

REPORT ON THE NOMINATION OF JUDGE SONIA SOTOMAYOR

The Association of the Bar of the City of New York

June 30, 2009

On May 1, 2009, Justice David Souter announced his resignation from the United States Supreme Court. On May 26, President Barack Obama nominated Judge Sonia Sotomayor of the United States Court of Appeals for the Second Circuit to replace Justice Souter. The Association of the Bar of the City of New York City formed a Subcommittee to Evaluate the United States Supreme Court Nominee, which conducted a review of Judge Sotomayor's candidacy and reported to the Executive Committee. The Executive Committee evaluated Judge Sotomayor's nomination under the Association's previously adopted guidelines.

The Association reviewed and analyzed information from a variety of sources: Judge Sotomayor's written opinions from her seventeen years on the circuit court and district court; her speeches and articles; her prior confirmation testimony; comments received from the Association's members and committees; press reports, blogs and commentaries; interviews with her judicial colleagues and numerous practitioners; and an interview with Judge Sotomayor.

The Executive Committee evaluated the extent to which Judge Sotomayor possesses the following eight qualifications: (1) exceptional legal ability; (2) extensive experience and knowledge of the law; (3) outstanding intellectual and analytical talents; (4) maturity of judgment; (5) unquestionable integrity and independence; (6) a temperament reflecting a willingness to search for a fair resolution of each case before the court; (7) a sympathetic understanding of the Court's role under the Constitution in the protection of the personal rights of individuals; and (8) an appreciation for the historic role of the Supreme Court as the final arbiter of the meaning of the United States Constitution, including a sensitivity to the respective powers and reciprocal responsibilities of the Congress and Executive.

The Executive Committee concluded that Judge Sotomayor is extremely well-credentialed to serve on our highest court; that she possesses a formidable intellect and a mature legal mind open to the arguments of others; that she is careful about deciding each case based on the precise facts and legal issues before her; that she understands the human dimensions to her cases, but is also faithful in following the law as it exists; and that she has a healthy respect for the limited role of judges and the balance of powers with the executive and legislative branches. Based on the entirety of its work, the Executive Committee finds Judge Sotomayor Highly Qualified to be an Associate Justice of the United States Supreme Court.

The Executive Committee determined that Judge Sotomayor possesses to an exceptionally high degree the eight qualifications set forth in the Association's criteria. The Executive Committee concluded that Judge Sotomayor has the requisite superior intellectual and legal talents to serve on the Supreme Court of our country; that her experience and performance as both a trial and appellate judge for the last seventeen years provide outstanding credentials for deciding cases in our highest court; that her practice as a public prosecutor and private

commercial litigator give her a broad understanding of the competing issues frequently implicated in the adversarial process; that her hard-driving work ethic and careful exploration of each case's facts and applicable law reflect a dedicated, cautious temperament committed to deciding each case fairly; and that her opinions evince a mindful respect for individuals' rights under the Constitution, the courts' prescribed role in adjudicating cases, and the powers and prerogatives of the other two branches of government.

The Executive Committee considered various criticisms of Judge Sotomayor in the course of its analysis, including ones related to her remark on a law school panel that the circuit court "is where policy is made", her comment made in several fora about the judging capabilities of a "wise Latina", her fact-based approach to opinion-writing, and her probing style of questioning attorneys who appear before her. After due consideration, the Executive Committee concluded that these issues do not call into question Judge Sotomayor's ability to be an exceptional member of the Supreme Court.

The Association's Ratings and Guidelines

The Association of the Bar is among the oldest bar associations in the United States and at present consists of over twenty-three thousand members, many of whom are from other parts of the country. The Association has been evaluating judicial candidates for nearly 140 years in a non-partisan manner based on the nominees' competence and merit. Although the Association had evaluated a number of Supreme Court candidates over the course of its history, in 1987 it determined to evaluate every candidate nominated to the Supreme Court.

