

**“Justices have a solemn duty to interpret the Constitution and have the last say in what will be the scope of our rights and the breadth of our freedoms.”**

**-Herb Kohl**

## **Supreme Court Confirmations**

Senator Kohl served on the Senate Judiciary Committee for 24 years and participated in 8 Supreme Court confirmations. He viewed Supreme Court confirmations as one of the most important roles he had as a Senator because the decisions justices make have a dramatic impact on the foundations and fabric of American society. Despite this great power, the public and Senators on the Judiciary Committee have only a brief time to examine nominees before they are confirmed for life tenure on the Court.

Whether nominated by a Democratic or a Republican president, Senator Kohl always reserved judgment on a nominee until a thorough review of the nominee’s background and record and after the confirmation hearing. In preparation, Senator Kohl convened a bipartisan Supreme Court Task Force made up of the deans of the University of Wisconsin and Marquette University Law Schools, professors, private practitioners, state and federal prosecutors, and lay-people in Wisconsin. The Task Force members researched the record of each nominee and prepared a memo for Senator Kohl. Then, prior to the hearing, Senator Kohl would meet with the group for several hours to discuss the nominee and potential lines of questioning.

*“When it came to questioning those seeking the highest judicial offices in the land, I always thought that you made a special offering in those Committees. The questions you asked and the way you asked them really brought a great deal of recognition to this Committee at its best. And I thank you for that because time and again you have just struck the right cord with the questions you asked some of the most important nominees to ever come before the Judiciary Committee. I commend you for that and so many other things.”*

**Senator Richard Durbin (D-IL)**

During confirmation hearings, Senator Kohl used his questions to go beyond a nominee's record to get into each nominee's heart and mind in order to learn who they were and who they would be on the Supreme Court. He provided a unique perspective as one of the few non-lawyers on the committee. He focused on questions that he thought were on the minds of ordinary Americans and questions that would be important to his constituents, not only to legal scholars and court watchers. Senator Kohl also urged nominees to be more candid and forthright with the committee. He was frustrated by nominees' so guarded that they only said only just enough to get confirmed.

### **David Souter**

When Justice Souter was nominated to the Supreme Court in 1990, he was believed to have been chosen in part because he did not have an extensive record that could be dissected and used against him, as had happened with Judge Bork. This provided a new challenge for Judiciary Committee members, including its newest and most junior member, Senator Kohl.

As a new member of the Judiciary Committee considering his first Supreme Court nominee, Senator Kohl sought input from Wisconsin's legal community through a bipartisan Supreme Court Nomination Task Force. He convened a panel to review what little was in then-Judge David Souter's record and to discuss the Constitutional issues important at the time that merited probing with the nominee. This began a tradition of using a bipartisan Supreme Court Nomination Task force for all of the nominations considered during Senator Kohl's 24 years on the Judiciary Committee.

*"On behalf of the American people, we will be having a conversation with you over the next few days. If you are confirmed it is the last conversation we can have about basic constitutional issues. So, in these next few days, we must make an extra effort to get to know you and you must make an extra effort to help us do that. The burden of proof rests on you and only you can discharge it."*

**From Senator Kohl's opening statement at the hearings on the confirmation of Justice David Souter**

On the first day of Judge Souter's hearing, Senator Kohl made his opening statement and outlined his own test for Supreme Court nominees which he would use for the next 20 years- judicial excellence. Judicial excellence had four main elements which Senator Kohl explained: (1) competence, character, temperament to serve, and a keen understanding of the law and the ability to explain it in ways that the American people understand; (2) values which form the core of our political and economic system. No ideological purity, but dedication to equality, civil rights and liberties; (3) compassion and the ability to recognize real people and real problems. He quoted Justice Black, "The Courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered or because they are non-conforming victims of prejudice and public excitement." And finally: (4) candor before confirmation. Supreme Court justices have enormous power and the public needs and deserves to know what he or she thinks about basic issues - abortion and privacy, civil and individual rights, the balance of power and separation of church and state. Nominees need not say how they will rule on specific cases, but they should share views about basic constitutional doctrine.

