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Key Questions for Sonia Sotomayor

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Since Judge Sonia Sotomayor was nominated for the Supreme Court by President Barack Obama, she has received fierce criticism for a number of her public statements and court opinions that reveal a troubling judicial philosophy. She has questioned whether judges can and should set aside personal bias, mocked the idea that judges do not "make law," and argued that judges of certain ethnicities or a particular gender will reach superior conclusions possibly due to "physiological differences" in logic and reasoning.

In addition to concerns about her judicial philosophy, serious questions have been raised about Sotomayor's respect for judicial procedure. She has displayed a tendency to completely ignore or bury arguments she disfavors, treating unsettled statutory and constitutional questions as frivolous legal claims that merit no serious discussion. Equally troubling is her approach to constitutional rights: In several cases she has denied rights that are specifically protected by the Constitution while giving little or no justification thereof.

Next week, Senators will begin the "advice and consent" process. Given these concerns about her judicial philosophy, fairness on the bench, and fidelity to the Constitution, Senators should ask Judge Sotomayor the following ten questions.

Question #1: Policy-Making from the Bench. During a Duke University panel discussion in 2005, you made a statement that raises grave concern as to whether you believe that the role of a judge is a limited one. In that speech, you stated: "All of the legal defense funds out there, they're looking for people with Court of Appeals experience. Because it is—Court of Appeals is where policy is made. And I know, and I know, that this is on tape, and I should never say that. Because we don't 'make law.'"

Though you claimed that you were not "promoting" or "advocating" the practice, it is quite clear, based on your flippant tone, which invoked laughter from the audience, that you were mocking the idea that judges do not "make law."[1]

Statements from your other speeches support this interpretation. You have unabashedly embraced the idea that judges should not hold back when tempted to alter the law in order to address some perceived societal need: "Our society would be strait-jacketed were not the courts, with the able assistance of the lawyers, constantly overhauling the law and adapting it to the realities of ever-changing social, industrial and political conditions."[2] Your idea of a "strait-jacketed" society ignores the existence of an entire branch that is actually constitutionally empowered to change the law to address society's needs: the legislature.

Do you still believe that judges should be overhauling the law and making policy? If not, when did you

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change your position, and why did you say and write these things in 2005?

Question #2: Patriotic Bias? When litigants stand before a judge in a courtroom, they should be confident that their judge is approaching the case without harboring any pre-conceived personal bias. Your speeches reveal a disturbing skepticism as to whether this basic element of the rule of law is possible—or even desirable. In a 2001 speech at Berkeley School of Law, you advanced the idea that legal interpretations are inevitably and unavoidably influenced by one's own experience and cultural background and that "impartiality" is just an "aspiration." You stated that you wonder whether the goal of impartiality is "possible in all or even in *most* cases."[3]

In the speech, you went even further to suggest that the impossibility of impartiality is actually somehow a benefit to this country: "I wonder whether by ignoring our differences as women or men of color we do a disservice both to the law and society."[4] Under your theory, it is somehow patriotic to embrace one's own personal biases.[5]

Yet as a judge, you took an oath to "administer justice without respect to persons, and do equal right to the poor and to the rich, and [to] faithfully and impartially discharge and perform all the duties incumbent" on you under the Constitution.[6]

Do you believe that following the judges' oath of office is a disservice to society? Do you believe that you are doing a disservice to the law if you impartially discharge your duties in a completely impartial manner?

Question #3: Respecting Judicial Procedure. While your statements about the undesirability of impartial judging raise concern, what is even more alarming is that you seem to have put this belief into practice in several cases. In these cases, you displayed a tendency to give little or no consideration to serious constitutional and statutory issues, and in one case doing so in a way that appeared to be calculated to prevent further review (and subsequent reversal) of the case. This calls into question your ability to perform one of the most basic duties of a judge: to respect judicial procedure, and to give a fair and adequate hearing to all arguments and parties.

In the case of *Ricci v. DeStefano*, your three-judge Second Circuit panel addressed a racial discrimination suit brought by a group of New Haven firefighters who were denied promotions on account of race. Despite the unsettled constitutional and statutory issues in this case, your panel stated its conclusion in one paragraph, doing so in a summary order and then withdrawing it and issuing yet another one-paragraph opinion, this time a *per curiam* opinion.

On review, the Supreme Court found that your panel wrongly concluded that Title VII of the Civil Rights Act of 1964 was not violated when the city of New Haven threw out the results of a race-neutral firefighter promotional exam due to a low pass rate among minorities.

