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SUBJECT: Sotomayor Nomination: Responding to Democrats' arguments about "empathy" and Justices Thomas and Alito  
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In response to criticism of the President's "empathy" standard for judges and Judge Sotomayor's statements that appear to argue that judicial decisions should be influenced by the judge's group identity and personal history, Democrats and mainstream press outlets have tried to argue that Justices Thomas and Alito pointed to their personal histories as a legitimate influence on their judging. Democrats' arguments, however, rely on selective quotation and distortion. Republicans can and should set the record straight.

### **Justice Thomas—Empathetic Person; Impartial Judge**

Democrats argue that President George H.W. Bush lauded then-Judge Thomas' "empathy" in announcing his nomination, and that Justice Thomas himself pointed to his compelling personal history to argue that he would be partial to the downtrodden. In fact, both President Bush praised Justice Thomas as an empathetic *person* and an impartial *judge*:

**GEORGE H.W. BUSH:** "I have followed this man's career for some time, and he has excelled in everything that he has attempted. He is a delightful and **warm, intelligent person who has great empathy and a wonderful sense of humor.** He's also a fiercely independent thinker with an excellent legal mind, who believes passionately in equal opportunity for all Americans. **He will approach the cases that come before the Court with a commitment to deciding them fairly, as the facts and the law require.**"

(President Bush, Remarks Announcing The Nomination Of Clarence Thomas, Kennebunkport, ME, 7/1/91)

Justice Thomas's own comments make clear that he would be impartial, explicitly rejecting the kind of argument Judge Sotomayor appears to have made that judges should allow their personal backgrounds to influence their decisions:

**CLARENCE THOMAS:** You see, Mr. Chairman, my grandparents grew up and lived their lives in an era of blatant segregation and overt discrimination. Their sense of fairness was molded in a crucible of unfairness. I watched as my grandfather was called "boy." I watched as my grandmother suffered the indignity of being denied the use of a bathroom. But through it all, they remained fair, decent, good people -- fair in spite of the terrible contradictions in our country.

...

Over the years I have grown and matured. I have learned to listen carefully, carefully to other points of views and to others; to think through problems recognizing there are no easy answers to difficult problems; to think deeply about those who will be affected by the decisions that I make and the decisions made by others. But **I have always carried in my heart the world, the life, the people, the values of my youth, the values of my grandparents and my neighbors, the values of people who believed so very deeply in this country in spite of all the contradictions.** It is my hope that when these hearings are completed, that this committee will conclude that I am an honest, decent, fair person. I believe that the obligations and responsibilities of a judge in essence involve just such basic values.

**A judge must be fair and impartial. A judge must not bring to his job, to the Court, the baggage of preconceived notions, of ideology, and certainly not an agenda. And a judge must get the decision right because when all is said and done, the little guy, the average person, the people of Pin Point, the real people of America will be affected not only by *what***

**we as judges do, but by the way we do our jobs.**

If confirmed by the Senate, I pledge that I will preserve and protect our Constitution and carry with me the values of my heritage, fairness, integrity, open mindedness, honesty and hard work.” (Judiciary Committee, U.S. Senate, Hearing, 9/10/91)

### **Justice Alito—Family History Shaped Him as a Person; Judge’s Job to Apply the Law**

Democrats also point to Justice Alito’s invocation of his family history during his confirmation hearings to Sen. Coburn’s invitation to “comment just about Sam Alito, and what he cares about, and let us see a little bit of your heart and what’s important to you in life.” But they conveniently ignore his firm statement that, while his family background and life experiences shaped him *as a person*, that does not alter the fact that it is his “job to apply the law.”

**SENATOR COBURN:** You know, I think at times during these hearings you have been unfairly criticized or characterized as that you don't care about the less fortunate, you don't care about the little guy, you don't care about the weak or the innocent. Can you comment just about Sam Alito, and what he cares about, and let us see a little bit of your heart and what's important to you in life?

**SAMUEL ALITO:** Senator, I tried to in my opening statement, I tried to provide a little picture of who I am as a human being and how my background and my experiences have shaped me and brought me to this point.

...

And that's why I went into that in my opening statement. **Because when a case comes before me involving, let's say, someone who is an immigrant --** and we get an awful lot of immigration cases and naturalization cases -- **I can't help but think of my own ancestors, because it wasn't that long ago when they were in that position.**

And so **it's my job to apply the law. It's not my job to change the law or to bend the law to achieve any result.**

But when I look at those cases, I have to say to myself, and I do say to myself, "You know, this could be your grandfather, this could be your grandmother. They were not citizens at one time, and they were people who came to this country."

**When I have cases involving children, I can't help but think of my own children** and think about my children being treated in the way that children may be treated in the case that's before me.

And that goes down the line. **When I get a case about discrimination, I have to think about people in my own family who suffered discrimination** because of their ethnic background or because of religion or because of gender. And I do take that into account. **When I have a case involving someone who's been subjected to discrimination because of disability, I have to think of people who I've known and admire very greatly who've had disabilities,** and I've watched them struggle to overcome the barriers that society puts up often just because it doesn't think of what it's doing -- the barriers that it puts up to them.

So those are some of the experiences **that have shaped me as a person.**

(Judiciary Committee, U.S. Senate, Hearing, 1/11/06)