As the most junior member of the committee, Senator Kohl was the last member to question Judge Souter. By the time his turn came, nearly one hundred questions had been asked. But Senator Kohl was the first with this simple yet poignant question -- why do you want this job? Souter answered that he would be given the greatest power, the power to preserve and protect. Senator Kohl focused on *Roe v. Wade*, asking him what his feelings were about the case when the decision was announced. Souter was cautious in his answer and said that he only remembers switching back and forth between arguments and playing devil's advocate. Senator Kohl pushed him on his opinion. Finally, Souter said had not made any commitment in his mind as to what he would do if he were on the court for that decision. This was significant because in the past nominees would simply avoid the question by saying in so many words that it would be inappropriate for them to answer that question because a similar case could come before them. This rote answer suggests that they had a view, but just didn't want to share it. Here, Souter readily admitted that he hadn't formed an opinion.

Senator Kohl asked about myriad other items, from how Souter felt about cameras in federal courts to antitrust to civil rights. Senator Kohl's final question was a last attempt to get to know Souter as a person and not merely a judge. He quoted Justice Brandeis who once said, "You can judge a person better by the books on his shelf than by the clients in his office," and asked him what he has read and what he has

learned from his reading. Judge Souter said that he has many books that he hasn't read yet, but his favorite books and authors ranged from historical books about the New Deal to everything of Faulkner, Fitzgerald, and Hemingway. Perhaps the most illuminating part of his answer was when he said that his clerks thought he lived "too sheltered a literary life" and one of them got him to read Fear and Loathing in Las Vegas.

When the Judiciary Committee met in executive session to consider Judge Souter's nomination, Senator Kohl announced his intention to support Judge Souter. He said that he still had some reservations, but "on balance, I believe [Judge Souter] will make a good justice." Senator Kohl was concerned that Judge Souter did not explicitly recognize a woman's constitutional right to reproductive choice. However, the senator's instinct proved right when Justice Souter defied expectations and voted to reaffirm *Roe v. Wade* in the landmark case *Planned Parenthood v. Casey*.

*Senator Kohl was named "Rookie of the Year" by National Public Radio's Supreme Court Nina Totenberg at the conclusion of the hearings on Justice David Souter*

### **Clarence Thomas**

Clarence Thomas' initial confirmation hearings were conducted from September 10-20, 1991. However, they may be best known for the allegations of sexual harassment made by his former colleague Professor Anita Hill. But these allegations did not come until after the ordinary Judiciary Committee hearing and committee vote. It was not until two days before the scheduled full Senate vote that reports of Hill's charges were reported in the press and the Judiciary Committee hearing was reconvened. Professor Hill's revelations ultimately overshadowed the Judiciary Committee's initial hearing and committee debate on the nomination, but that initial examination was particularly revealing about Thomas as a future jurist. And it was what he learned in those hearings, before Anita Hill came forward, that informed Senator Kohl's decision to oppose Thomas' confirmation.

Then-Judge Thomas had been on the DC Circuit Court of Appeals for a little more than a year when, in 1991, President George H.W. Bush tapped him for the Supreme Court to replace Justice Thurgood Marshall. Though Thomas had scant judicial record, he did have an extensive paper trail of speeches and testimony before

Congress as head of the Equal Employment Opportunity Commission. After reviewing these materials and again tapping his bipartisan Supreme Court Task Force, Senator Kohl focused on questions with a “humanistic” approach. He wanted to be able to “draw a picture of Thomas, the person. What he’s like, his values, how he thinks and feels” for the American people.

When Senator Kohl met with Thomas prior to his hearing, Thomas told him not to believe what he had read in the press -- that we would see “the real Judge Thomas” at the confirmation hearings. In his opening statement, Senator Kohl pressed Thomas not to hedge and not to give answers prepared for him by others. “Judge Thomas, we do not have to agree with you on everything, but we do have to be sure that you have firm beliefs and reasoned conclusions about the role of courts, the Congress, and the Constitution. And we do have to be sure that what you say to this committee today, comports with what you have said to others in the past.” After delivering his opening statement, Senator Metzenbaum (D-OH) passed Senator Kohl a note, “Congratulations – best statement made today.”

As with Souter, Senator Kohl was again the last senator on the committee to question Thomas. Nevertheless, Senator Kohl had a significant exchange with Thomas about abortion. Senator Kohl asked, “As Clarence Thomas the man, the human being, do you have a personal view on whether society ought to provide women with the option of having an abortion?” Thomas responded that whether or not he had a view was “irrelevant.” Senator Kohl continued to press him and asked whether he had discussed the *Roe v. Wade* decision with anyone when it was announced. Thomas said no. The incredulity of that answer reinforced Senator Kohl’s serious concerns about Thomas.

