News & Updates
EPPC Briefly
Interview
Press Release

Browse by:
- Author
- Title
- Date
- Type

Home > News & Updates >

The Record of Supreme Court Nominee Sonia Sotomayor

Print Email

By Edward Whelan

Posted: Tuesday, June 9, 2009

PRESS RELEASES & NEWS
Publication Date: June 9, 2009

In a series of posts on National Review Online's Bench Memos blog, EPPC President Ed Whelan is addressing the record of Supreme Court nominee Sonia Sotomayor. Here is an outline of various of Mr. Whelan's posts, followed by the full text of the posts.

What's at Stake

1. Filling the Souter Seat
2. Justice Souter and His Replacement

Sotomayor's Approach to Judging

1. Sotomayor's Repudiation of Objective Judging
2. The "Latina Judge's Voice"
    - Sotomayor's "Unscripted" Law-Review Article?
    - More on Sotomayor's "Unscripted" Law-Review Article
    - Still More on Sotomayor's "Unscripted" Law-Review Article
3. Her Majesty Sonia Sotomayor vs. the Rule of Law
4. Judge Sotomayor's Misreliance on Foreign and International Law
5. "I Don't Know What Liberal Means"
6. Lack of impartiality
    - Sotomayor's Public Cheerleading for Obama
    - Re: Sotomayor's Public Cheerleading for Obama
    - Missing the Point on Sotomayor's Public Cheerleading for Obama
7. Sotomayor's Revealing Joke About Supreme Court Justices Making Policy
8. Biden on Sotomayor's Supposed Empathy for

Police
9. David Brooks's Wishful Thinking on Sotomayor?
10. Jeffrey Rosen's Reassessment of Sotomayor

Racial Discrimination and Quotas

1. The New Haven Firefighters Case (*Ricci v. DeStefano*)
    - *Ricci v. DeStefano*
    - White House's Misleading Spin on New Haven Firefighters Case
    - The New Haven Firefighters Case and Judicial Activism vs. Judicial Restraint
    - Second Circuit Oral Argument in the New Haven Firefighters Case
    - *NYT* Background on New Haven Firefighters Case--Part 1 of 2
    - *NYT* Background on New Haven Firefighters Case--Part 2 of 2
    - "What Really Happened" in the New Haven Firefighters Case
    - Richard Thompson Ford's Confused Irony About *Ricci*
2. Sotomayor's "Novel Equal Protection Theor[y]"
3. Sotomayor's Fervent Hope for a "Completely Integrated Society"
4. Sotomayor's Single-Sex Club
    - Sotomayor on Good Discrimination vs. Invidious Discrimination
    - Judge Sotomayor and the Belizean Grove
    - Sotomayor Resigns Membership in Belizean Grove
5. Re: She Doesn't Impose Her Own Quotas
6. Goldstein on Judge Sotomayor and Race

Abortion

1. Sotomayor and Abortion
2. The Abortion-Assurance Mysteries
3. Sotomayor Commends Liberal Lawsuits on Abortion, Illegal Immigration, and Welfare Reform

Criminal Procedure

1. The Exclusionary Rule
    - Sotomayor as Trailblazer of Good-Faith Exception to Exclusionary Rule?
    - Hook, Line, and Sinker

First Amendment speech

1. Sotomayor on Campaign Finance Reform and the First Amendment

Death Penalty

1. Re: Sotomayor Questionnaire Omits Death Penalty-Racism Memo

Support for Puerto Rican Independence

political archeology, an excavation of Obama's radical roots and socialist affiliations."

1. Former (?) Puerto Rican Nationalist Nominated to North American Supreme Court
2. Sotomayor's "Affirmative Action Plan for Puerto Rico"

Filling the Souter Seat

Some initial thoughts on President Obama's opportunity to appoint a successor to Justice Souter:

1. Obama's own record and rhetoric make clear that he will seek left-wing judicial activists who will indulge their passions, not justices who will make their rulings with dispassion. As I discussed more fully in this essay:

In explaining his vote against [the confirmation of Chief Justice] Roberts, Obama opined that deciding the "truly difficult" cases requires resort to "one's deepest values, one's core concerns, one's broader perspectives on how the world works, and the depth and breadth of one's empathy." In short, "the critical ingredient is supplied by what is in the judge's heart." No clearer prescription for lawless judicial activism is possible.

Indeed, in setting forth the sort of judges he would appoint, Obama has explicitly declared: "We need somebody who's got the heart, the empathy, to recognize what it's like to be a young teenage mom, the empathy to understand what it's like to be poor or African-American or gay or disabled or old--and that's the criterion by which I'll be selecting my judges." So much for the judicial virtue of dispassion. So much for a craft of judging that is distinct from politics.

2. Souter has been a terrible justice, but you can expect Obama's nominee to be even worse. The Left is clamoring for "liberal lions" who will redefine the Constitution as a left-wing goodies bag. Consider some of their leading contenders, like Harold Koh (champion of judicial transnationalism and transgenderism), Massaschusetts governor Deval Patrick (a racialist extremist and judicial supremacist), and Cass Sunstein (advocate of judicial invention of a "second Bill of Rights" on welfare, employment, and other Nanny State mandates). Or Second Circuit judge Sonia Sotomayor, whose shenanigans in trying to bury the firefighters' claims in Ricci v. DeStefano triggered an extraordinary dissent by fellow Clinton appointee José Cabranes (and the Supreme Court's pending review of the ruling). Or Elena Kagan, who led the law schools' opposition to military recruitment on their campuses, who used remarkably extreme rhetoric--"a profound wrong" and "a moral injustice of the first order"--to condemn the federal law on gays in the military that was approved in 1993 by a Democratic-controlled Congress and signed into law by President Clinton, and who received 31 votes against her confirmation as Solicitor General. Or Seventh Circuit judge Diane Wood, a fervent activist whose extreme

opinions in an abortion case managed to elicit successive 8-1 and 9-0 slapdowns by the Supreme Court.

3. Don't be fooled by the false claims that we have a conservative Supreme Court. The Court has a working majority of five living-constitutionalists. Four of them--Stevens, Souter, Ginsburg, and Breyer--consistently engage in liberal judicial activism, and a fifth, Kennedy, frequently does. As a result, the Court is markedly to the left of the American public on a broad range of issues. Indeed, in coming years, Souter's replacement may well provide the fifth vote for:

-- the imposition of a federal constitutional right to same-sex marriage;
-- stripping "under God" out of the Pledge of Allegiance and completely secularizing the public square;
-- the continued abolition of the death penalty on the installment plan;
-- selectively importing into the Court's interpretation of the American Constitution the favored policies of Europe's leftist elites;
-- further judicial micromanagement of the government's war powers; and
-- the invention of a constitutional right to human cloning.

