

## JUDGE SONIA SOTOMAYOR Q & A

**QUESTION: Judge Sotomayor has written: “I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.” Does Judge Sotomayor think that a Hispanic woman would make a better judge than a white male?**

**ANSWER:** Judge Sotomayor’s comment in context says that a more diverse court leads to better decision making. This is **not** a controversial statement, nor a new statement

The point that life experiences are relevant to the *process* of judging, and in some cases, help judges understand facts is not new. Justice Alito has referenced the impact of his own heritage as the grandson of Italian immigrants when hearing a case.

Justice Ginsberg has stated that being a woman has brought her a perspective that her male colleagues didn’t have when reviewing the facts of a case involving the strip search of a 13 year old girl.

Justice Thomas said at his confirmation hearing that he could make a contribution, and bring something different to the court because he has walked in the shoes of people who are affected by what the Court does.

Justice O’Connor said she would bring her understanding as a woman to the court, but doubted that alone would affect her decisions.

What Judge Sotomayor said is no different, and this debate is a far-fetched attempt to make an issue out of nothing.

Judge Sotomayor’s approach to judging is evident from the hundreds of opinions she’s authored – and thousands she’s participated in – during her 17 years on the bench. Her full record – not a single line, pulled out of context from a speech – provides the best insight to her judging.

In fact, of the 96 race related cases Judge Sotomayor has decided as a Court of Appeals judge, she rejected the claim of discrimination in roughly 78 cases, or more than 80% of the time.

**QUESTION: Judge Sotomayor has shown racial bias – fighting for affirmative action as a student, as a board member of PRLDEF, and more. How can she be an impartial judge?**

**ANSWER:** Nothing could be further from the truth. Critics have tried to use a few out-of-context statements by Judge Sotomayor to suggest that her views on race-related issues are suspect. But, her 11 year record as a Court of Appeals judge shows no evidence of racial bias.

Other than Ricci, Judge Sotomayor decided roughly 96 race- related cases as a Court of Appeals judge. They cover the gamut from employment discrimination to racial bias in jury selection. She rejected the claim of discrimination roughly 78 times, and agreed with the claim of discrimination 10 times. (The remaining 8 involved other kinds of dispositions.)

Of the 10 cases favoring discrimination, 9 were unanimous decisions. Of those 9, in 7, the unanimous panel included at least one Republican appointed judge.

See Judge Sotomayor and Race: <http://www.scotusblog.com/wp/judge-sotomayor-and-race-results-from-the-full-data-set/>

**QUESTION: In *Ricci v. Destefano*, which is currently on review in the Supreme Court, didn't Judge Sotomayor rubber stamp reverse-discrimination against a group of white firefighters?**

**ANSWER:** Some people are trying to criticize Judge Sotomayor for being a judicial activist even as they criticize her for judicial restraint in *Ricci*. They simply can't have it both ways.

Judge Sotomayor was one member of a three-judge Second Circuit panel that ruled in *Ricci*, the New Haven firefighters case. Although the judges were very sympathetic to the firefighters discrimination claims, they found themselves bound by Second Circuit precedent and unanimously affirmed the lower court decision. The panel decision has been criticized for not reaching out and deciding important constitutional questions, but this would have run contrary to the idea of judicial restraint because the outcome was controlled by federal statutory law and longstanding Second Circuit precedent. Those important constitutional questions are better left for the Supreme Court, which has taken the case.

In fact, a majority of Second Circuit voted against hearing the case en banc and revisiting the panel's decision. Judge Parker wrote an opinion concurring in the denial of rehearing en banc—joined by Judges Calabresi, Pooler, Sack and Sotomayor—which expressly recognized that the case was controlled by settled Second Circuit precedent (*Hayden v. County of Nassau* and *Bushey v. N.Y. State Civil Serv. Comm'n*) establishing that “a public employer, faced with a prima facie case of disparate-impact liability under Title VII, does not violate Title VII or the Equal Protection Clause by taking facially neutral, albeit race-conscious, actions to avoid such liability.”

