who possess firearms, bows, or martial arts instruments have no rights which a State is bound to respect, and those citizens are not even worthy of a serious explanation as to why.

Thank you.

[The prepared statement of Mr. Kopel appear as a submission for the record.]

Senator KLOBUCHAR. Thank you very much. And did I say your name correctly? Oh, well, that was good. Thank you.

Next we have Ilya Somin, and Professor Somin is an assistant professor at George Mason University School of Law. His research focuses on constitutional law, property law, and the study of popular political participation and its implications for constitutional democracy. He currently serves as co-editor of the Supreme Court Economic Review, one of the country's top-rated law and economic journals. After receiving his M.A. in Political Science from Harvard University and his law degree from Yale Law School, Professor Somin clerked for Judge Jerry E. Smith of the U.S. Court of Appeals for the Fifth Circuit.

I look forward to your testimony, Mr. Somin. Thank you for being here.

**STATEMENT OF ILYA SOMIN, PROFESSOR, GEORGE MASON
UNIVERSITY SCHOOL OF LAW**

Mr. SOMIN. Thank you very much. I would like to thank the Committee for the opportunity to testify and, even more importantly, for your interest in the issue of constitutional property rights that I will be speaking about. For the Founding Fathers, the protection of private property was one of the most important reasons for the establishment of the Constitution in the first place.

As President Barack Obama has written, "Our Constitution places the ownership of private property at the very heart of our system of liberty."

Unfortunately, the Supreme Court and other Federal courts have often given private property rights short shrift and have denied them the sort of protection that is routinely extended to other constitutional rights. I hope the Committee's interest in this issue will over time help begin to change that.

In my oral testimony today, I will consider Judge Sotomayor's best property rights decision, *Didden v. Village of Port Chester*. In my written testimony, which I hope will be entered into the record, I also discuss her decision in *Krimstock v. Kelly*.

The important background to the *Didden* decision is the Supreme Court's 2005 decision in the case of *Kelo v. city of New London*,

which addressed the Fifth Amendment's requirement that private property can only be taken by the Government for a public use. Unfortunately, a closely divided 5–4 Supreme Court ruled in *Kelo* that it is permissible to take property from one private individual and give it to another solely for purposes of promoting economic development, even if there is not any evidence that the promised development will actually occur.

This licensed numerous abusive takings in many parts of the country. Indeed, since World War II, economic development and other similar takings have displaced hundreds of thousands of people, many of them poor or ethnic minorities. But as broad as the *Kelo* decision was in upholding a wide range of abusive takings, Judge Sotomayor's decision in the *Didden* case went even further than *Kelo* in doing so.

The facts of *Didden* are as follows: In 1999, the village of Port Chester in New York declared a redevelopment area in part of its territory where, therefore, property could be taken by eminent domain in order to promote development. And they also appointed a person named Gregg Wasser, a powerful developer, as the main developer for the area.

In 2003, Bart Didden and Dominick Bologna, two property owners in the area, approached the village for permission to build a CVS on their property, and they were directed by Mr. Wasser—they were directed to Mr. Wasser, who told them that they must either pay him \$800,000 or give him a 50-percent stake in their business. Otherwise, he threatened he would have the village condemn their property. When they refused his demands, the property was condemned almost immediately after that.

Now, in her decision with two other members of the Second Circuit, the panel that Judge Sotomayor was on upheld this condemnation in a very short, cursory summary order that included almost no analysis. And though it is true that they cited the *Kelo* decision, they made no mention of the fact that *Kelo* actually stated that pretextual takings are still forbidden under the Constitution—pretextual takings being defined as takings where the official rationale for the condemnation was merely a pretext for a plan to benefit a powerful private party of some sort.

There is some controversy over what counts as a pretextual taking and what does not. But if anything does count as a pretextual taking, it is surely a case like *Didden*, where essentially the property would not have been condemned but for the owner's refusal to pay a private party \$800,000. Surely, if anything is a pretextual taking, it is a case where property is condemned as part of a scheme for leverage to enable a private individual to extort money from the owners.

In her oral testimony before this Committee, Judge Sotomayor said that her decision was based in part on a belief that the property owners had filed their case too late. I think the important thing to remember about this statement is that in her own decision, she actually specifically wrote that she would have ruled the same way “even if the appellant's claims were not time-barred.” So she claimed that even regardless of when they filed their case, she would have come out the same way.

