



CONCERNS ABOUT SUPREME COURT NOMINEE SONIA SOTOMAYOR

Main Message Talking Points:

- Judge Sonia Sotomayor's rise from the housing projects in the Bronx to Supreme Court nominee is an inspiring tale and great accomplishment.
- But while her extensive experience and legal career make her a strong nominee, an inspiring story is not the most important criterion for a Supreme Court Justice.
- The most important criterion for any unelected federal judge—especially a Supreme Court Justice—is that they decide cases impartially, based on the law and free from personal bias.
- Unfortunately, Judge Sotomayor's comments about Latina judges being superior to their white male counterparts suggest that she may allow her personal biases to overshadow her responsibility to the Constitution and the law.
- The internationally-recognized symbol of Justice is a woman blindfolded, holding scales. The blindfold symbolizes the most basic and fundamental requirement for democracy: equal justice for all without regard to personal prejudices.
- Judge Sotomayor will need to reassure the country that she will set aside her biases, uphold the rule of law and interpret the Constitution as written, not as she believes it should have been written.

Three Main Areas of Concern:

- 1) **Personal Bias:** Judge Sotomayor is willing to put her thumb on the scale to tip justice in favor of individuals because of race or background. Justice is supposed to be blind to prevent bias.
- 2) **Second Amendment:** Judge Sotomayor does not believe that the Second Amendment is a "fundamental" right for individuals. This directly contradicts the Founders, who found it to be so fundamental that they explicitly granted the right to keep and bear arms in the Bill of Rights.
- 3) **International Law:** Judge Sotomayor consistently uses international law when determining the Constitutionality of domestic law.

Personal Bias: Putting her Thumb on the Scales of Justice:

- Numerous concerns have been raised about Judge Sotomayor's decision in *Ricci v. DeStefano* last year. The case is currently on appeal to the Supreme Court and many Court-watchers speculate that the decision will be reversed in the coming weeks.
- *Ricci v. DeStefano* is an employment discrimination case that appears to confirm concerns about Sotomayor's affinity for racial and ethnic group preferences and traditional Democratic identity politics.

- In addition to the Ricci decision, the way Sotomayor handled the case procedurally raises concerns about what appears to be an attempt to ‘bury’ the controversial decision to avoid Supreme Court review.
- In deciding the Ricci case, Sotomayor found it was legally justified to deny promotions to white (and Hispanic) fire-fighters because too few African Americans qualified for promotions on exams.
- The firefighters who were denied promotion brought their case to federal court, and presented evidence that the city’s decision was driven by local racial politics, not—as Judge Sotomayor and her colleagues later claimed—by some vague desire to comply with anti-discrimination law.
- On appeal, Judge Sotomayor agreed with the lower court’s decision to deny the firefighters a chance to go before a jury to protest what they claimed was racial discrimination by the City.
- The ruling by Judge Sotomayor and her colleagues effectively allows any employer to engage in reverse discrimination so long as they claim their actions were motivated by a desire to avoid discrimination against favored minority groups.
- Instead of writing a full opinion to address the significant and novel constitutional and statutory claims presented by the case, Judge Sotomayor and her colleagues issued an unsigned, unpublished, eight-sentence opinion, adopting wholesale the findings of the trial court.
- This highly unusual handling of the opinion reeks of either an attempt to cover up something flagrantly controversial, or blatant judicial laziness. Neither of which is acceptable for the Nation’s highest court.

The following quotes raise significant concerns about President Obama’s “empathy” standard, and about Judge Sotomayor’s willingness to put her thumb on the scale by letting her personal preferences and biases affect her decisions as a judge.

Taken from annual Judge Mario G. Olmos Law and Cultural Diversity Lecture at the University of California, Berkeley, 2001 (*NY Times*): <http://www.nytimes.com/2009/05/15/us/15judge.html>

- Sotomayor: “I would hope that a wise Latina woman with the richness of her experience would more often than not reach a better conclusion than a white male who hasn’t lived that life.”
 - NOTE: Both Justices O’Connor and Ginsburg ascribed to a different judicial philosophy: “At the end of the day, a wise old man and a wise old woman reach the same judgment.”
- Judge Sotomayor questioned whether achieving impartiality “is possible in all, or even, in most, cases.” She added, “And I wonder whether by ignoring our differences as women or men of color we do a disservice both to the law and society.”
- She also approvingly quoted several law professors who said that “to judge is an exercise of power” and that “there is no objective stance but only a series of perspectives.”
- Sotomayor: “Personal experiences affect the facts that judges choose to see.”

Stuart Taylor Jr., National Journal 5-23-09:

http://www.nationaljournal.com/njmagazine/or_20090523_2724.php

- Sotomayor also referred to the cardinal duty of judges to be impartial as a mere “aspiration because it denies the fact that we are by our experiences making different choices than others.”
- She suggested that “inherent physiological or cultural differences” may help explain why “our gender and national origins may and will make a difference in our judging.”

Video of panel discussion for law students, 2005 (NY Times):

<http://www.nytimes.com/2009/05/15/us/15judge.html>

- Sotomayor: “... court of appeals is where policy is made.” She then immediately added: “And I know — I know this is on tape, and I should never say that because we don’t make law. I know. O.K. I know. I’m not promoting it. I’m not advocating it. I’m — you know.”