American citizens have various policy positions on all these issues, but everyone ought to agree that they are to be addressed and decided through the processes of representative government, not by judicial usurpation. And President Obama, who often talks a moderate game, should be made to pay a high price for appointing a liberal judicial activist who will do his dirty work for him.

Justice Souter and His Replacement

It's been a busy day of media interviews, but I've worked in some writing. This *New York Times* symposium on Justice Souter's legacy includes my contribution, "The Souter Mistake." An excerpt:

> What will Justice Souter be remembered for? No opinion of his comes to my mind except the joint opinion that he, Justice O'Connor and Justice Kennedy co-authored in 1992 in *Planned Parenthood v. Casey*. That joint opinion is significant not for its coherence or elegance (it has neither quality) but because it perpetuated *Roe v. Wade*'s removal of the issue of abortion policy from the ordinary democratic processes -- and it resorted to what Justice Scalia aptly called a "Nietzschean vision" of the judicial role in order to do so.
>
> The end result was not, as Souter and company contended, a resolution of the

> bitter national controversy over abortion, but the continued poisoning of American politics by the Court's power grab on that issue.

Sunday's *Washington Post* will also present, in its Topic A feature on what President Obama should do with his first Supreme Court nomination, my advice, including:

> Alas, the once-dominant species of liberal proponents of judicial restraint has relatively few surviving members. Obama should find them -- why not Jose Cabranes, the excellent judge whom President Clinton appointed to the 2nd Circuit? -- and help revive the species.

As for the interviews: Here's the transcript (with a few minor garbled passages) of my discussion with Glenn Beck. Believe it or not, I couldn't bring myself to support Harold Koh's candidacy for the Court.

Sotomayor's Repudiation of Objective Judging

Jennifer Rubin's excellent cover article in the new issue of the *Weekly Standard* explores Judge Sotomayor's "wise Latina woman" speech more fully. Two key excerpts:

> Sotomayor's speech is in many ways a distillation of the most extreme views of the liberal civil rights establishment. They have dispensed with Martin Luther King Jr.'s vision of a "colorblind" society, in which people "will not be judged by the color of their skin but by the content of their character." The notion of a shared American tradition is considered a dodge for maintaining white, male domination of society. Instead, they aim to secure the levers of power, to empower disadvantaged groups to pursue their distinct ideology, culture, and language. It is not enough to eliminate barriers to entry in business, universities, government, or the bench; numerical quotas are essential to securing each group's "fair share." And most critically, group identity and goals supplant individual identity and professional obligations. Each of these elements, the core of the most extreme variety of contemporary multiculturalism, is prominently featured in Sotomayor's speech and law review article.
>
> She also denigrates the notion of a

> neutral, objective judiciary which treats all citizens alike and removes personal bias from the judicial branch. The goal here is not to remove racial or ethnic bias from judging, but to make sure the right bias is given voice--secured by increased numbers of minority judges. And her qualms about intellectual rigor and impartiality extend to virtually all that judges do ("I wonder whether achieving that goal is possible in all or even in most cases"). This is legal relativism, if not nihilism. No objective truth, no objective judging, only power politics.

Sotomayor's "Unscripted" Law-Review Article?

According to Jen Rubin, Sotomayor defender Lanny Davis contends that Judge Sotomayor "misspoke" when she said, "I would hope that a wise 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." That reminds me of this excerpt from a *Washington Post* article today:

> Meanwhile, conservatives have *seized upon Sotomayor's unscripted moments* to make the case that she is outside the mainstream. The two most often quoted are a statement she made about how appellate judges make policy and her *observation about how being a Latina affects her role as a judge*: "I would hope that a wise 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."

The trusting reader wouldn't understand that Sotomayor's "observation about how being a Latina affects her role as a judge," far from being "unscripted," was from the prepared text of a speech that Sotomayor then published as a law-review article. (For more on Sotomayor's comments in that speech, see my post "Sonia Sotomayor's Selective Empathy," which discusses and links to Stuart Taylor's critique.) It's entirely fair to hold Sotomayor to what she said.

Of course, unscripted comments like Sotomayor's quip about how the courts of appeals are where "policy is made" can themselves be especially revealing precisely because they're unscripted.

More on Sotomayor's "Unscripted" Law-Review Article

I've already discussed the silly efforts of Judge Sotomayor's defenders to claim that she "misspoke" and was "unscripted" when she said in 2001, "I would hope that a wise 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." As I've pointed out, that comment was from the prepared text of a speech that Sotomayor then published as a law-review article.

Now it turns out that Sotomayor made substantially similar comments in a 1994 speech, a speech that was part of the Senate record on her Second Circuit confirmation in 1998. Somehow the blogger who reports this news thinks it's significant not because it further refutes the White House's defense of Sotomayor's comment but because it supposedly raises the question why Republicans didn't object to this comment in 1998.

Applying Occam's razor, I'd speculate that the answer to that question is that the staffer who reviewed Sotomayor's speeches at the time missed the comment. While unfortunate, that would hardly be surprising, especially in light of the much lower level of resources devoted to an appellate confirmation.

(I'll also note that the sentence at issue in the 1994 speech--"I would hope that a wise woman with the richness of her experiences would, more often than not, reach a better conclusion"--doesn't itself state "better" than whom. The reader has to look four sentences earlier to understand that Sotomayor is comparing a "wise woman" to a "wise man." Someone skimming the speech might easily miss that.)

In any event, the strong reaction that Sotomayor's 2001 comment has elicited renders desperate any suggestion that Republicans are somehow estopped from objecting to it because of their failure in 1998 to object to a similar comment she made in 1994.

Still More on Sotomayor's "Unscripted" Law-Review Article

At CQ's "Legal Beat" blog, Seth Stern documents more instances of Judge Sotomayor's sentiment that "a wise Latina woman"--or a wise woman, regardless of her ethnicity--"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." (My previous posts on the topic are here and here.) As Stern delicately puts it, Sotomayor's "repeated use of the phrases ‘wise Latina woman' and ‘wise woman' [in substantially similar remarks] would appear to undermine the Obama administration's assertions that the statement was simply a poor choice of words."

