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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. draft	re: Question #8 - Response to Question from Senator Sessions for Judge Sonia Sotomayor - (1 page)	10/08/1997	P2, P5
002. fax	Sonia Sotomayor to Sheila Joy & Amy Jimenez; re: Responses to Questions (16 pages)	10/22/1997	P2, P5
003. fax	Sonia Sotomayor to Amy Jimenez; re: Responses to Revised Follow-Up Questions for Sonia Sotomayor (11 pages)	10/08/1997	P2, P5
004. fax	Sonia Sotomayor to Sheila Joy et al; re: Draft Responses (10 pages)	10/08/1997	P2, P5
005. fax	Sonia Sotomayor to Nancy Scott Finan; re: Draft Responses (14 pages)	10/07/1997	P2, P5
006. fax	Nancy Scott Finan to Sonia Sotomayor; re: Return Your Responses (1 page)	10/06/1997	P2

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Sotomayor - Miscellaneous [2]

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RESTRICTION CODES

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Freedom of Information Act - [5 U.S.C. 552(b)]

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
500 PEARL STREET
NEW YORK, NEW YORK 10007-1312

CHAMBERS OF
SONIA SOTOMAYOR
UNITED STATES DISTRICT JUDGE

FAX

NAME: AMY JIMINEZ

DATE: 10/8/97

TELEFAX NO.: (202) 456-1647

TELEPHONE NO.:

FROM: SONIA SOTOMAYOR

RE:

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, NEW YORK 10007-1581

CHAMBERS OF
SONIA SOTOMAYOR
UNITED STATES DISTRICT JUDGE

October 8, 1997

Hon. Orin G. Hatch, Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

Please accept the enclosed materials in response to the questions that have been posed to me by your colleagues.

Very truly yours,

Sonia Sotomayor

cc: Sen. Leahy
tb
encls.

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RESPONSES TO GENERAL AND ADDITIONAL QUESTIONS FOR SONIA SOTOMAYOR POSED BY SENATOR JOHN ASHCROFT

Questions For All Candidates

1. *Which current Supreme Court Justice do you most admire, and why?*

I have great admiration for Justice Sandra Day O'Connor. She has demonstrated the highest respect for the separation of powers, and for the sovereignty of the individual states. I have also been impressed by her meticulous consideration of precedent, and by her determination to approach each case on its individual facts. As a judge on the district court, I have made every effort to be guided by these same principles: to honor precedent, to respect the constitutional functions of the legislative and executive branches of our government, and to approach each case on its individual merits.

2. *What Judge or Justice has most influenced your thinking concerning the constitutional separation of powers, and why?*

Chief Justice John Marshall has most influenced my thinking concerning the constitutional separation of powers. Justice Marshall is frequently recognized as one of the greatest judges in our country's history, and for good reason. Marshall set the foundations of our Constitution in Marbury v. Madison, in which the Supreme Court, under Marshall's leadership, decided that the power of each branch of government is based solely in the Constitution, and that no branch of government can expand upon the powers specifically delineated in the Constitution.

3. *What does the discretionary power of the judiciary mean to you?*

The federal courts can exercise discretion only to the extent authorized by Congress. In the Federal Rules of Civil Procedure, for example, Congress has directed courts to exercise wide discretion in structuring discovery to promote judicial economy. In numerous other areas, Congress has more narrowly circumscribed court discretion. In all cases, courts must honor those parameters set by Congress.

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4. *Which Judge has served as a model for the way you would want to conduct yourself as a Judge, and why?*

I have many judicial colleagues whom I admire. It is difficult for me to mention one without feeling as if I have unfairly overlooked numerous others. I mention only the Honorable Leo Glasser of the Eastern District of New York, however, because he was a friend to me before I joined the bench. Knowing Judge Glasser on a personal level, I am aware of his extraordinary commitment to family, and of his passionate love of the law. I have always sought to emulate these qualities, and I have tried to devote the same time, care, and attention that Judge Glasser brings to the cases before him.

5. *Which law review article or book has most influenced your view of the law?*

I have an extensive background in intellectual property, and have been most impressed by Nimmer on Copyright, a comprehensive, insightful and authoritative treatment of the complex issues permeating this area of the law.

6. *What role do you think legislative history -- by which I mean the various committee reports, hearing transcripts and floor statements -- should play in the interpretation of the text of a statute?*

First and foremost, a statute should be interpreted and applied according to its unambiguous plain terms. Indeed, legislative history should be consulted only in those rare instances in which the text of a provision is truly ambiguous, and in which precedent has failed to elucidate its meaning. Even in these unusual situations, judges must exercise great care to ensure that the statements of intent they rely upon accurately reflect the Congressional will, and do not more narrowly reflect the views of an individual legislator.

<u>Additional Questions For Judge Sotomayor</u>

1. *You appear to have been critical of mandatory minimums and the sentencing guidelines. Do you think federal judges should have greater discretion in sentencing? Are there other areas in which you think federal courts should have additional discretion?*

As I explained during the hearings held on September 30, I value the Sentencing Guidelines -- with their mandatory minimums -- as an important tool in avoiding arbitrary

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results, and as a valuable means of ensuring that the community's standards are reflected in sentencing. Before the adoption of the safety valve provision by Congress, however, it was my view -- and the view of the Judicial Conference -- that the Guidelines and mandatory minimums could be revised to address more fairly those cases involving nonviolent first time offenders. Congress agreed with these concerns and passed the safety valve provision in 1994.

It is, of course, solely the prerogative of Congress to make any additional changes to the Guidelines, or its mandatory minimums, that it deems necessary or desirable. Since Congress passed the safety valve, in 1994, I am not aware of any remaining class of individuals for whom I believe modifications are advisable. As I have throughout my time on the bench, I will continue to apply the mandatory minimums, and the Guidelines, and all laws, in whatever manner prescribed by Congress.

2. *At the hearing, you mentioned that you recently concluded the trial in a case called Holmes v. Artuz, which involved a prisoner who was removed from his food service job because he was an open homosexual. Did you ever rule on a motion for summary judgment or a motion for a directed verdict in that case? If so, how did you rule?*

The defendant prison officials in Holmes did not move for summary judgment. During trial, however, I indicated to the parties that even if the jury were to return a verdict in plaintiff's favor, defendants would have had a strong basis for reasserting their claim of qualified immunity. At the close of the plaintiff's case, the defendants moved for a directed verdict. I reserved decision pending the jury's determination on the potentially dispositive factual questions, *i.e.*, whether the defendant prison officials did in fact remove the plaintiff from his work assignment without his consent and whether there was a genuine security concern motivating defendants' actions. By returning a verdict for the defendants on the first of these issues, the jury obviated any need for me to reach the legal questions implicated by the issue of qualified immunity. Based on the jury's verdict, I entered an order dismissing the action.

3. *In your 1995 opinion in Holmes v. Artuz, you appear to reject a qualified immunity defense, at least in part, on the ground that the prison officials had not provided a rational basis for the plaintiff's removal. Is that a fair reading of your opinion? Did the qualified immunity issue resurface later in the litigation? If so, how did you rule?*

In rejecting the motion to dismiss filed by the defendants in Holmes, I did not find

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the defendants' proffered security concerns to be unreasonable or irrational. I was not permitted to make any determination as to the factual merits of the defendants' arguments. In considering the motion to dismiss, I was instead obligated to treat the plaintiff's allegations as true. Accordingly, I had no basis -- in the context of the motion before me -- for rejecting the plaintiff's claim that the defendants had removed him from the food line based solely upon their discriminatory animus towards homosexuals and not because of any genuine concern for prison security.

With respect to the issue of qualified immunity, please refer to my response to Question 2.

4. *In your 1995 opinion in Holmes v. Artuz, you deferred resolution of the case in part to allow the Supreme Court to decide the Romer case. How did you feel that the Court's resolution of that case might be relevant in light of the standard for the application of qualified immunity?*

As I explained in my answer to Question 3, I rejected the motion to dismiss entered in Holmes specifically because I was under an obligation to accept plaintiff's allegations as true. Under well settled Supreme Court precedent, cited in Holmes, discrimination lacking any rational basis, as alleged by the plaintiff, is a clear violation of the equal protection clause. For this reason, I could not at that time make any conclusive determinations regarding qualified immunity. Defendants would have been entitled to qualified immunity, however, if at some later stage of the proceeding they presented evidence demonstrating a rational basis for their conduct. The Supreme Court decision in Romer would not have affected this conclusion. Nevertheless, as a district court judge considering issues similar to those in Romer, I considered it at least possible that the Supreme Court's forthcoming opinion might -- in some way that I could not specifically predict -- effect the legal analysis applicable to the case before me.

5. *In your 1995 opinion in Holmes v. Artuz, you read the pro se plaintiff's complaint in the light most favorable to him and concluded that it might be read to raise a substantive due process claim. What was the precise substantive due process claim that you felt was raised by the plaintiff's complaint, and what precedent supported that claim?*

According to the Second Circuit decision in Jones v. Coughlin, which I cited and relied upon in my Holmes Order, "a prisoner has a substantive due process right not to be subjected to false misconduct charges as retaliation for his exercise of a constitutional

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right such as petitioning the government for redress of his grievances . . . ." 45 F.3d 677, 680 (2d Cir. 1995). The plaintiff in Holmes, as in Jones, complained that he was retaliated against -- by means of false misbehavior reports -- specifically because he exercised his first amendment right to complain to prison officials regarding perceived mistreatment.