Moreover, as I discuss in my written testimony, her statute of limitations holding was entirely dependent on the substantive property rights holding as well, and I can discuss that further in questions if the Senators are interested.

I think the bottom line about this case is its extreme nature. If one is not willing to strike down a condemnation in a situation like this; if one is not willing to say that this is not a public use, it is not clear that there are any limits whatsoever on the Government's ability to take private property for the benefit of politically powerful individuals.

And on that note, I am happy to conclude, and I thank you very much for the opportunity to testify.

[The prepared statement of Mr. Somin appear as a submission for the record.]

Senator KLOBUCHAR. Thank you very much for your testimony.

We are not going to have each Senator ask 5 minutes of questions, and I will start with Director Freeh. You are the only panelist who has had the opportunity to sit with Judge Sotomayor as a fellow judge. What did you learn about her and her approach to judging that led you to endorse her?

Mr. FREEH. You know, I think all the qualities that we have heard in this hearing as the optimal qualities—mainstream, fair-mindedness, preparedness, integrity, knowledge and intellect, patience, part of being a good judge is listening and making sure that the parties are all heard, and really, you know, her sense of commitment to getting all the facts and then applying the law.

As you said, Senator, I not only served with her but actually was with her in court, as I mentioned in my opening statement. As we say, I “second-sat” her in a number of her first trials where I actually observed her entire conduct of the trial, preparation, motion practice, instruction to juries, how she treated witnesses. And I think of all the things I observed over a 6-month period was really, you know, how detailed she was in preparing a written opinion.

So this was never a judge that had a predisposition or a pre-notation or a personal agenda, but struggled and committed a lot of time and effort to getting the facts and applying the law. And I think she did that as a brand-new judge. She has done it for 17 years. And I think we can be assured she will do it as a Justice.

Senator KLOBUCHAR. As someone who was appointed by President George H.W. Bush, do you have any reservations about her ability to be a Supreme Court Justice without activism or an ideological agenda?

Mr. FREEH. No, I am totally confident that this would be an outstanding judge, and whether it was President Obama or someone else, as you mentioned, Judge Sotomayor was first appointed by George Bush, the first George Bush. I was also. You know, I think she has all of the mainstream, moderate, restrained adherence to the law qualities that we want, and I think we are going to be very proud of her.

Senator KLOBUCHAR. Thank you.

Mr. Canterbury, you spent more than 25 years as an active-duty police officer in South Carolina. I know what a difficult job you had. From my previous job, I have been able to see it firsthand. Are you confident that, if confirmed, Judge Sotomayor has the

background and judicial record to be a Justice who will be mindful of the need for law enforcement to protect our Nation and have a pragmatic view of law enforcement issues?

Mr. CANTERBURY. We are very confident of that. Based on the over 450 criminal cases that we reviewed, we felt that her judgment was fair, tough, and balanced. Throughout all of the cases that we reviewed, and looking at the totality of her career, we feel very comfortable that she will make a fine judge.

Senator KLOBUCHAR. Thank you very much.

Just as I said Mr. Freeh was the only one on the panel that served with Judge Sotomayor, Mr. Cone, you are the only one on the panel that has pitched a perfect game, as far as I know. Did you believe her to be fair when she ended the baseball strike? I have to tell you that I thought your testimony—people have for 4 days now talked about each specific case and questioned a lot on different cases and were very thorough in their questioning and their understanding. But I thought you so succinctly described the effect that her ruling had on many, many people across this country.

And what do you think that this decision says a little more broadly about her approach to law in general and the impact of her judicial philosophy on the lives of individual Americans?

Mr. CONE. Well, thank you, Senator. You know, from my perspective, as I said in my statement, a lot of people tried to end that dispute, including President Clinton—we were called to the White House—special mediators, Members of Congress. I spent weeks on end here in Washington lobbying Congress on trying to get a partial repeal of the antitrust exemption, which did happen, and Senator Hatch and Senator Leahy certainly sponsored that bill, the Curt Flood Act, which I think had an enormous impact as well. But Judge Sotomayor is the one who made the tough, courageous call that put the baseball players back on the field. You know, from my perspective as a union member, we felt that we were in trouble, that the game was in trouble. It was to the point of almost being irreparably damaged. And she made the courageous decision to put the game back on the field and get the two parties back to the bargaining table and negotiating in good faith.

Senator KLOBUCHAR. Thank you very much.

Senator SESSIONS.