In 2007, the Executive Committee of the Association moved from a two-tier evaluation system in which candidates were found to be either "qualified" or "not qualified", to a three-tier evaluation system. The ratings and the criteria that accompany them are as follows:

"Qualified." The nominee possesses the legal ability, experience, knowledge of the law, intellectual and analytical skills, maturity of judgment, common sense, sensitivity, honesty, integrity, independence, and temperament appropriate to be a Justice of the United States Supreme Court. The nominee also respects precedent, the independence of the judiciary from the other branches of government, and individual rights and liberties.

"Highly Qualified." The nominee is qualified, to an exceptionally high degree, such that the nominee is likely to be an outstanding Justice of the United States Supreme Court. This rating should be regarded as an exception, and not the norm, for United States Supreme Court nominees.

"Not Qualified." The nominee fails to meet one or more of the qualifications above.

Summary of Findings

a. Highlights of Judge Sotomayor's Background

While Judge Sotomayor's background has been documented extensively elsewhere, it is useful to offer a brief summary of her life here for the purpose of context. Judge Sotomayor was born on June 25, 1954 in New York, New York to parents from Puerto Rico who had moved to the United States during World War II. She was raised in a public housing project in the South Bronx. Her father, a factory worker with an elementary school education, died when Ms. Sotomayor was nine years old. Her mother raised Judge Sotomayor and her younger brother while working six days a week to support her family. Judge Sotomayor credits her mother with instilling in both of her children a strong commitment to education. Judge Sotomayor internalized this value at a young age and developed a passion for reading. She graduated as the valedictorian of Cardinal Spellman High School and received a scholarship to attend Princeton University.

Judge Sotomayor excelled at Princeton, graduating in 1976 with a B.A., *summa cum laude* and *Phi Beta Kappa*. She was a co-winner of the M. Taylor Senior Pyne Prize for scholastic excellence and service to the University. Judge Sotomayor went on to attend Yale Law School, where she served as an Editor of the Yale Law Journal and as a Managing Editor of the Yale Studies in World Public Order.

Upon graduation from law school in 1979, Judge Sotomayor served as an Assistant District Attorney in the Manhattan District Attorney's Office under Robert M. Morgenthau. During her five years in the District Attorney's office, Judge Sotomayor prosecuted murders, robberies, child abuse, police misconduct, and fraud cases.

In 1984, Judge Sotomayor left the District Attorney's office and entered private practice, joining the firm of Pavia & Harcourt as an associate. She was elected partner in 1988 and developed a practice in general civil litigation with a particular focus on intellectual property. Some of her cases entailed fighting counterfeiters of Fendi designer products.

In October 1992, President George H.W. Bush nominated Judge Sotomayor to serve on the United States District Court for the Southern District of New York. At the time of her appointment, Judge Sotomayor was in her late thirties and was the youngest member of the court. During her six years on the Southern District, Judge Sotomayor presided over nearly 500 cases. In 1998, President Clinton appointed Judge Sotomayor to the United States Court of Appeals for the Second Circuit. She is the only Latina to have served on this court. Since her appointment, Judge Sotomayor has participated in over 3,000 panel decisions, authoring more than 250 published opinions.

Judge Sotomayor has served on the board of directors for numerous non-profit organizations, including Princeton University and the Puerto Rican Legal Defense & Education Fund. She has played an active role in creating a variety of community outreach programs, including the Development School for Youth, a series of workshops facilitated by leaders from both the public and private sectors that teaches inner city high school students how to succeed in

a work environment. She has also served as an adjunct professor at Columbia Law School and New York University School of Law.

b. Analysis of Judge Sotomayor's Opinions in the Second Circuit

A review was undertaken of more than 250 opinions authored by Judge Sotomayor while serving on the Second Circuit. Her opinions exhibit highly detailed and logical reasoning across the wide range of subject areas that arise in the Second Circuit. The writing style is well-organized, succinct and authoritative but also respectful. Taken together, Judge Sotomayor's Second Circuit opinions offer three significant insights into her judicial philosophy: (1) a firm respect for the doctrines of judicial restraint, separation of powers, and *stare decisis*; (2) an affinity to plain meaning statutory analysis; and (3) a non-ideological and unbiased approach toward judicial decision-making.