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RESPONSES TO QUESTIONS BY SENATOR STROM THURMOND REGARDING THE NOMINATION OF JUDGE SONIA SOTOMAYOR

1. *Judge Sotomayor, in response to one of my questions at the nominations hearing on September 30, you stated that you do not oppose mandatory minimum sentences for drug offenses. However, during your sentencing of Louis Gomez and Victor Gomez on July 26, 1993, you stated: "I am deeply, personally sorry about the sentence that I must impose . . . . I hope that yours will be one among the many that will convince our new president and Congress to change these minimums. The only statement I can make is this is one more example of an abomination being committed before our sight. . . . [T]he laws require me to sentence you to the five-year minimum."*

   A. Have your views changed since 1993 based on subsequent Congressional action? If not, what did you mean when you said that Congress should "change these minimums."

Yes, my views have changes since 1993. As I explained during the hearing held on September 30, I favor the Sentencing Guidelines -- with their mandatory minimum sentences -- and appreciate the certainty which they provide. As I also indicated, it is solely for Congress, in conjunction with the President, to enact any changes to the Guidelines. In this regard, I believed, in 1993 -- as did the Judicial Conference -- that cases such as Gomez suggested a sound basis for Congressional action, particularly with respect to defendants who were first time offenders and subordinates in drug distribution schemes. In 1994, in enacting the safety valve, Sentencing Guideline § 5C1.2, Congress agreed. It amended the Guidelines to permit departures from mandatory minimums in cases involving defendants like Gomez -- first time offenders, involved as subordinates in nonviolent crimes, who fully disclose all information they have to the Government.

B. What other examples of abominations were you referring to?

I believe that the only sort of situation which struck me as an abomination was the Gomez type situation, a case in which a drug ring leader -- whom I sentenced to the maximum prison term permissible under Guidelines -- would be required to serve only three months longer than one of his subordinates. At the time I imposed sentence in the Gomez case, the Judicial Conference was providing Congress with other examples of cases in which the mandatory minimums -- as they existed at the time -- applied in such a way that drug ring leaders were sentenced no more severely than first time offenders working under them.

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2. *During your sentencing of Daniel Gonzalez on July 12, 1993, you stated: "I do hope that . . . your family will appreciate that we all understand that you were in part a victim of the economic necessities of our society, but unfortunately there are laws that I must impose."*

A. What did you mean when you said that the defendant was a victim of economic necessities?

As I made clear in my statements to the Gonzalez family, the defendant before me was only "in part" motivated by economic circumstances. Foremost, defendants are responsible for their misconduct, and have only themselves to blame for the choices that they make to violate the law. In their letters to me, the Gonzalez family indicated that they recognized that their relative bore the brunt of the responsibility for his egregious misconduct.

B. Do you believe the economic circumstances of someone who is convicted of a drug offense should be relevant in determining their sentence?

No, people should not be excused from their misconduct on account of their economic circumstances. As I believe my own life experience demonstrates, people must and can find more constructive ways to respond to economic hardship than to resort to crime.

3. *You stated during your hearing that the jury found against Darrow Holmes in his lawsuit against Superintendent of Security Services in New York, Case No. 95 Civ. 2309 (SS). I am aware that you denied the government's motion to dismiss the case. Did the government later make a motion for summary judgment? If so, did you issue a written order denying the motion.*

The defendants did not make a motion for summary judgment in the Holmes case.

4. *You are quoted in the New York Times on September 25, 1992 as saying that you were "very aware of the controversy surrounding the guidelines" and that you expected to "experience some dislocation with them." Please explain how and why you have had "dislocation" with the Guidelines.*

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As Senator Sessions observed during the hearing, "when you set a set of guidelines, everybody's not going to fit perfectly within it." In commenting to the New York Times concerning the responsibilities that I would have as a judge, I expected that it would be difficult -- though necessary -- to impose mandatory sentences in some such circumstances. During my time on the bench, I have come to recognize that, most often, the Guidelines provide welcomed certainty in sentencing.

5. *In the same New York Times article, when asked whether you were "among" those who sat on her hands rather than give [Justice Clarence Thomas] a standing ovation [at a Second Judicial Circuit conference], you are quoted as saying "I'll take the Fifth."*

A. Please explain exactly what you did and said at that event in connection with Justice Thomas's appearance.
B. Please explain why your conduct was apparently inconsistent with most of the audience.
C. When Senator Sessions approached the topic with you, you stated that you did what you did because you did not wish to make a "political statement" through your actions. However, didn't your conduct, which was apparently inconsistent with most attendees, actually constitute a "political statement?"

As I told Senator Sessions during the hearing, I stood in honor of Justice Thomas when he entered the room at the Judicial Conference. I recall that most other judicial attendees stood as well. Because my conduct was consistent with precedent and protocol, I did not view my conduct as a "political statement." In "taking the Fifth" in response to the reporter's inquiry on the subject, I meant only to offer a humorous proxy for a "no comment." Indeed, as a prospective judge involved in an interview with the New York Times, I was determined to avoid being drawn into a politically charged discussion, and limited my responses mostly to questions concerning such matters as my childhood in the South Bronx and my work as a prosecutor.

10/8/97

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RESPONSES TO REVISED FOLLOW-UP QUESTIONS FOR SONIA SOTOMAYOR FROM SENATOR SESSIONS

Judge Sotomayor, in Holmes v. Artuz, 1995 Dist. Lexis 15926, you noted that removing a prisoner from a prison job solely because he had declared his sexual orientation may itself state a claim under 42 U.S.C. §1983.

1. *In your legal opinion, is there a constitutional right to homosexual conduct?*

In my legal opinion, based upon the Constitution and Supreme Court precedent, including the Supreme Court's decision in Bowers v. Hardwick, there is no constitutional right to homosexual conduct. Moreover, as is the case with respect to all persons, except for those few who are entitled to the benefits of more heightened scrutiny, actions taken against homosexuals by the state are permissible provided only that they are rationally related to some legitimate state interest.

In the 1986 case Bowers v. Hardwick, the Supreme Court ruled that homosexual sodomy is not a constitutional right, and that a State could criminalize homosexual conduct.

2. *Judge Sotomayor, why did you mention the then pending Romer v. Evans case but not mention Bowers v. Hardwick in your opinion and order in Holmes v. Artuz? Isn't Bowers v. Hardwick relevant to the issue in Holmes v. Artuz?*

The plaintiff in Holmes did not advance any claim that the Constitution protected his homosexual conduct. Accordingly, I saw no reason to cite the Bowers decision.

The Romer case, however, which was pending before the Supreme Court at the time I entered my order in Holmes, might have had some bearing on the issue that plaintiff did raise in his complaint. Specifically, in Romer, the plaintiffs, like the plaintiff in Holmes, raised an equal protection argument concerning their status as homosexuals as opposed to their conduct as homosexuals.

In 1995, the Supreme Court ruled in Adarand v. Pena that all government racial preferences are subject to the strictest judicial scrutiny.

3. *Do you believe that the Adarand decision was correctly decided?*

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In my view, the Adarand Court correctly determined that the same level of scrutiny -- strict scrutiny -- applies for purposes of evaluating the constitutionality of all government classifications, whether at the state or federal level, based upon race.

4. *If confirmed, you will preside over many employment discrimination cases as a federal judge. In a suit challenging a government racial preference, quota, or set-aside, will you follow the Adarand decision and subject that racial preference to the strictest judicial scrutiny?*

Yes, as required by the decision in Adarand, I will apply the strictest judicial scrutiny in evaluating any claim before me challenging a government racial preference, quota, or set-aside. I am obligated as a district court judge -- and will remain obligated if appointed to serve on the Second Circuit -- to comply fully with the dictates of Supreme Court precedent.

5. *In your legal opinion, is the California Civil Rights Initiative constitutional?*

As a sitting judge, I hesitate in commenting upon an issue which is directly pending in a case before the Supreme Court on an application for certiori. The Ninth Circuit has examined this issue closely and, in a carefully considered opinion, determined that the Initiative is constitutional. The Ninth Circuit opinion has a foundation in the strong presumption favoring the constitutionality of public referenda and laws and in recent Supreme Court precedents.

6. *Which current Supreme Court Justice do you most admire and why? Which former Supreme Court Justice do you admire and why?*

I have great admiration for Justice Sandra Day O'Connor. She has shown the highest respect for the separation of powers, and for the sovereignty of the individual states. Her meticulous consideration of precedent has also impressed me, as well as her determination to approach each case on its individual facts. As a judge on the district court, I have made every effort to be guided by these same principles: to honor precedent, to respect the constitutional functions of the legislative and executive branches of our government, and to approach each case on its individual merits.

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I also admire former Chief Justice John Marshall. Justice Marshall is frequently recognized as one of the greatest judges in our country's history, and for good reason. Marshall set the foundations of our Constitution in Marbury v. Madison, in which the Supreme Court, under Marshall's leadership, decided that each branch of government derives its powers solely from the Constitution, and that no branch is equipped to alter or expand upon those powers delineated in the Constitution.

7. *Is there a current law school professor or academic that you strongly admire?*

I admire Dean John D. Feerick, Dean of Fordham Law School. Dean Feerick throughout his academic life has been an exceptional public servant who has participated in countless committees and commissions dedicated to improving ethical practice in government and in our profession. Dean Feerick is currently chairing the Ethics Committee of the Dispute Resolution Section of the American Bar Association ("ABA"); he also previously chaired a joint committee of the ABA and American Arbitration Association ("AAA") that developed a set of ethical standards for mediators and arbitrators. He is Chair of the Executive Committee of the AAA and Chair of the Fund for Modern Courts. He has been a member of the New York State Law Revision Committee and was chairperson of the New York State Commission on Government Integrity. In short, Dean Feerick is a well-respected academic of high character, with a demonstrated commitment to his community. I admire him greatly for these qualities.