Her Majesty Sonia Sotomayor vs. the Rule of Law

In 1996, Judge Sonia Sotomayor delivered a speech to law students that she then turned into a law-review article (which she co-authored with Nicole A. Gordon), "Returning Majesty to the Law and Politics: A Modern Approach" (30 Suffolk U.L. Rev. 35 (1996)). The article is muddled and mediocre--it's certainly not something that those struggling to portray Sotomayor as brilliant would want to highlight--but I will focus less on its overall quality than on some of Sotomayor's arguments:

1. Sotomayor argues, "It is our responsibility"--the responsibility of lawyers and judges--"to explain to the public how an often unpredictable system of justice is one that serves a productive, civilized, but always evolving, society." She identifies--and treats as equally legitimate--four "reasons for the law's unpredictability": (a) "laws are written generally and then applied to different factual situations"; (b) "many laws as written give rise to more than one interpretation"; (c) *"a given judge (or judges) may develop a novel approach to a specific set of facts or legal framework that pushes the law in a new direction"*; and (d) the purpose of a trial is not simply to search for the truth but to do so in a way that protects constitutional rights.

Somehow Sotomayor doesn't see fit even to question whether, and under what circumstances, it's proper or desirable for a judge to "develop a novel approach" that "pushes the law in a new direction." Instead, she complains about "recurring public criticism about the judicial process," and she laments that lawyers "have also unfortunately joined the public outcry over excessive verdicts and seemingly ridiculous results reached in some cases" (as though lawyers have some special responsibility to indulge judicial excess). The fact that Sotomayor cites as her lead example of unwelcome "public criticism" an article "describing Senator Dole's criticism of liberal ideology of Clinton judicial appointments and American Bar Association" lends credence to the suspicion that Sotomayor is less interested in the majesty of the law than in the majesty of liberal activist judges.

2. Sotomayor discusses "the law" without distinguishing meaningfully between the legislature's role in making law and the judiciary's role in applying it. For example, she asserts:

> The public expects the law to be static and predictable. The law, however, is uncertain and responds to changing circumstances.

What the public is entitled to expect is that judges will apply the law neutrally, according to established principles. That's a large part of what the "rule of law" means. It's the province of legislatures to change the law (prospectively, of course) to "respond[] to changing

circumstances."

3. Sotomayor complains that "the public fails to appreciate the *importance of indefiniteness in the law*." But beyond pointing out the uncontroversial fact that some indefiniteness is inevitable (for reasons (a), (b), and (d) in point 1), she nowhere makes the case that indefiniteness is somehow a positive good. She relies heavily on Jerome Frank's legal realist views about the development of law, but nowhere explains why legislatures aren't the proper forum for (to use Frank's phrase) "adapting [law] to the realities of ever-changing social, industrial, and political conditions."

4. As if Sotomayor's unwarranted celebration of "indefiniteness" weren't enough to alarm anyone who cares about the rule of law, anyone interested in civil-justice reform ought to take note of Sotomayor's criticism that "legislators have introduced bills that place arbitrary limits on jury verdicts in personal injury cases. But to do this is inconsistent with the premise of the jury system." Oh, really? How can it be that legislation can determine when juries should rule for plaintiffs but not limit the amounts they can award?

Judge Sotomayor's Misreliance on Foreign and International Law

I've just watched the 22-minute video of an April 2009 speech that Judge Sotomayor delivered to the ACLU of Puerto Rico on the topic of American judges' use of foreign and international law. It's a terribly muddled speech in which Sotomayor explicitly embraces Justice Ginsburg's misguided position and asserts that Justice Scalia and Justice Thomas misunderstand the issue even as she misconceives the basis of their objections. (She also posits an unintelligible, but supposedly fundamental, distinction between "us[ing]" foreign and international legal materials and "consider[ing] the ideas that are suggested by" foreign and international legal materials.)

A week ago, Senator Cornyn launched an impressive series of daily questions for Judge Sotomayor. His first question in the series--"What is the proper role of foreign and international law in interpreting the United States Constitution?"-- draws on Sotomayor's speech. I haven't yet located a transcript of the speech (and haven't transcribed the relevant portions myself), so I copy here Senator Cornyn's account:

> Judge Sotomayor argued that foreign and international law can be "very important" to American judges as a source of "good ideas" that "set our creative juices flowing." In response to those who oppose judicial consideration of foreign law to determine the limits of democratic decisionmaking, she stated at

> the 1:08 mark: *How can you ask a person to close their ears? Ideas have no boundaries. Ideas are what set our creative juices flowing. They permit us to think, and to suggest to anyone that you can outlaw the use of foreign or international law is a sentiment that is based on a fundamental misunderstanding. What you would be asking American judges to do is to close their minds to good ideas.*
>
> Judge Sotomayor also stated at the 20:48 mark that considering foreign and international law is part of a judge's "freedom of ideas":
>
> *To the extent that we as a country remain committed to the concept that we have freedom of speech, we must have freedom of ideas. And to the extent that we have freedom of ideas, international law and foreign law will be very important in the discussion of how to think about the unsettled issues in our legal system. It is my hope that judges everywhere will continue to do this.*

As Cornyn points out, Sotomayor's confused invocation of a judge's "freedom of ideas" provides no warrant for use of foreign and international legal materials. The unconstrained judicial role that Sotomayor's comments reflect, and her apparent willingness to make freewheeling resort to foreign and international legal materials to define the meaning of provisions of our Constitution and statutes, are very troubling. In my judgment, Sotomayor's views on this matter provide a compelling basis for senators to vote against her confirmation.

(My July 2005 House of Representatives testimony on the general subject is here.)

"I Don't Know What Liberal Means"

According to the account that Judge Sotomayor provided of a speech that she gave in January 2001, Sotomayor offered this explanation of her problems getting confirmed to the Second Circuit:

> Senate Republican leaders believed that I was a potential for the Supreme Court one day. They also believed that I am a liberal, and therefore did not want the nomination to go through. *I don't know what liberal means*....

