Dean Kellye Testy: I'm Kellye Testy. I'm the dean of the University of Washington School of Law, and it is wonderful to have you all here today. So, I want to thank you very much for coming. I have so enjoyed getting to know the school of law, and all the things that makes it great. And one of those is certainly its people. Like any institution that's excellent, the excellence starts with students, with faculty, and with staff, and those students who become alumni.

And so it's a great pleasure today for me to be able to introduce to you our panelists, two of whom are professors in the school of law, and two are our alums. So, let me introduce the three panelists, and then the moderator, and we'll go ahead and get started on the breakfast program this morning.

Let me begin to your left, my right, and introduce to you Justice Richard Sanders from the Washington State Supreme Court. Justice Sanders is a native of Tacoma. His B.A. and J.D. are from the University of Washington. And he was in private practice before joining the Court, where he was a champion of civil rights and was elected to the Court in 1995.

Now, in 14 years on the bench, he's written over 500 opinions, has gained a very broad base of support and respect for a tireless articulation of the rule of law under the Washington State Constitution and the United States Constitution. And I want to share with you a quote that is often cited as a favorite passage from the Washington Constitution by Justice Sanders. Saying, "Governments are established to protect and maintain individual rights."

He has also served as an adjunct professor, teaching appellate advocacy at the UW law school, and has also, in his own right, been a scholar writing articles for journals and presenting many lectures and talks to legal organizations on many, many diverse topics, including civil liberties, land use, the state constitution, legal ethics, and Abraham Lincoln, among other topics.

In the middle of our panelists here today, we have professor Kathryn Watts from the University of Washington School of Law. I have so enjoyed getting to know Professor Watts. She is one of our brightest stars, and has her B.S. from Northwestern University and her J.D. summa cum laude also from Northwestern.

She was awarded, in law school, the John Paul Stevens Prize for Academic Excellence for graduating first in her class, and a Raoul Berger Prize for senior research paper on the history of general rule making grants.

After law school, Professor Watts clerked first for Judge Raymond Randolph of the court of appeals for the D.C. circuit and then went on to clerk for Justice John Paul Stevens of the U.S. Supreme Court, of course. She worked at Sidley and Austin in Chicago before joining the law school faculty in 2007.

She is one of our most award winning teachers, teaching in the area of administrative law, con law, and Supreme Court decision making. She is also an extraordinary scholar and has recently achieved one of the pinnacles of publishing in the legal academy, and that is that her most recent article was selected for publication in the Yale Law Journal. So, she's a wonderful colleague at the law school. Students, faculty, staff alike admire her so very much.
And then on my... Closest to me, I want to introduce Judge Ricardo Martinez, a 1980 graduate of the law school, of course, the United States district judge confirmed to the Federal District Court in 2004. He previously served as a United States magistrate judge for the western district of Washington for six years and as judge for the superior court of King County for nearly nine years.

He's held memberships in many distinguished associations, and serves now, or has served, on so many community boards and organizations that it would take all our time today for me to name those. So, I will just note that I want to give a special nod of appreciation for all the many activities and community service, Judge, that you're involved in. It's really quite remarkable.

And that service and distinguished record has also been widely acknowledged, because Judge Martinez is also the recipient of many awards here in this state and around the country.

And so, it is also then my pleasure to turn the podium over and introduce our moderator today. And our moderator is Professor Stewart Jay, whom many of you know from your experience in law school. He is also an outstanding classroom teacher and one of our most respected and prolific scholars. Like Professor Watts, Professor Jay was also a Supreme Court clerk, clerking for Warren Berger after law school.

And he is, as I noted, one of the nation's most distinguished scholars in the area of constitutional law, authoring many articles and books, including a book entitled "Most Humble Servants: The Advisory Role of Early Judges" that was published by Yale in '97. And his most recent work is entitled "Mortal Words: A History of the United States Constitution" which is forthcoming publication in spring of 2010.

Professor Jay is also known for his tireless advocacy for civil rights and for the rights of women, including reproductive rights of women. And his expertise within the constitutional law domain includes civil liberties, constitutional law generally, eminent domain, equal protection, free expression, and is a noted expert and frequent commentator around the country on the Supreme Court.

Professor Jay, it's wonderful to have you with us today, and I will now turn the podium over to you, and thank you so very much for leading this panel today.

[applause]

Stewart Jay: Thank you, Dean Testy, for your very kind remarks and your, I thought, quite thorough introduction of the panel. I want to say, too, though, as a professor at the law school how very greatly we appreciate Dean Testy joining our ranks. The law school is just a beehive of energy at the moment, I would say, and so many things are going on that are really interesting, that I urge you all to keep up with what's going on at the law school and to become involved in our activities. And if nothing else, just watch what's going on, because things are really happening quickly at the law school.

We have a really interesting topic this morning, dealing with Justice Sonia Sotomayor. It's a little difficult, of course, to predict, speculate how someone is going to behave on the Supreme Court. I mean, if you think about Harry Blackman, for example. When he came on the court, he was about as conservative as you could get. And I refer to that as Harry's "blue period" on the court.

[laughter]

Professor Jay: But as you know, he changed rather substantially in the time that he was on the court. So, it's sometimes hard to say. On the other hand, there have been some justices, I'd say Justice Scalia would an example, and maybe Justice Thomas, who we got pretty much exactly what we expected. So, maybe we can make some predictions, or at least look for things that will be interesting to observe. Now, she comes to the court with an absolutely unique background. Not only had she been a federal district judge, making her unusual in that regard on the court. She was a former prosecutor. She's the court's first Latina justice.
She's also a lifetime New Yorker, and she's someone who grew up in utter poverty, rose from her circumstances, and she's a Roman Catholic. And obviously there are a lot of other things about her background. She's clearly a very brilliant woman based upon her academic success.

So, let's turn now to the panel and begin thinking about some of the possible issues, or possible ways we could interpret how she might act on the court. Now she is only the third female justice to be on the court, and she's just now one of two female justices sitting on the court.

Now, I'm going to ask Professor Watts this question. You've fairly recently been on the court, and you've had the chance to observe the interaction of female and male justices, something that I unfortunately did not get to observe in my time. How do you think that's going to affect how not only she decides cases but the dynamics of the court?

Professor Watts: I think I'd have to say, in terms of how she decides cases, I don't think the mere fact that she's a female tells us all that much. But I would say that in terms of how the court operates as an institution, or how the court speaks to the outside world and to the legal world, it is quite significant that she's a female. In terms of my views as to why I don't think it's all that significant that she's a female, in terms of how she'll decide cases, it reminds me a little of your question of a chapter in a book Justice O'Connor wrote, where she talked about this question, because people often ask her, the first female justice ever to sit on the court, "Do women and men decide cases differently?"

And she talks about how there's no empirical evidence that suggests that female judges would reach different judgments than male judges. And she gives that quote that Justice Sotomayor played off of in her "wise Latina" quote, where Justice O'Connor says that a wise old woman and a wise old man will reach the same judgment.

And so, because of that, I think that's probably right, that you really can't just simply look at the fact that she's a female and say, oh, she's going to be more empathetic, or she's going to want to mediate more than a male justice might want to.

But having said that, I think there are many, many people out there that are hoping or wishing that the fact that she's a female will impact how she decides cases, and I think the abortion issue rises to the very top of that list. But the reality is we just don't know much about her views about abortion. That was clear in the confirmation hearings.

That was one of the big red flags raised about her: is she really going to do what you would think an Obama appointee would do and reach results that are going to be more pro-choice, that are going to support Roe versus Wade.