8. *You have been very critical of the federal sentencing guidelines. Please provide a copy of every opinion or order in which you departed downward from the guidelines as a federal district judge.*

I have never issued a published or unpublished opinion or order relating to upward or downward departures from the Sentencing Guidelines. Furthermore, I have never been appealed for a downward departure. I have been appealed twice for upward departures and, in both cases, I was affirmed on appeal. I will forward to you copies of the judgment and commitment orders filed with the Clerk of the Court upon sentencing for all cases in which I have departed.

The overwhelming majority of my departures downward have been at the government's specific request, as authorized by the Guidelines, because of the defendant's substantial assistance to the government and its administration. In other cases, in which the Guidelines range required a sentence of less that one year, I departed

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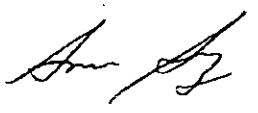
downward due to extraordinary family circumstances, and I substituted a comparable or longer term of either community confinement or home detention. Furthermore, with respect to the cases involving illness, some of these defendants were to be immediately deported because they were expected to live for a very short time.

Overall, in the 217 criminal cases over which I have presided, I departed downward a total of 58 times: 44 of those departures were at the government's specific request for the reasons previously explained. In 3 of the remaining 14 cases, I was mandated by law to depart downward because the criminal statute at issue contained a maximum applicable sentence that precluded application of the Sentencing Guidelines (see Guidelines §5C1.2). My remaining 11 departures were expressly authorized under the Sentencing Guidelines as follows: 5 cases in which the defendant was terminally ill, seriously ill or borderline retarded (departure permitted in those circumstances under Guidelines §5H1.4); 1 case in which the defendant's criminal history category over-represented the seriousness of his past criminal activity as well as the likelihood of recidivism -- the defendant had a high criminal history category solely because of motor vehicle convictions for driving without a license (departure permitted under Guideline §5H1.8); 2 cases in which defendants had extraordinary family circumstances (*i.e.*, in one of those cases, defendant was the sole caretaker of a young child with serious emotional problems due to father's abuse) (departure permitted under Guidelines §5H1.6); 1 case in which the defendant had substantially assisted the administration of justice in his arrest and post arrest conduct with the government and the Court (departure permitted under Guidelines §5K2.0); and 2 cases in which I departed for a combination of the reasons described above, including poor health and a criminal history category that over-represented the seriousness of past criminal activity (in one of these cases, the defendant was of poor health and had a high criminal history category due to convictions that had occurred over 20 years prior to arrest).

Finally, I have departed upwards from Sentencing Guidelines in 6 cases: in 2 of those cases because of the quantity of drugs involved and the defendant's significant role in a drug-related offense; in 2 cases because of the defendant's serious prior criminal history; in 1 case due to the number of guns involved and the defendant's prior criminal history; and in 1 case because of the defendant's disruption of the government's prosecution and investigation (upward departure is expressly authorized in these instances under §5K2.7 of the Guidelines).



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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
500 PEARL STREET
NEW YORK, NEW YORK 10007-1312

CHAMBERS OF
SONIA SOTOMAYOR
UNITED STATES DISTRICT JUDGE

FAX

NAME: Amy Jimenez

DATE: 10/8/97

TELEFAX NO.: 202 456 1647

TELEPHONE NO.:

FROM: Sonia Sotomayor

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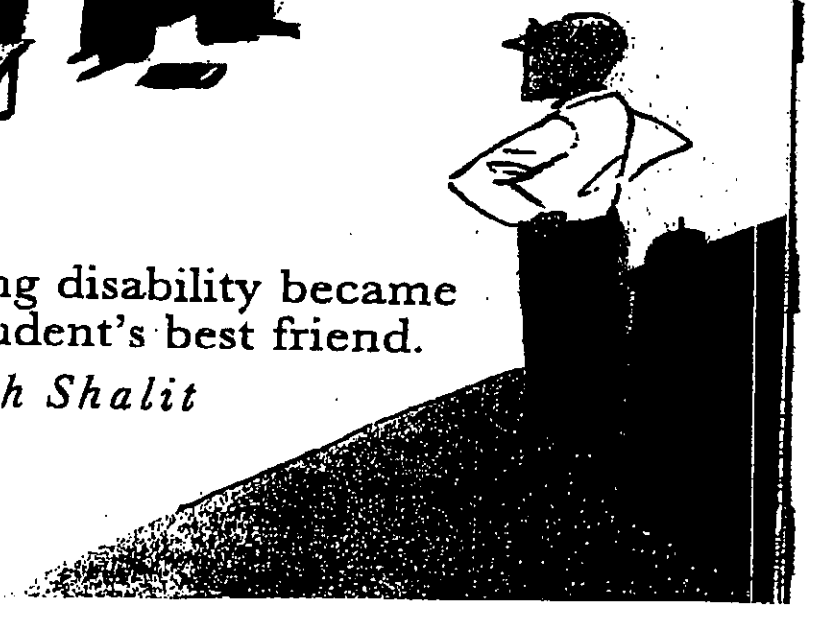
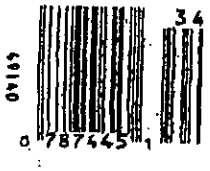
Why Johnny Can't Read

(or Add, or Sit Still in Class, or Take Notes)

How a little learning disability became the ambitious student's best friend.

By Ruth Shalit





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Why Johnny can't read, write or sit still.

DEFINING DISABILITY DOWN

By Ruth Shalit

In July of 1995, Jon Westling, the provost of Boston University, traveled to Australia to attend the Winter Conversazione on Culture and Society, a highbrow tête-à-tête for globetrotting pundits and savants. Westling, a protégé of former B.U. President John Silber, is an avowed conservative; and the subtitle of his speech, "The Culture Wars Go to School," seemed to portend the usual helping of red meat for the faithful. But instead of decrying deconstruction, or puncturing the pretensions of tenured radicals, Westling took aim at an unexpected target—the learning-disabled. He told the story of a shy yet assertive undergrad, "Somnolent Samantha," who had approached him one day after class and presented him with a letter from the Office of Disability Services. The letter explained that Samantha had a learning disability "in the area of auditory processing" and would require certain "accommodations," including time-and-a-half on quizzes, double time on the midterm, examinations administered in a room separate from all other students, copies of Westling's lecture notes, and a reserved seat at the front of the class. Samantha also notified Westling that she might doze off in class, and that he should fill her in on any material she missed while snoozing.

The somnolent undergrad, Westling contended, was not alone. A new, learning-disabled generation was coming of age in America, a generation "trained to the trellis of dependency on their special status and the accommodations that are made to it." Citing a Department of Education estimate that up to 20 percent of Americans may be learning-disabled, Westling mused on the evolutionary ramifications of such a diagnosis. "There may be as many as 50 million Americans," he observed. "What happened? Did America suffer some silent genetic catastrophe?"

Westling's speech, it turns out, was a prelude to action. Shortly after returning from Melbourne, the aggrieved provost took a cleaver to B.U.'s bloated Office of Learning Disabilities Support Services, a half-million dollar fiefdom whose policies had, in the words of *The New York Times*, earned B.U. a "national reputation" as a haven of support for the learning-impaired. He stepped up standards for documentation, and he issued a blanket prohibition on waivers of the school's math and foreign language requirements, contending that there was no medical proof that students with learning disabilities are unable to learn these subjects. Henceforth, he declared, all requests for learning-disabled accommodations would be routed through his office. Westling then made a final announcement. In 1996, he said, he would become president of the university.

The learning-disability establishment was dumbfounded. "Here was someone coming in with no knowledge, taking the national model and destroying it," says Anne Schneider, the Park Avenue fund-raising doyenne who spearheaded the creation of B.U.'s program a decade ago, after her learning-disabled daughter Andrea nearly washed out of the university—due, Schneider says, to a lack of services. Schneider, whose personal fund-raising efforts have kept the office flush with cash, sees Westling's assault on her brainchild as analogous to "taking a seeing-eye dog away from a blind person." Janet Cahaley, mother of learning-disabled sophomore Michael, agrees: "These kids are the most vulnerable people on campus. Before, they were treated with humanity and decency and kindness. Now, they're hopeless and helpless."

Well, maybe not so helpless. Westling's putsch brought howls from disabled-rights advocates and from the media, which pounced upon the revelation that Somnolent Samantha was a fictitious composite—a "rhetorical trope," as Westling somewhat sheepishly admitted. And on July 15, 1996, ten students filed a lawsuit against Westling, claiming his unkind words and arduous new requirements amounted to illegal discrimination under the 1990 Americans With Disabilities Act. In their complaint, the students alleged that Westling's new standard for documentation—requiring applicants to submit an evaluation that is less than three years old and prepared by a physician or licensed psychologist—amounted to an "unduly burdensome prerequisite" that would screen out learning-disabled students from receiving their legally mandated accommodations. Also unlawful, the students contended, was Westling's prohibition on waivers of academic requirements. Finally, in their most enterprising claim, the students accused Westling of creating a "hostile learning environment" for the disabled, inflicting needless "emotional distress" and crushing their hopes of collective advancement. A ruling by Judge Patti B. Saris of Boston Federal District Court is expected by the end of August.

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Recent rulings by other judges suggest that the learning-disabled students may well prevail in court. But even then the questions begged by Somnolent Samantha will remain. Westling and B.U.'s new guard insist that they have no animus against those with "genuine" learning impairments; they simply want to weed out the impostors. Yet, in holding up a trendy diagnosis to the bright light of public scrutiny, B.U. officials have raised issues that go to the core of a debate that has grown as civil rights law has expanded to cover not merely the halt, the lame and the blind, but the dysfunctional, the debilitated and the drowsy.

Should "learning-disabled" even be a protected category under federal law? What, exactly, is a learning disability? Are the B.U. plaintiffs at the vanguard of a new generation of civil rights warriors, as their supporters contend? Or is their lawsuit the *reductio ad absurdum* of identity politics and tort madness—Harrison Bergeron meets Perry Mason in The Case of the Litigious Lollygaggers?