Hmmm. Evidently Sotomayor knew what "liberal" meant when a *New York Times* article quoted her in 1983, when she was working as an assistant district

attorney:

> "I had more problems during my first year in the office with the low-grade crimes--the shoplifting, the prostitution, the minor assault cases," [Sotomayor] says. "In large measure, in those cases you were dealing with socioeconomic crimes, crimes that could be the product of the environment and of poverty.
>
> "Once I started doing felonies, it became less hard. No matter how liberal I am, I'm still outraged by crimes of violence. Regardless of whether I can sympathize with the causes that lead these individuals to do these crimes, the effects are outrageous."

In stating "No matter how liberal I am," Sotomayor is describing herself as very liberal. The clause is the semantic equivalent of "Even though I'm very liberal ...." Among other things, Sotomayor understood back then that a liberal "sympathize[s] with the causes that [supposedly] lead these individuals to do these crimes" and is inclined to explain crimes as "the product of the environment and of poverty."

But I think that I can offer Sotomayor even more help on what "liberal" means, at least in the context of judging.

A liberal judge thinks that it's proper to indulge her own identity in deciding cases.

A liberal judge celebrates "the importance of indefiniteness in the law" and the "unpredictability" that results when a judge "develop[s] a novel approach" that "pushes the law in a new direction."

A liberal judge resorts to shenanigans to bury the claims of white firefighters that they've been discriminated against on the basis of their race.

A liberal judge favors campaign-finance restrictions over the First Amendment.

A liberal judge embraces novel equal-protection theories that would compromise public safety.

A liberal judge publicly cheerleads liberal politicians.

A liberal judge excuses her own acts of discrimination.

A liberal judge thinks that Supreme Court justices are entitled to make policy.

A liberal judge hides her support for racial quotas behind gauzy euphemisms.

A liberal judge commends lawsuits that promote abortion and illegal immigration and that undermine welfare reform.

Hope these examples help. Happy to flesh out more fully.

Sotomayor's Public Cheerleading for Obama

In a speech that she delivered to the Black, Latino, Asian Pacific American Law Alumni Assocation on April 17, 2009--two weeks before news of the Souter vacancy broke--Judge Sotomayor made a number of references to President Obama that seem surprisingly and disturbingly partisan coming from a sitting federal judge:

> "The power of working together was, this past November, resoundingly proven." (p. 6)
>
> "The wide coalition of groups that joined forces to elect America's first Afro-American President was awe inspiring in both the passion the members of the coalition exhibited in their efforts and the discipline they showed in the execution of their goals." (p. 7)
>
> "On November 4, we saw past our ethnic, religious and gender differences." (p. 10)
>
> "What is our challenge today: Our challenge as lawyers and court related professionals and staff, as citizens of the world is to keep the spirit of the common joy we shared on November 4 alive in our everyday existence." (p. 11)
>
> "It is the message of service that President Obama is trying to trumpet and it is a clarion call we are obligated to heed." (p. 13)

Canon 2 of the Code of Conduct for United States Judges provides that a judge "should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Sotomayor's public cheerleading for Obama seems clearly to violate that ethical obligation.

Re: Sotomayor's Public Cheerleading for Obama

Just a couple of follow-up comments to my post yesterday about Judge Sotomayor's disturbingly partisan pro-Obama remarks in her April 17, 2009, speech:

1. Both supporters and opponents of President Obama properly take note of the historic achievement that his election marks, and I would not see remarks along that line as partisan. For that reason, I did not include among the remarks that I found objectionable Sotomayor's reference to "a grand historical event like the Presidential election of a person of color." (p. 10) (One of the passages that I do find objectionable includes a reference to the election of "America's first Afro-American President," but it is other parts of that passage--e.g., the "wide coalition of groups that joined forces ... was awe inspiring"--that render it partisan.)

2. A hypothetical might enable supporters of Sotomayor to exercise dispassionate judgment on this matter. Imagine that then-D.C. Circuit judge John Roberts, in the aftermath of President Bush's re-election victory in 2004, had made public statements like these:

> "The power of working together was, this past November, resoundingly proven."
>
> "The wide coalition of groups that joined forces to re-elect President Bush was awe inspiring in both the passion the members of the coalition exhibited in their efforts and the discipline they showed in the execution of their goals."
>
> "On Election Day, we saw past our ethnic, religious and gender differences."
>
> "What is our challenge today: Our challenge as lawyers and court related professionals and staff, as citizens of the world is to keep the spirit of the common joy we shared on Election Day alive in our everyday existence."
>
> "It is the message of promoting democracy worldwide [or, if you prefer, of 'promoting compassionate conservatism'] that President Bush is trying to trumpet and it is a clarion call we are obligated to heed."

Would anyone imagine that any sitting federal judge--much less someone who has since been nominated to the Supreme Court--could appropriately have made such comments?

Sotomayor's remarks provide further evidence that she doesn't practice the judicial obligation of impartiality.

Missing the Point on Sotomayor's Public Cheerleading for Obama

At the *Huffington Post*, Sam Stein imagines that he's rebutting my criticism of Judge Sotomayor's

disturbingly partisan public cheerleading for President Obama as he points out that Chief Justice Roberts had various Republican ties in 2000 and earlier--before he became a federal judge.

My criticism rests entirely on the fact that Sotomayor was a sitting federal judge when she engaged in her public cheerleading (just two months ago). Stein quotes the relevant portion of my post--"surprisingly and disturbingly partisan coming from a sitting federal judge"--but somehow manages to miss the point.

The *Washington Monthly*'s Steve Benen also gets confused. Benen thinks that my objection is akin to complaining about Sotomayor's "expressing some ideological predispositions" and that her public cheerleading for Obama is the equivalent of taking part in "a Federalist Society gathering, or a conference hosted by the American Constitution Society." He also thinks it's meaningful to note that Justice Scalia and Vice President Cheney were "hunting buddies"--as though that situation has some meaningful bearing on assessing Sotomayor's public remarks.

Finally, Benen resorts to contending that "Sotomayor's remarks seemed to address a sense of cultural and civic pride more than obvious partisanship." Oh, sure, there's nothing obviously partisan about stating, to cite just two of my five examples, that "we are obligated to heed" the "message of service that President Obama is trying to trumpet" and that "[o]ur challenge as lawyers and court related professionals and staff, as citizens of the world is to keep the spirit of the common joy we shared on November 4 alive in our everyday existence." You see, promoting the cult of Obama is just a matter of "cultural and civic pride."

Just wondering: Has any sitting judge since the adoption of the Code of Conduct for United States Judges ever engaged in such public cheerleading for a president?