Senator SESSIONS. Thank you, Madam Chairman. It is good to be with you, and we are glad you are on this Committee.

Senator KLOBUCHAR. Thank you.

Senator SESSIONS. Mr. Cone, I was reading a story about statistical stuff the other day. It came to me that, you know, if you throw a coin, it can land five times in a row on heads. And so I wonder about that a little bit in an effort to have racial harmony on test taking, because sometimes it is just statistically so, which makes me think there is no way the American League could have won—what? —12 out of the last 13 All-Star Games.

Mr. CONE. It makes you wonder, yes.

Senator SESSIONS. Two or three is about all they are worth, right? Thank you for your testimony. We have enjoyed it.

Judge Freeh, nice to see you. I value your testimony, always do, and I appreciate it very much.

I would note, I think you would agree with me, but former President Bush, former former President Bush nominated Judge Sotomayor as Senator Moynihan's pick. In other words, they had a little deal that President Bush would appoint three judges, I think, and Senator Moynihan would get to pick one, and he nominated the recommendation of Senator Moynihan. Is that the way you remember it?

Mr. FREEH. I think that is correct, but I also think he is supporting this nomination now.

Senator SESSIONS. Okay. That is a good comment. You did good.

Ms. Stith, thank you for your very insightful comments. I appreciated that very much, and it is valuable to us.

Dr. Yoest, I was thinking about this organization, Puerto Rican Legal Defense and Education Fund, PRLDEF, and do board members of your organization know what lawsuits you are pursuing and generally what the issues are?

Ms. YOEST. Thank you for that question, Senator.

Senator SESSIONS. Push your button.

Ms. YOEST. I was asked that question, actually, right after Judge Sotomayor was nominated, and it was the day before my board came to town for one of our annual meetings. And as I have listened to the discussion of her relationship with the fund as a board member, I have found the connection between her association with the cases and her description to really strain credulity.

The fact of the matter is you don't have to have read an individual case or reviewed a particular point as a board member to be intimately associated with it. The point of being a board member for all of us who have dedicated our lives to the nonprofit realm is to have oversight and to have accountability and responsibility for the organization. And so I think it is—

Senator SESSIONS. Well, I think that is probably—most boards should operate that way, at least.

Ms. FROMAN, is it correct to say that Judge Sotomayor's opinion in *Maloney*, which said the Second Amendment does not apply to the States, if it is not overruled and if it is followed by the United States Supreme Court, then basically the Second Amendment rights are eviscerated, with regard to cities and States they could eliminate firearms?

Ms. FROMAN. That is correct, Senator. The problem is the *Heller* case did not have to deal with the incorporation issue because it took place in Washington, D.C., which is a Federal enclave and Federal law applies directly. But if the Second Circuit decision or the Seventh Circuit decision remains law, is approved by the Supreme Court, goes up the Supreme Court and is affirmed, then, yes, cities and States can ban guns.

Senator SESSIONS. Does it worry you that the judge who has already ruled on the case one way, and it was a 5:4 case before, now could be deciding—being the deciding vote on how that might turn out?

Ms. FROMAN. It is of great concern to me, Senator, and that is why I am here today to testify. And it is of particular concern to me today because she did not give any reason, she did not explain what the basis was for her holding. It is kind of like when I was in math class, it was not enough to get the right answer. You had

to show your work so that the professor knew that you actually worked the problem and you did not cheat.

So, you know, without any explanation of how she reached her conclusions, we cannot tell whether that was a legitimate application of the Constitution and the statute.

Senator SESSIONS. I know your organization officially—I see today they said they wanted to see how the hearings went and what the nominee said. After that, has the National Rifle Association now made an announcement today, and what is it?

Ms. FROMAN. Well, I, of course, have been here today, and I am not here to speak on behalf of the NRA. I am here to speak on my own behalf and, of course, on behalf of other American gun owners. The NRA is the oldest and largest civil rights organization in the history of this country. They are dedicated to preserving and protecting the Second Amendment. And I think they have been out every day talking about the concerns that the NRA has over Judge Sotomayor's record.

Senator SESSIONS. Are you aware that—I was just given a document here that said that, "Therefore, the National Rifle Association opposes the confirmation of Judge Sotomayor." Were you aware that that had happened?

Ms. FROMAN. I was told about that while I was here, Senator, yes.

Senator SESSIONS. Okay.

Ms. FROMAN. And so I am sure that they have given a full explanation of that position, and I am glad to see that.