The recent announcement by the Equal Employment Opportunity Commission that the Americans With Disabilities Act covers not only physically but mentally handicapped individuals has occasioned a flurry of hand-wringing editorials. Worried employers have painted a scary scenario of a law that will coddle murderous lunatics, endanger the welfare of unsuspecting customers and transform America's factories and foundries into dystopias of dementia. In some ways, however, it is the entrenchment of learning disability—a comparatively undersung, and seemingly more benign, "hidden impairment"—that poses the more subversive challenge to basic notions of fair play, professionalism and equal protection under the law.

No one would deny that an individual who is unfortunate enough to be afflicted with one of the classically defined mental disorders—schizophrenia, paranoia, manic depression, and so on—suffers from a clearly defined and clearly recognizable infirmity, one that is likely to impair significantly her educational achievements and career prospects. (Whether employers should be legally compelled to overlook these mental disabilities is another matter.) The diagnosis of a learning disability, in contrast, is a far more subjective matter. For many of the more recently discovered learning maladies—math disability, foreign-language disability, "dysrationalia"—there are no standard tests. To be sure, real and debilitating learning disabilities do exist. But there are no good scientific grounds to believe that some of the more exotic diagnoses have any basis in reality. Yet, thanks to the interlocking protections of three powerful federal disability laws, refusal to accommodate even the most dubious claims of learning impairment is now treated by the courts and by the federal government as the persecution of a protected minority class.

Modern disability law was inspired by the most humane of motives, to protect the disabled from prejudices that deprived them of equal opportunities in the workplace and in the classroom. From the outset, however, this grand aspiration was framed in the fuzziest of terms. The statutory framework for modern disability law was established in the Rehabilitation Act of 1973, which mandated assistance measures for the disabled in federal facilities. Here is how Section 504 of the act defined a learning disability: "a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written ... [which] may manifest itself in imperfect ability to listen, think, speak, read, write, spell or do mathematical calculations." This remarkably broad definition is echoed in all subsequent disability laws, notably the 1975 Individuals With Disabilities Education Act, which mandated an array of services for disabled public school students, and the 1990 Americans With Disabilities Act, which extended the protections of the Rehabilitation Act into the private sector. All three laws are equally vague in their description of how people with disabilities must be treated. As the ADA puts it, in the case of any individual possessing a "disability" that results in "substantial impairment" of a "major life activity," schools and employers cannot "discriminate" and must provide "reasonable accommodation." The meaning of these legal appelations, as interpreted by the courts and the regulatory agencies, would turn out to be remarkably expansive.

There were *some* limits written into the disability laws. For instance, only "otherwise qualified" individuals are entitled to protection; accommodations are only mandated if they do not result in "undue hardship." But recently a number of rulings by federal courts and government enforcement agencies have revealed how flimsy these limits are.

Although compliance with federal disability law is not supposed to come at the expense of education or job performance standards, the Department of Education's Office of Civil Rights has delivered stinging rebukes to schools that refuse to exempt learning-disabled students from academic requirements. Last May, a student afflicted with dyscalculia—math disability—filed a complaint with the San Francisco Office for Civil Rights after her college declined to waive the math course required of all business majors in paralegal studies. Despite the college's earnest attempts to accommodate her impairment—the student would receive extensive tutoring and extra time on tests—OCR issued a finding of discrimination anyway, writing on May 30 that "[a]bsolute rules against any particular form of academic adjustment or accommodation are disfavored by the law." When the school asked if they could require learning-disabled students to at least *try* to pass a required course, OCR said no way, arguing that "it is discriminatory to require the student to consume his or her time and jeopardize his or her grade point average taking a particular mathematics course when the person qualified to administer and/or interpret the psychometric data has determined that the student, due to his or her disability, is highly unlikely to pass the course with any of the accommodations the institution can identify and/or deliver." OCR added that this rule should apply even to borderline

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dyscalculics, that "substantial group of students for whom interpretation of psychometric measures provide no clear prediction of success in a particular mathematics course."

This is the new frontier, the learning disability as an opportunistic tautology. The fact that one displays a marked lack of aptitude for a particular intellectual discipline or profession establishes one's legal right to ensure at least a degree of success in that discipline or profession. That is not a fanciful conceit, but an adjudicated reality. Several judges have recently ventured the enterprising claim that any person who is not performing up to his or her abilities in a chosen endeavor suffers from a learning disability within the meaning of the ADA.

Consider the lawsuit filed in 1993 by an aspiring attorney named Marilyn J. Bartlett. Bartlett graduated in 1991 from Vermont Law School, where she received generous accommodations of her reading disability and disability in "phonological processing." Nonetheless, Bartlett did not do well, graduating with a GPA of 2.32 and a class standing of 143 out of 153 students. She then went to work as a professor of education at Dowling College, where, according to court documents, she "receives accommodations at work for her reading problems in the form of a full-time work-study student who assists her in reading and writing tasks."

When it came time to take the bar exam, Bartlett petitioned the New York Board of Law Examiners for special arrangements. She wanted unlimited time for the test, access to food and drink, a private room and the use of an amanuensis to record her answers. Acting on the advice of its own expert, who reported that Bartlett's test data did not support a diagnosis of a reading disorder, the board refused Bartlett's demands. Three times, Bartlett attempted the exam without accommodation. After her third failure, she sued the board.

On July 3, 1997, Judge Sonia Sotomayor ruled in Bartlett's favor. Ordering the board to provide the accommodations Bartlett had requested, she also awarded Bartlett $12,500 in compensatory damages. Judge Sotomayor did not challenge the board's contention that Bartlett was neither impaired nor disabled, at least not in the traditional sense. In an enterprising new twist, however, she declared that Bartlett's skills ought not to be compared to those of an "average person in the general population" but, rather, to an "average person with comparable training, skills and abilities"—i.e., to her fellow cohort of aspiring lawyers. An "essential question" in the case, said the judge, was whether the plaintiff would "have a substantial impairment in performing [the] job" of a practicing lawyer. The answer to this question was "yes," the judge found. And this answer—the fact that Bartlett would have a very hard time meeting the job requirements of a practicing lawyer—was, in the judge's opinion, precisely the reason why Bartlett had a protected right to become a practicing lawyer. Thus, Judge Sotomayor ruled that Bartlett's "inability to be accommodated on the bar exam—and her accompanying impediment to becoming bar-admitted—exclude her from a 'class of jobs' under the ADA," and could not be permitted.

To drive home her point, Judge Sotomayor triumphantly cited Bartlett's performance during a courtroom demonstration of her reading skills. "Plaintiff read haltingly and laboriously, whispering and sounding out some words more than once under her breath before she spoke them aloud," the judge recalled. "She made one word identification error, reading the word 'indicted' as 'indicated.'"

It could, of course, be argued that the ability to read is an essential function of lawyering; that any law school graduate who cannot distinguish "indicated" from "indicted," who cannot perform cognitive tasks under time constraints, is incapable of performing the functions of a practicing lawyer and therefore, perhaps, should not be a practicing lawyer. But one would be arguing those things in the teeth of the law. Thanks to the Americans With Disabilities Act, the Individuals With Disabilities Education Act and Section 504 of the Rehabilitation Act of 1973, Bartlett and her fellows among the learning-disabled are now eligible for a lifelong buffet of perks, special breaks and procedural protections, a web of entitlement that extends from cradle to grave.

Jon Westling is a crusty chainsmoker with owlish glasses and a stuffy, orotund manner, an easy figure to mock. But, as it turns out, his portrait of Somnolent Samantha was hardly a wild flight of fancy. Before beginning his formal audit of LDSS's practices, Westling asked its director, Loring Brinckerhoff, whether the office had ever turned down a single request for special dispensation on the grounds that the student hadn't presented enough evidence. When Brinckerhoff answered no, Westling asked to see folders and accommodation letters for the twenty-eight students who had most recently requested and received adjustments to their academic program. Of these twenty-eight, Westling pronounced no fewer than twenty-seven to be insufficiently documented. And, indeed, copies of the students' files, exhumed during the discovery phase of the lawsuit and now available as courthouse exhibits, seem to provide some support for this harsh assessment.

For starters, some of the diagnosticians themselves appeared somewhat impaired. One evaluator wrote that "taking notes and underlying [sic] while reading" would help a student "maintain her attention." Another student, a female, was erroneously referred to as "Joe" by the evaluator who pronounced her to be learning-disabled. Even more troubling, though, was LDSS's seemingly reflexive acquiescence to students' wish lists. Michael Cahaley, one of the plaintiffs in the lawsuit, was, according to Westling's affidavit, described by his doctor as having "minimal" deficits: "this very intelligent youngster should do well in high school and college." Nonetheless, Cahaley had requested—and was granted—double time on all of his examinations. In