Not only did the Supreme Court find fault with the decision your panel reached in this case, but all nine justices agreed that your one-paragraph summary order was insufficient.[7]

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1. Deborah O'Malley, "Sotomayor: Court Jester or Judge as King?" The Foundry, May 29, 2009, at *http://blog.heritage.org/2009/05/29/sotomayor-court-jester-or-judge-as-king.*
2. Judge Sonia Sotomayor and Nicole A. Gordon, "Returning Majesty to the Law and Politics: A Modern Approach," *Suffolk U. L. Rev.*, Vol. 30, No. 35 (1996), p. 37.
3. Judge Sonia Sotomayor, "A Latina Judge's Voice," lecture at the University of California, Berkeley, School of Law, Berkeley, California, *La Raza L.J.*, Vol. 13, No. 87, (2002), at *http://www.nytimes.com/2009/05/15/us/politics/15judge.text.html?_r=1* (July 8, 2009) (emphasis added).
4. *Ibid.*
5. Robert Alt, "Sotomayor's and Obama's Identity Politics Leave Blind Justice at Risk: Can Sotomayor Keep Her Biases in Check? For the Constitution's Sake, We'd Better Find Out," *U.S. News and World Report*, May 27, 2009, at *http://www.usnews.com/articles/opinion/2009/05/27/sotomayors-and-obamas-identity-politics-leave-blind-justice-at-risk.html* (July 8, 2009).
6. 28 U.S. Code § 453.
7. Ed Whelan, "9-0 Against Sotomayor," National Review Online Bench Memos, June 29, 2009, at *http://bench.nationalreview.com/post/?q=OTBhOTEzMTZhMmMyNDczNTE5MjA4MTI0Mjk1Zjc5MDA* (July 9, 2009).

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The Supreme Court justices were not the first to point out this error. In his dissent from denial of rehearing en banc, Judge Jose Cabranes, a Clinton appointee on your circuit, explained that your panel's refusal to address the constitutional issues in the case was entirely unjustified. He noted that the "core issue presented by this case…is not addressed by any precedent of the Supreme Court or our Circuit,"[8] and "where significant questions of unsettled law are raised on appeal…a failure to address those questions—or even recognize their existence—should not be the approved modus operandi of the U.S. Court of Appeals."[9]

You displayed a similarly dismissive approach in your opinion in *Maloney v. Cuomo*, in which you found that the Second Amendment does not apply to the states through the Fourteenth Amendment. In a scant 11 words, which failed to provide even a scintilla of reasoning for your conclusion, your panel declared that a state statute restricting possession of weapons does not implicate a fundamental right.

Do you believe that your treatment of these cases was appropriate, particularly considering the fact that the Supreme Court not only found the case important enough to hear but also reversed you? Why did you refuse to address the serious legal issues at stake in these cases?

Question #4: The "Empathy" Standard. President Obama has stated several times the importance of finding a nominee who displays empathy in judging. Legitimate criticisms have been raised concerning this standard, including questions as to how a judge should go about deciding which litigant is deserving of sympathy:

> In some cases, all of the parties are sympathetic. In other cases, none are. In still other cases, the law may be unambiguously on the side of a party who is less sympathetic. If empathy is the guiding principle, how is a judge to decide these cases? And how do we separate empathy from personal bias?[10]

While empathy divorced from law is a dubious way to decide cases, you were arguably presented with the opportunity to display your empathy in the case of *Ricci v. DeStefano*. The plaintiff in the case, Frank Ricci, is a learning disabled firefighter who, as you recall, put considerably more time into preparing for the lieutenant's exam given his disability. Because of his dyslexia, Ricci had a friend record his exam textbooks into a tape recorder and spent every spare hour studying. After taking such great strides to overcome his disadvantage, he ranked sixth in the competition for eight lieutenant spots but was nonetheless denied the promotion on account of race.

Do you agree with President Obama that empathy is a proper way to decide cases? If so, why was Ricci *unworthy of your empathy—or even of a full opinion from your court?*

Question #5: Physiological Differences and Identity Politics. You have stated that gender and national origin "may and will make a difference in our judging." You stated that these differences could be due to cultural experience or because of "basic differences in logic and reasoning." You further stated your hope that a Latina woman "with the richness of her experience would more often than not reach a better conclusion than a white male who hasn't lived that life."

There has been a great deal of discussion about the so-called "wise Latina woman" quote, but the defenses to date have been inaccurate or insufficient. The White House responded that you misspoke, but this was shown to be false by the fact that the statement was made in a published speech, and by the subsequent revelation that you had made that very same speech on at least seven separate occasions. Later explanations suggest that you did

8. Ed Whelan, "White House's Misleading Spin on New Haven Firefighters Case," National Review Online Bench Memos, May 27, 2009, at *http://bench.nationalreview.com/post/?q=MDM0YWM4ZDI1NGIxNTc2MzhiMmRmZDcyNDFiZWI0YmE=* (July 9, 2009).
9. Robert Alt, "The Sotomayor Pattern," The Foundry, June 30, 2009, at *http://blog.heritage.org/2009/06/30/morning-bell-the-sotomayor-pattern*.
10. Alt, "Sotomayor's and Obama's Identity Politics."

not mean that the opinion would be superior but that you were simply lauding a diversity of opinion. However, that is plainly not what you said, both in print and verbally, again more than seven times.