But she decided a few abortion cases on the Second Circuit, but they didn't directly involve Roe. And some of the results were pro-opponents of abortion, or reached results that supported opponents of abortion, so we can't tell all that much about her views there.

And then she's got other aspects of her background, right, like the Catholic nature that might tug in a different direction. So it's really hard to simply say, oh, because she's a female, this will impact issues like abortion.

But then, I do want to be clear, as I said just now, that in terms of the institution, it matters that she's a female. It's really quite significant that we have another female leading jurist out there in the country. When you think about the court, it is just such a very male, very white institution.

That was my experience being there. When I was a clerk, there were 13 of us that were female law clerks out of the 35. I clerked in the 2002 term, so not very long ago, just a few years ago. And a couple years after that, I think the 2006 term, there were only seven females out of the 30-plus law clerks.
So law clerks tend to be male advocates. The statistics I've seen recently, 14 percent of advocates arguing cases are female; 86 percent are male. So to have another role model out there, a leading jurist in our country that is female, can only help to further open the doors for women, in the legal profession and in other professions. So that, I think, is extremely significant.

**Professor Jay:** Just by the way, on a side note, I was at the Order of the Coif Dinner recently at UW. And this, of course, is for our top 10-percent graduates. And I think there were three men among the group. [laughter]

**Professor Jay:** So, I think our time has passed. [laughter]

**Professor Watts:** I can say, UW's been a leader in this front, because, actually, Lucille Lomen was the very first female law clerk ever to serve the US Supreme Court, and she was a UW grad.

**Professor Jay:** Really?

**Professor Watts:** So, something that we have in terms of a feather in our cap.

**Professor Jay:** Yeah. Yeah, that's certainly true. I would say, as kind of a follow-up question, I heard this story at a conference, I think it was last term, when they were discussing the case of the young girl who had been strip searched. And apparently, Justice Breyer, he couldn't see what was the big deal. And I gathered that I think it was Ginsburg that kind of took him to task over this. Is that the kind of thing where a woman would have a different perspective?

**Professor Watts:** I suppose it's certainly possible. But I think a male could have that same perspective. That's why I think it's somewhat simplistic to be able to just simply say, because you are female or because you are male, you will automatically come to things with a more empathetic light.

**Professor Jay:** Right, right.

**Professor Watts:** Because there's some men that tend to be more empathetic than others. That's just the nature human...

**Professor Jay:** Right, yeah. Yeah, I wouldn't want my daughters strip searched either.

**Professor Watts:** [laughs]

**Judge Martinez:** Is empathy a good thing for a judge?

**Professor Watts:** Right. That gets us into the empathy question, doesn't it? [laughs]

**Professor Jay:** [laughs]

**Professor Watts:** What do you think, Judge? You think being empathetic is a good thing?

**Judge Martinez:** [laughs] I actually want to answer... [laughter]

**Professor Watts:** No, that's not on the script. [laughs]

**Judge Martinez:** Is this on? All right. I want to actually tag on to Professor Watts' comment about being a woman. I just find this really interesting, because, obviously, from my perspective, it's fascinating that we have a Latina on the bench at that level. But right after she was confirmed, I was actually at a dinner with several minority attorneys, and obviously several women. And I think at least two or three of them said, "You know, I'm glad to see a Latina on the bench, but I'm happier to see a woman on the bench."
And I thought, because, as the answer you just heard, I agree with exactly what she said, that it's going to be impossible, I think, for us right now to predict which way she's going to go. What sort of an impact will her gender have? But the representation to the rest of America, and to the impact on that institution of having, what, only the third woman ever in history being at that level, I think is fantastic. So I'm looking forward to it.

**Professor Jay:** Now, the Court does have some critical issues coming up this term. Would anybody like to discuss what those issues might be, and how she might have an effect on those? For example, thinking about the Florida cases dealing with life imprisonment for juveniles, for example. So let's turn this over to the panel.

**Judge Martinez:** I can certainly talk about that. That is a fascinating issue right now, in my opinion. Anyone that practices criminal law is aware that we don't have the death penalty for juveniles, right? That was a Supreme Court ruling that just happened in 2005, I think? But the big issue right now before them that'll be handled this term is, is it a violation of the Eighth Amendment, and cruel and unusual punishment, to sentence juveniles to life in prison without parole for a non-homicide?

They've taken two cases, both of them from Florida--Sullivan, and I can't remember what the other one is, Graham I think--and they're both up before them. And I just took a real quick look at the cases themselves. I'm always curious, and I don't have the insight that my colleague up here has, in terms of why they take cases or how they decide to do that, but I can tell you that it's interesting to me to notice that they've taken two cases.

One of them, Sullivan, involves a 13-year-old who committed a burglary with some friends and then left the scene, returns to the scene, and then raped the woman, 72-year-old resident of that house where the burglary got committed. As a result of that ended up with being sentenced to life in prison.

Graham involves a 16-year-old who went on a crime spree and then received some time in prison, was released, and then did another crime spree. And both of those got revoked and then sentenced to life in prison without the possibility of parole.

To me, that's really fascinating to see that they've taken two of these cases. One involves a 13-year-old, one involves a 16-year-old, at the time they were sentenced to the time they committed the crimes. You wonder, are they going to make a differentiation based on age? Is that going to be an issue? Is there a procedural issue with one of the cases, maybe? Is that why they took two?

You realize, we are the only country that basically imprisons juveniles for life. There are several other countries around the world that have that as a potential punishment, but none of them have any juveniles currently under that punishment.

And here's another fascinating aspect, and here's how Sotomayor may come into it, to some degree, as well. From all the 13 and 14-year-olds in the country that are currently serving life in prison without parole for a non-homicide, there aren't very many, but of all of them, all 13 and 14-year-olds, every single one of them is an African American.

Really shouldn't surprise you a whole lot. There are 73 kids, 13 and 14, serving life in prison without parole in America. Now, that includes homicide sentences as well. Of those 73, 70 are racial minorities. Is her presence on the court going to make a difference when we look at that particular issue? You balance that out.

**Doctor Professor Jay:** Do you think the fact that she grew up in dire poverty will make her somewhat more empathetic or understanding of kids who get themselves into trouble? I would assume that probably all of those 13 or 14 kids are from impoverished backgrounds.
**Judge Martinez:** I think your assumption is probably right on the money. As to whether her background makes a difference, I would say yes. The comment that got her in trouble taking about the wise Latina, I think was sort of taken out of context. But every aspect of who you are as a person, I think, impacts how you behave as a judge. I happen to think that empathy is a good thing for a judge, and I know that there was a lot of flack based on when President Obama made that comment about wanting to put on the bench that were empathetic. I think every single person that goes to court is a litigant, as a juror, would like to see your judges have empathy.

Now, maybe, I don't understand the difference between empathy and sympathy. Maybe, that's my problem but I see those as two completely different things. Just because I understand what it is that brings someone in front of me for a particular case doesn't necessarily mean I'm going to be easier on them or be more sympathetic. If that make sense? But I think that everybody that appears in court wants your judge to understand what it is that brought you there.

Maybe, you can see the issues from a slightly different perspective than someone who doesn't have that same sort of background or viewpoint.