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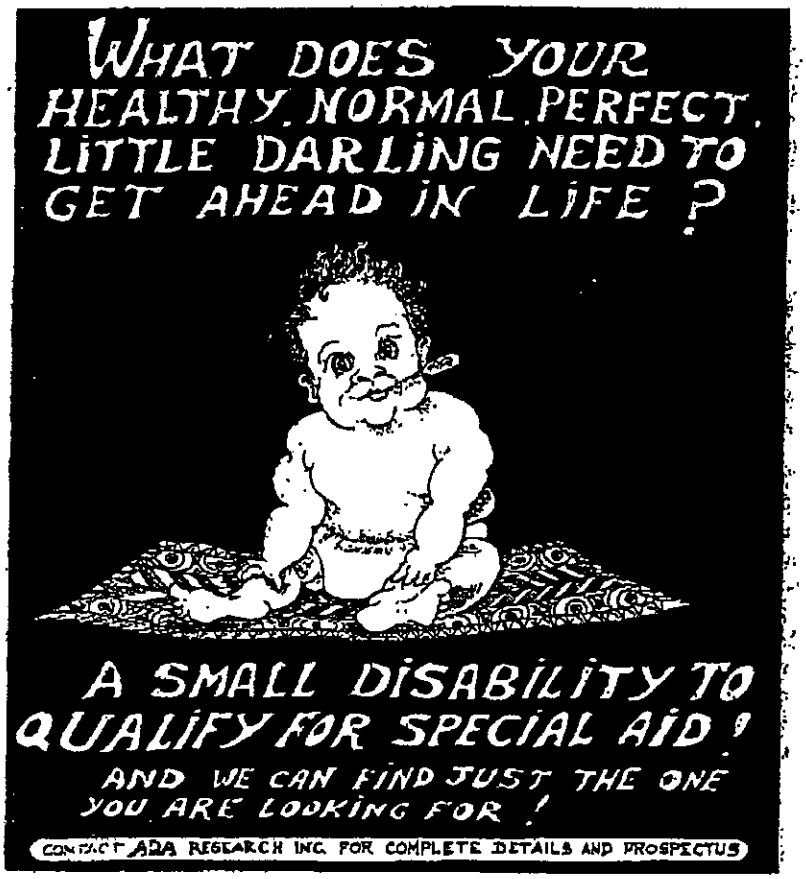
another case, the clinical psychologist who examined a student reported that his "skill deficits" were "not severe enough to be a learning disability"; but a learning specialist misread the report and recommended accommodation anyway, on the grounds that "the student was evaluated and found to have a learning disability."

Sometimes the evaluator's recommendations seemed just bizarre. In one case, a student's psychologist opined that a student who "appears to have subtle verbal processing difficulties" should not be "asked to recall very specific data or information." As Westling dryly observed in his affidavit, requests for "very specific data or information" constituted "an essential element of every course and academic program offered by Boston University."

At the trial, the student plaintiffs came off as something other than inspiring champions for disabled rights. Elizabeth Guckenberger, a third-year law student who was diagnosed as having "a visual and oral processing disability" while a freshman at Carleton College, admitted she had received every accommodation she had ever requested under the Westling regime, including extra time on exams, a reduced course load and priority registration in the law school section of her choice. Benjamin Freedman, a senior with dysgraphia ("really, really bad handwriting," he says), also got everything he wanted, including double time on exams, the option to be tested orally and the services of a professional note-taker.

Plaintiff Jordan Nodelman, who claimed he suffered from Attention Deficit Disorder (ADD), also had received every accommodation he ever requested, including the right to take all tests in a distraction-free environment with extra time. At trial, he admitted that his attention deficit waxed and waned. When "something's very important to me," he explained at trial, he "forc[ed] [him]self to concentrate." Nodelman had a 3.6 GPA, had made the Dean's List and had taken his tests untimed in every class except Zen Guitar.

Perhaps the least compelling plaintiff was sophomore Scott Greeley, who testified that he suffers from an "audio-visual learning processing deficit." At B.U., Greeley had been provided with a note-taker, time-and-a-half on tests and an open-ended right to have any test question "clarified" by the instructor. But the perks didn't help much—as Greeley explained at trial, after the accommodations were provided his GPA improved to a less-than-stellar 1.9. Over the course of the trial, B.U. attorneys established that this shoddy showing was perhaps not wholly attributable to societal persecution of the disabled. Queried about his spotty attendance record in a science course for which he received a "D" grade, Greeley explained that "part of my disability is that I need a structured schedule." "Would you say you missed over half the classes?" persisted the judge. "Probably around that, yes," replied the undergrad.



DRAWING BY VINT LAWRENCE FOR THE NEW REPUBLIC

It would be comforting to think that B.U.'s "disabled" plaintiffs represent an exception to the norm, but this does not seem to be the case. Over the years, proposed reforms to disability law have been effectively vanquished by televised testimony from sobbing children in wheelchairs. Increasingly, however, individuals with grave physical handicaps comprise only a small portion of the people who claim special privilege under the federal disability laws. As Manhattan Institute fellow Walter Olson points out in *The Excuse Factory*, complaints by the traditionally disabled—the deaf, blind and paraplegic—have accounted for only a tiny share of ADA lawsuits. According to 1996 EEOC figures, only 8 percent of employment complaints have come from wheelchair users and a mere 6 percent from the deaf or blind, bringing the total for these traditional disabilities to a skimpy 14 percent.

The diagnosis of learning disability, by contrast, is experiencing something of a boom. In the space of only a few years, the number of children diagnosed with Attention Deficit Disorder, reading disability and math disability has swollen by hundreds of thousands. Of the 5.8 million handicapped children currently on

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Individual Education Programs (specially tailored, often costly regimens of technology, therapy and one-on-one tutoring that public schools are mandated to provide to every child with a disability), the U.S. Department of Education estimates that just over half (51 percent) are learning-disabled. According to the authors of the book *Promoting Postsecondary Education for Students with Learning Disabilities*, up to 300,000 students currently enrolled in college have proclaimed that they are learning-disabled and need special accommodations.

The National Collegiate Athletic Association, meanwhile, is under intense legal pressure from the Justice Department to relax the initial eligibility standards that require student athletes to get a cumulative score of 700 on their SATs and to maintain at least a 2.0 grade point average in core courses. These standards are meant to offer a slight safeguard against the tendency of universities to enroll and graduate young men and women whose ability to pass a ball exceeds their ability to pass their courses. Not so fast, said Justice Department lawyer Christopher J. Kuczynski. In a March 1996 letter to the NCAA, Kuczynski warned that the association's academic standards may "have the affect [sic] of excluding students with disabilities from participation in college athletics." NCAA spokesman Kevin Lennon says the association is in the process of revising its policy "to accommodate students with learning disabilities."

The most common estimate cited by advocacy groups and frequently repeated in government documents is that between 15 and 20 percent of the general population have learning disabilities. Any hypochondriac can test himself: in a recent booklet, the American Council on Education supplies a checklist of symptoms for adults who suspect they may be learning-disabled. Some of us will be disturbed to recognize in the checklist possible symptoms of our own: according to the council, telltale signs of adult learning-disablement include "a short attention span," impulsivity, "difficulty telling or understanding jokes," "difficulty following a schedule, being on time, or meeting deadlines" and "trouble reading maps."

As the ranks of the learning-disabled swell, so too do the number of boutique diagnoses. Trouble with numbers could signal dyscalculia, a crippling ailment that prevents one from learning math. Lousy grammar may stem from the aforementioned dysgraphia, a disorder of written expression. Dozing in class is evidence of latent ADD, perhaps even ADHD (Attention Deficit/Hyperactivity Disorder). Many tykes also exhibit the telltale symptoms of ODD—Oppositional Defiant Disorder. According to the American Psychiatric Association, the defining feature of ODD is "a recurrent pattern of negativistic, defiant, disobedient, and hostile behavior ... characterized by the frequent occurrence of at least four of the following behaviors: losing temper, arguing with adults, actively defying or refusing to comply with the requests or rules of adults, deliberately doing things that will annoy other people, blaming others for his or her own mistakes or misbehavior." Rates of up to 16 percent have been reported.

A tongue-tied toddler could have dysphasia, otherwise known as a "difficulty using spoken language to communicate." Boorish behavior may be a sign of dyssemia, defined as a "difficulty with signals [and] social cues." (According to the Interagency Commission on Learning Disabilities, social skills are a domain in which a learning disability can occur.) An even more sinister malady is dysrationalia, defined in an October 1993 issue of *The Journal of Learning Disabilities* as "a level of rationality, as demonstrated in thinking and behavior, that is significantly below the level of the individual's intellectual capacity." A checklist of childhood precursors include "premature closure, belief perseverance ... resistance to new ideas, dogmatism about beliefs, and lack of reflectiveness."

These neo-disabilities are likely to strike the nonspecialist as an exercise in pathologizing childhood behavior, and the nonspecialist would be on to something. Increasingly, scholars and clinicians in the field of learning disability are speaking out against the dangers of promiscuous diagnosis of disablement. "In the space of twenty years, American psychiatry has gone from blaming Johnny's mother to blaming Johnny's brain," says Dr. Lawrence Diller, an assistant clinical professor of behavioral pediatrics at the University of California at San Francisco. The problem, says Dr. Diller, is that in a variant of the Lake Woebegone effect, "Bs and Cs have become unacceptable to the middle classes. Average is a pejorative." And yet, as he points out, "*someone* has got to be average."

Some scholars have even begun to question the notion that there is such a thing as a learning disability. In a recently published book, *Off Track*, one of its authors, Robert Sternberg, a Yale professor of psychology and education, presents a powerful case for why the concept of learning disability ought to be abandoned. Drawing on the latest research into the physiology of the human brain, Sternberg argues that there is no evidence to support the view that children who are labeled as learning-disabled have an immutable neurological disability in learning. From a medical standpoint, he writes, there is no scientific proof that children labeled as learning-disabled actually have a discernible biological ailment "in terms of the underlying cognitive abilities related to reading." Says Sternberg: "I'm not denying that there are dramatic disparities in the speed with which people learn.... But, most of the time, what you're talking about here is a garden-variety poor reader. You're talking about someone who happens to be not very good in math."

To be sure, there is no question that children who are intellectually normal, and sometimes even unusually bright, can have genuine, serious difficulties in learning how to read or to do math; and that educators should do everything in their power to put these students back on track developmentally. But as their clinics swarm with

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hordes of pushy parents and catatonic collegians, all hankering for a diagnosis of intractable infirmity, a growing number of diagnosticians are crying foul. "The way the diagnoses [of Attention Deficit Disorder and learning disabilities] are being used right now, a backlash against the conditions is inevitable," says Diller. "We've created a paradox where the more problems you have, the better off you may be. That's a prescription for societal gridlock."