*“If confirmed, you may serve for 30 or 40 years, decades in which you will shape the nature of our country. Before we decide whether to entrust you with this power, we ask that you stand before the public and explain your views, express our hopes, and expound on your approach to the bedrock principles that guide us as a Nation. We have an obligation to find out where you will take us before we decide whether we want you to lead us there.”*

**From Senator Kohl’s opening statement at the hearings on the confirmation of Justice Clarence Thomas**

Following this initial hearing and on the eve of the Judiciary Committee's business meeting to vote on Thomas, Senator Kohl announced his intention to vote against Thomas' confirmation. He was not believe that Thomas' responses to the questions asked by the committee demonstrated a mastery of legal issues. They failed to reveal a coherent and consistent approach to constitutional interpretation. And, they were nonresponsive to legitimate questions about basic values as opposed to future rulings.

Senator Kohl had hoped that during the hearings Thomas would articulate a clear vision of the Constitution – ideally one that included full safeguards for individuals and minorities. Unfortunately, after the hearing, Senator Kohl was unable to determine what views and values he would bring to the bench. Second, he felt that Thomas had exhibited “selective recall.” Senator Kohl was also frustrated by Thomas' assertion that the policy positions he took in the past would not impact his decision on the Court. Presidents nominate candidates based on their values, and the Senate must consider them. He quoted Justice Rehnquist: “Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of Constitutional adjudication would be evidence of lack of qualification, not lack of bias.” Senator Kohl agreed with Chief Justice Rehnquist – either we judge Thomas on his complete record – as a lawyer, policymaker, as well as his youth – or we do not consider any part of his record at all.

Senator Kohl also was disturbed by what he called Thomas' “oratorical opportunism.” Judge Thomas crafted policy statements apparently tailored to win the support of specific audiences – and then later repudiated these very same positions. For example, when speaking to the Federalist Society, he said that the natural law background of the American Constitution provides the only firm basis for a just, wise, and constitutional decision. Yet during the hearings he steadfastly maintained that natural law played no role in constitutional adjudication. He told another audience that Lew Lehrman's article opposing abortion was a splendid application of natural law. Yet at the hearings he said that he had only skimmed the article and never endorsed Mr. Lehrman's conclusions.

Finally, Senator Kohl was alarmed by the answers Thomas gave to questions about *Roe v. Wade*. Most significant was his assertion to the committee that he had never discussed that decision either as a lawyer or as an individual, and that he had no views about it. Senator Kohl found this to be either a complete lack of intellectual legal curiosity or simply an untruthful statement.

The next day, September 27, the Judiciary Committee initially deadlocked at 7-7 on whether to endorse Thomas' nomination but then voted in favor of sending his nomination to the full Senate for consideration.

After Professor Anita Hill accused Thomas of sexual harassment, the legal arguments against his confirmation were overwhelmed by the explosive charges, Senator Kohl's reasons for opposing Thomas faded into the background. What ensued following Hill's allegations was utterly chaotic and undeniably partisan, an unfortunate end to what had been an informative confirmation hearing. Senator Kohl acknowledged that it was simply not possible to know what happened between Thomas and Hill. But it was clear to him that the committee and the Senate needed to reduce the partisanship in the confirmation process. "It's the American people, the ones we're supposed to serve and lead, who ultimately lose out," he noted at the conclusion of the Committee's work.

### **Ruth Bader Ginsburg**

When her nomination was announced in June 1993, then-Judge Ginsburg was the first Democratic nominee to the Supreme Court in 26 years. Senator Kohl was pleased that President Clinton nominated someone who was broadly viewed as a moderate judge to fill the Supreme Court vacancy created by the retirement of Justice Byron White. When the nomination was announced he said "with this nomination, the President has shown that he is willing to put the overall good of the nation ahead of scoring political points." After meeting with her, Senator Kohl thought she displayed a keen intellect and independence, characteristics that are epically important for justices of the Court.

Ginsburg had a well-known track record, having served for 13 years on the D.C. Court of Appeals, and spoken extensively from the bench. The nomination was relatively non-controversial, in part because she had a well-known background so there was little to decipher or quibble about. But Senator Kohl wanted to probe her about how she looked at the places in America where there were particular problems in society, such as in gender and racial equality or education, and how she would approach them as a Supreme Court justice. Senator Kohl reconvened his bipartisan Supreme Court Task Force to review her written opinions and speeches.