**Professor Jay:** Katherine?

**Dean Watts:** I was going to say, instead of focusing on a particular issue when you ask about what is going on this term and what impact Sotomayor might have, I think it's really hard. We can play these games of trying to figure out what--well she's replacing Suter. Suter was on the liberal side. She's on the liberal side, but where does she differ from Suter and on which issues might it make a difference then? It's possible to play that game, but I think it's probably more likely that where she is really going to have an impact is how persuasive is she in terms of bringing along certain people along with her. So, Kennedy. We all know it's a Kennedy court today, that he's our swing vote.

I thought something that Dean Shamerinski did since he's so focused on the fact that this is a Kennedy court where he talked about how this last term we had 23 cases that were split 5-4, and Kennedy was in the majority in 18 of those cases. This is out of 70 approximately, I think, 75 cases decided this last term. So, he is the key.

If she is able to speak to him and bring him along, then she'll have a major impact, not necessarily even related to particular issues necessarily. So, that's where I get this next term. I'd like to watch to see how do Sotomayor and Kennedy align or how do they fail to align on issues in terms of giving this some predicted value as to the impact of this term and next in terms of the issues.

**Professor Jay:** I know, when you were on the court, I know this is hard to observe because you weren't in Justice Kennedy's chambers. How do I put this? How pliable to Justice Kennedy? I mean, was he persuadable or did he have his own views and...?

**Professor Watts:** My impression was that he would listen. He would listen to others. Each of the justices operates in their own way, and some of them have more closed doors than others, but for the most part they do chat with each other and they do have an open ear. And I do think Kennedy can be persuaded. I think the fact that when you think about really seminal decisions that he's written recently, Lawrence versus Texas, the sodomy case in Texas that was decided the year I was clerking at the court. Justice Stevens has made this public in a "New York Times" article, so I can now say he decided to assign it to Kennedy to keep Kennedy on his side, but part of it is this kind of dialogue between the justices that, I think, illustrates that he is somewhat pliable. The question was: does she have the political finesse or the political savvy to bring him along and to finesse him?

I don't know because if you think about how she's acted in oral arguments, she's quite bold and she's quite direct and so whether she's going to be the politician on the court, I'm not sure.
Judge Martinez: Any other critical issues anybody wants to bring up?

Professor Jay: Well, I think there's a couple of cases that I'm interested in what the Supreme Court will do. One of them is McDonald versus Chicago which considers whether the second amendment is incorporated by the 14th to apply to the states. I know that there's quite a bit of interest in this in Bellevue which is the headquarters for two national gun rights organizations, The Second Amendment Foundation and the Citizens For the Right to Keep and Bear Arms. The other case that strikes my interest is U. S. versus Comstock which considers the constitutionality of prolonged imprisonment of sex offenders after they've completed their sentence. I really haven't studied this particular case to know what all is there, but I remember, I think it was in 2000 or no, it was earlier on.

What was it? 1993, I think, Hendrick versus Kansas which was an opinion written by Justice Clarence Thomas saying that it was OK to incarcerate someone civilly and not one of my favorite opinions. So, I don't know whether the U. S. Supreme Court will try to trim that back a little bit or not, but I'm interesting in seeing it.

Judge Martinez: Why do you think they took that case, Katherine?

Professor Watts: I'm not sure. It's not one I've closely followed. I don't have a good sense on it.

Judge Martinez: What's your view, Justice Sanders the application of the second amendment to the states?

Justice Sanders: Well, we've got a case pending on that issue right now [laughter]. I'll leave it to the audience to guess [laughter].

Judge Martinez: Well, it's been a long time since the Supreme Court applied a provision of the Bill of Rights to the states. Well, I disagree on this issue. I think the second has to do with militias, but apparently the Supreme Court disagrees with me on that point. Now, we have talked about her background as a Roman Catholic, and that brings us to some questions about religious liberty. Obviously, the court has changed tremendously since I've been a professor on issues of religious liberty. The whole area of free exercise of religion has utterly changed since the 1990s largely because of the work of Justice Scalia, I might say.

Is there anything about, maybe, her district or appellate opinions that would give you any insights about her views on religious liberty? Dr. Sanderson, I'll ask you that since I know this is a subject of great interest to you.

Justice Sanders: Well, I did do a little research into her district court, the Court of Appeals, on this issue. One is Flammer, Rabbi Flammer versus City of White Plains. The district court decided in December 1993. Rabbi Ffammer is Orthodox and had proposed to the municipality that he erect a menorah in the city park during the holiday season. He was opposed by some of the Reformed Jews in the area. It became quite a contest there. Eventually, the city passed an ordinance saying the city park could not be used for any display of religious or political symbols. That came before Judge Sotomayor, and she reasoned that the city park is an open traditional public forum that religious speech should not have a second place in any other kind of speech and that government involvement in determining what was of political or religious speech involved them too much in religion and found that the city ordinance was unconstitutional and that the menorah could be erected by Rabbi Flammer.

The second case that I thought was interesting is Hankins versus Licht. That was the U. S. Court of Appeals opinion that she signed onto. No, she didn't sign onto; she wrote a dissent, and this was in 2006. I think it's significant to look at the dissent of the justices because they have to feel strongly, I think, to write a dissent. Otherwise, they go along with the flow.

Professor Jay: You may know something about that... [laughter]
**Justice Sanders:** This was an age-discrimination case, brought by Pastor John Hankins against the New York Conference of the United Methodist Church. He was a Methodist minister. He turned 70, and the church retired him involuntarily. He brought an action against the church, claiming that this violated the Age Discrimination in Employment Act of 1967. A majority of the Court said that this was a neutral employment regulation and that it should be enforced against the church and reversed a trial court dismissal of Pastor Hankins' lawsuit. In dissent, however, Justice Sotomayor opined that the Age Discrimination Act simply could not constitutionally be applied in a circumstance like this, where we have a church official fighting with the church authorities, and that therefore the church retained the right to fire him because he turned 70. I know our chief justice is on the cusp of turning 75. I wonder if there's some hope for him in this Age Discrimination Act.

[laughter]

**Professor Jay:** Now, Justice Sanders, she was making that argument on First Amendment grounds?

**Justice Sanders:** I believe so.

**Professor Jay:** Yeah. That strikes me, prima facie, as wrong. Generally speaking, a neutral law like that, an age-discrimination law, applies to all organizations. And religions don't get a special break, I wouldn't think.

**Justice Sanders:** Well, she thought so. She thought that that would be too much governmental entanglement in the internal affairs of the church. I think she would have made a distinction between someone who was an official of the church, like a pastor, and a janitor, for example. Last case is Campos versus Cofflin. This case arose out of the New York State prison system. An inmate at Singh-Singh [sp] claimed that he was a member of the...

**Professor Jay:** Santeria.

**Justice Sanders:** ...Santeria faith, and that as part of that, he should be entitled to wear beads, according to what the saint is that's being celebrated on that particular day. Well, prison authorities had a regulation which said that traditional religious symbols, like crucifixes, et cetera, could be possessed by prisoners but they couldn't be wearing them, and that as to a religion which they, the prison officials, didn't recognize, the burden was on the prisoner to demonstrate that he had a sincere belief and that this was part of sort of an organized religious practice. But even then, you couldn't wear the beads.

So this case went before Judge Sotomayor as a trial court judge, in 1994. And I was impressed. She indicated, went through all the justifications by the Department of Corrections for banning prisoners wearing beads, just outright, and really, I thought, tore them apart.

She said that she was going to give deference to these prison officials. But, as it turned out, she found that their justifications for this were hogwash, I guess. It was because, as she said, well, the regulation even prohibits the prisoner from wearing the beads under his clothing, whereas the prison officials were saying, "Well, we can't have prisoners wearing beads because other prisoners in the prison yard would be able to identify them as gang members," for example.

