

Senate confirmation hearing

Supreme Court nominee Sotomayor appeases Republicans

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After three days of questioning by 19 senators, Supreme Court nominee Sonia Sotomayor appears assured of an early confirmation vote. All twelve Democrats and at least a few of the seven Republicans on the panel are likely to vote to send her nomination to the Senate floor.

The senior Republican on the panel, Senator Jeff Sessions of Alabama, indicated that there would be no filibuster against Sotomayor and no attempt to prevent a confirmation vote by the first week of August. The *Wall Street Journal* cited Senate Republican sources as suggesting that 20 votes against Sotomayor (half the Republican caucus) was all that could be expected, given her status as the third woman and first Hispanic nominee, and her thoroughly conventional judicial record. [See: "Sotomayor's record: A judicial pragmatist and defender of corporate interests"]

Several Republican members of the Judiciary Committee went out of their way to praise Sotomayor's testimony and jurisprudence, contrasting them to what they suggested was a "left-wing" and "activist" record outside the courtroom, particularly her association with the Puerto Rican Legal Defense and Education Fund (before she became a judge) and her so-called "wise Latina" speech, in which she suggested that a judge of her ethnicity and gender would frequently come to better decisions than a white male.

Senator Lindsey Graham of South Carolina compared her to Chief Justice John Roberts, nominated by President Bush. "You've got a judge who has been on a circuit court for a dozen years," he said. "You have, I think, consistently, as an advocate, took a point of view that was left of center. You have, as a judge, been generally in the mainstream."

Graham began the hearing by declaring that Sotomayor would be confirmed unless she had a "meltdown." He has previously stated that President Obama was entitled to deference on his nominee, saying, "President Obama won, and that ought to matter."

Senator John Cornyn of Texas echoed Graham, telling Sotomayor, "I actually agree that your judicial record strikes me as pretty much in the mainstream of judicial decision-

making by district court judges and by court of appeals judges on the federal bench...you appear to be a different person almost in your speeches and in some of the comments that you've made."

Even ultra-conservative Senator Tom Coburn of Oklahoma, a Christian fundamentalist for whom abortion is the political litmus test, praised Sotomayor as "an admirable judge, an admirable woman. You have very high esteem in my eyes for both your accomplishments and your intellect. I have yet to decide where I'm going on this...but I am mightily impressed."

What so impressed the right-wing senators was Sotomayor's efforts to appease them whenever it was suggested that she had voiced undue sympathy with the poor and downtrodden, particularly members of minority groups like blacks, Hispanics and immigrants.

Time and again she denied that her status as a woman of Puerto Rican descent would make her any more likely to rule in favor of people who are disfavored and oppressed by the privileged and powerful. She was aided—and to some extent steered—in this course by the Democrats on the Judiciary Committee, who presented her as a tough law-and-order advocate, former prosecutor, and upholder of the death penalty.

Perhaps the most degrading performance took place during the questioning by Senator Charles Schumer, Democrat from New York, who seemed to delight in leading Sotomayor through a recital of examples of her willingness to put aside all normal human feelings in order to impose legal rebuffs on seemingly sympathetic plaintiffs.

Among those whose claims Sotomayor opposed, Schumer pointed out, were the families of victims of the crash of a TWA jetliner (Sotomayor said federal rules precluded their suit for damages), black correction officers charging discrimination in promotions and hiring, a black woman who sued over being denied a home equity loan, and immigrants seeking to press claims of asylum based on political persecution.

Summing up his brief on the immigration cases, Schumer said: "In the nearly 850 cases you have decided in the Second Circuit, you ruled in favor of the government—that is, against the petitioner seeking asylum, the immigrant seeking

asylum—83 percent of the time. That happens to be the exact statistical median rate for your court. It's not one way or the other. This means that, with regard to immigration, you are neither more liberal nor more conservative than your colleagues.”

He concluded by asking, “And has there ever been a case in which you ruled in favor of a litigant simply because you were sympathetic to their plight, even if rule of law might not have led you in that direction?” Sotomayor responded, “Never.”

The chairman of the committee, Democrat Patrick Leahy of Vermont, pointed out that Sotomayor had “affirmed 98 percent of the convictions for violent crimes, including terrorism cases. Ninety-nine percent of the time at least one of the Republican appointed judges on the panel agreed with you.”

Democrat Dianne Feinstein of California observed, “In my view, because you have agreed with your Republican colleagues on constitutional issues some 98 percent of the time, I don't see how you can possibly be construed to be an activist.”

Democrat Amy Klobuchar of Minnesota cited a report issued last week that “found that you sent more convicts to prison and handed out longer sentences than your colleagues did when you were a district court judge.”

Senate Majority Whip Richard Durbin, the second-ranking Democrat in the Senate, led Sotomayor through her decision in the Heatley case, the first federal death penalty prosecution in the Southern District of New York (which covers the city and its suburbs) in more than 40 years. Sotomayor explained that she had rejected the claims of the defense that the prosecutor had sought the death penalty at least in part because Heatley was black. “I determined that that was not the case and rejected his challenge,” she said.

In response to questioning by Republican Cornyn, Sotomayor explicitly repudiated the statement by President Obama, shortly before he nominated her, that he would seek a judge possessed of “empathy” for the less fortunate in society. “We apply law to facts, we don't apply feelings to facts,” she said.

Nearly every Republican questioner referred at some point to the “wise Latina” comment—eliciting repeated statements from Sotomayor that she regretted the remark. The only legal issue that received equivalent emphasis was her ruling on the New Haven firefighters' lawsuit against the city government for canceling a scheduled promotion of fire lieutenants to captains after no black firemen and only one Hispanic passed the qualifications test.

The Supreme Court reversed Sotomayor's ruling in its decision last month in *Ricci v. DeStefano*. But it was difficult for the Republicans to portray Sotomayor's position as an aberration, given that 13 of the 25 federal judges who weighed the case at one point or another took her position (the district court judge ruled for the city, the appeals court split 7-6 for the city, while the Supreme Court split 5-4 for the firefighter plaintiffs).

Throughout the hearing, Sotomayor sought to reassure Republicans that she was not an automatic vote for liberal positions on abortion, gun rights, criminal procedure or executive power. She did not challenge their condemnations of “judicial activism,” a charge which is particularly hypocritical given that the most overtly political interventions of the Supreme Court have been decisions by the right-wing majority overturning regulatory and civil rights actions taken by local, state and federal governments.

The single most flagrant example of such “activism” is the 5-4 decision in *Bush v. Gore* which placed George W. Bush in the White House. Sotomayor was asked her view of that decision but declined to offer an opinion, the same stance she took on dozens of other specific legal and constitutional issues.

According to an analysis of the hearings in the *New York Times*, the Republicans were not seeking to defeat Sotomayor, but rather to set conditions on future nominees to the high court. “By forcing Judge Sotomayor to retreat from Mr. Obama's desire for justices with ‘empathy,’” the *Times* argued, “Republicans have effectively set a new standard that future nominees will be pressed to meet. The Republicans hope their aggressive questioning of Judge Sotomayor on race discrimination, gun control and the death penalty will make it harder for Mr. Obama to choose a more outspoken liberal in the future.”

Liberal law professor Jonathan Adler, writing for *Washingtonpost.com*, observed with disappointment that “Sonia Sotomayor has started to sound more like the sort of nominee we would have expected from a President McCain than a President Obama.” He bemoaned the fact that “a Senate with sixty Democrats would be wary of confirming an overt and unapologetic liberal.”



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