*“Today we begin a public discussion, which is the only opportunity we will have – on behalf of the American people – to engage in a conversation with you about the core concepts of our society... These issues invite all Americans to struggle with the dilemmas of Democracy. And if we discuss these issues with candor, I believe we will have a conversation the American people will profit from.”*

**From Senator Kohl’s opening statement at the hearings on the confirmation of Justice Ruth Bader Ginsburg**

When Ginsburg’s hearings began, Senator Kohl set out to learn about Ginsburg as a “whole person”. This meant avoiding the typical technical legal questions and focusing on the non-legal issues that Congress and the country were facing. For example, at that time, Congress had failed to do anything to solve the large federal budget deficit and ever-increasing national debt. Senator Kohl asked her how she felt about this enormous tax burden placed on her grandchildren, effectively “taxation without representation.” She responded that in a democracy, it was legislators’ job, as well as parents’ job, to “care for the next generation.”

Senator Kohl also referenced a speech in which Justice Scalia said that he would not mind being stranded with Ginsburg on a desert island and asked whether she felt the same way. She treaded carefully, responding that “he is one of the people in the world who can make me laugh and I can appreciate that.” This exchange would clearly not impact her judging, but it was a rare moment during which the public watching on c-span could relate to a Supreme Court nominee as not simply a master of intellect and the law, but as a human being like any other.

Senator Kohl also engaged Ginsburg in lines of questioning about her judicial philosophy and how her life experiences might impact her decisions. He asked her whether she would be predisposed to help those fighting discrimination because she had faced discrimination in her career, and whether her activism in the 1970s would emerge once she was confirmed to the Supreme Court and free from the legal precedent she was bound to as a court of appeals judge. He stated his own view that he didn’t believe any nominee could shed their total life experience and personality when sitting on the bench. She responded that she did not expect Senators to overlook, and she would not apologize for, anything she had done in her past. She emphasized her

current duty as a judge and not an advocate. She pledged impartiality rather than advocacy.

Senator Kohl was again frustrated by the extent to which Judge Ginsburg evaded questions, and her “don’t ask, don’t tell, don’t pursue strategy of responding.” However, because she had a proven track record as a judge, he felt he had enough to judge her by and believed that she would make an excellent Supreme Court justice. He said: “[A]s I reflect on the confirmation hearing, I keep returning to how Judge Ginsburg told me she wanted to be remembered: As someone who care about people and does the best she can with the talent she has to make a contribution to the world.”

*“We’d bet Sen. Herb Kohl was one of the best-prepared members of the Senate Judiciary Committee as it voted 18-0 Thursday in favor of Supreme Court nominee Ruth Bader Ginsburg. That’s because Kohl (D-WI) did his homework with help from his Supreme Court Task Force... Kohl and the panel members deserve praise for taking their responsibility seriously.”*

**Janesville Gazette Editorial**  
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### **Stephen Breyer**

When the nomination of then-Judge Stephen Breyer was announced, Senator Kohl acknowledged the difficulty President Clinton had in filling Justice Blackmun’s shoes. And while Senator Kohl expressly said that he would not take a position on the nominee until after the hearings, he praised Judge Breyer for being exceedingly bright, well respected, and independent. He thought he would be a Justice that would strengthen the Court and a nominee that would not divide the Senate. On the latter point, the senator proved correct: Judge Breyer was ultimately confirmed 87 to 9.

During Senator Kohl’s courtesy visit with Breyer, they learned about an unexpected personal connection. Breyer’s relatives, the Winston family, owned The Grand, an old Milwaukee ladies specialty store, and were friends with Senator Kohl’s parents, founders of Kohl’s department stores. This connection helped Senator Kohl get to know Breyer the person better. He urged Breyer to be forthcoming with the American people and to use the confirmation hearings to give them a sense of how he might affect their lives.

*“Judge Breyer, as you know, John Adams once said that we are a government of laws and not men. But this is, at most, a half-truth, for ultimately, it is men and women who give meaning to the law. And so it follows that character matters, and matters a great deal.”*

**From Senator Kohl’s opening statement at the hearings on the confirmation of Justice Stephen Breyer**

During the confirmation hearings, Senator Kohl began by asking questions that would be meaningful to ordinary Americans. He asked Breyer about the problems faced by our nation and encouraged Breyer to take the opportunity to speak openly and frankly, and perhaps not as a nominee for the Supreme Court, but as an American citizen who is intelligent, thoughtful, and has thought long and hard about the problems that we face as a country. Breyer obfuscated and ultimately said that it is a Supreme Court justice’s challenge to try to make life a little better for people who are struggling. When pushed

by Senator Kohl, he raised his strong belief in antitrust law that ensures competition and fairness for consumers.