Sotomayor's Revealing Joke About Supreme Court Justices Making Policy

In a May 2006 speech, Judge Sotomayor tells "a joke that [she thinks] aptly describes the difference between supreme court, circuit court, and district court judging":

> It involves three judges who go duck hunting. A duck flies overhead and *the supreme court justice*, before he picks up his shotgun, *ponders about the policy implications* of shooting the duck--how will the environment be affected, how will the duck hunting business be affected if he doesn't shoot the duck, well by the time he finishes, the duck got away.

> Another duck flies overhead, and the circuit judge goes through his five part test before pulling the trigger--1) he lifts the shotgun to his shoulder, 3) [sic] he sights the duck, 3) he measures the velocity of the duck's flight, 4) he aims, and 5) he shoots--and, he misses.
>
> Finally, another duck flies by, the district judge picks up the shotgun and shoots. The duck lands and the district judge picks it up, swings it over his shoulder and decides that he will let the other two judges explain what he did over dinner.

So Sotomayor thinks an unobjectionable and apt description of *what is most distinctive about* the role of Supreme Court justices in making decisions ~~involves~~ *is* "ponder[ing] about ... policy implications." [Update: Eugene Volokh offers a characteristically thoughtful critique of the original version of this post. In response, I have tweaked my language in this paragraph; the italicized words are new.]

(The excerpt above is from the prepared text on pages 10-12 of the speech (emphasis added). Sotomayor handwrote some trivial changes.)

Biden on Sotomayor's Supposed Empathy for Police

Politico reports that, at a White House event yesterday in support of Judge Sotomayor's nomination, Vice President Biden assured police, "As you do your job, know that Judge Sotomayor has your back as well." His assurance drew sound criticism. For example: < blockquote>"I think what Biden said was foolish," said Stephen Gillers, a law professor at New York University who is a prominent legal ethicist. "She's not there to 'have their back.' She's there to interpret the law as she sees fit.... "It'll be embarrassing to her when she learns of it," Gillers said. "Biden crosses the line when he starts representing to interest groups that she would be voting in their favor."

Unfortunately, when President Obama commits to use his misguided and lawless "empathy" standard as his criterion for picking Supreme Court justices, it's only natural that some folks will want assurances that they will be beneficiaries of his nominee's selective empathy--especially when that nominee's actual record raises serious questions whether she has a sound understanding of how the law ought actually to apply to police and others who risk their lives to protect the public.

More generally, I suspect that there is growing bipartisan agreement that the proposition "I think what Biden said was foolish" always has a high probability of being accurate.

David Brooks's Wishful Thinking on

Sotomayor?

David Brooks acknowledges that someone who reads Judge Sotomayor's speeches might "come away with the impression that she was a racial activist who is just using the judicial system as a vehicle for her social crusade." But although he concludes from her "whole record" that she is "quite liberal," he sees "little evidence that she is motivated by racialist thinking or an activist attitude" and he labels her a "liberal incrementalist."

Just a few observations:

1. Sotomayor's speeches offer the clearest window into her thinking about the role of a judge. In those speeches, she is not constrained by Supreme Court precedent, circuit precedent, the risk of being overturned, or the facts and procedural posture of any case. And she's generally speaking before friendly audiences, with whom she would be more comfortable in being candid. Her speeches display more than a racial activism. As Jennifer Rubin discusses in her Weekly Standard cover article:

> [Sotomayor] also denigrates the notion of a neutral, objective judiciary which treats all citizens alike and removes personal bias from the judicial branch. The goal here is not to remove racial or ethnic bias from judging, but to make sure the right bias is given voice--secured by increased numbers of minority judges. And her qualms about intellectual rigor and impartiality extend to virtually all that judges do ("I wonder whether achieving that goal is possible in all or even in most cases"). This is legal relativism, if not nihilism. No objective truth, no objective judging, only power politics.

2. Brooks credits Tom Goldstein's "much-cited study of the 96 race-related cases that have come before" Sotomayor. But as I've noted, that study offers dubious insights, especially since Goldstein has for some odd reason omitted en banc proceedings entirely from his review. Thus, his review doesn't include Sotomayor's dissent in Hayden v. Pataki, in which the en banc majority rejected a Voting Rights Act challenge to New York's felon-disenfranchisement law. Nor does it include the important case of Brown v. City of Oneonta, in which Judge Sotomayor joined an opinion dissenting from the denial of rehearing en banc that set forth what Chief Judge Walker called a "novel equal protection theor[y] that ... would severely impact police protection."

3. The phrase "liberal incrementalist" invites the question, "incrementalist towards what end?" Brooks thinks that Sotomayor's opinions "embody the sort of judicial minimalism that Obama and his aide Cass

Sunstein admire most." But as I address more fully in my review of Sunstein's Radicals in Robes, Sunstein's "minimalism" is his "tactically prudent, gradualist path to a liberal 'perfectionist' rewriting of the Constitution":

> Sunstein's minimalism ... is better described as boil-the-frog gradualism. We American citizens are like the frog in the pot of water on the stove. If the Court turns up the heat--that is, imposes the Left's agenda--too suddenly, we'll jump out. But if it does so gradually, we'll sit there in blissful ignorance until it's too late.

I'll bet that Brooks's wishful thinking will prove to be naïve thinking.

Jeffrey Rosen's Reassessment of Sotomayor

The *New Republic*'s Jeffrey Rosen offers what he clearly intends as a very approving portrait of Judge Sotomayor's record--a portrait that differs dramatically from his initial take as well as from the White House's efforts to market Sotomayor as a "nonideological and restrained judge." Whether Americans should find cause to welcome what Rosen approves of is a different matter.

Rosen's piece focuses heavily on Sotomayor's dissents, since it's "often in dissents that appellate judges can express their true selves--their passions, judicial philosophies, and unique views of the law." According to Rosen (emphasis added):

> Unlike her majority opinions, her dissents sometimes show *flashes of civil-libertarian passion or indignation*, even as they remain closely grounded in facts and precedents. Most important, they are *substantively bold, staking out unequivocal liberal positions*--from a broad reading of the Americans with Disabilities Act to sympathy for the due-process rights of a mentally ill defendant....
>
> It's in these dissents that a different view of Sotomayor emerges: a judge who can be both *crusading* and open-minded....
>
> Her most impressive dissents reveal her to be a *true civil libertarian*.

