Testimony of
Dahlia Lithwick
Senior Legal Correspondent, *Slate*
October 8, 2009

House of Representatives Judiciary Committee
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Civil Rights Under Fire: Recent Supreme Court Decisions

Mr. Chairman and members of the Subcommittee, thank you for the opportunity to address this Committee. I am not here as a constitutional scholar but as a journalist who has been closely watching the US Supreme Court for ten years. I want to be clear that the views expressed here this morning reflect only my own opinions and not those of either *Slate* or *Newsweek* magazines, where I am, respectively, a Senior Editor and Contributing Editor.

It is no longer a matter of any real scholarly dispute that the current US Supreme Court has worked hard to roll back what some conservatives have long seen as the worst excesses of the Warren Court Era -- from affirmative action to expanded rights for criminal defendants to a more expansive view of the right to vote. At times, this rolling back of Warren Court precedent has been done boldly and unequivocally – as was the case in the Seattle schools voluntary integration case in 2007. But more frequently it has happened through a series of feints and legal pirouettes – such as last summer's warning shot to Congress about the constitutionality of Section 5 of the Voting Rights Act.

And the most intriguing part of all this action at the High Court? Whether one is for it or against it, heartened or appalled by it, nobody seems to recognize that it is happening. It seems to have escaped our notice that there is indeed a profound difference between the Rehnquist Court and the Roberts Court. Most of us still believe we're living in Sandra Day O'Connor's America, despite the fact that her vision of affirmative action, abortion, church/state separation, and election law has been eroded in a very short time. Justice O'Connor herself pointed out in a speech in Williamsburg last weekend that that her own rulings have been "dismantled" in the handful of years since she left the bench.

As a country we have almost completely missed out on the truth that the substitution of Justice Samuel Alito for O'Connor has changed everything.

As an initial matter, I want to be clear that the language of judicial "activism" versus "restraint" is almost altogether unhelpful in discussing the Roberts or any other supreme court. Judicial activism is political – and not legal -- shorthand for "I don't like this outcome." My conservative colleague Stuart Taylor correctly observed in a column in The *National Journal* last

year that every single member of the Supreme Court is an "activist." And by any of the approximately six allegedly empirical measures of judicial activism – be it overruling duly enacted acts of Congress; short circuiting its own precedents; or overreaching to address issues not properly briefed or argued in a given case – the Roberts Court is clearly as activist as any of its predecessors.

Whether you opt to celebrate or bemoan the Supreme Court's new shift to the political right, ultimately rests entirely on your view of the outcomes. Opponents of affirmative action, the so-called "wall of separation" between church and state and the criminal rights revolution of the Warren Court will say the Roberts Court is merely engaging in some much needed course-correction. Those who worry about voting rights, defendant's rights and equal access to justice will say the current court is on a crusade to undo hard-won civil liberties. The fact that we can't get past this sort of ends-driven political framing is unfortunate, because it reduces the conversation about the role of the court in this system of constitutional government to a fight over outcomes, rather than methodology or first principles.

I'd like to suggest here today that the reason nobody has cottoned on to the very dramatic shift at the high court is that it has happened almost imperceptibly. I think at least three factors have contributed to this phenomenon. The first has to do with a subtle intramural split on the court's conservative wing.

There is no real debate that the Court is now more politically conservative than it has been in decades. This, I suspect, will someday come to be seen as, the most fundamental legacy of the George W. Bush era. A 2008 study by Prof. Richard Posner -- who sits on the Seventh Circuit Court of Appeals -- and William Landes, at the University of Chicago, showed empirically that four of the five most conservative justices to serve on the Supreme Court since Franklin Roosevelt, including Roberts and Alito, are on the current bench. Justice Anthony Kennedy, the court's famous "swing voter" was ranked tenth using Posner's methodology.

But there is a deep division between the court's conservatives and it has to do less with vision than approach: Justices Antonin Scalia and Clarence Thomas advocate for bold clear and swift changes to the legal landscape. While Chief Justice John Roberts and Justice Samuel Alito have been inclined to move more incrementally; quietly kicking old precedents, tests,

and assumptions to the curb, without explicitly renouncing them. So where Scalia and Thomas would overturn old cases, Roberts and Alito have often stepped over or around them. Where Scalia and Thomas have urged striking down legislative acts, Roberts and Alito have subtly chipped away at them.

This likely has less to do with ideology than proximity to one's own confirmation hearing. The newer justices, having just recently promised fidelity to *stare decisis* will doubtless opt to go slowly. This is practical incrementalism versus intellectual coherence. But how it's happening should not obscure the fact that it is happening. Whether cases are expressly overruled, or simply rendered irrelevant, the legal landscape is changing and changing quickly. In the *New York Review of Books*, Ronald Dworkin accused the justices of "remaking constitutional law by overruling, most often by stealth." And Justice Antonin Scalia himself, in his concurrence in the Wisconsin Right to Life case, derided his conservative brethren's unwillingness to flat-out do away with bad precedent as "faux judicial restraint."