Senator Kohl also pressed him on an issue the senator had recently raised in committee hearings and legislation -- court sanctioned confidential settlements that shield the public from information regarding dangerous products. Breyer was sympathetic to the concern and said that no court should stand silent when it sees an immediate and serious risk to health or safety. But, he said that it is Congress’s job to review any problems with court secrecy, and if Congress determines that courts are not drawing the line properly regarding what should and should not be withheld from the public, then Congress ought to change that line.

Senator Kohl raised issues of antitrust and competition, subjects on which Breyer had focused while at the Justice Department and as Chief Counsel to the Judiciary Committee. The senator asked Breyer about vertical price fixing, when manufacturers attempt to set the retail price of their products, thereby restricting discounting. Breyer reaffirmed his own personal opinion that laws against retail price maintenance were sound antitrust law and especially helpful to consumers because they bring about lower

prices. As a Justice, Breyer would write a strong dissent in the case *Leegin v. PSKS Inc.* which overturned nearly 100 years of precedent establishing that vertical price fixing was illegal.

Before voting to confirm Breyer, Senator Kohl again raised his concerns with the confirmation process and the fact that Breyer only answered questions when he wanted to – or when he felt he needed to. “I point this out not to chastise Judge Breyer, whom I respect. But I cannot ignore a nominee’s unwillingness to answer reasonable questions. Indeed the process demands that we should not.”

### **John Roberts**

Then-Judge John Roberts was nominated in July 2005 to fill the vacancy left by Justice Sandra Day O’Connor after she stepped down to care for her husband, who was suffering from Alzheimer’s disease.

However, when Chief Justice Rehnquist passed away in early September, President George W. Bush withdrew his nomination for Justice O’Connor’s vacancy and nominated Roberts to become Chief Justice. Senator Kohl met with Roberts and questioned him closely regarding several issues, including his views on the right to privacy and his judicial philosophy. He also convened his bipartisan Supreme Court Task Force to help review Roberts’ record.

Roberts came before the Committee as the first nominee to the Supreme Court in 11 years. Roberts had only a brief record as a Court of Appeals judge, but many writings as a young lawyer in the Reagan Justice Department. As always, Senator Kohl approached

*“You will likely be the most influential Justice of your generation. During these decades, you will help shape the nature of our country and our democracy. It will be your job to give life and meaning to the broad and lofty promises of the Constitution – such essential principles as ‘due process’, ‘equal protection’, and ‘free speech’ – and to stand up for the rights and civil liberties of the underrepresented and unpopular.”*

**From Senator Kohl’s opening statement at the hearings on the confirmation of Justice John Roberts**

the nomination with an open mind and convened his bipartisan Supreme Court Task Force to help review his record and recommend lines of questioning to Senator Kohl.

During Roberts' opening statement, he referred to a Supreme Court Justice as a baseball umpire, "I will remember that it's my job to call balls and strikes and not to pitch or bat." Senator Kohl expressed skepticism with this analogy in his opening round of questions. He pointed out that in 1954, the Supreme Court justices who decided *Brown v. Board of Education* were willing to step outside of the box, to break new ground, and to strike an entirely new and positive direction for this country. These were not umpires simply calling balls and strikes. He challenged Roberts' analogy: Do judges merely operate as automatons? Don't they bring their life experiences and philosophies to the bench in deciding cases?

Under Senator Kohl's questioning, Roberts admitted that judges are not automatons and that judges do bring their life experiences to the bench, but they are supposed to do their best to interpret the law and the Constitution according to the rule of law, not their own preferences or personal beliefs. Roberts' also acknowledged that his "judge as umpire" analogy did not work with respect to the Supreme Court deciding which cases to hear, an area in which the Justices have considerable discretion.

Senator Kohl's questions revealed other important insights into Roberts' views. For example, upon questioning from Senator Kohl, Roberts recognized the validity of the *Griswold v. Connecticut* decision, which protected the right to privacy, a fundamental underpinning of the *Roe v. Wade* decision.

