

Judge Sonia Sotomayor Nomination – Op Ed by ERA Board Member

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FORUM COLUMN

By Maria L. Ontiveros

A Supreme Court justice needs to be wise - wise in the ways of the world, wise in the ways of the courtroom and wise in the ways of the law. Judge Sonia Sotomayor would bring such wisdom to her role as a Supreme Court justice. What do I mean by "(a) Supreme Court justice"? It represents the merger of several ideas. The term can refer to those who serve on the country's highest court. It can also refer to the rendering of decisions in the most important and difficult cases facing our country. In these cases, we seek "Supreme Court justice" or the fair resolution of a dispute under the rule of law. In reality, the terms overlap because it is the role of Supreme Court justices to dispense Supreme Court justice. While it is inevitable that an individual's experiences will affect how they see a dispute, it is also essential that the rule of law be applied. Because the two terms are inextricably bound, I refer to (a) Supreme Court justice. It is precisely the

merger of these ideas that vex those who try to determine the proper role that an individual's background and beliefs should play in deciding legal cases at the highest level. To deal with this difficulty, we need wisdom in a justice. An examination of Sotomayor's life and opinions reveal her wisdom in the ways of the world, the ways of the courtroom and the ways of the law.

Her background has given her wisdom in the ways of the world. As a child raised by a widowed mother in New York city housing projects, she learned both the devastating effects of poverty and the importance of hard work and a solid education. As a criminal prosecutor, she saw the effect of crime on victims and the important role played by police officers. As a civil litigation attorney representing business, she observed the intricacies of the law facing her clients. As a Latina, she has experienced the myriad ways that race and gender affect every person in the United States today.

She brought these varied experiences with her to the bench, where she became wise in the ways of the courtroom as a trial and appellate judge. During her six years of service as a trial judge and 11 years of experience on the 2nd Circuit Court, she has seen a wide variety of cases and attorneys. Some have questioned her temperament, relying on anonymous critiques suggesting that she's abrasive in the courtroom. A recent New York Times op-ed by Indiana Law professor Gerard Magliocca, a self-described conservative who worked at the 2nd Circuit, paints a different picture. He describes her as tough and probing, especially for unprepared attorneys, but also as someone who went out of her way to help new attorneys improve their trial and cross-examination skills. Others have suggested that such criticism would not have been leveled against a male judge in similar circumstances.

Most importantly, Sotomayor is wise in the ways of the law. Her superior intellect, as well as her superior work ethic, has led to an outstanding record of well-reasoned, solidly crafted legal decisions. Despite some unsubstantiated claims of an activist record, a tempered review of her decisions reveals what the Wall Street Journal recently called someone within the mainstream of Democratic judicial appointees. It quotes a partner at Mayer Brown, who said, "there is no reason for the business community to be concerned," and a Simpson Thacher partner who argued in front of her, who said that one of her rulings "demonstrated that in securities litigation, she is in the judicial mainstream."

Wisdom in the ways of the law for (a) justice requires more, though, than a solid, mainstream record. It requires the recognition that there may not be a single correct answer in any given case and that interpretations must be made, even when faithfully applying the law.

The 1999 decision *U.S. v. Santa*, written by Sotomayor, exemplifies this idea. In that case, Sotomayor had to step into somewhat uncharted territory and apply the good faith exception to the exclusionary rule, as applied to officers who reasonably rely on erroneous information, resulting from the clerical error of a court employee. The *Santa* decision required analysis, not just of the Constitution, but the purpose of the exclusionary rule and an understanding of the inner workings of a statewide computer database. Ten years later, during its current term, the U.S. Supreme Court reached a similar decision in *Herring v. U.S.* While

some people have criticized Sotomayor's suggestion that circuit courts set policy, these are exactly the types of interpretations or policies that we require from (a) justice.

Wisdom in the ways of the law also recognizes that, sometimes, justice must be dispensed quickly. In 1995, Sotomayor was called on to act quickly on a request for an injunction that would ultimately lead to the conclusion of the baseball strike. The decision turned on a fairly complex issue of labor law, seldom seen in the federal courts. After a two-hour hearing, Sotomayor needed only 15 minutes to issue her decision. By prohibiting the baseball owners from unilaterally changing the terms of the collective bargaining agreement, she cleared the path for the players to return to play while negotiations continued. Her handling of the case has been praised, by both management and the players' union.

Finally, wisdom in the ways of the law also recognizes that sometimes the less said or done, the better. The case of *Ricci v. DeStefano* may well fall into this category. In that case, the city of New Haven, Conn., devised a test to determine which firefighters should be promoted. When the test was administered and determined to have an adverse impact on black firefighters, the employer had to decide what to do. If it certified the results and was unable to prove that the test accurately predicted who would perform well in the new role, they could certainly lose a Title VII challenge brought by the black firefighters. Instead, the employer chose not to certify the results, promote no one, and look for a better test (one that could be defended as an accurate predictor of job performance or that did not have an adverse impact). The white and Hispanic firefighters who performed well on the test sued, alleging that they were victims of a discriminatory

decision made by the employer. The case raised a variety of complex issues in both Title VII and constitutional law. The district court found for the city, and a three-judge panel of the 2nd Circuit (including Sotomayor) affirmed the case in a short per curiam opinion. The Supreme Court heard oral argument earlier and should issue an opinion before the end of the term. Some have criticized Sotomayor for finding for the employer and/or not writing a full opinion in the case. An alternative view for a justice could be that letting the employer try again, without seeking to prematurely untangle the very difficult issues raised in the case, is better for society. Although the Supreme Court may issue a full decision in the case, it is also possible that it, too, will decide the case on a narrow issue and/or remand it for further deliberation. Just like Sotomayor, it may embrace the notion that, sometimes, justice - and justices - work best when they move slowly.

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