There is a second factor contributing to the fact that the steady erosion of civil rights by the court has gone largely undetected. In addition to the trend toward overruling precedent by stealth, the court has been able to make dramatic changes without even a modicum of drama by chipping away at our access to the courts. Be it through the doctrines of constitutional "standing" or "ripeness," by virtually doing away with facial constitutional challenges, or by subtly shifting the burden of proof on plaintiffs – it is becoming materially harder for victims of any sort of injustice or discrimination to access the very protections this congress has enacted. Just yesterday the court heard a remarkable establishment clause case that may well end up changing the standing requirements for anyone seeking to challenge religious displays on public lands. Now a change in the standing requirements rarely makes the morning headlines. But it sure makes it harder to get into a courtroom. And from environmental protections to worker protections, to civil rights legislation, Congressional guarantees of equal justice are only as robust as a citizen's power to march into a courtroom. That doorway gets narrower every year.

The third and final factor that contributes to the invisible nature of the changes at the Supreme Court can be laid at the doorstep of people like me and my colleagues in the media who sometimes focus on big cases and big drama at the court, rather than the subtle trends. In our quest to find the next *Miranda* or *Roe* we don't always pay enough attention to the big picture. Often lost in all the drama of the Sotomayor coverage this past summer, was why the court mattered at all.

And so one should hardly be surprised by the fact that the unraveling of the civil rights revolution has almost completely escaped public notice. A Gallup poll conducted early last month showed the highest approval ratings for the Supreme Court in a decade: Sixty-one percent of Americans approve and only 28% disapprove of the job the Supreme Court is doing. Just one year ago, in September of 2008, the Roberts Court had record low approval ratings with 50% of Americans approving of its performance and 39% disapproving.

According to that same poll, fifty percent of Americans currently believe the court is neither too liberal nor too conservative; up from 43 percent last year. And perhaps the most interesting aspect of these new numbers is that the dramatic spike in public approval for the Roberts Court came from Democrats. As of last month, the majority of Democrats (59%) now say the court is about right in its ideological makeup, up from 34% in 2008. These numbers may tell us a lot about how democrats feel about the President and his choice of Sonia Sotomayor to fill David Souter's seat. But they do not correlate to the reality of what has gone on at the court itself.

If we can accept the proposition that Chief Justice John Roberts has, to quote my colleague Jeffrey Toobin, "in every major case since he became the nation's seventeenth Chief Justice . . . sided with the prosecution over the defendant, the state over the condemned, the executive branch over the legislative, and the corporate defendant over the individual plaintiff," and put aside the question of whether that is good or bad, the more interesting question remains: How is it possible that such a dramatic shift at the court has escaped the notice of ordinary Americans? And how can it have escaped the notice of Democrats, who are now more satisfied with the court than they have been in decades?

Summing up the 2006 Term in an opinion (in the Seattle schools case) read from the bench, Justice Breyer famously said "It is not often in the law that so few have so quickly changed so much." So why has the American people noticed so little?

To be sure, public opinion polling often tells us very little about what Americans really know about the Supreme Court. The court is so utterly mystified in its doings that should hardly surprise us. As has long been the case, Americans feel very strongly about the court, even when they know little about what it actually does. A recent poll conducted for C-Span revealed that while nearly nine in ten American voters (88%) agree that the Court has an impact on their everyday lives -- only half (49%) could name even a single Supreme Court case. Democrats may be feeling bullish about the high court simply because they spent the summer witnessing the Sonia Sotomayor confirmation. Republicans may well believe, as do Scalia and Thomas, that the court isn't tacking right swiftly enough.

Just last term, the high Court decided an unremarkable age discrimination case, *Gross v. FBL Financial.* Despite the fact that the issue before the court was a narrow one, the Supreme Court reached out and rewrote basic civil rights laws, overturned established precedent, and made it harder for workers facing age discrimination to enforce their rights. The decision was neither humble, nor minimalist, nor deferential to the elected branches of government. But it, like so many other such decisions, went almost completely under the public opinion radar.

When the court changes a law, shifts a burden, limits a test, increases standing requirements, or claims to be limiting itself to the narrow facts of a case, as it functionally reverses a precedent, it is changing the law as surely as decisions in *Miranda*, *Roe,* or *Brown* changed the law. Some Americans may be happy about that fact and some may be dismayed. But they should at least be aware that it is happening.

For scholars, advocates, and litigators concerned about the erosion of civil rights at the high court, there needs to be a redoubled effort to explain to the public what the court does and why it matters. The media needs to do a better job highlighting the subterranean shifts at the court and pointing out

broad trends that will only grow more marked. And, with the prospect of one and maybe even two new vacancies at the Supreme Court in the coming years, the time to address these issues is now. Thank you so much for allowing me to talk to you this morning, and I look forward to answering any questions you may have.