Rosen finds Sotomayor's dissents "methodologically as well as ideologically eclectic":

> She samples from different judicial philosophies in different cases. Sometimes Sotomayor sounds like a

> textualist in the Scalia style, and sometimes she sounds as enthusiastic as Justices Ginsburg and Breyer in her devotion to international law and the living constitution.

A few comments:

1. An important part of the job of a Supreme Court justice is the often difficult work of objectively determining the meaning of the civil liberties enshrined in the Constitution and embodied in statutory law. If that were all that Rosen signaled by labeling Sotomayor a "true civil libertarian," there would be no cause for concern. But his references to her "flashes of civil-libertarian passion or indignation," her "crusading" spirit, and the "unequivocal liberal positions" that she has staked out in "substantively bold" dissents are strong warning signs of a liberal judicial activist who will redefine the Constitution to comport with her policy preferences.

2. What Rosen euphemistically labels Sotomayor's "methodological eclecticism" is another strong warning sign. It's tempting for justices to pick and choose different methodologies in different cases in order to reach the results that seem right to them or that they want to reach. A justice who doesn't commit to a constraining interpretive methodology has no barrier against indulging that temptation.

3. Curiously, Rosen (a) approvingly cites a study that concludes that Justice Souter "can be objectively described as a judicial activist," (b) says that Sotomayor will adopt "more liberal positions on civil liberties and business issues" than Souter, but (c) relying entirely on her appellate opinions rather than his own prediction of how she will be as a justice, opines that "the charge that she is a judicial activist" (emphasis added) will be "hard to sustain." Perhaps that depends on the meaning of "is." If the concern is that Sotomayor *will be* a liberal judicial activist, Rosen himself has provided ample cause for that concern.

Grant of Certiorari in ***Ricci v. DeStefano***

I'm delighted to see that the Supreme Court granted review today of the Second Circuit's panel decision in *Ricci v. DeStefano*. In that decision, the Second Circuit panel rejected the claim by New Haven firefighters that city officials violated their Title VII and equal-protection rights by throwing out the results of two promotional exams.

As I've previously detailed (and will in large part repeat here), the Second Circuit's narrow 7-6 denial of en banc rehearing in *Ricci* was accompanied by a remarkable dissent, written by Clinton appointee José Cabranes and joined by his five dissenting colleagues, that exposed some apparent shenanigans by the three

panel members and the district judge. (Cabranes's opinion begins on the ninth page of this Second Circuit order.) One of those panel members was Sonia Sotomayor, who has been thought by many to be a leading contender for a Supreme Court appointment in the Obama administration.

Judge Cabranes's account indicates that Sotomayor and her colleagues engaged in an extraordinary effort to bury the firefighters' claims: In a case in which the parties "submitted briefs of eighty-six pages each and a six-volume joint appendix of over 1,800 pages," in which two amicus briefs were filed, and in which oral argument "lasted over an hour (an unusually long argument in the practice of our Circuit)," the panel "affirmed the District Court's ruling in a summary order containing a single substantive paragraph"--which gives the reader virtually no sense of what the case is about. Four months later, just three days before Cabranes issued his opinion (and in an apparent attempt to preempt it), "the panel withdrew its summary order and published a per curiam opinion that contained the same operative text as the summary order, with the addition of a citation to the District Court's opinion in the Westlaw and LexisNexis databases." As Cabranes sums it up:

> This per curiam opinion adopted in toto the reasoning of the District Court, without further elaboration or substantive comment, and thereby converted a lengthy, unpublished district court opinion, grappling with significant constitutional and statutory claims of first impression, into the law of this Circuit. It did so, moreover, in an opinion that lacks a clear statement of either the claims raised by the plaintiffs or the issues on appeal. Indeed, the opinion contains no reference whatsoever to the constitutional claims at the core of this case, and a casual reader of the opinion could be excused for wondering whether a learning disability played at least as much a role in this case as the alleged racial discrimination.

And then this killer understatement:

> This perfunctory disposition rests uneasily with the weighty issues presented by this appeal.

That's quite an indictment--by a fellow Clinton appointee, no less--of Sotomayor's unwillingness to give a fair shake to parties whose claims she evidently dislikes. And, whatever the Supreme Court's ultimate disposition, its decision to grant review of a case that Sotomayor treated in such a perfunctory manner ratifies Cabranes's indictment. Hardly the mark of a jurist worth serious consideration for the nation's

highest court.

White House's Misleading Spin on New Haven Firefighters Case

In a press conference yesterday, White House press secretary Robert Gibbs tried to defend Judge Sonia Sotomayor's outrageous shenanigans in the New Haven firefighters case (*Ricci v. DeStefano*):

> You can't criticize somebody for ruling based on adhering strictly and strongly to the precedent of Second Circuit, in the case of -- in this case, of *Hayden v. The County of Nassau*, and *Bushey v. The New York State Civil Service Commission*.

Gibbs's brazen defense (which I'm told that White House lawyers are providing in an even bolder form on background) is quite a stretch and is at war with both highly respected Clinton appointee José Cabranes and Obama's own Justice Department.

In his dissent from denial of rehearing *en banc* in *Ricci*, Judge Cabranes (joined by five other judges) states that the case "raises important questions of first impression in our Circuit--and indeed, in the nation--regarding the application of the Fourteenth Amendment's Equal Protection Clause and Title VII's prohibition on discriminatory employment practices." He calls the district court's opinion (which Sotomayor and her panel colleagues adopted wholesale) "path-breaking" and the questions on appeal "indisputably complex and far from well-settled." He declares that the "core issue presented by this case--the scope of a municipal employer's authority to disregard examination results based solely on the race of the successful applicants--is not addressed by any precedent of the Supreme Court or our Circuit."

Further, in its brief in the pending Supreme Court case, President Obama's Department of Justice argues that the unsigned per curiam opinion that Sotomayor joined--and, given her aggressive lead role at oral argument, probably authored--did not "adequately consider whether, viewing the evidence in the light most favorable to [the plaintiff firefighters], a genuine issue of fact remained whether [the City's] claimed purpose to comply with Title VII was a pretext for intentional racial discrimination in violation of Title VII or the Equal Protection Clause." On that ground, the Department of Justice argues that the Supreme Court "should vacate the judgment below and remand for further consideration."