It's no puzzle, of course, why the learning-disability movement insists that learning disability is an immutable, brain-based disorder—a malady that is "fundamentally neurological in origin," according to the National Center for Learning Disabilities. For it is this understanding of learning disability that justifies its inclusion as a protected category under the ADA. If learning disability is an innate neurological defect that "artificially" lowers test performance, then it follows that learning-disabled individuals should be able to take tests under special conditions that will neutralize the effects of this handicap. In *Help Yourself: Advice for College-Bound Students With Learning Disabilities*, author Erica-lee Lewis stresses that asking for an untimed administration of your SATs "does NOT give you an unfair advantage; it just reduces the unfair disadvantage by providing you with equal access and opportunity. You deserve that and the law protects you against anything short of that fairness!"

There's just one tiny problem: the two major studies on the subject say that precisely the opposite is true. As Dr. Warren W. Willingham, a psychometrician with the Educational Testing Service, points out in his widely respected textbook *Testing Handicapped Students*, institutions have long relied on standardized tests because such tests, for all their faults, tend to be highly reliable in their estimation of how well a particular applicant will actually perform in college or on the job. The case of learning-disabled students, in contrast, "presents a very different picture," writes Willingham. When students diagnosed with learning disabilities were allowed to take the SAT on an untimed or extended-time basis, the "college grades of learning-disabled students were substantially overpredicted," suggesting that "providing longer amounts of time may raise scores beyond the level appropriate to compensate for the disability." The other study—by Marjorie Ragosta, one of ETS's own researchers—confirms Willingham's pessimistic diagnosis.

Both researchers raise a troubling question: whether, as Willingham puts it, "the nonstandard version of the SAT is seriously biased *in favor* of [learning-disabled] students." The concern is not just theoretical. There is reason to suspect that fast-track students, and their parents, have figured out that a little learning disability can be an advantageous thing—can make the difference, in a hypercompetitive setting, between getting into (and getting successfully out of) the right school. The privilege of taking the SAT on an untimed basis raises students' scores by an average of 100 points, according to the College Board. In the last couple of years, testing agencies have been bombarded with requests from students who proclaim that they are learning-disabled and will therefore need additional time. According to Kevin Gonzales, a spokesman for the Educational Testing Service, 18,000 learning-disabled examinees received "special administration" for the SAT in 1991-92. By 1996-97, that number had more than doubled, to 40,000. Requests for accommodation on Advanced Placement exams, meanwhile, have quadrupled—in 1996, 2,244 learning-disabled eggheads took their A.P. tests untimed. To reap the benefits of this particularly useful perk, ETS requires only a letter of verification from a school special education director or a state-licensed psychologist or psychiatrist.

Certification and licensure exams—long, carefully standardized examinations that function as gatekeepers into the professions—are also under assault. In 1995, the National Board of Medical Examiners administered over 450 untimed Medical College Admissions Tests—a fivefold increase from 1990. Lawyers, too, are requesting special dispensation. This year, in New York alone, more than 400 aspiring attorneys have asked to take the bar exam untimed. "The requests have increased tremendously," says Nancy Carpenter, who heads up the New York Board of Legal Examiners. "ADD is becoming much more common. We have a lot of dysgraphia. Some dyscalculia.... Most applicants just say, 'unspecified learning disability.' They are all over the lot."

ETS officials do not like to talk about the Willingham and Ragosta studies. Indeed, far from planning to toughen up its accommodations policy, the agency seems poised to eliminate its only check on spurious claims—the marking, or "flagging" of a score to indicate that an applicant took the test under nonstandard conditions. For years, the learning-disability industry has railed against the asterisk, arguing that it violates a student's right to keep his or her disability a secret. Now ETS seems prepared to agree. "We are taking a good, hard look at the whole issue of flagging," says ETS's newly appointed director of disability services, Loring Brinckerhoff. "I'm not prepared to say it's going to go away overnight.... My gut feeling is that it may well be a Section 504 violation." Yes, that's the same Loring Brinckerhoff who recently resigned under pressure by Jon Westling from his B.U. sinecure. "Isn't it ironic," muses Brinckerhoff. "I'm told by Boston University that I'm unqualified to do my job. Yet here I am—at the biggest testing agency in the world—determining accommodations for hundreds of thousands of people with disabilities."

Of course, a legally recognized disability means more than just extra time on tests—or even extra privileges in the classroom. Under the Individuals With Disabilities Education Act, a diagnosis of L.D. also qualifies a child for an Individual Education Program—a handcrafted educational program, replete with techno-goodies and other kinds of

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specialized attention. The law, which states that "all children with disabilities" ought to have available to them "a free and appropriate public education," encourages parents to be bound not by what the school district can offer, but by what they think their child needs. It specifies that, in the event that the parents don't care for their child's IEP, the local school district must convene a "an impartial due process hearing"—a trial-like proceeding in which both parties have the right to be represented by a lawyer, the right to subpoena, confront and cross-examine witnesses, and the right to present evidence. If a school district loses the due process hearing, it must pay the parents' attorneys' fees. The result, says Raymond Bryant, director of special education for Maryland's Montgomery County public schools, has left school districts vulnerable to parental tactics bordering on extortion. "It used to be that kids didn't try hard enough, or didn't work hard enough," says Bryant. "Now, it's ADD or L.D.... They want their child to read half the material. They want him to do half the homework. They don't want him to take the same tests. But guess what? They want him to get the same grades!"

In prosperous, sun-dappled school districts around the country, exotic new learning disabilities are popping up, each requiring its own costly cure. In Orange County, where "executive function disorder" (difficulty initiating, organizing and planning behavior) reigns, parents have begun demanding that schools foot the bill for horseback riding lessons. "This is now supposed to be the way to help kids with EFD," says Peter Hartman, superintendent of the Saddleback Unified School District. "There's some stable in the area that they all go to." In Holliston, Massachusetts, parents of children with Attention Deficit/Hyperactivity Disorder hanker for a trendy new treatment called "educational kinesthesiology," a sort of kiddie Pilates for angst-ridden tots. "Unfortunately, the treatment can only be done by a, quote, licensed educational kinesthesiologist," sighs Margaret Reed, special-ed administrator for Holliston Public Schools. "And it seems there's only one in the district. And she charges $50 an hour."

Sometimes, it seems, the problem is less inattentive children than overattentive parents, many of whom are unwilling to believe their progeny is less than perfect. Consider the case of Michael F., whose plight was thrashed out at length at a 1996 hearing after his parents expressed discontent with his Individual Education Program. Michael, then a ninth grader, was thriving at his high school—earning As in honors courses and demonstrating "overall cognitive functioning in the very superior range (99th percentile)." He had also written a book, played in the school band and, according to the hearing officer, "successfully completed bar mitzvah training."

At the hearing, it emerged that Michael did all of this while fighting off the ravages of "attention deficit disorder, language-based specific learning disabilities, neuromotor dysfunction, and tactile sensitivity." These numerous handicaps had made Michael eligible for a generous dose of special-education services. Under the terms specified in his IEP, Michael received three and three-eighths hours a week of special tutoring; extra time on homework assignments and tests; "allowance of standing up, stretching and/or walking around in class"; "permission to chew gum or hard candy to help him concentrate and focus"; "seat assignments in close proximity to the teacher"; and "access to a tape recorder, transcripts of lectures, outlines and notes and/or a laptop computer if needed." Now Mr. and Mrs. F. wanted even more. Michael's low grade on his Honors Geometry midterm, they argued at the hearing, revealed evidence of a new, previously unsuspected disability "with the concepts of quadratic equations and the Pythagorean theorem." They blamed the school for numerous "procedural violation[s]," including "failure to pursue a math reevaluation of Michael" after he received a 65 on his midterm. Now, they said, their son would experience "substantial regression" over the summer, unless his high school saw fit to furnish him with "extended summer programming in the form of math tutoring."

This, the hearing officer would not do. True, she wrote, Michael's poor showing on his geometry midterm might well be "related to his learning disability and/or ADD." On the other hand, she boldly ventured, it could also be that "math remains a subject where Michael will not receive As in an Honors track."

Ensconced in his pleasantly stuffy office, an Anglophile's fantasy of elephant ear plants and bas-relief cornucopias in carved wood, Jon Westling awaits the decision of Judge Patti B. Saris. He is resigned to the knowledge that, whatever is decided, the learning-disabled activists and their supporters will regard him as a villain. "This is a cause where the support and commitment verges almost on fanaticism," he says, puffing on one Marlboro Light, then another. "And whenever you have less than ideal science coupled with something close to fanaticism, you can move beyond appropriate use into areas of abuse."

The students say that, whatever the outcome, the litigation has salved their faltering self-esteem. Ben Freedman, a 21-year-old senior who has maintained a 3.6 GPA despite a reading and writing disability and dysgraphia, likens his crusade to the civil rights movement of the 1960s. "I don't want to compare myself to Dr. King, but there are great similarities," he says.