She went through these various claims by prison officials, dissected them, and found that they had no merit, and upheld the religious right of these prisoners to wear these beads underneath their clothing, issued a preliminary injunction to that effect.

So I see a double significance in this case. One, of course, is her attitude about religious liberty. And the other is that in the prison setting, where liberties seem to be diminished, she recognized that prison officials had some deference, but she was not hesitant to go through their rationale, dissect it, and set it aside. So I think that these are important cases.
Justice Sanders: That is unusual. Prisoners almost always lose on claims like that. [laughter]

Professor Jay: I mean, there have been plenty of religious claims brought by prisoners, and the Supreme Court, I don't think it's ever been sympathetic to any of them. It's interesting. That's the same religion that was involved in the Hialeah case, the famous case from Florida in which the Supreme Court found that there'd been discrimination against the Santeria faith, which, among other things, practices animal sacrifice. So I'm waiting for the next case in which he wants to sacrifice animals in the prison.

Justice Sanders: These prisoners had originally identified themselves as Catholics.

Professor Jay: Really?

Justice Sanders: It is a kind of Catholic, Voodoo combination, you might say.

Justice Sanders: Yeah. She mentioned in her opinion that this is common, that individuals of this faith would identify themselves as Catholics, and that shouldn't be held against them, which the prison officials did. They said, "Well, they said they were Catholics, so they can't be Santeriasts." But she saw through that. Maybe she had empathy. [laughter]

Professor Jay: Or is that sympathy? I don't know. [laughter]

Professor Jay: Now, there's another interesting thing about her, too. In addition to being a federal district judge, she was a prosecutor. And I don't think there are any current justices who were prosecutors. Is that correct?

Professor Watts: Alito? I thought Alito had been...

Judge Martinez: I thought Alito was...

Professor Watts: Alito had been...

Professor Jay: Well, you're right. Alito worked at the Department of Justice. That's correct. Yeah, that's true, him. But she was a US attorney and handled some very big cases. And Judge Martinez, you, of course, have had that background. What do you think that's going to bring to her performance on the court?

Judge Martinez: It's really interesting, because I think if you ask the criminal bar, if you're a criminal defense attorney and you're appearing before a judge, you've got a client, would you want a former prosecutor or a former defense attorney? I think, almost to a person, they would say, "I want a former prosecutor on the bench." Whether it's true or not that former defense attorneys are more cynical, they deal with the clients all the time, they know what they have to try to get around to deal with the legal system that they're in--I don't know if that's true or not. I do know, from my own experience, going on the bench after 10 years of being a prosecutor, I did have a legitimate concern as how I would be viewed by everybody appearing in front of me.

I mean, if I'm a defendant and I'm going before a judge who's been a prosecutor his whole career, I'm a little nervous. "Is he going to be leaning that way or not?" So I think, from my own perspective...

But I did sort of take a step back. At the very beginning, handling any criminal case, I took a step back and said, "Am I absolutely being fair here. Am I, in any way, being biased or leaning one way or the other? Does the fact that I know both of these attorneys that are appearing in front of me, that I've known them for 10 years, make any difference in this case?"
No, absolutely not. Push that aside. "The fact that I know that this prosecutor is very hard-working and focuses on the issues and doesn't focus on other things that may be extraneous to what we're dealing with, does that play a factor?" No. Try to push all that back.

As to whether or not her former background as a prosecutor is going to make any difference, I'm just glad to see someone at that level who's been a trial court judge. Please. I mean...

Professor Jay: Now, what does that bring to the equation, do you think?

Judge Martinez: OK, look. I used to have hair like yours, before I went on the bench. [laughter]

Judge Martinez: And now look at it.

Professor Jay: I know they trim you when you go on the Federal Bench. [laughter]

Professor Jay: Isn't that part of the initiation?

Judge Martinez: No-no, what I meant is that I had a lot more up front here. Every time I would read those appellate decisions that were reversing me I would go, "Oh, that's what they meant." This is what happened as a result of that. [laughter]

Judge Martinez: No, I think every single one of us that has ever been a trial court judge wants people that are reviewing those cases, who have been there. I think it makes a difference. It absolutely makes a difference. Can you give one or two examples of how that could make a difference?

Professor Jay: [laughs] Well, we get to sit by designation with the circuit court and I've had that wonderful opportunity on three different occasions. And, as a matter of fact, I just got an email yesterday wanting me to sign up for another one this coming year, which I will, because I love doing it. I'm not sure I would like a steady diet of it, you know?

Professor Jay: Mm-hmm.

Judge Martinez: I love the court room. I'm a trial judge. That's what I really enjoy. But I think you just bring a different perspective of what it's like to be in middle of a major case where there's hundreds of evidentiary decisions that have to be made, lots of them on the fly, if you will, before a jury. Yes, we can deal with motions in limit in lots of cases, but every single person that's ever tried a case in court, knows things don't always go according to plan. There's all sorts of things that come up, where you have to make a call one way or the other. I want someone who's reviewing that, who has been in the same exact position, and I think it does make a difference.

And I know, even in the cases that I've sat on, by designation, that several of the other judges that I've been with, at the 9th Circuit Level, have looked at me and said, "All right, from your experience, as a district judge, as a trial judge, tell us why this is important here and what matters here." I think it's made a difference.

Professor Jay: Yeah-yeah. That's interesting. Do you think maybe that all federal appellate judges should be required, or at least strongly encouraged, to sit on the district court for at least some cases? I know Judge Kacvinsky does that regularly, for example.

Judge Martinez: He's not the only one. There are several of them that do that as well, Judge Hammond, for example, just sat on a homicide case, not too long ago, and then goes up to be reviewed by his fellow colleagues. That's always just kind of fascinating, I thought. I'd love to read those opinions. No, I think it makes a big difference. The ones that come from a trial background, trial experience, they've been there, but the ones that maybe come more from the academic background, I think that, for them, it would be a real eye-opening experience.
Professor Jay: Yeah, yeah. Justice Sanders, do you have any views on that? I know you've been both a trial lawyer and now a supreme court justice.

Justice Sanders: Prosecutors or...?

Professor Jay: No-no, I was just thinking about the fact that people who have had trial, courtroom, experience whether as a judge, or as a practicing courtroom lawyer... Here's the question I am really getting at. I have sometimes talked to district judges and, in an unguarded moment, they will say something like, "These judges on the Court of Appeals, the Supreme Court, they have no idea the impact this decision is going to have on our lives. This is just going to wreak havoc," or something like that.

Justice Sanders: Well, I think that I remember Judge Bork's book, he said that, "Judges, whatever intellectual capital they have is brought with them to the court. They don't gain it there." And I think that having a trial lawyer experience is invaluable, really. Being on the court to understand, well, the ramifications of denying an award of attorney fees, for example. How judges sitting back there who have spent their life in public service, drawing a paycheck every two weeks, don't understand how many of these cases, particularly civil rights cases, turn into a war of attrition, which the government will always win. And that it is so important, where statute permits an award of reasonable attorney's fees, to award adequate, reasonable, attorney's fees. Otherwise, there is not going to be a challenge to unlawful government conduct.

So that's one example.

Also, I have a different attitude than some of my colleagues about the ramifications, where I don't think the world is going to collapse or end the civilization as we know it, as Justice Talmadge used to say. That really, it's not that bad if we vindicate individual rights and that this is the way the system ought to be.