There has been an effort by some folks who wish to reignite the culture wars of the past to define this case as demonstrating racial bias. But, her 11 year record as a Court of Appeals judge show no evidence of racial bias. Other than *Ricci*, Judge Sotomayor decided roughly 96 race- related cases as a Court of Appeals judge. She rejected the claim of discrimination 78 times, and agreed with the claim of discrimination 10 times. (the remaining 8 involved other kinds of dispositions).

Judge Sotomayor is a thoughtful, fair minded judge who follows the rule of law. The *Ricci* case is a perfect example of that.

**QUESTION: But, the Justice Department argued before the Supreme Court to overturn the Second Circuit decision in *Ricci*. Does that mean that the Obama Administration disagrees with her?**

**ANSWER:** The main question in this case is whether an employer, when faced with evidence that it may have administered a flawed test with a severe disparate impact in violation of federal civil rights law, can take steps to avoid violating the law. The Solicitor General’s brief makes clear that the Administration’s position on this question is the same as the Second Circuit’s—in other words, the Justice Department says that the Second Circuit got the law right in this case.

- The Justice Department brief says that, “a genuine intention to comply with Title VII’s disparate-impact provisions does not constitute intentional racial discrimination, and that the Equal Protection Clause does not bar facially neutral action taken in response to such concerns.” In other words, both the Justice Department and the Second Circuit have taken the position that employers can take reasonable steps to avoid violating Title VII.

Nothing in the United States’ position suggests that the Second Circuit’s conclusion was incorrect. While, the Justice Department does seek a remand on a less central question in the case—whether the City was acting in good faith when it refused to certify the exam results—its brief makes clear that the Supreme Court could also review the record in this case on its own, as the district court did and the Second Circuit approved.

In any event, it is important to remember that the Second Circuit judges have a different job and role in our government than the Justice Department—while the SG is charged with litigating the case before the Supreme Court, the Second Circuit judges are charged only with following Second Circuit precedent, which they unquestionably did here. Again, people can’t have it both ways. You can’t call her a judicial activist and then criticize her upholding the law.

**QUESTION: The President has indicated that he would only appoint a Justice who recognized a right to privacy in the Constitution. How does the President know that Judge Sotomayor fits this description? Did he ask her?**

As the White House said, the President and Judge Sotomayor had a very substantive conversation, mostly about her approach to judging. They talked about her theory of constitutional interpretation, and that conversation left the President comfortable that they shared a similar view of how a justice should approach applying our Constitution.

Judge Sotomayor’s record stands for itself and she has already seen strong support from members of the Senate, including Republican members who are keeping an open mind and waiting for her hearing before prejudging.

**QUESTION: Of the five opinions authored by Judge Sotomayor that the Supreme Court has reviewed, three resulted in reversals. Doesn't that establish that Judge Sotomayor has a weak record as a judge and/or is out of the mainstream ideologically?**

**ANSWER: No.** In an eleven-year career on the Court of Appeals, Judge Sotomayor participated in over 3000 panel decisions, and has authored over 230 majority opinions. Of the majority opinions that Judge Sotomayor has written, the Supreme Court granted review in 5 cases. It affirmed Judge Sotomayor in 2 cases and reversed or vacated in 3. A 60 percent reversal rate is actually lower than the overall Supreme Court reversal rate, which has ranged 66% to 73% for the last several years. Of the three opinions Sotomayor had overturned by the Supreme Court, two found the man she is being nominated to replace -- Justice David Souter -- on her side.

Judge Sotomayor's record before the Supreme Court is comparable to Justice Alito's when he was on the Third Circuit. The Supreme Court reviewed 6 Third Circuit cases where Judge Alito wrote an opinion (either majority or dissenting). Of those, the Court agreed with Judge Alito in 3 and disagreed in 3. Moreover, in only 2 of the 6 cases did Judge Alito write a majority opinion (the other 4 dissents or partial dissents/partial concurrences). The Supreme Court reversed in both of those cases. Thus, Judge Alito's reversal rate for majority opinions he wrote was 100%.

Chief Justice Roberts was even reversed after he had already become Chief Justice—he had been part of the panel in the *Hamdan* case when he was a judge on the DC Circuit Court of Appeals.