There is no indication in the opinions that Judge Sotomayor seeks to exercise discretion to achieve a personally favored outcome or to advance a particular ideology; rather, they appear to reflect a strong determination to understand and apply the law as it exists. While sensitive to individual rights and concerns about racial and other forms of discrimination, Judge Sotomayor seems to take each case as she finds it, and she has no difficulty in ruling against a complainant where the claims of infringement of individual rights or discrimination are not sustainable under the facts or applicable law.

We note that Judge Sotomayor's participation in the *per curiam* opinion issued in *Ricci v. Destefano*, 530 F.3d 87 (2d Cir. 2008), adjudicating a Title VII challenge regarding the test results of an exam issued to firefighters in New Haven, has garnered attention in the press. Judge Sotomayor served on the three-judge panel that initially affirmed dismissal of the firefighters' claims via summary order. The Second Circuit's decision, which was subsequently issued as a *per curiam* opinion, affirmed "for the reasons stated in the thorough, thoughtful and well-reasoned opinion" of the district court. The Second Circuit refused to grant rehearing en banc (7-6) with Judge Sotomayor voting with the majority, and the Supreme Court reversed the Second Circuit decision by a 5-4 vote. It seems to us that Judge Sotomayor's decision and approach in this case were not driven by an ideological motive given her consistently balanced record in discrimination cases.

c. Analysis of Judge Sotomayor's Opinions in the Southern District

A review was undertaken of more than 450 opinions authored by Judge Sotomayor while she served on the Southern District of New York. The judge dealt with various types of cases involving immigration, discrimination, securities, bankruptcy, intellectual property, Section 1983 claims, and employment law, among other fields—including a famous decision in which she granted the players' request for injunctive relief against Major League Baseball owners, ending a long baseball strike. Her district court opinions reflect a methodical approach devoid of unsupported conclusions or rhetorical excess. They are careful and thorough and tend to follow a consistent format: a detailed presentation of facts, followed by a statement of the issues presented and the controlling authority, and finally an application of the governing law to the facts. The opinions generally are dispassionate, clear, and complete—the judge's reasoning and

chain of thought are not in doubt. They include extensive citations to precedent, which is applied and followed, and demonstrate an ability to draw distinctions. They reflect a careful, hardworking jurist with an intelligent mind, striving to find and apply the proper principles to resolve a particular dispute.

In addition to displaying a vigorous adherence to precedent, Judge Sotomayor's reasoning does not appear to be dictated by any particular agenda or political philosophy. The opinions reflect an intense determination to understand and apply the law as it exists, regardless of the status of the litigants. Judge Sotomayor does not appear to have favored government or private litigants in either criminal or civil settings. In immigration and habeas decisions, she lays out the standard of review, the level of deference owed to findings of administrative agencies, and the controlling legal principles, and then applies the principles to their logical result, often rejecting the immigrant's position. In some cases, Judge Sotomayor appears to have reached her result using what could be considered narrow (or even "strict") statutory construction.

d. Review of Judge Sotomayor's Speeches and Articles

Several of Judge Sotomayor's speeches delivered to law students and prospective law clerks describe the process of deliberation on the circuit court and reflect her intellectual engagement as an appellate judge:

Unquestionably, three heads are better than one, and it is an extremely gratifying exercise to have three judges dissect a particularly difficult case and resolve it. In the process of coming to a decision, explaining one's rationales to other judges, and listening to their reasoning, an appellate court judge can sometimes be forced to see a case from new and unexpected angles. The insights that one's colleagues bring to the table can also press the other judges to frame the issues in ways that make it much easier to resolve, to harmonize with the existing case law, or to provide clarification in a given area of law.