It's true that the unpublished district-court opinion that Sotomayor and her panel colleagues adopted relies heavily on Hayden and Bushey and rejects plaintiffs' various grounds for distinguishing those cases. It's also

true that Sotomayor and several of her colleagues, in an opinion concurring in the denial of rehearing en banc, maintain (contrary to Judge Cabranes and the five judges who joined his opinion) that Hayden and Bushey were "controlling authority." But apart from the fact that neither Hayden and Bushey involved a government entity's discarding the results of promotional exams, the position of Sotomayor and her colleagues depends on their assertion that "there was no evidence of a discriminatory purpose" in the City of New Haven's discarding the results--the very assertion that the Obama Justice Department disputes.

(The *en banc* opinions and the district court's opinion are available together here.)

The New Haven Firefighters Case and Judicial Activism vs. Judicial Restraint

Washington Post columnist Eugene Robinson argues that Judge Sotomayor's "action [in *Ricci v. DeStefano*] is more properly seen as an example of judicial restraint" than of judicial activism. I think that he mistakes what's at issue. A few comments:

1. My core complaint, and the complaint of Judge José Cabranes (a Clinton appointee), about the perfunctory per curiam opinion that Sotomayor and her panel colleagues is not that the result she reached was necessarily the wrong one. I believe that I have been agnostic on that question (though I will point out that even President Obama's Department of Justice has argued to the Supreme Court that Sotomayor did not "adequately consider whether, viewing the evidence in the light most favorable to [the plaintiff firefighters], a genuine issue of fact remained whether [the City's] claimed purpose to comply with Title VII was a pretext for intentional racial discrimination in violation of Title VII or the Equal Protection Clause.")

My complaint is instead that Sotomayor engaged in shenanigans designed to bury the claims of the plaintiff firefighters, shenanigans that Judge Cabranes exposed in his blistering dissent from denial of rehearing *en banc*. Simply put, she didn't give the firefighters a fair shake, and she seemed to be trying to prevent further review of their claims.

2. Whether you call Sotomayor's malfeasance "judicial activism" or not depends on how you define that term. If you use it to refer to a judge's indulgence of her own policy preferences, then you might reasonably allege that Sotomayor engaged in judicial activism (though proving her subjective motivation is difficult or impossible). In any event, there are plenty of categories of judicial wrongdoing beyond "judicial activism," and the term "judicial restraint" certainly doesn't capture the behavior that Judge Cabranes complained of.

3. Repeating the White House spin, Robinson contends that there was "ample precedent" for the unsigned *per curiam* opinion that Sotomayor joined (and, I suspect, wrote). As I've explained, the White House's account is at war with both Judge Cabranes and the Obama Justice Department.

Second Circuit Oral Argument in the New Haven Firefighters Case

At the *Weekly Standard* blog, John McCormack has an interesting post on the oral argument in *Ricci v. DeStefano* (the audio of which is available here). Here are excerpts from the argument by the counsel for plaintiff firefighters:

> I think a fundamental failure is the application of these concepts to this job as if these men were garbage collectors. This is a command position of a First Responder agency. The books you see piled on my desk are fire science books. These men face life threatening circumstances every time they go out. ... Please look at the examinations. ... You need to know: this is not an aptitude test. This is a high-level command position in a post-9/11 era no less. They are tested for their knowledge of fire, behavior, combustion principles, building collapse, truss roofs, building construction, confined space rescue, dirty bomb response, anthrax, metallurgy, and I opened my district court brief with a plea to the court to not treat these men in this profession as if it were unskilled labor. We don't do this to lawyers or doctors or nurses or captains or even real estate brokers. But somehow they treat firefighters as if it doesn't require any knowledge to do the job....
>
> Firefighters die every week in this country. ... [There was a case] a few miles away where a young father and firefighter Eddie Ramos died after a truss roof collapsed in a warehouse fire because the person who commanded the scene decided to send men into an unoccupied house, with no people to save on Thanksgiving Day, with a truss roof known to collapse early in the fire because of the nature of the pins that hold the trusses together would have collapsed. And for 20 minutes he couldn't find any air and he he suffocated to death. And the fire chief had to go tell a 6 year-old that her father wasn't coming home.

Here's a comment/question by Judge Sotomayor:

> JUDGE SOTOMAYOR: Counsel ... we're not suggesting that unqualified people be hired. The city's not suggesting that. All right? But there is a difference between where you score on the test and how many openings you have. And to the extent that there's an adverse impact on one group over the other, so that the first seven who are going to be hired only because of the vagrancies [sic] of the vacancies at that moment, not because you're unqualified--the pass rate is the pass rate--all right? But if your test is always going to put a certain group at the bottom of the pass rate so they're never ever going to be promoted, and there is a fair test that could be devised that measures knowledge in a more substantive way, then why shouldn't the city have an opportunity to try and look and see if it can develop that?

As McCormack writes: "Sotomayor may have not wanted *un*qualified firefighters to be elevated to the position of captain and lieutenant--she simply wanted *less* qualified firefighters to be placed in charge of the lives of other men in the interests of racial diversity. I wonder what Eddie Ramos would say about that if he were alive today."

NYT Background on New Haven Firefighters Case--Part 1 of 2

Two recent *New York Times* articles shed some interesting light on Judge Sotomayor's role in *Ricci v. DeStefano*, the controversial summary-order-later-converted-into-per-curiam-opinion that buried the claims of New Haven firefighters--19 whites and one Hispanic--that New Haven discriminated against them on the basis of race when it discarded the results of promotional exams because it didn't like the racial composition of those who did well. (The Supreme Court's decision in the case is expected over the next two weeks or so.) I'll address one article in this post and the second in a second post.

This article from last Saturday by Adam Liptak explores how the Second Circuit panel handled Ricci and offers some unusual behind-the-scenes insights. Some excerpts (emphasis added):

> Almost everything about the case of *Ricci v. DeStefano* -- from the number and length of the briefs to the size of the appellate record to the exceptionally long oral argument -- suggested that it would produce an important appeals court

> decision about how the government may use race in decisions concerning hiring and promotion.
>
> But in the end the decision from Judge Sotomayor and two other judges was an unsigned summary order that contained a single paragraph of reasoning that simply affirmed a lower court's decision dismissing the race discrimination claim brought by Frank Ricci and 17 other white firefighters, one of them Hispanic, who had done well on the test....
>
> *There is evidence that the three judges in the case agreed to use a summary order rather than a full decision in an effort to find common ground....*
>
> *In the end, according to court personnel familiar with some of the internal discussions of the case, the three judges had difficulty finding consensus, with Judge Sack the most reluctant to join a decision affirming the district court. Judge Pooler, as the presiding judge, took the leading role in fashioning the compromise.* The use of a summary order, which ordinarily cannot be cited as precedent, was part of that compromise.