Roberts' confirmation split the Democratic caucus – 22 voted in favor and 22 against his nomination. Senator Kohl supported nomination, saying that he was "voting my hopes and not my fears." He did not come to the decision easily, and he had concerns about Roberts' claim of being a neutral umpire: "I worry that a Court full of neutral umpires would not have decided *Brown v. Board of Education* or other cases in which the Court moved America forward. Modesty is to be respected to a point, but not when it stands in the way of progress. Historically, the Courts have often succeeded when our democratically elected branches could not."

### **Samuel Alito**

In October 2005, after the failed nomination of White House Counsel Harriet Miers (whose last courtesy meeting with was Senator Kohl), President Bush nominated

then-Judge Samuel Alito, to fill Justice O'Connor's seat on the Court. Unlike Chief Justice Roberts, Alito had a judicial record from his 15 years on the Third Circuit Court of Appeals. Alito also worked in the Reagan Justice Department in the 1980s. There were several significant documents regarding his record, including a job application Alito submitted for a political position with the Justice Department in which he stated that he disagreed with several important Warren Court decisions and that he did not believe that the right to an abortion was protected by the Constitution.

Senator Kohl met with Alito during his courtesy visit to the Senate and reactivated the bipartisan Supreme Court Task Force. Work continued throughout the holidays to prepare for Alito's January hearing.

At the confirmation hearing, Senator Kohl questioned Alito thoroughly regarding his judicial philosophy, his views on the role of a Judge and the Supreme Court, and his record as an appellate judge. Senator Kohl also questioned Alito regarding several statements on his 1985 job application to the Justice Department. Alito disavowed several of these statements, including his disagreement with the concept of one person/one vote. Many of his answers were evasive. For example, when asked to explain his 1988 statement that Judge Bork was the best Supreme Court nominee of the century, Justice Alito claimed he made that comment merely because he served in the Reagan administration. He even failed to answer a simple question as to whether he favored term limits for federal judges.

In order to get a sense of how Alito would change the court, Senator Kohl asked how Alito was like or unlike Justice Sandra Day O'Connor, whom he would be replacing. Alito

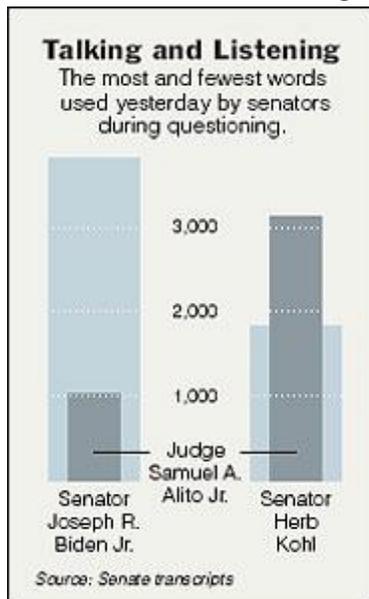
*"If confirmed, you will write the words that will either broaden or narrow our rights for the rest of your working life. You will be interpreting the Constitution in which we as a people place our faith and on which our freedoms as a nation rest. And, on a daily basis, the words of your opinions will affect countless individuals as they seek protection behind the courthouse doors."*

**From Senator Kohl's opening statement at the hearings on the confirmation of Justice Samuel Alito**

said he would “try to emulate her dedication and her integrity”. He said, “I am my own person,” in a way that seemed to purposefully avoid aligning himself with her judicial philosophy or ideology.

Senator Kohl was frustrated by Alito’s unwillingness to engage with the committee regarding the *Bush v. Gore* decision. Senator Kohl asked whether the Supreme Court was correct to take the case in the first place. Alito responded that he didn’t know and that he hadn’t studied it fully. Of course, the facts and circumstances of the case were well known and one would hope that any lawyer would have given some thought to it, but Alito evaded the question.

Senator Kohl received extensive plaudits in many national media outlets for the incisive nature of his questions. Further, at a hearing at which many Senators were criticized for the length of their questions – which often resembled speeches rather than inquiries – the New York Times noted that, of all 18 senators on the Judiciary Committee, Senator Kohl spent the least amount of time asking questions and the most amount of time listening to the nominee.



After much deliberation, Senator Kohl decided he could not vote in favor of Alito’s confirmation. He believed that Alito was simply too restrictive and conservative in his views. In announcing his opposition, the senator spoke about the individuals who had the courage to seek justice from the court and whose names are now familiar – *Brown v. Board of Education*, *Gideon v. Wainwright*, *Baker v. Carr*, *Miranda v. Arizona*. He expressed a concern about how Judge Alito would view the next *Brown* or *Gideon* and concluded that it was unlikely that Judge Alito would side with the future seekers of justice.