Judge Martinez: As an aside, I just want to say that she does go on the bench--and I just read this other day--with 17 years of judicial experience. In the last 100 years there's not been a justice in the Supreme Court that has had that kind of experience going on when they go on the bench. So it will be fascinating to see how all of that plays out.

Professor Jay: I think that helped a lot in her confirmation. You couldn't fault for lack of experience. That was for sure. Have any of you had a chance to study the questions that she's been asking from the bench? We of course don't have the oral recordings, but we have the transcripts. Is there anything about her questioning that strikes you as interesting? Kathryn?

Professor Watts: She's not going to be a wallflower. That's quite clear. She's been quite active in her questioning. Just the quantitative number of questions has been quite voluminous. Then in terms of the quality of the questions, they're quite bold and quite direct. And she's been relatively even-handed is my impression from the transcripts I've looked at in the sense that it's hard to necessarily guess, which it is with so many of the justices. But sometimes they show their cards more than she does. So it's been somewhat...

Professor Jay: Is she more active than Sutter?

Professor Watts: More active than Sutter in terms of the number of questions? I haven't seen a comparison there, but I assume that the answer is probably yes. I think it was The National Law Journal did a study comparing Sotomayor--it was a certain two-week period right after she joined the bench--to Alito and to Roberts. And she was above both of them. Alito was something like three and a half questions per argument he averaged. Robert something like 10, and then Sotomayor 11. So the fact that she's above both of those, I would think would probably be because Sutter wasn't one of the most vocal justices by any means. So that dynamic. She has...
Professor Jay: He wasn't noted for asking really very pointed questions, either.

Professor Watts: No, his demeanor is much more calm, and his tone is very much more even. Whereas she seems to be coming up here with very directed that-makes-no-sense kind of points, which you expect from a Scalia more than you expect from any others on the bench. So she's definitely going to have an impact on the dynamic of arguments.

Professor Jay: Do you think that's going to make a difference? I'm just wondering. My observation as a clerk was that the arguments made no difference whatever. [laughter]

Professor Watts: Right. And in most cases that's true. It makes no difference to the outcome in most cases. This is my impression, but it does make a difference as to the reasoning very often. Right? The argument in many ways helps the justices to solidify in their mind how they're going to get to the result that they've most likely already decided they're going to get to. And then they're also doing a lot of talking to each other at oral argument, which that's one thing I do wonder from the excerpts I've looked at.

Professor Jay: With the exception of Justice Thomas.

Professor Watts: True. He doesn't do any talking. But the others, when asking questions, it's often not so much to elicit the information from the advocate but to speak to each other and float their theories to each other. So the fact that she's been relatively direct and even-handed as to both sides in many cases, it actually seems like she's doing a bit less of the talking to people. It's too soon to tell. I haven't looked at all the transcripts, but that's my initial reaction. She's really trying to elicit information like a prosecutor [laughs] might less than do the dialogue with her colleagues.

Professor Jay: She has been compared sometimes to a prosecutor asking very direct questions. Thank you. Now here's the next question kind of thing.

Judge Martinez: Well, I'm not sure that you can really say that that's being a prosecutor.

Professor Jay: [laughs]

Judge Martinez: I like what I do, right? The majority of civil cases in district court, of course, don't go to trial. I think we have like a 98 percent rate that get resolved through trial. I schedule a lot of oral arguments. And when I have an oral argument, I don't want to sit there and listen to some attorney read from their brief to me or go over the points. I schedule an oral argument because I want to hear certain responses to questions that I have so I can decide this case to what I think makes the most sense. I need information. I'm not talking to anybody else on the bench with me. I'm sitting there by myself, and that's the kind of question and answer session that we do. My very first exposure, when I sat on the Ninth Circuit, was that, oh, he's talking to me!

He's not talking to you, he's talking to me over here! Because we do, of course, circulate the draft opinions that go beforehand, and it does make a difference. I thought, to me, it did make a difference, and I understood really quickly that wait, they're not talking about the point that I made in my opinion. They don't care what information comes from this attorney out here. So, that was really fascinating, that level of exposure.

Professor Jay: Justice Sanders, has that been your experience on the Washington Supreme Court?

Justice Sanders: I think that questioning attorneys sometimes believe that you're really on their side. You try to help them flesh out their argument, or talk to a point that's relevant that they're not recognizing. Many times they fumble the ball, or the softball. They try to argue with you. You're trying to help them out. [laughter]
Justice Sanders: I remember one case involving Pang, what was his, the guy that burned down the warehouse in Seattle.

Professor Jay: Martin Pang.

Justice Sanders: Martin Pang then took a timely vacation to Brazil right after that when five firemen died in the fire. Eventually he was extradited to come back to the United States to stand trial only for arson, because Brazil didn't recognize felony murder. So, immediately when he stepped off the plane, of course, he was charged with felony murder anyway. He took that up to the State Supreme Court, and I remember Justice Smith, another UW graduate, was quizzing the defense lawyer about this. Smith, I knew, was really on the side of the defendant, but historically he'd been very much the prosecutor's boy. As a matter of fact, one time Justice Alexander said that he thought that Justice Smith was going to crawl down from the bench and sit with the prosecutor, he was so...

[laughter]

Justice Sanders: But at any rate, he was giving some softball questions to the attorney for the defendant, and then he started arguing with Justice Smith. [laughter]

Justice Sanders: I thought it was funny, but that often happens. You go to the Supreme Court, and you think, well, everybody's against me, but really that's not the case. Sometimes questions are used to try to enhance your point of view to persuade your colleagues.

Professor Jay: Another question I wanted to ask has to do with how she has organized her chambers. Justices, of course, control their chambers, to an extent how many law clerks they want to hire, how they want to do the assignments, whether they join what's called the cert pool. Professor Watts, have you noticed anything about that?

Professor Watts: Yes, she has joined the cert pool, so that's one thing I've noticed in terms of her organization.

Professor Jay: Would you explain that to everybody, what that means?

Professor Watts: Sure. The Supreme Court gets 7,000-8,000 petitions for certiorari a year, petitions asking the court to hear a case on the merits. In recent years they hear maybe 70, maybe 60, maybe 80 cases. So, it's pretty much like winning the lottery to have your case actually heard on the merits by the court. So, that winnowing process, of taking it from 7,000-8,000 down to in the range of 70 is really very significant, and it's a lot of work, because there's just so many of those petitions to get through, on top of your merits cases.

Back in the '70s, I think it was '72, is my memory, the Court initiated what is called the cert pool, where justices began to pool their law clerks, so that one law clerk in the pool would look at each petition, and would write a memo to the other justices in the pool, and would make a recommendation: grant, deny, or take some other action on this cert petition. The pool grew over time, so that back when I clerked on the Court in 2002, Justice Stevens was the only one who didn't participate in the pool.

So, all of the other justices had their law clerks pooled, which meant at the time I was there, there were only two sets of eyes at the clerk level before you get to the justices, that would look at each petition: one clerk in Justice Stevens' chambers, and one clerk in the pool. So, it meant in the Stevens chambers, of course, our stack every week looked like this, but the pool clerks' would like this.

I found that really significant that there were two sets of eyes looking at something. If you only have one set of eyes, mistakes happen. Plus, people have their own ideological preferences and judgments that are going to come into play, that can color how they look at a petition. So, having that check, in my mind, is extraordinarily significant, and that's part of why Justice Stevens has opted out.
So, he's only one. Alito, then, when he joined the court, he decided to opt in at first, but then after a year of trying the cert pool, he opted out, and so now he's doing it on his own. Now, before Sotomayor, we had only Alito and Stevens out, and the rest pooling. So, it was interesting to see when Sotomayor joined the court, that's one of those operational choices: do you do the cert pool or not? She decided to opt in to the cert pool.

