



Written by [Steven Yates](#) on July 14, 2009

The Sotomayor Hearings—Day One to Day Two

In one of day one's more memorable moments, Sen. Lindsey Graham (R-S.C.) told her, "Unless you have a complete meltdown, you're going to get confirmed." Graham then added, "And I don't think you will." Have a meltdown, that is.

But she has already been called to account for her "wise Latina" remark, the target of harsh criticism from Republicans. Moreover, the Senate Judiciary Committee wants to hear from the plaintiff in *Ricci v. DiStefano*, the New Haven reverse-discrimination case in which she took a position against white firefighters alleging discrimination and in favor of the city.



Thus far, she has proven herself able to handle intense lines of questioning. There can be no doubt that Sonia Sotomayor is a woman with a lot of self-confidence who does not get intimidated easily.

About the first, this morning she said by way of clarification: "I want to state upfront, unequivocally and without doubt: I do not believe that any racial, ethnic or gender group has an advantage in sound judging. I do believe that every person has an equal opportunity to be a good and wise judge, regardless of their background or life experiences."

She further explained to Sen. Patrick Leahy (D-Vt.), "I gave a variant of my speech to a variety of different groups, most often to groups of women lawyers or to groups, most particularly, of young Latino lawyers and students.... I was trying to inspire them to believe that their life experiences would enrich the legal system, because different life experiences and backgrounds always do. I don't think that there is a quarrel with that in our society. I was also trying to inspire them to believe that they could become anything they wanted to become, just as I had."

When Sen. Jeff Sessions (R-Ala.) wondered aloud if this view of life experiences would affect her decisions on the court, she responded, "No, sir. As I've indicated, my record shows that at no point or time have I ever permitted my personal views or sympathies to influence an outcome of a case. In every case where I have identified a sympathy, I have articulated it and explained to the litigant why the law requires a different result.... I do not permit my sympathies, personal views, or prejudices to influence the outcome of my cases."

Regarding her decision as one third of a three-judge panel in the *Ricci* case, she said, "The issue was not what we would do or not do, because we were following precedent."

Late last month, the Supreme Court Sotomayor aspires to join overturned that ruling.

As we enter the second day of confirmation hearings, what may well be the most contentious long-term issue of the process is gradually becoming clear: affirmative action. It has been one of the most contentious issues of the past four decades. Today, however, we can ask: does an era that has witnessed the election of the first African-American president need government-mandated programs that offer



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advantages to some, whether those advantages are defended because of past discrimination and traces of residual racism among Americans, to bring about a more diverse work force or student body, or (as is most commonly the case) some combination of these?

Polls are mixed and somewhat contradictory, simply because the term *affirmative action* means different things to different people. Most Americans today believe in basic fairness, and will say they are for affirmative action when it is presented to them in that language. But Americans do not agree on how to bring fairness about. Many have always believed that fairness in employment settings means that the job or promotion should go to the most qualified person, independent of race, ethnicity, or gender. Defenders of affirmative action continue to hold that things do not always work out that way, because a residuum of prejudice and preference for those like oneself in American society effectively blocks minorities from advancement — usually without the prejudiced even being aware of it — and that this is bad for a society growing more diverse demographically.

Sotomayor made her position clear with her decision in the *Ricci* case in New Haven, Connecticut, in which a test was thrown out because it did not allow for the promotion of enough minority firefighters. Back in 1994, she referred to herself as a “perfect affirmative action baby,” acknowledging that her ethnicity had likely aided her in being admitted to Princeton University, where she graduated *summa cum laude*.

At some point, the Senate Judiciary Committee will hear from Frank Ricci, the white firefighter who brought the suit against New Haven. Republicans have already referred to the case several times to portray Sotomayor as a liberal who favors some racial and ethnic groups over others. Sessions had stated in his opening remarks, “It seems to me that in *Ricci*, Judge Sotomayor’s empathy for one group of firefighters turned out to be prejudice against another.”

Sessions use of the word *empathy* was doubtless deliberate; President Barack Obama had expressed hope for a new justice who would bring “ephemeral qualities” such as life experience and empathy to the Supreme Court. To conservatives, such remarks are red flags for judicial activism — legislating from the bench.

Sotomayor responded to the judicial activism charge. “The task of a judge is not to make law,” she said. “It is to apply the law. And it is clear, I believe, that my record in two courts reflects my rigorous commitment to interpreting the Constitution according to its terms, interpreting statutes according to their terms and Congress’ intent, and hewing faithfully to precedents established by the Supreme Court and by my circuit court.” She also told Jeff Sessions, “My personal and professional experiences help me to listen and understand, with the law always commanding the result in every case.”

Another event from day one that is probably worth comment: congressional hearings this visible are bound to attract protesters, and yesterday’s morning session was not an exception. Several pro-life protesters appeared. “What about the unborn! Abortion is murder,” one of them shouted shortly before 11 a.m., interrupting Sen. Dianne Feinstein (D-Calif.). Leahy responded immediately, “The police will remove that man.” Afterwards Leahy warned the assembled observers that disruptive conduct would not be tolerated. “This is a hearing of the United States Senate,” he said, “and we will have order.”

Sotomayor has not decided any cases directly related to abortion, and once even dismissed a challenge to the so-called global gag rule, deciding against an abortion rights group. But her nomination by Barack Obama, who favors abortion rights, as well as her use of the phrases *anti-abortion* and *pro-choice*, had suggested that a Justice Sotomayor would not vote to overturn *Roe v. Wade*. What remarks



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she has made so far today indicate: (1) she does consider a right to abortion as “settled law” — not absolute but deserving deference; (2) there is a right to privacy in the Constitution; it is found in the Fourth Amendment’s protections against unreasonable search and seizure and in the 14th Amendment’s equal-protections clause. Although she declined to express a direct opinion on *Roe v. Wade*, such arguments became the foundation for that decision.

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