

Statement of
The Honorable Jon Kyl

United States Senator
Arizona
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Senator Kyl

Every American should be proud that a Hispanic woman--one with a very impressive background and life story--has been nominated for the Supreme Court.

In evaluating a nominee, it's important that the Senate examine all aspects of the individual's career and his or her merits as a judge, and not make judgments on the basis of gender or ethnicity. It starts with a judge's decisions and opinions. Also important to understanding what an individual really thinks about things are speeches, writings, and associations.

Judge Sotomayor's most widely-known speech is, of course, her "wise Latina woman" speech, given in various forms over the years. It's clear that the often-quoted phrase is not just a comment out of context, but is the essence of the speeches. Her central theme in these speeches was to examine whether gender and ethnicity bias a judge's decision. Judge Sotomayor concludes that they do--that it is unavoidable.

She develops this theme throughout the speech, including examining opposing arguments. After examining evidence that suggests gender makes a difference, she quotes former Justice Sandra Day O'Connor's statement that men and women judges will reach the same decision, and, in effect, disagrees, saying she's not so sure. That's when she says she thinks a "wise Latina" would reach a better decision.

Her attempt to re-characterize these speeches at the committee hearing strained credulity. I will address this issue at greater length during the confirmation debate, but suffice it to say, I remain unconvinced that Judge Sotomayor believes judges should set aside biases, including those based on race and gender, and render the law impartially and neutrally.

Foreign Law

Judge Sotomayor's address to the Puerto Rican ACLU, entitled, "How Federal Judges Look to International and Foreign Law under Article VI of the U.S. Constitution," also raises red flags. In this speech, Judge Sotomayor inferred that foreign law should be used, but then later testified it shouldn't. I will also discuss, at length, my concerns related to this matter during the confirmation debate and the problems I have squaring her testimony with the contents of the speech. The central point is, of course, that it's completely irrelevant to consider foreign law in U.S. courts. I don't believe Judge Sotomayor is sufficiently committed to this principle.

Reversals and Ricci v. DeStefano

Judge Sotomayor's supporters argue that we should not focus on her speeches, but on her "mainstream" judicial record. They claim that Judge Sotomayor agreed with her colleagues, including Republican appointees, the vast majority of the time. That may be true; but, as President Obama has reminded us, most judges will agree in 95 percent of all cases. The hard cases are where differences in judicial philosophy become apparent.

I've looked at Judge Sotomayor's record in these hard cases and have found cause for concern. The U.S. Supreme Court has reviewed directly ten of her decisions--eight of those decisions have been reversed or vacated, another sharply criticized, and one upheld in a 5-4 decision.

The most recent reversal was *Ricci v. DeStefano*, a case in which Judge Sotomayor summarily dismissed before trial the discrimination claims of 20 New Haven firefighters, and the Supreme Court reversed 5-4, with all nine justices rejecting key reasoning of Judge Sotomayor's court. In my view, the most astounding thing about the case was not the incorrect outcome reached by Judge Sotomayor's court--it was that she rejected the firefighters' claims in a mere one paragraph opinion and that she continued to maintain in the hearings that she was bound by precedent that the Supreme Court said didn't exist.

As the Supreme Court noted, *Ricci* presented a novel issue regarding "two provisions of Title VII to be interpreted and reconciled, with few, if any, precedents in the court of appeals discussing the issue." One would think that this would be precisely the kind of case that deserved a thorough and thoughtful analysis by an appellate court. But Judge Sotomayor's court, instead, disposed of the case in an unsigned and unpublished opinion that contained zero--and I do mean zero--analysis.

Some have speculated that the Judge Sotomayor's panel intentionally disposed of the case in a short, unsigned, and unpublished opinion in an effort to hide it from further scrutiny. Was the case intentionally kept off of her colleague's radar? Did she have personal views on racial quotas that prevented her from seeing the merit in the firefighters' claims?

Judge Sotomayor was asked about her *Ricci* decision at length during the confirmation hearing. Her defense was that she was just following "established Supreme Court and Second Circuit precedent." The problem with this answer is that *Ricci* presented a novel question for which there were no Supreme Court precedents squarely on point. Indeed, the Supreme Court noted that there were "few, if any" circuit court opinions addressing the issue.

When I pressed Judge Sotomayor to identify those controlling Supreme Court and Second Circuit precedents that allegedly dictated the outcome in *Ricci*, she dissembled and ran out the clock. Her "answers" answered nothing and, in my opinion, violated her obligation to be forthcoming with the Judiciary Committee.

