

Draft Floor Statement on the Nomination of Judge Sotomayor

Senator Al Franken

Thank you, Mr. President. Before I discuss the nomination of Judge Sotomayor, I want to take a moment to thank all of my colleagues here in the Senate for their very warm welcome and hospitality. I joined this body a little less than a month ago, but I have been humbled by this institution, the work that goes on here, and most importantly by my new colleagues. It's an honor to represent the people of Minnesota, and it's a very special privilege to do so here in the United States Senate.

Mr. President, one of my first responsibilities on joining the Senate was to participate in the nomination hearings for Judge Sotomayor. I said at the start of the hearings that I wanted to be a voice for the overwhelming majority of Americans who aren't lawyers. The actions of the Supreme Court directly affect the everyday lives of all Americans. Who we choose to place on the court affects us all.

That's what I want to do today. I want to put the nomination of Judge Sotomayor in context. I want to put it in the context of what the Supreme Court has done these past five years—and how that has affected the lives of Minnesotans and all Americans.

Our country is going through some tough times. We're experiencing the highest unemployment rates in decades. Businesses are failing. Investors are seeing their investments shrink, if not disappear.

Yet despite all of this, despite our faltering economy, in the past five years the Supreme Court has restricted the rights of Americans as employees, as small business owners, and as investors. And they've done this by overturning long-standing precedents.

Let me put this in the context of Minnesota. Ten years ago, Minnesota had an unemployment rate of 2.8 percent. Let me repeat that: ten years ago, Minnesota had an unemployment rate of 2.8 percent. Today, it's 8.4 percent. In certain counties, it hovers between 13 and 14 percent.

At the same time, Minnesota has an older workforce. The Twin Cities are fourth in the nation in the percentage of seniors working past the age of 65. When businesses are making tough personnel decisions, you can bet that they're taking a good hard look at older workers, who have higher pension and health care costs.

But just last month, the Supreme Court eviscerated the one law designed to prevent discrimination against older workers—the Age Discrimination in Employment Act, or ADEA as its called. Because of this case, the *Gross* case, it's not enough for a worker suing for age discrimination to show that he or she was fired partly because of her age. Under this new standard, an older worker must show that age was the single, determinative reason for the firing. This is a difficult, if not practically impossible, standard to meet.

This also breaks with a long-standing rule that the ADEA must be interpreted the same as Title VII of the Civil Rights Act, which protects women and minorities against discrimination in the workplace. Because of the *Gross* case, Minnesota's older workers have fewer rights in the workplace precisely when they need them most.

This was the same Court that two years ago barred a Title VII suit by Lilly Ledbetter—a woman who was paid less than her male colleagues for the same work for two decades. Minnesota women are paid 74 cents for every dollar earned by a man. And until Congress fixed this precedent last year through the Lilly Ledbetter Fair Pay Act, this was yet another ruling that limited Minnesotans’ rights in the workplace.

This Supreme Court has put Minnesota small business owners in a similar position. Like entrepreneurs around the country, Minnesota business owners are struggling. Business bankruptcies in our state increased 40% between 2006 and 2008 – and it will likely be worse in 2009. If there ever was a time small business owners in Minnesota needed a leg up, it’s right now.

But two years ago, the Supreme Court overturned one of the strongest protections that small business owners have under the Sherman Act, our main antitrust law. For over 100 years, it has been illegal for manufacturers to price-fix—to force retailers to sell their goods at a certain price. Today, thanks to the Court’s ruling in the *Leegin* case, price-fixing is now permitted. In fact, the burden is now on consumers and small business owners to show, through a complex economic analysis, that price fixing hurts them.

This Court has been no kinder to investors. Like almost all American investors, Minnesotan investors are reeling from the trillions of dollars in losses in the stock market. These losses were partly caused by structural deficiencies in our finance system. But they were also caused by speculation and by fraud, by people like Bernie Madoff and Tom Petters, a Minnesota financier who is charged with organizing a \$3.5 billion Ponzi scheme.

And yet last year, the Supreme Court handed down a decision that severely limited investors' ability to defend themselves against securities fraud. In the *Stoneridge* case, the Supreme Court said that an investor cannot sue an outside accountant or a lawyer that worked with a company to fraudulently alter its financial records—to deliberately cook its books—unless that third party somehow, for some reason, publicly announced its involvement.

Together, the Age Discrimination in Employment Act, Title VII of the Civil Rights Act, the Sherman Act, and the Securities Exchange Act are some of the strongest protections that employees, small business owners and investors have under American law. These laws help to level the playing field for the less powerful or wealthy in our society.

And yet in each of these cases, for each of these laws, this Supreme Court has ignored long-standing precedent and original congressional intent to limit the rights that these laws afford—precisely when they are needed the most.

The Supreme Court’s willingness to ignore long-standing precedent to restrict individual rights is not limited to our economy. This Supreme Court also recently overturned a 30-year rule that requires that a woman’s health be taken into account in any law regulating her right to choose.