- *Remarks at NYLS Law Review Dinner, April 7, 2000*

Some of Judge Sotomayor's past words have created controversy at the outset of the confirmation process and will likely be the subject of further scrutiny as the process continues. Her highly publicized line from the taped Duke Law School Panel that the circuit court "is where policy is made" has been cited by some observers as evidence that she is a judicial activist who will legislate from the bench. Several of her speeches also use the word "policy" in discussing the impact of the circuit courts. A close examination of her speeches amplifies her meaning in using this term. The language appears in her discussion of the differences between the work of the district courts and the circuit courts (and at the Duke Forum she was discussing these same differences for an audience of prospective law clerks). She makes the point that the district court decides only the case before it and the ramifications are generally limited to the parties, but the circuit court's decisions are binding precedent and can have a policy *impact* with far-reaching ramifications. Her reference to "policy" appears to be referring to *precedent*. She is wary of creating precedent (and thereby creating binding legal strictures) without carefully considering the ramifications in other circumstances. She uses similar language in several speeches:

Our decisions are, moreover, binding over all the district courts in our circuit and over our own panels, which seek to harmonize the law of the Circuit, in subsequent cases. Thus our decisions affect not only the individual cases before us, but the course of litigation and the outcomes of many similar cases pending or to come. This fact has made me much more aware of the *policy impact* of the decisions I have drafted or worked on. I give much more thought to the impact of our holdings on hypothetical factual variations that may arise and that are likely to be controlled by our decision. If our proposed holding would lead to results in other cases which cannot be squared with the language of a statute or its legislative history and purpose, then the analysis and holding will have to be reexamined and either abandoned or narrowed further. In fact, this concern permeates not only opinion drafting but the exhaustive review that most panel members give each others' drafts to ensure we are reconciling our own past precedent, dealing with the Supreme Court case law, and interpreting the law in an intellectually honest way.

-Remarks at NYLS Law Review Dinner, April 7, 2000 (emphasis added)

Judge Sotomayor's focus in these speeches is an acknowledgement of the power of binding precedent and the need to be wary of unexamined consequences. Rather than being evidence of judicial activism, her concern over the "policy" impact of decisions appears to reflect a predisposition towards judicial restraint and caution.

Judge Sotomayor has also received attention for her statement, made in a number of forums, that:

I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life. *-Olmos Lecture at Boalt Hall School of Law, October, 2001.*

Few would quarrel with the notion, argued by Judge Sotomayor in her Olmos Lecture and elsewhere, that a judge's life experience may have some influence on the approach to decision-making. Judge Sotomayor's expression of hope that a wise Latina with certain experience would more often reach a better decision than a white male lacking that experience raised questions about her comparison of decision-makers based in part on their gender, or their ethnic or racial background. We note, however, that on the occasions where Judge Sotomayor has made this type of remark, one of her purposes has been to explore and encourage the advancement of minorities and women within the judiciary branch. Judge Sotomayor also makes the point that the decision-maker's experience or lack of experience ultimately is relevant for the way in which it impacts the deliberative process. In short, her statements seem intended to show her appreciation of the value of diverse life experience that a judge brings to bear in deciding cases. We do not harbor any concern that Judge Sotomayor's remarks reflect any bias or that she intended to suggest that her own experiences should be given undue weight in deciding a case. This conclusion is based on our full examination of her extensive record, including the respect she shows for the deliberative process and for her judicial colleagues of all backgrounds and across the ideological spectrum, a review of her opinions, the remarks of practitioners who have appeared before her, and, significantly, the reviews of her fellow judges. The judges' comments

are particularly important because they come from colleagues of various genders, ethnicities, and political philosophies, who report that Judge Sotomayor works well with colleagues and takes their views into account in formulating her final position on cases.

Judge Sotomayor's articles offer some important insights into her understanding of the limits of judicial power and her self-reflective approach as a jurist, including her view on the importance of judges being truly impartial. In a foreword to Daniel Terris, Cesare P.R. Romano, and Leigh Swigart's book, *THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES* (2007), Judge Sotomayor discussed the parallel problems facing international and American judges: "[A]ll judges have cases that touch our passions deeply, but we all struggle constantly with remaining impartial...[W]e are also acutely aware of the other dimensions of our roles as judges and...we struggle to find ways to convince our colleagues of our views and to accommodate the needs—and respect the powers—of the other branches of government."