But I think that there's a glimmer that she's along the path of Alito, to the extent that during her confirmation hearings, the cert pool came up, and she made some references that made me think she might have been thinking along the lines of Alito, which is, well, how do you know what it's all about until you try it? Maybe it's trying to be a team player, but then it's also trying not to pass judgment on something until you give it a crack. So, I think it's possible that she could do what Alito does, and after she gives it a try, decide to opt out.

I'm hopeful that will happen, because Stevens, he's going to be 90 this spring. He's not going to be there forever, so when he's off the court, then we would just have Alito, and the rest of the pool. It would be nice to have two people out of the pool, in my mind, that are on different sides of the ideological spectrum, if you could have Sotomayor out, Alito out, and then the rest of the pool. That would provide a nice check to the pool, and it would make me more comfortable.

**Professor Jay:** But as a digression, and since you mentioned Justice Stevens and his age, and you were his clerk, do you have any inside information as to whether this is his last year on the court?

**Professor Watts:** I have no inside information. I just had a very wonderful visit with him in October in D.C., and he looks great. He looks as good as he did when I worked for him. He's sharp as ever, and still enjoying his job. So, we don't know. We do know that he's only hired one law clerk for next year. He normally would hire four, so that has been, by the press, portrayed as a significant sign that he is going to be retiring soon. But I also think that might just be a reflection of the fact that he's such a wonderfully nice man, that he would hate to hire people, and give them the impression they're going to have this great job, if there's some possibility that he might think about retiring. So, he probably figures, "Well, I can always fill those slots later if I'm still here. So, why fill them out way ahead?" You could probably read too much into it.

**Professor Jay:** There might be a few good clerks left.

**Professor Watts:** Right. Or, former clerks would be willing to come back, right? [laughter]

**Professor Jay:** Not this one. [laughter]

**Professor Jay:** Actually, you mentioned, Judge Martinez, the wise Latina comment. Maybe you could expand on that. I remember the first time I heard it, I was actually pretty shocked until I did see the whole context of it. But she is Latina, and that is unusual. Actually, it's unusual to be a person of color at all on the Supreme Court, and moreover, she's bilingual. Do you think that's going to, in any way, have an effect on her perspective?

**Judge Martinez:** It can't help but have an effect on your perspective. I tried to find out if anybody else on that bench was bilingual, and I couldn't. I don't think anybody is. I can tell you, if someone else is bilingual, I can almost guarantee you that they're not bicultural, and that's a huge difference. Having grown up with my first language was Spanish--and actually, really I hadn't been exposed to English until I was almost six years old, I can tell you that it does affect the way you look at the world. Is anyone in here bilingual? All right. If you grew up bicultural, bilingual, you know exactly what I mean.

You grew up knowing that there are two different words for everything. At the very least, when you were four, or five, or six years old, you look at things, and all of a sudden you realize, well, there are...
two different ways of calling this thing whatever that is. I think that really impacts the way you look at the world.

They've done some interesting studies about bilingualism. In one of them, they call it the Simon Test, which is just one of those weird things. Who comes up with this stuff? There are all these academics that have all this time, I guess, to do this.

[laughter]

**Judge Martinez:** The Simon Test is a really interesting one. They flash up two objects on a screen. Your job is, if the object is green, use your right hand, and you hit this button. If one of the objects is red, you use your left hand, and you hit the other button. That's all you're supposed to do. And they're flashing these objects pretty quickly. Bilingual people always do better whenever the object that is the color is opposite of whatever hand it is you have to hit the button with. What the heck does that mean? I don't know!

[laughter]

**Judge Martinez:** The fact that you grew up bilingually, why would that make any difference? But does it maybe order your mind a little bit differently? We know that music orders your mind differently, being exposed to music at a very young age. So of course it does. I find that absolutely fascinating. The fact that she's also bi-cultural, that plays into all the other things you mentioned before. Coming from a very poor background, she raised herself up by her bootstraps. She had nothing handed to her.

In fact, you could say just the opposite: she had to work her butt off to get exactly to where she is. Just think about where she managed to get to. It's absolutely incredible. So all of those things, I think, are going to have an impact.

At the very beginning, we talked about the fact of her gender and what that means to America, and what that means to the institution. Well, the fact that she's Latina has the very same impact. I mean, Hispanic Americans or Latinos are the nation's largest ethnic or racial minority.

We work and thrive in every walk of life. We serve and sacrifice in every sector of public service. And regardless of whatever people say, our roots predate Europeans in the west, the southwest, and the southern United States.

There's 50 million Hispanic Americans. And for us to see someone like us, who speaks that same language, who has those same experiences, the same background, and even has that wonderful little accent, you've got to love. I mean, you've just got to love it.

[laughter]

**Professor Jay:** What did she mean by the "wise Latina" comment?

**Judge Martinez:** That's really interesting because, I don't know if any of you remember this, but...

**Professor Jay:** I bet they do. [laughs]

**Judge Martinez:** No, I'm sure you remember the comment. What you don't remember is there was a newspaper story that came out in the "Seattle Times," "Seattle PI," where they quoted yours truly. One of those, reporter has a slow day, "Let's call Judge Martinez and say, 'What do you think about Judge Sotomayor?'" [laughter]

**Judge Martinez:** And I'm thinking, "Oh, man." After I hung up the phone, I think, "I just shot my chances to ever get on the appellate bench, or the Supreme Court. That's gone." But then I made the
huge mistake of reading all the comments that people put on there online. I mean, I spent way too much
time doing that. It was crazy. [laughter]

**Judge Martinez:** But some of those comments on there, and you start thinking about, "Wow, there's
some wacky people out there..." [laughter]

**Judge Martinez:** "Well, Judge Martinez said this. Judge Martinez said that." You get all over the place.
But, I was really curious about what exactly did she say, and what was the context where she said it,
because all that certainly makes a difference. It makes a difference to me.

And so, she said it in 2001, at a symposium at Berkeley. She was with a panel of people, other judges
and professors, just like this. The topic was "Different Voices, Different Perspectives for 21st-Century
Issues." And it was fascinating.

And here's the exact comment she says. She said, "Whether born from experience or inherent
physiological or cultural differences, our gender and national origins may and will make a difference in
our judging. Justice O'Connor has often been cited as saying that a wise old man and a wise old woman
will reach the same conclusion in deciding cases. I am not so sure Justice O'Connor is the author of that
line, since Professor Resnick attributes that line to Supreme Court Justice Coyle."

"I am also not so sure I agree with the statement. First, as Professor Martha Minnow has noted, there can
never be a universal definition of wise. Second, I would hope that a wise Latina woman, with the
richness of her experiences, would more often than not reach a better conclusion than a white male who
hasn't lived that life." That's the statement that she made. There's the comment right there.

But then, that's the part that she got hammered on in terms of her confirmation process. The rest of it I
find absolutely fascinating. She goes on to talk about, "Many people are capable of looking at other
people from different groups and being able to accept and understand the values and the needs of those
individuals."

She goes, "However..." This is one paragraph later. "To understand takes time and effort, something that
not everyone is willing to give. For others, their experiences limit their ability to understand the
experiences of others. Others simply do not care. Hence, one must accept the proposition that a
difference there will be by the presence of women and people of color on the bench."