Anne Schneider, too, says she's achieved closure on the whole regrettable incident. To the true believers, it seems, there's an explanation for everything; and it's usually the same explanation. "I've been thinking about Jon Westling," she tells me one evening. "For all his bragging about his Rhodes scholarship, he didn't do the final paper. He's not a finisher." Schneider lets out a reflective sigh. "To tell the truth," she says, "I've always thought: learning disability." •

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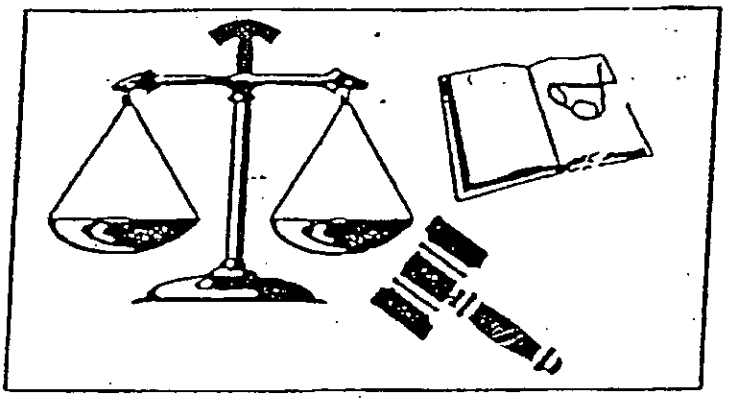

TO: Amy

FAX NO.: 456-1647

FROM: Nancy Scott-Finan

PHONE: 202/514-3752 Fax: 202/305-2643

DATE: 10/7/97

NO. OF PAGES: 6 (EXCLUDING COVER)

COMMENTS: Sotomayor questions

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Questions for All Candidates

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2. What Judge or Justice has most influenced your thinking concerning the constitutional separation of powers, and why?

3. What does the discretionary power of the judiciary mean to you?

4. Which Judge has served as a model for the way you would want to conduct yourself as a Judge, and why?

5. Which law review article or book has most influenced your view of the law?

6. What role do you think legislative history -- by which I mean the various committee reports, hearing transcripts and floor statements -- should play in the interpretation of the text of a statute?

Additional Questions for Judge Sotomayor

1. You appear to have been critical of mandatory minimums and the sentencing guidelines. Do you think federal judges should have greater discretion in sentencing? Are there other areas in which you think federal courts should have additional discretion?

2. At the hearing, you mentioned that you recently concluded the trial in a case called Holmes v. Artuz, which involved a prisoner who was removed from his food service job because he was an open homosexual. Did you ever rule on a motion for summary judgment or a motion for a directed verdict in that case? If so, how did you rule?

3. In your 1995 opinion in Holmes v. Artuz you appear to reject a qualified immunity defense, at least in part, on the ground that the prison officials had not provided a rational basis for the plaintiff's removal. Is that a fair reading of your opinion? Did the qualified immunity issue resurface later in the litigation? If so, how did you rule?

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5. In your 1995 opinion in Holmes v. Artuz you read the pro se plaintiff's complaint in the light most favorable to him and concluded that it might be read to raise a substantive due process claim. What was the precise substantive due process claim that you felt was raised by the plaintiff's complaint, and what precedent supported that claim?

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FOLLOW-UP QUESTIONS FOR SONIA SOTOMAYOR FROM SEN. JEFF SESSIONS

Judge Sotomayor, in Holmes v. Artuz, 1995 U.S. Dist. Lexis 15926, you noted that removing a prisoner from a prison job solely because he had declared his sexual orientation may itself state a claim under 42 U.S.C. §1983.

1. In your legal opinion, is there a constitutional right to homosexual conduct?

In the 1986 case of Bowers v. Hardwick, the Supreme Court ruled that homosexual sodomy is not a constitutional right, and that a State could criminalize homosexual sodomy.

2. Judge Sotomayor, why did you mention the then pending Romer v. Evans case but not mention Bowers v. Hardwick in your opinion and order in Holmes v. Artuz? Isn't Bowers v. Hardwick relevant to the issue in Holmes v. Artuz?

In 1995, the Supreme Court ruled in Adarand v. Pena that all government racial preferences are subject to the strictest judicial scrutiny.

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3. Do you believe that the Adarand decision was correctly decided?

4. If confirmed, you will preside over many employment discrimination cases as a federal judge. In a suit challenging a government racial preference, quota, or set-aside, will you follow the Adarand decision and subject that racial preference to the strictest judicial scrutiny?

5. In your legal opinion, is the California Civil Rights Initiative constitutional?

6. Which current Supreme Court Justice do you most admire and why? Which former Supreme Court Justice do you admire and why?

7. Is there a current law school professor or academic that you strongly admire?

8. You have been very critical of the federal sentencing guidelines. Please provide a copy of every opinion or order in which you departed downward from the guidelines as a federal district judge.

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QUESTIONS BY SENATOR STROM THURMOND REGARDING THE NOMINATION OF JUDGE SONIA SOTOMAYOR.

1. Judge Sotomayor, in response to one of my questions at the nominations hearing on September 30, you stated that you do not oppose mandatory minimum sentences for drug offenses. However, during your sentencing of Louis Gomez and Victor Gomez on July 26, 1993, you stated: "I am deeply, personally sorry about the sentence that I must impose.... I hope that yours will be one among the many that will convince our new president and Congress to change these minimums. The only statement I can make is this is one more example of an abomination being committed before our sight.... [T]he laws require me to sentence you to the five-year minimum."

A. Have your views changed since 1993 based on subsequent Congressional action? If not, what did you mean when you said that Congress should "change these minimums"?

B. What other examples of abominations were you referring to?

2. During your sentencing of Daniel Gonzalez on July 12, 1993, you stated: "I do hope that ... your family will appreciate that we all understand that you were in part a victim of the economic necessities of our society, but unfortunately there are laws that I must impose."

A. What did you mean when you said that the defendant was a victim of economic necessities?

B. Do you believe the economic circumstances of someone who is convicted of a drug offense should be relevant in determining their sentence?

3. You stated during your hearing that the jury found against Darrow Holmes in his lawsuit against Superintendent of Security Services in New York, Case No. 95 Civ. 2309 (SS). I am aware that you denied the government's motion to dismiss the case. Did the government later make a motion for summary judgment? If so, did you issue a written order denying that motion?

4. You are quoted in the New York Times on September 25, 1992 as saying that you were "very aware of the controversy surrounding the guidelines" and that you expected to "experience some dislocation with them." Please explain how and why you have had "dislocation" with the Guidelines.

5. In the same New York Times article, when asked whether you were "among those who sat on her hands rather than give [Justice Clarence Thomas] a standing ovation [at a Second Judicial Circuit conference], you are quoted as saying, "I'll take the Fifth."

A. Please explain exactly what you did and said at that event in connection with Justice Thomas's appearance.

B. Please explain why your conduct was apparently inconsistent with most of the audience.

C. When Senator Sessions approached this topic with you, you stated that you did what you did because you did not wish to

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
003. fax	Sonia Sotomayor to Amy Jimenez; re: Responses to Revised Follow-Up Questions for Sonia Sotomayor (11 pages)	10/08/1997	P2, P5

COLLECTION:
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Counsel's Office
Doug Band
OA/Box Number: 12689

FOLDER TITLE:
Sotomayor - Miscellaneous [2]

2009-1007-F
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P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
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004. fax	Sonia Sotomayor to Sheila Joy et al; re: Draft Responses (10 pages)	10/08/1997	P2, P5

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Counsel's Office
Doug Band
OA/Box Number: 12689

FOLDER TITLE:
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2009-1007-F
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U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

DATE: October 7, 1997

TO: Sheila / Sarah

FAX: 4-2424 4-4456

FROM: Nancy Scott-Finan

PHONE: 202-514-3752

FAX: 202-514-4482

PAGES: 14

SUBJECT:

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
005. fax	Sonia Sotomayor to Nancy Scott Finan; re: Draft Responses (14 pages)	10/07/1997	P2, P5

COLLECTION:
Clinton Presidential Records
Counsel's Office
Doug Band
OA/Box Number: 12689

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Sotomayor - Miscellaneous [2]

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From: **T. D. Albright**

Date: **October 6, 1997**

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WASHINGTON, D.C.

October 6, 1997

Hon. William Jefferson Clinton, Esq.
President, United States of America
1600 Pennsylvania Avenue
Washington, D.C. 20500

Attention:

Mr. Charles Ruff
Mr. Jonathan Yarowsky
Mr. Michael O'Connor
Mr. Douglas J. Band
Office of Counsel to President
Room 130
Old Executive Office Building
Washington, D.C. 20502

Re: Nomination of Kermit E. Bye to the United States Court of Appeals for the Eighth Circuit

Dear President Clinton:

This letter is written in support of the proposed nomination of Kermit E. Bye to the United States Court of Appeals for the Eighth Circuit.

As a past President of the Indiana State Bar Association and a member of the Executive Council of the National Conference of Bar Presidents, I have had the opportunity to work extensively with Mr. Bye over the course of the last four years. Our work has covered a wide range of subjects, both substantively and professionally. It is my considered opinion that Mr. Bye would make an excellent selection to the Eighth Circuit Court of Appeals vacancy. He possesses keen insights into complex issues and is able to sort through those issues in a careful and thoughtful manner. Moreover, he would bring to the position the highest sense of integrity with an appropriate mix of judicial temperament.

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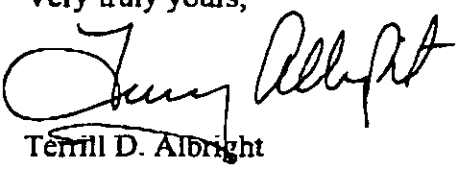
As a member of the American College of Trial Lawyers, and one who has an intense interest in the quality of our federal judiciary, I wholeheartedly support the candidacy of Kermit Bye and urge your appointment of him to the position.