Men who have suggested that there may be physiological differences between genders have received an onslaught of criticism, in some cases being led to resign from their positions. For example, when Larry Summers, the current director of the White House's National Economic Council, suggested that "innate differences between men and women might be one reason fewer women succeed in science and math careers,"[11] many of those who are currently defending your statements expressed such outrage that he was forced to resign his post of dean at Harvard University. Nancy Hopkins, the MIT biologist who famously walked out of the Summers talk and remarked, "I would've either blacked out or thrown up,"[12] praised you in an Editor's Selection comment to a *New York Times* article. She wrote that "you deserve all of this success and more," and that "this is the American dream come true."[13]

Do you believe that there are physiological differences between ethnicities that affect reasoning? Why should we read the word better *in your description of the decision of a Latina compared to other sexes and ethnicities—a word that you used repeatedly in print and verbally—as something other than what it actually means?*

Question #6: Second Amendment Rights. In *Maloney v. Cuomo*, you joined a three-judge panel concluding that the Second Amendment right to bear arms does not apply to the states through the Fourteenth Amendment. You also argued that the right to bear arms is not a "fundamental right."

In your incredibly short opinion, your panel cites *Presser v. Illinois* as the basis for its claim that "it is settled law…that the Second Amendment applies only to limitations the federal government seeks to impose on [the right to bear arms]." Your panel neglects to mention, however, that *Presser* was decided before the courts began incorporating the Bill of Rights through the due process clause of the Fourteenth Amendment, which the Supreme Court in *District of Columbia v. Heller* describes as "the sort of Fourteenth Amendment inquiry *required* by our later cases."[14]

More disturbingly, your panel summarily stated in a scant 11-word conclusion that statutes restricting possession of weapons do not implicate a fundamental right—something that no court has done since the Supreme Court affirmed an individual Second Amendment right in *Heller*.

Why did you fail to even consider the sort of inquiry that the Supreme Court said is required by the Fourteenth Amendment in your decision stripping Second Amendment protection from citizens in the Second Circuit? Do you believe that statutes restricting possession of weapons do not even implicate fundamental rights? How does that view comport with the text of the Second Amendment?

Question #7: Legal Realism. Legal realism, the theory responsible for the rise of judicial activism, is based on the idea that law has no objective meaning and must constantly evolve with the changing needs of society. The problem with legal realism is that both society's "needs" and the seemingly legal solutions to these needs turn out to be—interestingly enough—in synch with the political or policy preferences of the judges who advance this theory. Legal realism mocks the idea that judges simply apply law to cases as mere subterfuge for what really occurs: the judiciary essentially functioning as another political branch, judicially amending the Constitution and other laws as the judges see fit, regardless of what the American people think.

Your academic work has revealed obvious support for this corrosive theory. For example, you have stated:

11. Marcella Bombardieri, "Summers' Remarks on Women Draw Fire," *The Boston Globe*, January 17, 2005, at *http://www.boston.com/news/local/articles/2005/01/17/summers_remarks_on_women_draw_fire* (July 8, 2009).
12. *Ibid.*
13. Peter Baker and Jeff Zeleny, "Obama Hails Judge as 'Inspiring,'" *The New York Times*, May 26, 2009, at *http://community.nytimes.com/comments/www.nytimes.com/2009/05/27/us/politics/27court.html?sort=editors-selection* (July 8, 2009) (Editor's Selection comment by Nancy Hopkins, May 26, 2009).
14. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2813 n.23 (2008) (emphasis added).

- "Our society would be strait-jacketed were not the courts, with the able assistance of the lawyers, constantly overhauling the law and adapting it to the realities of ever-changing social, industrial and political conditions."[15]
- "Yet law must be more or less impermanent, experimental and therefore not nicely calculable. Much of the uncertainty of law is not an unfortunate accident: it is of immense social value."[16]
- "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."[17]

Do you believe that it is the role of judges and the courts to change the laws if they believe the law is outdated or needs changing? What prevents a judge from simply implementing her policy preferences in the place of legislature, and what recourse do citizens have when an unelected judge gets the policy question wrong?