"Personal experiences affect the facts that judges choose to see. My hope is that I will take the good
from my experiences and extrapolate them further into areas with which I am unfamiliar. I simply do not
know exactly what that difference will be in my judging, but I accept there may be some based on my
gender and my Latina heritage."

And then she says to me, what resonates with me, also. Because I'm a Latino judge, and when people
walk into my courtroom, they see that. They see me as a Latino. I understand that. That's one aspect of
who I am, but that's a very visible one.

Here's what she said. "Each day on the bench, I learn something new about the judicial process and
about being a professional Latina in a world that sometimes looks at me with suspicion. I am reminded
each day that I render decisions that affect people concretely and that I owe them constant and complete
vigilance in checking my assumptions, presumptions, and perspectives and ensuring that to the extent
my limited abilities and capabilities permit me, that I reevaluate them and change as circumstances and
cases before me require."

"I can and do aspire to be greater than the sum total of my experiences, but I also accept my limitations.
I willingly accept that we who judge must not deny the differences resulting from experience and
heritage but attempt, as the Supreme Court suggests, continuously to judge when those opinions,
sympathies, and prejudices are appropriate."
That's the kind of justice I want on the bench. Whether she's female, whatever, that kind of thinking is exactly what I want.

**Professor Jay:** Justice Sanders, what do you think about that? Is that the kind of justice you want on the high court?

**Judge Martinez:** Careful now, my momma was a wise Latina. [laughter]

**Justice Sanders:** Well, I had a law clerk this last year who was a very wise Latina. She came to the University of Washington. Rosario Daza. She was in MENSA, and I said, "Well, I don't know about Justice Sotomayor, but I'm sure that you're smarter than this white guy." [laughter]

**Professor Jay:** She liked that. We hold swearing-in ceremonies twice a year at the state supreme court, and the candidates to be sworn in are all introduced in some detail, and I'm impressed about how everybody has their unique story to tell.

And I think everyone in this room has a unique story, has a unique life experience, and I tend to think that it's not entirely appropriate to be emphasizing one's racial background or national-origin background. I mean, everybody's different. Everybody brings a different perspective. That's the way I look at it.

**Professor Jay:** So, say on an issue like guns that is going to be before the court this term. She grew up in a hard-scrabble existence where there obviously were lots of guns on the streets, and firearm violence is a constant part of life where she grew up. How do you think that's going to affect her attitude about gun control and gun-control laws?

**Justice Sanders:** I think, also, that she's a woman. Maybe that has an aspect of it. I know, on the state supreme court, when we have gun cases, that female justices are much less likely to side with the gun owner than the male justices. There's a per-curiam opinion from panel in which Judge Sotomayor was a judge, issued in January of this year, Maloney versus Cuomo, where the issue was, is a martial-arts practitioner entitled to wield a nunchuck in the privacy of his home? And Judge Sotomayor seemed to be less than empathetic to the claim. The per-curiam opinion dealt a challenge to a New York law which prohibited this practice.

**Professor Jay:** It prohibits nunchucks period, right?

**Justice Sanders:** Yes. And the procurium said it is settled law that the Second Amendment applies only to limitations the Federal government seeks to impose on the right, the right to keep and bear arms, citing Presser vs. Illinois, a U.S. Supreme Court case in 1886 which indeed says that. The pro-curium does not engage in any independent analysis of whether the Second Amendment is of such a fundamental right that it should be applied to the states. Rather, the Procurium says that where there's United States Supreme Court precedent, on point, even if it's ill founded or there's another kind of authority which contradicts it, nevertheless controls which I suppose is an arguable basis of. But when she said it's settled law, I wonder by the United States Supreme Court has granted cert in a case to be considered as this very issue.

I wonder why a panel at least of the Ninth Circuit in Nordi vs. King came to an opposite conclusion after an extensive analysis of the question, disapproving these older U.S. Supreme Court cases. So I think that maybe it was an overstatement here of the right of whether or not the Second Amendment applies to the states.

And that gun advocates could find that she's less than empathetic to their views. I'm reminded about what P.J. O'Rourke said in one of his books, he said, "Well, this national was founded by religious nuts with guns."
Justice Sanders: Who does Bill Clinton think stepped ashore at Plymouth Rock, peace core volunteers? [laughter]

Justice Sanders: So apparently Judge Sotomayor hasn't read that particular passage but it could be that she'll be apprised on this issue, but I would think that she would probably be negatively inclined to applying the Second Amendment to the states. Also I might add that the Presser case that she cited that is an 1886 case occurred before the United States Supreme Court started selecting to incorporation of the Bill of Rights to apply to the states that due process...

Professor Jay: Yeah, that first occurred in 1896 with the takings clause.

Justice Sanders: And the panel of the Ninth Circuit pointed that out and also relied upon the Heller case that they thought an indication that it should apply to the states, although that question was not directly before the panel, there was a lot of, or before the Supreme Court there was a lot of discussion about whether or not that was indeed a fundamental right and that kind of thing. Although once again, even in the Ninth Circuit case the parties moved for a re-hearing in bank before the 11 justices and judges. And that was granted. So, it seems like nothing is settled here to me.

Professor Jay: We now have fortunately some time to... [background noise] [background noises]

Professor Jay: So everybody can here. I can repeat it if necessary.

Audience member off mic: I have gone hen collecting as it's important for people to use Indistinct 1:08:49]

Professor Jay: The question, in case everybody, no one, you couldn't hear it in back was if I can paraphrase. We have discussed her being a Latina justice and how that might affect someone coming into her courtroom and the question was: would it make a difference if it was a gay judge and should the judge's sexual orientation be known to the lawyers? I guess that's the...

Audience member: Or did the client?

Professor Jay: The client exactly.

Justice Sanders: You know, I don't think it would make any difference whatsoever, by that I mean I have always believed that everyone walks into the courtroom should see themselves reflected in the people that are sitting there wearing those robes. I don't care who you are. Whether you are a sexual minority or any other type of minority, we are a nation of so many different people and backgrounds, genders, whatever. And you need to be able to walk into that courtroom and feel that you are a part of that process.

So what we have, I think she's 111th Associate Justice in the Supreme Court. Only the third one, first Latina. The majority of them white males. That would be great if nothing but white males show up in front of them. But that's not what's happening in our country now.

I think you are absolutely right that we needed every single level, for whoever is wearing those robes up there to be representative of the people that come before them.

Professor Jay: That's a little difficult to do with one judge on the bench, though, right? [laughter]

Justice Sanders: And one of the things that I wanted to so and I think it's interesting because you're all obviously; obviously you are not lay people. You all understand what it is that we're talking about and it's a subject that has so many nuances. But for the average American, I think it's the lay people out
there. They look at judges slightly differently. I go this from reading all those little blog at the end of that story. [laughter]

**Justice Sanders:** But they think the job of judging if you are competent, if you are careful, if you decide the relevant facts and apply the applicable law, everyone will reach the same conclusion. That's their thinking. It's like a mathematician. You multiply this number by this number and you will always get this result. And if it doesn't then you are activist judge somewhere along the way. If you let something color the way you look at the world, that's the way the average person out there thinks. They don't think that about politicians but they think that about judges. And whenever that doesn't occur in that mindset, in their mindset they say, oh, well something's wrong with that particular judge.

They don't understand the subtlety, the nuance that comes into a lot of this stuff. I think it was Justice Roberts or Justice Aledo during their confirmation process made the comment that justices should like basketball referees. You don't make the rules. You just enforce them.