Senator Kohl based his concern about Alito’s narrow judicial philosophy on Alito’s 1985 job application in which he took issue with Warren Court decisions that established one-person/one-vote, Miranda rights, and protections for religious minorities. “These statements leave the clear impression that his antagonism toward these decisions – decisions that helped religious and racial minorities receive protection from majority abuses – motivated Judge Alito’s pursuit of

the law,” stated Senator Kohl. The applications also suggested that Alito would have restrictive views of Constitutional liberties, such as a woman’s right to choose.

Senator Kohl further noted that, by 2006, Alito’s judicial philosophy as a court of appeals judge suggested a well-formed philosophy of limited rights and restricted civil liberties. In *Planned Parenthood v. Casey*, he would have placed more restrictions of a woman’s freedom than other conservative judges, including the woman he was seeking to replace on the court.

Concluded Senator Kohl on the floor of the Senate: “I cannot support the nomination of Judge Alito to the Supreme Court. I fear that a Justice Alito will narrow our rights, limit our freedoms, and overturn decades of progress. To confirm Judge Alito to the Supreme Court would be to gamble with our liberties, a bet I fear the Constitution – and the American people – would lose... Judge Alito has the right to see, read, and interpret the Constitution narrowly. And we have the obligation to decide whether his views have a place on the Supreme Court. I have decided they do not.”

### **Sonia Sotomayor**

Senator Kohl’s Judiciary Committee tenure came full circle with the nomination of Judge Sonia Sotomayor, who was chosen to replace Justice Souter, the first Justice whom he helped confirm. She was the first nominee of Hispanic heritage and only the third woman to be nominated to the high court. Senator Kohl activated his Supreme Court Task Force and met with then-Judge Sotomayor. In addition to the usual questions about judicial philosophy, Senator Kohl urged her to be candid and forthcoming in her confirmation hearings so that the American people could hear more than platitudes and vague promises to uphold the rule of law. They also discussed her love of sports, especially baseball.

Prior to the hearing, much attention had been paid to a line Sotomayor used in several speeches, “I would hope that a wise Latina woman with the richness of her experiences would, more often than not, reach a better conclusion.” Senator Kohl did not see these words, taken out of context by critics, as a liability. In fact, he thought her diversity in experiences would bring value to the Court. As he said in his opening statement, “Your nomination is a reflection of who we are as a country and it represents an American success story that we can all be proud of... as a judge, you have brought a richness of experience to the bench and to the judiciary which has been an inspiration for so many.”

In his opening statement, Senator Kohl echoed the theme woven into all of the confirmations in which he participated – the great impact Supreme Court decisions have on Americans: “A Supreme Court Justice must be able to recognize that real people, with real problems are affected the decisions rendered by the court. They must have a connection with and an understanding of the problems that people struggle with on a daily basis. Justice, after all, may be blind, but it should not be deaf.”

Senator Kohl’s questioning was well received on the committee and in the press. He elicited Sotomayor’s acceptance of *Roe v. Wade* and *Planned Parenthood v. Casey*, two landmark abortion cases upholding a woman’s right to choose, as “settled law”. He also asked about affirmative action, noteworthy because of the attention that had been paid to a decision she made while on the 2<sup>nd</sup> Circuit upholding New Haven’s affirmative action laws with respect to firefighters, *Ricci v. DeStefano*. That case was later overturned by the Supreme Court. Senator Kohl asked her whether she believed that affirmative action is a necessary part of our society today -- whether she agreed with Justice O’Connor’s opinion in the *Grutter v. Bollinger* in which she stated that racial preferences will no longer be necessary to promote diversity 25 years hence? Sotomayor acknowledged and accepted affirmative action in higher education and said that it was her hope that in 25 years race would not be a consideration in any situation.

Senator Kohl urged Sotomayor to provide insight into her views on the importance of precedent. He raised *Brown v. Board of Education*, which overturned previous court precedent that blessed “separate but equal,” and asked when she thought it was appropriate to overturn what at the time seems to be “settled law?” Sotomayor said that

*“A child of immigrants with modest means, Judge Sotomayor has risen by dint of exemplary academic accomplishment and hard work, to the cusp of confirmation to our nation’s highest court. But Judge Sotomayor is much more than just a story of accomplishment. She has shown herself to be a judge truly worthy of elevation to the Supreme Court. Both on the bench and before this Committee, Judge Sotomayor has proved that she has the necessary character, competence and integrity to serve on the Supreme Court.”*

**From Senator Kohl’s Senate floor statement on the confirmation of Justice Sonia Sotomayor**

changing precedent should be done cautiously, but she agreed that “precedent can’t stand if other things counsel that it should not.”