Question #8: Importing Foreign Law. In your April 2009 address to the Puerto Rican chapter of the American Civil Liberties Union (ACLU), you commented that "international law and foreign law will be very important in the discussion of how to think about the unsettled issues in our own legal system."[18] Though you stated that you do not advocate the *use* of international and foreign law in American courts, you nevertheless endorsed the *consideration* of international and foreign law by judges in order to better inform their decisions. As Heritage Foundation scholar Steven Groves has explained, there is little, if any, distinction between these terms, for by considering international and foreign law, one necessarily uses it.[19] Even though you may advocate its use only as persuasive authority, this does not substantially clarify your position, because no judge entertains the notion that foreign law should be regarded as binding authoritative law in the U.S. legal system. There is indeed reason for concern if international and foreign law is used even persuasively, for it could undermine America's own unique laws and written Constitution, which have been enacted by its own people.

You also stated in your ACLU of Puerto Rico speech that "unless American courts are more open to discussing the ideas raised by foreign cases, by international cases, that we are going to lose influence in the world."[20] This is troubling, because the Constitution does not entrust the Supreme Court with influencing and earning the approval of foreign courts. The duties of international relations are specifically given by the U.S. Constitution to the two political branches of the government, especially the executive.[21] For the judiciary to take on these duties would be for it to insert itself into the realm of policymaking—thus divorcing itself further from its role as a legal institution that interprets and is bound by text.

Apart from treaties that incorporate foreign law into U.S. domestic law, why do you think it is a good idea for judges to consider foreign law in deciding domestic law cases?

Question #9: Felon Voting. The Fourteenth Amendment specifically allows the states to abridge or deny the voting rights of those who partake in "rebellion, or other crime." In the case of *Hayden v. Pataki*—a case that included among it's petitioners a double cop-killer—the Second Circuit affirmed this view and further concluded that disenfranchising felons does not violate the Voting Rights Act (VRA).

In your brief three-paragraph dissent, you dismissed the majority's detailed analysis of the VRA's textual meaning and legislative history, arguing that section 2 of the VRA is "unambiguous" and "sub-

15. Sotomayor and Gordon, "Returning Majesty to the Law and Politics," p. 37.
16. *Ibid.*
17. *Ibid.*
18. Judge Sonia Sotomayor, speech to ACLU of Puerto Rico, April 2009, at *http://video.nytimes.com/video/2009/06/10/us/politics/1194840839480/speech-to-the-a-c-l-u-of-puerto-rico.html* (July 6, 2009).
19. Steven Groves, "Questions for Judge Sotomayor on the Use of Foreign and International Law," Heritage Foundation *WebMemo* No. 2525, July 6, 2009, at *http://www.heritage.org/Research/LegalIssues/wm2525.cfm.*
20. Sotomayor, speech to ACLU of Puerto Rico.
21. Groves, "Questions for Judge Sotomayor."

jects felony disenfranchisement and all other voting qualifications to its coverage." As any law student could tell you, if indeed the statute were this clear and so clearly violated the Fourteenth Amendment, it would be void. But it is not so clear that the VRA is as broad as you say, particularly if one takes into account specific statements made in the U.S. House of Representatives and the U.S. Senate Judiciary Committee Reports and on the Senate floor regarding the VRA, which explicitly recognized that felon disenfranchisement laws would not be effected by the VRA.[22]

Do you believe that the VRA guarantees the rights of felons to vote? Do you believe that the VRA supercedes the right of states to deny the vote to criminals, as it is guaranteed in the Fourteenth Amendment?

Question #10: Death Penalty. As a member of a three-person task force of the Puerto Rican Legal Defense and Education Fund, you signed a memo objecting to the reinstatement of the death penalty in New York. The memo demonstrated hostility to the death penalty, equating it with racism: "Capital punishment is associated with evident racism in our society. The number of minorities and the poor executed or awaiting execution is out of proportion to their numbers in the population."[23]

Given your clear views against the death penalty, and your statements suggesting that judges cannot avoid expressing bias in most cases, why should Americans believe that you will not express your anti-death penalty bias on the Supreme Court?

Questions the American People Deserve Answered. Throughout her career, Judge Sotomayor has made a series of statements and rendered a number of decisions that raise grave questions about her ability to be impartial and to decide the law as it is written. Before she is confirmed to a lifetime appointment to the Supreme Court, Senators must engage in questions such as the 10 listed above to assure that she will be able to uphold her oath to impartially decide cases and that she will do so according to what the law says—rather than how she would seek to change the law. The American people, and the Constitution, deserve at least this much.

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22. Hans Von Spakovsky, Felons Voting: Another Troubling Sotomayor Decision," The Foundry, May 29, 2009, at *http://foundry.heritage.org/2009/05/29/felon-voting-another-troubling-sotomayor-decision.*
23. Task Force on the Bill to Restore the Death Penalty in New York State, untitled memorandum to the the Board of Directors, Puerto Rican Legal Defense Education Fund, March 24, 1981.