The Court is also poised to overturn critical protections to voters. This Supreme Court has questioned the constitutionality of Section 5 of the Voting Rights Act, even though the 15th Amendment expressly grants Congress the power to regulate elections—and even though Congress recently voted to reauthorize these provisions for the fourth time by a vote of 98-0.

Talk about judicial activism. This is judicial activism. This is the Supreme Court questioning the constitutionality of a law passed by Congress

under an explicit and exclusive grant of power in the United States Constitution.

If she is confirmed, the first case that Justice Sotomayor will hear will reconsider the constitutionality of sections of McCain-Feingold that the Supreme Court upheld just six years ago. The underlying principle in question goes back 100 years to the Tillman Act of 1907. For 100 years, Congress has said, with increasing force, that corporations should not be spending money on federal election campaigns. And yet this court is poised to contravene that 100 year old rule—and its own ruling on the identical provision just six years ago.

Again, I think that this is judicial activism. In fact, I think it's judicial activism in one direction—away from long-standing protections for the individual and towards a more friendly law for the powerful.

Mr. President, as I said last week, I firmly believe that in this context, with this Supreme Court, a vote for Judge Sotomayor is a vote against judicial activism.

In a careful review of her opinions as an appellate judge, the non-partisan Congressional Research Service recently concluded that “[p]erhaps the most consistent characteristic of Judge Sotomayor’s approach as an appellate judge has been an adherence to the doctrine of *stare decisis*,” the upholding of past judicial precedents. Of the 230 majority opinions that Judge Sotomayor wrote as an appellate judge, the Supreme Court has reversed only three. That’s three reversals out of 230 majority opinions.

But the best examples of Judge Sotomayor’s inherent judicial restraint are the two cases for which she has ironically received the most criticism—the *Ricci* case and *Maloney v. Cuomo*, the Second Circuit’s most recent Second Amendment case.

In both of these cases, Judge Sotomayor simply followed the Supreme Court’s own maxim that “it is [the Supreme] Court’s prerogative alone to overrule one of its precedents.” When the three-judge panel in *Ricci* affirmed the district court’s decision, it was simply following existing Title VII law. When the three-judge panel in the *Maloney* case said that the Second Amendment does not apply to the states, it was simply following a one hundred-and-twenty year old Supreme Court precedent that said exactly that. Moreover, a three-judge panel on the Seventh Circuit that included two of the most prominent conservative judges in the country, Frank Easterbrook and Richard Posner, reached the exact same conclusion.

Judge Sonia Sotomayor is a judge that follows and respects precedent.
She is a judge that does not make new law.

In fact, it seems that Judge Sotomayor’s worst sin in this process is her straightforward observation that our life experiences shape who we are and what we do. This is not a new idea. One hundred and twenty five years ago, on the first page of the most famous treatise in American law, Oliver Wendell Holmes wrote: “The life of the law has not been logic; it has been experience.”

This isn't an old idea, either. Justices Alito, Scalia, and Thomas each acknowledged in their own confirmation hearings that their own life experiences—being born into an immigrant family, an exposure to discrimination, a childhood in poverty—shaped their approach to judging.

But Judge Sotomayor went beyond Justices Alito, Scalia and Thomas by also recognizing that judges must be aware of these prejudices, and must not allow these prejudices to impact their approach to a case.

Mr. President, since this is a body that values its history, I thought it would be appropriate to close by mentioning the last nominee that came to the Supreme Court with a comparable amount of experience to Judge Sotomayor. That person was Benjamin Cardozo.

Cardozo was nominated to the Supreme Court in 1932, after spending 18 years on his state's highest court. Like Judge Sotomayor, Judge Cardozo was from New York. Like Judge Sotomayor, he had a tough childhood, and one of his parents, his mother, died when he was 9 years old. Like Judge Sotomayor, Cardozo was from an ethnic minority—he was a Sephardic Jew, a descendant of Portuguese immigrants. Like Judge Sotomayor, Cardozo was rightly proud of his heritage. Like Judge Sotomayor, Cardozo was the most experienced nominee to the Supreme Court in his generation.

And yet unlike Judge Sotomayor, Judge Cardozo did not attract so much controversy. In fact, he was unanimously confirmed to the Supreme Court in a voice vote that lasted ten seconds.

Mr. President, Judge Sotomayor is one of the leading jurists of our nation. If confirmed, she would be the only judge on the Supreme Court with trial court experience. She would be one of only a few with experience as a prosecutor. And, as many have commented, she would be the appointee with the most federal court experience in a century.

Mr. President, we have—right now—a chance to make history.

Thankfully, unlike a lot of the most important decisions that have come before this body, this is an easy one to make.

Judge Sotomayor will not only be the first Latina in the Supreme Court; she will be the first person of Hispanic descent to reach the pinnacle of any one of the three branches of federal government. And she could not be more qualified for this position. Moreover, her appointment will help protect the individual rights and liberties that are so necessary for Minnesotans and for all Americans—and that this Supreme Court has steadily, and dramatically, eroded.

I am honored to cast my vote in favor of Judge Sonia Sotomayor, and I hope my colleagues on both sides of the aisle will join me.

Thank you, Mr. President, and I yield the floor.