**QUESTION: In a video from Duke Law School in 2005, Judge Sotomayor said that the Court of Appeals is where “policy is made.” Doesn't this statement demonstrate that she is a judicial activist who will legislate her policy preferences from the bench rather than following the law as it is written?**

**ANSWER: No.** It is misleading to look beyond Judge Sotomayor's long and distinguished judicial record for evidence of what kind of judge she is. She reads factual records carefully, follows precedent diligently, and refuses to reach out to address issues not squarely before her. Her record shows that she respects appropriate limits on the judicial role and follows the rule of law, even when she might be sympathetic to a claim.

For example, in *Mendez v. Mukasey* (2008), Judge Sotomayor authored an opinion applying circuit precedent to hold that the court lacked jurisdiction to review an Immigration Judge's decision, even though the panel found the petitioner's arguments on the merits “persuasive,” and that “[w]ere we operating on a new slate, we would be inclined to hold that the question of whether an alien has established ‘exceptional and extremely unusual hardship’ is a determination for which we have jurisdiction to review.”

In addition, at her Second Circuit confirmation hearing, Judge Sotomayor expressly spoke out against judicial activism when she said: “Our Constitution vests the right to make and administer laws in the legislative and executive branches of our government. Judges impermissibly encroach upon that right by rendering decisions that loosen jurisdictional requirements outside of the scope of established precedents and by fashioning remedies aimed at including parties not before the court to resolve broad societal problems.”

She was simply stating the facts – that the trial judges, district court judges, decide only the cases before them, and that appeals courts interpret and apply precedent. In the words of Hofstra University law professor Eric Freedman, Sotomayor's remark was "the absolute judicial equivalent of saying the sun rises each morning."

**QUESTION: Is Judge Sotomayor hostile to the rights of gun owners?**

**ANSWER:** In this area, like all others, Judge Sotomayor follows the law. Last year, the Supreme Court held in *District of Columbia v. Heller* that the Second Amendment protects an individual right to keep and bear arms. The *Heller* case only addressed this issue as a matter of federal law, and said nothing about state laws or the constitutionality of state law restrictions on gun ownership. Judge Sotomayor participated in two Second Amendment cases—one decided prior to *Heller* and one decided after *Heller*.

- In *Maloney v. Cuomo*, the Second Circuit case decided after *Heller*, the court addressed a state law restriction on bearing arms. A unanimous panel -- including Judge Sotomayor -- acknowledged both the *Heller* decision and the fact that *Heller* did not change the long-settled Supreme Court precedent that the Second Amendment applied only to federal restrictions on the right to keep and bear arms.
- In *United States v. Sanchez-Villar*, the Second Circuit case that predates *Heller*, Judge Sotomayor joined a unanimous opinion rejecting a Second Amendment challenge brought by a defendant convicted of being an illegal alien in possession of a firearm. That outcome was controlled by a separate Supreme Court case.

**QUESTION: Some have said that Judge Sotomayor lacks congeniality, and is too tough in the court room?**

**ANSWER:** Judge Sotomayor is smart and she engages actively with the lawyers who appear before her, dedicated to grappling with all factual and legal dimensions of each case. She is a tough questioner, some might say in the style of Justice Scalia. Her tenacity is something to admire, not criticize. Indeed, one of Judge Sotomayor's former Yale Law School classmates, now Dean of Lewis & Clark Law School, remembers that "she would stand up for herself and not be intimidated by anyone" and says this quality would make her "the kind of justice who could change some minds." Sotomayor refuses to let powerful interests bully her, as was evident when she stood up to Major League Baseball and ended the 1995 strike.

"In some ways she could match, well, the other New Yorker on the court, Justice Scalia," said Douglas Kmiec, a law professor at Pepperdine, "He expects people to give back as good as he gives, and I expect that when Justice Sotomayor is on the court, his wish will be fulfilled."

Judge Guido Calabresi, a fellow judge on the 2<sup>nd</sup> Circuit, said Judge Sotomayor's forceful and lucid arguments had persuaded him to reconsider his position in a number of instances. "And I'm a tough act," he said.

Judge Richard C. Wesley, said his interactions with Judge Sotomayor had been "totally antithetical to this perception that has gotten some traction that she is somehow confrontational...I think there is a difference between tough questioning and demeaning questioning, and I haven't seen that line crossed by any of my colleagues."