Very truly yours,



Terrill D. Albright

TDA/plh
Via facsimile transmission
and United States first-class mail

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Office of Policy Development
United States Department of Justice

10th and Constitution Ave. NW
Washington, D. C. 20530

TO: Aimee Jimenez

FAX: 456-1647

FROM: Sarah Wilson

VOICE: (202) 514- 8052
FAX: (202) 514-2424

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006. fax	Nancy Scott Finan to Sonia Sotomayor; re: Return Your Responses (1 page)	10/06/1997	P2

COLLECTION:
Clinton Presidential Records
Counsel's Office
Doug Band
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FOLDER TITLE:
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jp1532

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uerte interrogatorio a la juez federal

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EL NUEVO DÍA

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otomayor fue presentada por el senador republicano por ev York, Alfonse D'Amato, quien habló a favor de la firmación de la juez también a nombre de su colega demó- a por su estado, Daniel P. Moynihan. D'Amato comentó que omayor se sentaba frente a la Comisión de lo Jurídico por una vez en menos de cinco años. La primera fue cuando nominada para jueza del Tribunal de Distrito.

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"Nunca he dicho que estaba descontenta con los mínimos de sentencia mandatorios. Quizás estuve descontenta en algunos momentos", señaló la juez para afirmar que cree en las guías de sentencia. Las guías de sentencia federales establecen mínimos y máximos de pena dependiendo del delito y, por ejemplo en los casos de drogas, la pena depende de la cuantía de la droga que se traficó o se conspiró para traficar.

Sessions citó un artículo del diario The New York Times que señalaba que Sotomayor se amparó en la quinta enmienda cuando se le preguntó si había aplaudido al juez Thomas cuando éste visitó el Segundo Circuito. La juez indicó que no le contestó al periódico porque no debe inmiscuirse en asuntos de corte político.

PERO CUANDO Sessions le preguntó, Sotomayor contestó que Thomas es su juez superior y que se levantó (a saludarlo). Thomas, el único juez supremo afroamericano, fue confirmado para juez del Supremo en medio de las candentes acusaciones de la abogada Anita Hill de que él la había acosado sexualmente.

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HEADLINE: A Breakthrough Judge: What She Always Wanted

BYLINE: By JAN HOFFMAN

BODY:

The views from Pavia & Harcourt's 12th-floor offices in midtown Manhattan are commanding, and the carpeted halls, in soft pastels, are adorned by modern Italian paintings. But Sonia Sotomayor, a partner at the commercial litigation firm, was boxing up her things the other day to take another job. The new one comes with a pay cut, scant carpeting, dingy lighting and a room without a view.

Ms. Sotomayor is thrilled.

"I've gotten letters from people who remember me in grammar school saying that this is what I wanted," she said.

What Ms. Sotomayor has wanted was to be a judge. Next Friday she is to take the oath for a seat on the Federal court of the Southern District of New York, the first Hispanic American to do so. She will also become one of seven women among the district's 58 judges.

But what attaches to her name in legal circles is less her breakthrough status than incredulity: Many of her colleagues say that in a time of skepticism about the quality of judicial appointments, Ms. Sotomayor seems too good to be true.

A Child of From the Projects

On paper, she comes across as a classic overachiever -- a child from the Bronx housing projects who graduated summa cum laude from Princeton, became an editor of the Yale Law Journal at Yale Law School, spent five years as a prosecutor with the Manhattan District Attorney, then developed her substantial civil practice as a commercial litigator.

But it was her pro bono activities that an admiring Senator Edward M. Kennedy of Massachusetts praised during her wrinkle-free confirmation hearing before the Senate Judiciary Committee in June.

For 12 years she was a top policy maker on the board of the Puerto Rican Legal Defense and Education Fund. She was also on the board of the State of New York Mortgage Agency, where she helped provide mortgage insurance coverage to low-income housing and AIDS hospices. In her leisure time she became a founding member of the New York City Campaign Finance Board, which distributes public money for city campaigns.

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The New York Times, September 25, 1992

Senator Daniel Patrick Moynihan of New York, who recommended Ms. Sotomayor for the bench, gleefully recalled that when his judicial selection staff first suggested her name last year, they told him, "Have we got a judge for you!"

Not Every Inch Judicial

In person, with her round face and faint spray of summer freckles, Ms. Sotomayor looks younger than her 38 years and, wearing dangling earrings and a leather-and-gold bracelet, not every inch the judge. Neither does she have the studied charm nor dazzle factor of many judicial candidates who win accolades from lawyers and politicians.

Hers is a cumulative impression. She is plain-spoken and direct, good-humored but not exactly humorous. She is also seemingly without affectation, a trait that colleagues say helps her move as comfortably among her wealthy European clients as she does in her old Bronx neighborhood, where she recently returned to live. (The Federal Bureau of Investigation advised her not to disclose it.)

"You know anybody who wants to buy my cheap apartment in Carroll Gardens?" she asks in a street-scraped New York accent, referring to the section of Brooklyn.

She moved because Carroll Gardens is not in her judicial district. The courthouse is in Manhattan, but even on a judicial salary of $129,000 -- modest compared with the potential earnings of a law partner -- Ms. Sotomayor has chosen moderation, and a longer commute from the Bronx, which is also in her district.

"I've never wanted to get adjusted to my income because I knew I wanted to go back to public service," she said. "And in comparison to what my mother earns and how I was raised, it's not modest at all." She paused, as if watching a slide show of memories, and laughed heartily. "I have no right to complain," she said.

Her mother, a nurse who recently retired from her job at a methodone clinic, raised Ms. Sotomayor and her younger brother, now a doctor, largely on her own. "I saw her working, being the emotional and spiritual leader in our family," Ms. Sotomayor said. "She had almost a fanatical emphasis on education. We got encyclopedias, and she struggled to make those payments. She kept saying, 'I don't care what you do, but be the best at it.' "

Her father, a tool-and-die worker with a third-grade education, died when Ms. Sotomayor was 9. Both parents were from Puerto Rico, and because her father spoke only Spanish, Ms. Sotomayor did not become fluent in English until after his death.

She had intended to become the Puerto Rican Nancy Drew, girl detective. That dream ended at the age of 7, when doctors told her she had diabetes and suggested she pick a more sedate career. She got a new idea from an episode of "Perry Mason" when a prosecutor character on the old television program said he did not mind losing when a defendant turned out to be innocent because his job was about justice.

"I thought, what a wonderful occupation to have," Ms. Sotomayor said. "And I made the quantum leap: If that was the prosecutor's job, then the guy who made

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the decision to dismiss the case was the judge. That was what I was going to be."

Even as she speaks of the courts as often the "last refuge for the oppressed," Ms. Sotomayor, who has 400 cases awaiting her, defines a good judge as one who "has the ability to absorb a new area of law quickly, and has a commitment to take control of a case and move it forward."

When colleagues speak of her they emphasize her pragmatism. "I'm a down-to-earth litigator, and that's what I expect I'll be like as a judge," she said. "I'm not going to be able to spend much time on lofty ideals. I don't lose sight of the fact that they're important, but I also don't lose sight that 95 percent of the cases before most judges are fairly mundane. The cases that shake the world don't come along every day. But the world of the litigants is shaken by the existence of their case, and I don't lose sight of that, either."

Indeed, while she speaks of the pressure to crash-learn the Federal Rules of Criminal Procedure and the excitement of being fitted for black robes, she keeps returning to "the anxiety and the terror" that joining the Federal bench provokes when she thinks of the sentences and fines she will have to issue.

"I don't get paralyzed by making decisions, but I fear the extent to which I'll be tortured by the difficult decisions I'll have to make," she said.

John W. Fried, her bureau chief when she was a prosecutor, attests to Ms. Sotomayor's decision-making capacity, noting how she would scrupulously search for her own reasonable doubt before going forward with a case. Mr. Fried, now in private practice, said she "was the brightest, most eager assistant I ever worked with."

Then he laughed, recalling that when he met Ms. Sotomayor she asked where the courtroom was.

Although Ms. Sotomayor left the Manhattan District Attorney's office eight years ago, she remembers in detail the victims and the lasting effect that crime had on them. "The saddest crimes for me were the ones that my own people committed against each other," she said. She has received letters from Hispanic people from all walks of life expressing their pride in her confirmation. "I hope there's some greater comfort about the system to Hispanics because I'm there," she said.

Careful Responses

While Senator Moynihan is a Democrat, Ms. Sotomayor says she is politically independent, and her chatty expansiveness shuts down when she is asked about judicial philosophy. She allows that she is in the center. Then comes a tap dance around any questions on specific topics, her mouth twitching in amusement, her eyes bright, as if to say, "You're trying to cross-examine a cross examiner?"

How did she react to a recent appeals court ruling that disqualified Federal Judge H. Lee Sarokin from hearing a suit against tobacco companies because an opinion of his about the case appeared biased?

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The New York Times, September 25, 1992

"I'm aware it will have an effect," she said. "Some judges will feel they don't have a right to be too passionate."

When Justice Clarence Thomas was introduced at a Second Judicial Circuit conference, was she among those who sat on her hands rather than give him a standing ovation?

"I'll take the Fifth," she said.

What does she think of the Federal Sentencing Guidelines, which many judges resent for limiting discretion?

"I am very aware of the controversy surrounding the guidelines" and expect to "experience some dislocation with them."

So what kind of music do you like?

"Soft rock," the centrist replied.

Judge Jose Cabranes of Federal District Court in New Haven, a longtime mentor who will be administering her oath, cautions that she will quickly find herself leading "a much more isolated life than before."

Ms. Sotomayor, who is divorced, said that becoming a judge is like joining a monastery. So she plans to spend this weekend before her swearing-in with friends in New Orleans, the last such fling for a while.

Rocking out, your honor-to-be?

"Yeah," she said, with a smile and a shrug, "I party."

GRAPHIC: Photo: "I'm a down-to-earth litigator, and that's what I expect I'll be like as a judge," said Sonia Sotomayor, who is about to take the oath for a seat on the Federal court of the Southern District of New York. She will be the first Hispanic American and one of only seven women in the district. (Marilynn K. Yee/The New York Times)

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