Senator SESSIONS. Mr. Somin, thank you for your testimony. Thank you, Mr. Kopel, for yours. And I frankly feel now obligated to look more closely at the *Didden* case. You raised more serious concerns than I realized. In fact, I guess I was thinking this is worse than I thought after hearing your testimony. I do think that it does impact the property rights of great importance, and thank you for sharing that.

If you want to make a brief comment, my time is—

Mr. SOMIN. Yes, thank you, Senator. I agree with you it raises very important concerns and that these sorts of takings affect thousands of people around the country, particularly the poor and minorities, as the NAACP pointed out in their amicus brief in the *Kelo* case where they indicated that the poor and politically vulnerable and ethnic minorities tend to be targeted for these sorts of condemnations.

Senator SESSIONS. Thank you.

Senator KLOBUCHAR. Thank you very much.

Senator KYL.

Senator KYL. Thank you, Madam Chairman.

First of all, let me acknowledge those on the panel who I know, but I thank all of you for being here. Louis Freeh, it is great to see you again. I respect your opinions greatly. I want you to know that.

I also respected the way David Cone played baseball very, very much. And I used to root for you, as a matter of fact. I should not say that as an Arizona Diamondbacks fan, but I had another team in the other league.

Senator SESSIONS. Senator Bunning's record, was his perfect game the last one when you did it?

Mr. CONE. No. His was done back in the 1960's, but there are only, I think, 17 perfect games in the history of the game. I am lucky enough to be one of them.

Senator KYL. And, of course, Dr. Yoest; and Sandy Froman is a person with whom I have consulted over many, many years, long before she was the National President of the NRA, but also on legal matters. And I appreciate her because of her distinguished law career, the judgment that she gives on this.

I wish I could ask all of you a question, but let me just ask a couple here.

First of all, Sandy, the question that Senator Sessions asked I think gets right to the heart of the matter, and I wonder if you could just put a little bit of a legal spin to it. The question is: What would it mean to the gun owners of America if Judge Sotomayor's opinion were to be the controlling law in this country from now on?

She acknowledged under my questioning that it would be more difficult—I do not have her exact quotation here, but it would be more difficult for gun owners to challenge the regulations of states or cities, but it was unclear exactly how much more.

Could you describe the test that would be used in such a situation and, in your opinion, how much more difficult it would be for gun owners to sustain their rights as against States and localities?

Ms. FROMAN. Yes, thank you, Senator Kyl. Well, I believe I heard you questioning one of the panels earlier. You raised that issue yourself, which is she said the rational basis test would be sufficient to sustain any gun ban that the Government wanted to impose, whether it was a city or a state. And the rational basis test is the lowest threshold that the Government has to meet to sustain a ban. They can articulate any reason, pretty much, and it will be sufficient to get past that review.

Now, the Supreme Court in *Heller* made it clear that the rational basis test is not allowed when you are interpreting an enumerated right like the Second Amendment. But she ignored that in the *Maloney* case and talked about rational basis anyway. So that is of great concern to me and I think to the almost 90 million American gun owners that, yes, it is fine to say in *Heller* that we have a right that is protected against infringement by the Federal Government. But that doesn't mean—the *Heller* case doesn't mean that cities and states cannot ban guns, cannot issue whatever regulations they want, as long as they can articulate what will meet this rational basis test. It is a very, very low threshold.

And as a matter of fact, that is why the District of Columbia had their gun ban. That is why the city of Chicago basically has a gun ban that prevents people from having firearms even in their home for self-defense.

So that is what we are concerned about as gun owners in America.

Senator KYL. Thank you very much.

Dr. Yoest, in the questions by Senator Coburn of the nominee, he asked about advances in technology, and as I recall Judge Sotomayor's testimony, she did not want to acknowledge the impact of advances in technology as it relates to the Supreme Court's evaluation of restrictions on abortion.

Do you believe that advances in technology are important to the viability trimester framework that the Court articulated in Roe, and why?

Ms. YOEST. Well, I would reference back to the confirmation hearings of the Chief Justice in which he went through one of the elements that we look at when we reconsider factual—how things relate to a case, and there has definitely been tremendous advances on the scientific realm as it relates to human life.

So I think it is important to see her, whether or not she is willing to consider that kind of thing, and it also goes to—Americans United for Life works very focused on pro-life legislation at the State level, and part of the challenge that we face is this question of how much the American people are going to be allowed to interact with their duly elected representatives at the State level in restricting abortion in a common-sense way that they would like to see.