As he had in the prior Supreme Court hearings, Senator Kohl was noted for being the member who spent the least amount of his time talking, instead letting the nominee respond to questions. As noted by Fox News, he spoke for only 10 of his 30 minutes of questioning.

Senator Kohl was pleased to get a few elucidating comments from Sotomayor, but he was disappointed in the confirmation process. He felt that, while she did well, she had said just enough to be confirmed. Nevertheless, he was impressed by Judge Sotomayor and strongly supported her confirmation.

### **Elena Kagan**

When Justice John Paul Stevens announced his retirement from the Supreme Court, Senator Kohl lamented the loss of Justice Stevens: “Justice Stevens has served on the Supreme Court with the utmost integrity, honor, and Midwestern sensibility. He contributed a lifetime of experience, knowledge, legal acumen and leadership to some of the most important legal issues in our nation’s history. I thank Justice Stevens for his lifetime commitment to public service; he will be greatly missed. I look forward to confirming a nominee that will carry on his distinguished legacy.”

President Obama nominated Solicitor General Elena Kagan to replace Justice Stevens. Kagan had previously worked on Justice Ginsburg’s Supreme Court nomination for then-Chairman Biden. Reflecting on that experience, she criticized the hearing process as being a “vapid and hollow charade, in which repetition of platitudes has replaced discussion of viewpoints and personal anecdotes have supplanted legal analysis.”

Senator Kohl hoped this would mean a more meaningful confirmation hearing. This was especially important in Kagan’s case because she had no judicial record and almost no record otherwise. Senator Kohl was noted for having challenged Kagan in his opening statement: “We have less evidence about what sort of judge you will be than any nominee in recent memory. Your judicial philosophy is almost invisible to us. We don’t have a right to know in advance how you will decide cases, but we do have a right to understand your judicial philosophy... The great dilemmas of democracy invite us to engage in a robust debate and my hope is that we can engage in a substantive and

candid dialogue that will benefit not only those here on the committee, but also the public. The American people want and deserve a process that is more than what you characterized as a ‘vapid and hollow charade’ which so frustrated you 15 years ago.”

Senator Kohl led his questioning in a manner not-surprising to those who had followed his career: He asked, why do you want to be a Supreme Court justice? What issues motivate you? What things are you most passionate about? She said that she wanted to serve the country, and that it would be a great honor. Senator Kohl tried to elicit more, pushing her to explain about what she was most passionate. Kagan answered safely that she was motivated by the opportunity to safeguard the rule of law. Again, Senator Kohl pressed Kagan to provide a window into her as a person, not just a lawyer. “Thurgood Marshall cared passionately about civil rights, Justice Ginsburg had a passion for women’s rights, your father had a passion for tenants’ rights... Where are your passions?”

In an effort to get a sense of which Supreme Court justices she would more closely resemble in her judicial philosophy, Senator Kohl asked Kagan whether she considered herself more like Justice Scalia, who looks solely at the text and rejects the notion of a living constitution, or whether she agreed more with Justice Souter, who criticized the textual approach because the plain text does not resolve the conflict in many of today’s tough cases. While Kagan avoided answering the question directly, she did acknowledge that the text and original intent are not always sufficient because we live in a very different world from the framers of the Constitution.

Finally, Senator Kohl asked Kagan how she felt about allowing cameras in Supreme Court arguments. She unequivocally expressed her support.

Kagan proved herself to be well qualified, both through her record of accomplishments and her performance before the Judiciary Committee, and Senator Kohl proudly supported her confirmation. However, he did so with some regret that Kagan could not be as open as he had hoped she would be.

“At times during the hearing, Solicitor General Kagan seemed to be somewhat more candid than previous nominees. She disavowed a purely originalist interpretation of the Constitution... But despite the strength of her qualifications, like so many other nominees before her, General Kagan often retreated to the generalities and platitudes that she once criticized... In my opinion, she made small in-roads, but we still have a

long way to go in meeting the high standard to which we should hold Supreme Court nominees during their confirmation hearings.”