**Professor Jay:** Actually it was baseball referees.

**Justice Sanders:** Was it baseball?

**Professor Jay:** You are just supposed to call the balls and strikes he says. That's our job.

**Justice Sanders:** All right, all right.

**Professor Jay:** Do you think that's a inaccurate description of the judging process.

**Professor Jay:** Well, let me put it more in my sport. I love basketball and I played basketball...

[laughter]

**Justice Sanders:** I play basketball. I coach basketball. I ref basketball. And it's sort of the same thing. I'm out there reffing, realizing how hard it is to actually make those calls, because the game happens so quickly. But secondly you realize that yes, you are not making the rules, but you are interpreting those rules. And if you have ever had to call a block versus a charging play, believe you me, depending upon where you are, what your perspective is, those are two completely different things.

How can you have three referees and all three of them make it different call out there? You have seen that happen, too. One referee will call a charge. One referee will call a block. And you go, wait you guys are watching the same exact thing. Is the reality different for them?

Is their perspective different? Is their interpretation slightly in a different light? If the typical view out there was you can just input all this information. You are going to get the result. We could have computers up there doing it. We don't need nine people on the Supreme Court. We could just have one.

You wouldn't need appellate judges. All you would need are the trial judges, right? Because we would never be wrong. That's not the way it works. And I think people need to understand that and that's why it is so important... Back to your question of having all those viewpoints and perspectives represented.

**Professor Watts:** That reminds of how one line of the favorite cases of the place that I teach and the administrative law case is blind judges are not made of. Judges are not computers and we talk about that in class, in the context of deference doctrines and standards of review. I think that's absolutely right. Your personal background, of course, is going to color how you come to the bench, but people need to be careful about being overly simplistic - being able to just walk in and say, "Ah, she's a female, hence this," or "Ah, she's Latina, hence this." People are too complex for that. I just wish we could move past that point and move on to other issues.

**Professor Jay:** Judge Sanders, do you think it's balls and strikes?
Justice Sanders: No, I don't think so. I think maybe at the trial court level, and... to a lesser degree, the court of appeals is bound by United States Supreme Court precedent. However, the United States Supreme Court or the highest court in the state has a lot more latitude in forming the future of the law than perhaps the lower courts do. That's one distinction that could be made here, talking about Judge Sotomayor's record on the court of appeals or the district court. Maybe she'll see things differently, in some respects, on the U.S. Supreme Court.

Of course, a good lawyer can argue anything and totally confuse the issue, so maybe that'll confuse the Justices. The U.S. Supreme Court has a habit of having many five-to-four decisions, and our State Supreme Court as well, so if it were calling balls and strikes, I'd think that that wouldn't happen like that.

As to looking at the judge - is the judge a man or a woman? Is he gay or straight? You know, when I was in private practice my clients and I agreed on one thing, and that is that when we went to court, no matter who the judge was - black, white, brown, yellow, or whatever - we only had one objective in mind, and that was vindicating the legal rights of my clients. If someone appearing very unlike my clients was to protect their legal rights, we were all very happy.

I remember, we had one case here involving a judge in King County - there was a little mini-scandal. He was a cross-dresser or something. My client never even mentioned that. My client just wanted to win the case. I think that that's really 99 percent of it. No matter what gender, no matter what race, no matter what predisposition - if you win your case, this is a very smart guy, and if you lose your case, he's worthless! That's the way I think it works.

Martinez My favorite line about balls and strikes and judges - one judge goes, "I call them as they are," and then the next judge goes, "I call them as I see them." The third judge goes, "Ain't nothing till I call."

Professor Jay: Another question? Yes? Cindy?

Cindy: Hi, my name is Cindy Laughlin. I've heard that there's a case pending... dealing with the immigration conflict... [inaudible - too far from the mic] I'm wondering if Justice Sotomayor... [someone coughing]

Professor Jay: Professor Watts?

Professor Watts: It's not one that I followed closely, so I can't speak much to the substance. I guess I'd echo the same remarks we all just made, which is that certainly she brings to the table her perspectives and her background, but whether we can, from that, clearly predict the result - I'm not one to think that that's the case, but I can't, unfortunately, speak to the specifics of that case, because it's not one I've tracked.

Judge Martinez: You know, that's a fascinating case. I echo what Judge Laznic, the Chief Justice of our district, said - I've heard him talk to groups and say, "98 percent of the time, I try to do what the right thing is. The other two percent are immigration cases." I think every single one of us feels handcuffed by this particular area and some of the true injustices that occur in some of those cases. The case that you're mentioning is a fascinating one, because it's... how much does an attorney have to advise his client of potential collateral consequences, down the line, for it not to be ineffective assistance of counsel?

When we're dealing with a criminal case, that is your primary concern, right now - how many years this guy's got to do in prison, and can you get him out of this charge or that charge? And then to realize, well, wait a minute - the way the law is, and the way the law might change, and the fact that the law might change next year and affect my guy now - how far do you carry that out? I'm very curious to see which way they come out on that.

Professor Jay: We're just about out of time. Maybe one more quick question? Yes?
Calvin Brom: Calvin Brom, class of '65. Any insights into how Justice Sotomayor might impact what we perceive as the increase in... [someone rustling papers] pharmaceutical companies that are now arguing that since we licensed the sale of our product, the negative consequences that are out could become... [someone coughing]

Professor Jay: Anyone?

Professor Watts: I was just going to say, that's a great question, because of course preemption is such a topic right now, in recent years - the last two years, particularly, before the court. Also, it's an issue right now, given that we're under the new Obama administration and we're seeing changes in direction in terms of agencies, where the new administration is directing them to switch course in terms of preemption regs. So that's likely to continue to bubble around. I don't remember, during the confirmation hearings, seeing much discussion of any particular Sotomayor decisions from the second circuit that shed light on that. It's possible I missed it, but...

Professor Jay: I don't think so.

Professor Watts: It's an area I follow, so I'd like to think that I would have noticed if it was really a big one that she'd written. Stewart, you don't...?

Professor Jay: I watched all the hearings. I don't think that question came up, but it is one of the major issues in American law today, and one that I personally am very interested in, because it has such profound ramifications for the federal system. As someone who believes in federalism, I'm often very disturbed by the federal government taking over entire areas. Unfortunately, we are out of time. I'm going to turn this back over to Dean Testy now to conclude the program.

[applause]

Professor Watts: I was going to ask you to join me in thanking this amazing panel and our great moderator, but I think you've done a wonderful job of that already. Let me just let you all know that I really enjoyed your remarks so very much. We covered a lot of ground here today. Professor Jay, I want to thank you for moderating and leading this. Just a tremendous amount of information, and I want to thank all of you for being with us today.

Let me let you know, I know there are so many of our alums in the audience today. I want to say a special thank you for being here, that we're glad to see you. We are really out actively reconnecting with all of our alums this year.

They've been calling it the Dean Rollout Plan, which I think is kind of an interesting topic, but I'm certainly enjoying getting to know all of you, and I just want to let you know that we want to be your law school for always, and any way that we can assist you or connect with you in any way, we're happy to do that.

I also want to say that one of the things I'm so enjoying is just getting to know all the alumni, and we are just so very proud of all that you're accomplishing. Today, with our panel, we have two particularly remarkable alums of the law school, so if I could ask you one more time to thank Judge Martinez, Justice Sanders, and Professors Watts and Jay, I would really appreciate that.

[applause]