Senator KYL. Thank you. Just to be clear, I have recalled her testimony slightly incorrectly. She actually did not say or would not say how she viewed it. She said it would depend upon the case that came before her. So I do not want to mischaracterize her testimony, but your point is that it would be very important for a court in evaluating a restriction imposed by a State.

Ms. YOEST. Yes, sir.

Senator KYL. Okay. Thank you. Again, I wish I had more time to—but we have, I think, one or two panels left here, so we should probably move on.

Senator KLOBUCHAR. Senator, we have two panels left.

Senator KYL. Yes, but we thank you very much. This is an important event in our country's history. You have contributed to it, and we thank you, all of you, for it.

Senator SESSIONS. Thank you, Mr. Canterbury. I appreciate the FOP's—

Senator KLOBUCHAR. Yes, I want to thank all of you, and you just did a marvelous job in stating your opinions. I think it was helpful for everyone, and thank you very much. Have a very good afternoon. It was one of our shortest panels. You are lucky. You can go home and have dinner.

We are going to take a 5-minute break, and then we will have the next panel join us. Thank you very much.

[Whereupon, at 5:36 p.m., the Committee was recessed.]

After Recess [5:46 p.m.]

Senator KLOBUCHAR [presiding].—We are going to get started with our next panel, if you could stand to be sworn in and raise your right hands. Do you affirm that the testimony you are about to give the Committee will be the truth, the whole truth and nothing but the truth, so help you God?

[Witnesses sworn.]

Senator KLOBUCHAR. Thank you. We are joined here by Senator Sessions. I know Senator Kyl may be joining us and has been with us today, and whoever else stops by. But we want to thank you for coming. We have had a good afternoon.

What I am going to do is introduce each of you individually and then you will give your 5 minutes of testimony. I know one of our

witnesses is a little late. So we are going to start here with you, Ms. Romero.

Ramona Romero is the current national president of the Hispanic National Bar Association and the corporate counsel for logistics and energy at DuPont. She is also a cofounder and former board member of the Dominican-American National Roundtable. She is a graduate of Harvard Law School.

Ms. Romero, we are honored to have you here. Thank you. We look forward to your testimony. You can give your testimony, because our other witness got a little delayed coming over from the House. So thank you.

**STATEMENT OF RAMONA ROMERO, NATIONAL PRESIDENT,
HISPANIC BAR ASSOCIATION**

Ms. ROMERO. Good afternoon. As Madam Chair said, my name is Ramona Romero and I am the national president of the Hispanic National Bar Association, which is known as the HNBA. We are grateful to Chairman Leahy, to you, Ranking Member Sessions, and to all of the members of the Committee for affording the HNBA the opportunity and honor of testifying at this hearing.

This is the fifth time that we have appeared before this Committee in support of the confirmation of a Supreme Court justice. We take great pleasure in endorsing Judge Sotomayor. Her support is based, first and foremost, on the merits of her stellar credentials.

The HNBA was founded in 1972. One of its primary goals is to promote equal justice for all Americans by advancing the participation of Hispanics in the legal profession. It is a nonprofit, voluntary bar association. We have 37 affiliates in 22 states. The HNBA is nonpartisan and it does not represent a particular ideology.

Today, I am accompanied by nine former HNBA national presidents and vice president-elect. Like many Americans, we were proud when President Obama announced the nomination of Judge Sotomayor. As many members of this Committee know, for decades, the HNBA has worked to promote a fair, independent and, yes, diverse judiciary, one that reflects the rich mosaic of the American people.

There are over 45 million Hispanics in the United States. We represent over 15 percent of the population. We are the largest, fastest growing and youngest segment of the population. Yet, Hispanics are under-represented among lawyers and judges.

The appointment of the first Hispanic to the Supreme Court is an important—an important symbolic milestone for our country, just like Justice Marshall was with respect to African-Americans and Justice O'Connor was with respect to women.

The HNBA often reviews the qualifications of judicial candidates, regardless of background or politics. We consider a number of factors: exceptional professional competence, intellect, character, integrity, temperament, commitment to equal justice, and service to the American people and, also, to Hispanics, the community we serve.

Judge Sotomayor more, more than satisfies all of these criteria. Before her nomination, we were already familiar with Judge Sotomayor's impressive background. We had endorsed her for both of her prior judicial appointments.