Second Amendment: Not a “Fundamental” Right:

- An individual right to keep and bear arms is a fundamental right guaranteed explicitly in the Second Amendment of the Constitution. Judge Sotomayor, however, appears to disagree.
- In two cases, Judge Sotomayor has advanced a narrow view of the Second Amendment and suggested it is not a “fundamental” right. However, she has provided little explanation of how she reached this conclusion. As Ranking Member Sessions recently said, “Judge Sotomayor has gone from A to Z, without explaining how she got to B and C.”
- The Supreme Court’s recent decision in *District of Columbia v. Heller* does not address many important questions and issues surrounding the right to bear arms.
- For example, it is still unsettled whether the Second Amendment applies only to the Federal government or to the state and local governments as well. This is important because it will determine whether states and local governments can restrict an individual’s second amendment right.
- If a state or local government is not bound by the Second Amendment, then it can pass restrictions on firearms use and ownership—even outright banning gun ownership. This is a critical issue that will be addressed by future Supreme Court Justices.

Maloney v. Cuomo (2009): Judge Sotomayor joined an unsigned panel opinion that rejected an individual’s constitutional challenge to a state law that barred the possession of nunchakus (a traditional Japanese weapon made up of two sticks connected by a chain) in the home. The plaintiff argued that the law violated both the Second and Fourteenth Amendments. The case was argued *after* the Supreme Court decided, in *District of Columbia v. Heller*, that the Second Amendment guaranteed an individual the right to keep and bear arms.

The opinion in *Maloney* stated that the Second Amendment didn’t directly apply to the States, citing Supreme Court decisions from the late 1800s that have arguably become obsolete after *Heller*. In rejecting the plaintiff’s Fourteenth Amendment argument, the panel went out of its way to rule that the Second Amendment does not protect a fundamental right.

- Judge Sotomayor needs to explain what she meant when she stated that Second Amendment rights are not “fundamental,” despite being clearly singled out by our Founders in the Bill of Rights.

United States v. Sanchez-Villar (2004): In *Sanchez-Villar*, Judge Sotomayor joined a summary panel opinion that, among other things, used a one-sentence footnote to reject a Second Amendment challenge to a New York criminal statute. The panel summarily rejected the claim by quoting an earlier Second Circuit case where the court effectively assumed that “the right to possess a gun is clearly not a fundamental right.”

- Judge Sotomayor’s views of whether the Second Amendment protects a “fundamental right” are important because the Supreme Court has made this determination a key element in deciding whether to apply parts of the Bill of Rights to state and local governments.
- The 19th Century cases cited by Sotomayor also found, for example, that the First Amendment does not apply to states. That is, of course, no longer the law. The Supreme Court has applied most of the Bill of Rights for decades.

International Law: Imposed on America’s Judicial System:

On April 28, 2009, Judge Sotomayor gave a speech to the ACLU of Puerto Rico entitled “How Federal Judges Look to International and Foreign Law Under Article VI of the U.S. Constitution.” In that speech she gave a broad defense of the practice by some American judges of looking to foreign and international law as a source of “good ideas” in deciding questions of American domestic law.

- According to Judge Sotomayor, any effort to “outlaw the use of foreign or international law ... would be asking American judges to ... close their minds to good ideas,” to ill effect. “How can you ask a person to close their ears? Ideas have no boundaries. Ideas are what set our creative juices flowing.”
- Judge Sotomayor criticized Justices Scalia and Thomas by name for their opposition to relying on foreign law to interpret the Constitution, and embraced what she says is Justice Ginsburg’s view—that “unless American courts are more open to discussing the ideas raised by foreign cases, and by international cases, that we are going to lose influence in the world.”
- She also linked this concept to America’s commitment to free speech. It is not clear whether Judge Sotomayor recognized that our unique tradition of free speech could well be one of the earliest casualties should other judges take seriously her call to look to foreign legal sources as guideposts.
- The American people benefit from the greatest legal system in the world. Why would we subject them to opinions by international courts that do not value the same rights and freedoms that we have in America?
- No Supreme Court Justice should be looking to international law to determine whether an American statute is constitutional. It flies in the face of American justice and does a disservice to the American people by imposing other systems of justice on our own.
- In 2007 Judge Sotomayor wrote a forward to, *The International Judge*, a book on the role of judges in international law: "This book provides a nuanced roadmap for [judges in international courts], as well as for judges from established legal systems, while we all attempt to cobble together a culture of justice-seeking in a changed world."

Croll v. Croll (2000): In this case, Judge Sotomayor referred to international case law and argued for a more expansive interpretation of a treaty in order to support the return of a child in the U.S. to Hong Kong.

Mrs. Croll removed her child from Hong Kong, violating a Hong Kong court's joint custody order. Mr. Croll filed a petition under the 1980 Hague Convention on the Civil Aspects of International Child Abduction seeking to get his son back. The Second Circuit Court of Appeals sided with the mother, ruling that the convention did not give Mr. Croll the right to determine the child's place of residence.

However, Judge Sotomayor dissented. She argued for a more expansive interpretation of the treaty and also referred to foreign case law to support her view. She reportedly gave more weight to this than the majority. This reference may be a red flag that Judge Sotomayor believes that foreign case law should not only be considered—but at times can trump U.S. law.

*Taken from NPR, "Foreign Policy: The List: How Sotomayor Sees the World":
<http://www.npr.org/templates/story/story.php?storyId=104698081>

House Judiciary Committee, Republican Staff
202-225-5906
kim.smith@mail.house.gov