If there is a single theme that runs throughout Judge Sotomayor's varied writing—which includes a student note, a foreword to a book discussing the biographies of judges who serve on international tribunals, and a tribute to the Dean of New York University's School of Law—it is that Judge Sotomayor respects and admires our judicial system and courts, her colleagues and the law. Her writings display an enthusiasm and love for the law, its practice and practitioners.

The Association's Assessment of the Nominee and Conclusions

We find Judge Sotomayor to be a highly qualified candidate for the Supreme Court. She demonstrates a formidable intellect; a diligent and careful approach to legal decision-making; a commitment to unbiased, thoughtful administration of justice; a deep commitment to our judicial system and the counsel and litigants who appear before the court; and an abiding respect for the powers of the legislative and the executive branches of our government. We highlight several of her strengths that we find particularly significant in reaching this determination.

First, Judge Sotomayor has outstanding analytical talents and is extraordinarily engaged in the issues raised by the cases before her. Given the intense analysis and work that goes into cases presented to the Supreme Court, we believe litigants will appreciate Judge Sotomayor's masterful review of the cases before her and the public will be well-served by such an intellectually-engaged, hard-working jurist. Judge Sotomayor's willingness to analyze each issue and argument implicated in a case can only benefit the quality of the Court's decisions.

Second, Judge Sotomayor is a jurist who is mindful of the limits of judicial power and who aspires to create holdings grounded in the facts of the case at bar and the applicable law rather than using cases as platforms for the announcement of broad ideologically driven rules. Her approach reflects a preference for moving the law incrementally, but given her extensive judicial experience on both the circuit and district court levels, we believe that she also will be mindful of the need for the Supreme Court to provide meaningful guidance to the public and lower courts in the important matters that come before the Court.

Third, we believe Judge Sotomayor’s collegiality is an important asset. The strong professional relationships she has built with her colleagues on the bench, no matter their ideological leanings and backgrounds, suggests that should she be confirmed, Judge Sotomayor will establish a similarly collegial rapport with her fellow justices. It appears that Judge Sotomayor’s demeanor has won the respect not only of her colleagues, who say that she is talented at collaborating with multiple parties and forging consensus, but also of the vast majority of practitioners who appear before her.

Fourth, we are impressed by Judge Sotomayor’s ideological neutrality. Judge Sotomayor’s decisions appear intent on reaching the legally correct result in a given case, not advancing an overarching agenda. Parties from across the political spectrum should find in Judge Sotomayor a keen mind that values reason over rhetoric and is open to any argument with a sound foundation in the law. While the Executive Committee believes that Judge Sotomayor’s “wise Latina” comments were not well-designed to convey her overall point that a wider array of experiences can lead to a better decision-making process and legal outcome, we have seen no evidence that the judge exhibits biases in her legal reasoning or decisions. Her opinions exhibit an understanding of opposing points of view, but no partiality toward any group. Her colleagues and the vast majority of litigants appearing before her have also found her legal reasoning and interpersonal style to be devoid of bias.

For similar reasons, we also view Judge Sotomayor’s fidelity to precedent as one of her greatest strengths. Judge Sotomayor’s opinions reflect the work of a jurist who takes case law seriously; they almost uniformly include an exhaustive survey of the relevant legal doctrines before applying the law to the facts of a case in a comprehensive fashion.

Finally, Judge Sotomayor’s experience as a district court judge is valuable. Should Judge Sotomayor be confirmed by the Senate, she would be the only sitting justice who has served at the federal district court level. The Executive Committee believes that having this diversity of experience on the Supreme Court bench is desirable. Judge Sotomayor would be able to provide insights as to how a given holding would affect lower court practice, with important consequences for both trial court judges and litigants.

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Based on its review, and considering the Association’s guidelines and rating system, and having reflected on the complete factual picture presented by Judge Sotomayor’s candidacy, the Executive Committee of the Association of the Bar of the City of New York concludes that Judge Sotomayor is Highly Qualified to serve as an Associate Justice of the United States Supreme Court.