



Supreme Court Nominee Judge Sonia Sotomayor

In a July 2007 speech before Planned Parenthood Action, then-Presidential Candidate Barack Obama described the criteria that he would use, if elected, in selecting Supreme Court Justices. He stated, “[W]e need somebody who’s got the heart—the empathy—to recognize what it’s like to be a young teenage mom. The empathy to understand what it’s like to be poor or African-American or gay or disabled or old.”¹ His nomination today of Second Circuit Judge Sonia Sotomayor begs the question—if confirmed, will Judge Sotomayor bring the concept of empathy to her judicial decision-making?

Sonia Sotomayor is the first Hispanic nominated to the Supreme Court. If confirmed, she would be the third female justice in the Court’s history, and the second woman currently sitting on the Court. While her nomination is a historic milestone, Judge Sotomayor’s background and philosophy raise concerns about her views on judicial activism, the Constitution, and the rule of law. Will Judge Sotomayor view the Constitution as a document that changes with the times? Will Judge Sotomayor allow identity politics to influence her judicial decision-making, or will she uphold the rule of law? A look at some of Judge Sotomayor’s published statements and decisions shed some light on how she will approach these issues. We hope that the members of the Senate will ask Judge Sotomayor probing questions about her views on these issues.

- Judge Sotomayor has claimed that judges play an activist policy-making role. In a speech that has been well-reported on in the press, Judge Sotomayor said that the “Court of Appeals is where policy is made.”²
- As a federal appellate court judge, Judge Sotomayor claimed that she “would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life. . . . Personal experiences affect the facts that judges choose to see.”³ In fact, she “accept[s]” that there will be differences in her judging “based on [her] gender and [her] Latina heritage.”⁴
- In the same speech, she further questioned if “by ignoring our differences as women or men of color we do a disservice both to the law and society.”⁵

¹ Senator Barack Obama, Remarks before Planned Parenthood Action Fund (July 17, 2007) (*transcript available at <http://lauraetch.googlepages.com/barackobamabeforeplannedparenthoodaction>*.)

² *The Sotomayor Video*, VOLOKH CONSPIRACY, May 3, 2009, <http://volokh.com/posts/1241390040.shtml>.

³ Hon. Sonia Sotomayor, *Latina’ Judge’s Voice*, 13 LA RAZA L.J. 87, 92 (2002).

⁴ *Id.* at 92.

⁵ *Id.* At 91.

- In a 1996 article co-authored by Judge Sotomayor, she wrote that “change—sometimes radical change—can and does occur in a legal system that serves a society whose social policy itself changes. It is our responsibility to explain to the public how an often unpredictable system of justice is one that serves a productive, civilized, but always evolving, society.”⁶
- Of the six opinions of Judge Sotomayor’s that have been reviewed by the Supreme Court, four of those opinions have been reversed.
- In a short unsigned opinion, Judge Sotomayor and two of her colleagues upheld a district judge’s determination that 18, 17 white and one Hispanic, firefighters could not sue the City of New Haven for racial discrimination when the City threw out the results of two promotional examinations after the exams failed to yield African-American firefighters who were eligible for promotion. The opinion that Judge Sotomayor joined was criticized by her colleague and fellow Clinton appointee Judge Jose Cabranes, for adopting the opinion of the district court with “no reference whatsoever to the constitutional claims at [t]he core of this case.”⁷ Judge Cabranes explained, “The questions raised in this appeal ... are indisputably complex and far from well-settled.”⁸ The Supreme Court, which recently heard arguments in the case, could overturn the decision of Judge Sotomayor and her colleagues.
- Despite the Supreme Court’s ruling in *District of Columbia v. Heller*, which held that the Second Amendment espouses an individual right, Judge Sotomayor has read that decision narrowly, claiming that “[t]he Second Amendment applies only to limitations the federal government seeks to impose on this right.”⁹

⁶ Hon. Sonia Sotomayor & Nicole A. Gordon, *Returning Majesty To The Law and Politics: A Modern Approach*, 30 SUFFOLK U. L. REV. 35, 37-38 (1996).

⁷ Ed Whelan, *Second Circuit Shenanigans*, June 16, 2008, NATIONAL REVIEW ONLINE, <http://bench.nationalreview.com/post/?q=YzUwOGM3YWxZTk2NzIwZjliNDBkZDUzMzhlOTc5ZDc=>.

⁸ Mary E. O’Leary, *High Court Candidate’s Ruling Scrutinized*, NEW HAVEN REG., May 10, 2009, http://www.nhregister.com/articles/2009/05/10/news/new_haven/aljudge.txt.

⁹ *Sotomayor’s Notable Court Opinions and Articles*, THE NEW YORK TIMES, May 26, 2009 (available at <http://www.nytimes.com/interactive/2009/05/26/us/0526-scotus.html#abortion>)