Maloney v. Cuomo

I am also concerned about Judge Sotomayor's analysis--or lack thereof--in *Maloney v. Cuomo*, a Second Amendment case that could find its way to the Supreme Court next year. *Maloney* was decided after the Supreme Court's landmark ruling in *District of Columbia v. Heller*, which held that the right to bear arms was an individual right that could not be taken away by the federal

government. In *Maloney*, Judge Sotomayor had the opportunity to consider whether that individual right could also be enforced against the states, a question that was not before the *Heller*-court. In yet another unsigned opinion, Judge Sotomayor and two other judges held that it was not a right enforceable against states.

What are the legal implications of this holding? State regulations limiting or prohibiting the ownership and use of firearms would be subject only to "rational basis" review. As Sandy Froman, the respected lawyer and former National Rifle Association president, said in her witness testimony, this is a "very, very low threshold" that can easily be met by a state or city that wishes to prohibit all gun ownership, even in the home. Thus, if Judge Sotomayor's decision were allowed to stand as precedent, then states will, ironically, be able to do what the federal District of Columbia cannot--place a de facto prohibition on the ownership of guns and other arms.

PRLDEF

As we've seen, Judge Sotomayor's testimony about her previous speeches and some of her decisions is difficult, if not impossible, to reconcile with her record. Similarly, her testimony about the extent of her role with PRLDEF is in tension with the evidence that we have. The *New York Times* has detailed her active involvement as recounted by former PRLDEF colleagues, who have described Judge Sotomayor as a "top policy maker" who "played an active role as the defense fund staked out aggressive stances."

What were the litigation positions advanced by PRLDEF during Judge Sotomayor's tenure there? Well, it argued in court briefs that restrictions on abortion are analogous to slavery. And it repeatedly represented plaintiffs challenging the validity of employment and promotional tests--tests similar to the one at issue in *Ricci*.

Conclusion

Unfortunately, I have not been persuaded that Judge Sotomayor is absolutely committed to setting aside her biases and impartially deciding cases based upon the rule of law. And I cannot ignore her unwillingness to answer Senators' questions straightforwardly. For these reasons, I oppose her nomination.

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151 Cong. Rec. S10,366 (2005) (statement of Sen. Obama) (emphasis added).
530 F.3d 87 (2nd. Cir. 2008).

557 U.S. ___, Nos. 07-1428, slip op. (June 29, 2009) (5-4 decision).

Ricci v. DeStefano, No. 07-1428, slip op. at 16 (U.S. June 29, 2009) (emphasis added).

Respected legal columnist Stuart Taylor has detailed how, "by electing . . . to dispose of the case by a cursory, unsigned summary order," Judges Sotomayor's panel "avoided circulating the decision in a way likely to bring it to the attention of other 2nd Circuit judges, including the six who later voted to rehear the case." Stuart Taylor, *How Ricci Almost Disappeared*, July 10, 2009, available at <http://ninthjustice.nationaljournal.com/2009/07/how-ricci-almost.php>.

Sotomayor Hearing, at 34 (July 14, 2009) (transcript) (statement of Sonia Sotomayor).
Ricci v. DeStefano, No. 07-1428, slip op. at 16 (U.S. June 29, 2009).
Sotomayor Hearing, at 3-18 (July 16, 2009) (transcript) (statements of Sonia Sotomayor).
554 F.3d 56 (2nd Cir. 2009).
128 S.Ct. 2783 (2008).
Maloney, 554 F.3d 56.
Sotomayor Hearing, at 314 (July 16, 2009) (transcript) (statement of Sandy Froman).
Jan Hoffman, A Breakthrough Judge: What She Always Wanted, N.Y. Times, September 25,
1992, at B16.
Raymond Hernandez & David W. Chen, Nominee's Links with Advocates Fuel Her Critics, N.Y.
Times, May 29, 2009, at A1.
Brief Of Certain Organizations As Amici And Amicae Curiae In Support Of Petition For
Rehearing, Williams v. Zbaras, Harris v. McRae (Filed July 1980) ("Just as Dred Scott v. Sanford
refused citizenship to Black people, these opinions strip the poor of meaningful citizenship under
the fundamental law."); Brief Of Amici Curiae Of The NAACP Legal Defense And Educational
Fund, Inc., And Other Organizations, Planned Parenthood v. Casey (Filed March 1992) ("For
poor women, and particularly for poor African American women, the right to privacy in matters
of body and reproduction -- a right that was trammled with state sanction during centuries of
slavery -- is fundamental to notions of freedom and liberty.")
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Doc-22-1988Jan141987AnnualProgramReport99148.pdf](http://judiciary.senate.gov/nominations/SupremeCourt/Sotomayor/upload/Doc-22-1988Jan141987AnnualProgramReport99148.pdf).