A summary order may well be an expedient way for judges to resolve their "difficulty finding consensus," but I don't see how it's an appropriate one. Nor, given that the summary order affirmed the district court, do I see what Judge Sack obtained by the supposed "compromise." In any event, there's still a lot more that could be learned about Sotomayor's role in the matter. (I will note that Liptak's account cuts against my speculative aside that Sotomayor probably authored the summary order and per curiam opinion.)

NYT Background on New Haven Firefighters Case--Part 2 of 2

A second recent *New York Times* article that provides an interesting backdrop to Judge Sotomayor's role in *Ricci v. DeStefano* explores Sotomayor's work as a member of the board of directors of the Puerto Rican Legal Defense and Education Fund in the 1980s, including in PRLDEF's successful suit forcing the New York City police department to institute racial quotas for the hiring and promotion of police officers. Some excerpts:

> In the 1980s, the Puerto Rican Legal Defense and Education Fund sued the New York City Police Department, claiming that its promotion exams discriminated against Latinos and African-Americans....

> [This and other] efforts were backed by the defense fund's board of directors, an active and passionate group that included a young lawyer named Sonia Sotomayor....
>
> The board monitored all litigation undertaken by the fund's lawyers, and a number of those lawyers said Ms. Sotomayor was an involved and ardent supporter of their various legal efforts during her time with the group....
>
> One of the legal defense fund's most important suits charged that a Police Department promotional exam discriminated against minority candidates. It was filed on behalf of the Hispanic Society of the New York police. The exams, the group charged, did not really measure the ability to perform in a more senior position, and were yielding unfair results: Too many whites were doing well, and too many Hispanics and African-Americans were not....
>
> The suit resulted in a settlement with the city that produced greater numbers of promotions to sergeant for Latino and African-American officers.
>
> Some white officers, however, felt that the settlement was unfair. They said that many white officers had outscored their Hispanic and African-American counterparts, yet were not allowed to fill the spots because of quotas. They sued, and their case, Marino v. Ortiz, reached the Supreme Court, where it failed by a 4-to-4 vote in 1988....

"What Really Happened" in the New Haven Firefighters Case

Stuart Taylor's close study of the New Haven firefighters case (*Ricci v. DeStefano*) deepens his concern that Judge Sotomayor's decisionmaking "may be biased by the grievance-focused mind-set and the 'wise Latina woman' superiority complex displayed in some of her speeches." Some excerpts:

> The [Second Circuit] panel's decision to adopt as its own U.S. District Judge Janet Arterton's opinion in the case looks much less defensible up close than it does in most media accounts. One reason is that the detailed factual record strongly suggests that -- contrary to

> Sotomayor's position -- the Connecticut city's decision to kill the promotions was driven less by its purported legal concerns than by raw racial politics....
>
> But the unmistakable logic of Sotomayor's position would encourage employers to discriminate against high-scoring groups based on race -- no matter how valid and lawful the qualifying test -- in any case in which disproportionate numbers of protected minorities have low scores, as is the norm.
>
> Such logic would convert disparate-impact law into an engine of overt discrimination against high-scoring groups across the country and allow racial politics and racial quotas to masquerade as voluntary compliance with the law.

Richard Thompson Ford's Confused Irony About Ricci

On Slate, Stanford law professor Richard Thompson Ford argues that "conservatives" (like Second Circuit judge, and Clinton appointee, José Cabranes?) who complain about Judge Sotomayor's treatment of the employment-discrimination claims presented by the New Haven firefighters in Ricci v. DeStefano should instead blame Justice Scalia and other conservative justices for making it too hard for plaintiffs to win employment-discrimination claims. But the grand irony that Ford posits rests on his distorted account of Supreme Court precedent and on his misunderstanding of the procedural posture of the proceedings in Ricci.

Ford contends that Frank Ricci has "been treated just like any other plaintiff suing for employment discrimination," and that "the reason that people who sue for employment discrimination ... rarely win their cases is that conservative judges have spent decades making sure they usually lose." According to Ford, "as Justice Scalia made clear in [*St. Mary's Honor Center v.] Hicks*, the employer doesn't have to prove that there was a good reason for its decision; it needs only to claim that there was one." "At this point, to keep his case alive, the plaintiff has to prove that the employer's [claimed] reason is just a pretext." Even if the plaintiff does prove that the employer's claimed reason is a pretext, "the plaintiff will still lose if the judge or jury decides that the employer acted for a different nondiscriminatory reason from the one that was given." Ricci's "best argument" might have been to argue that the city acted from "mixed motives"--partly legitimate and partly discriminatory--but Ricci

"didn't argue it at trial," and Sotomayor and her panel colleagues therefore couldn't consider that argument.

Ford's argument is a jumble that fails to distinguish between summary judgment and trial and that misstates the Supreme Court's ruling in *Hicks*. Let's examine Ford's confusion:

1. Ford claims that Scalia's majority opinion in *Hicks* establishes that "the employer doesn't have to *prove* that there was a good reason for its decision; it needs only to *claim* that there was one." That's not accurate. What Scalia explains in *Hicks* concerns the so-called shifting burdens of *production* (as distinct from burden of *proof*) in the trial of employment-discrimination cases. Specifically: The plaintiff must first establish, by a preponderance of evidence, a "prima facie" case of discrimination. Once he has done so, the defendant has the burden of producing an explanation to rebut the prima facie case. It's not enough for the defendant "only to *claim* that there was" a "good reason for its decision." Rather, the "'defendant must clearly set forth, through the introduction of admissible evidence,' reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." (Emphasis omitted.) If the defendant does so, the plaintiff then has the full opportunity to demonstrate that the proffered reason was not the true reason and that unlawful discrimination was a cause.

2. Ford's asserts that "at this point"--i.e., once the employer has merely claimed that it had a good reason for its employment decision--"to keep his case alive, the plaintiff has to prove that the employer's [claimed] reason is just a *pretext*." Any reader who knows that the district court granted summary judgment in favor of the City of New Haven would be justified in thinking that Ford, in referring to what a plaintiff must do "to keep his case alive," is explaining what a plaintiff has to do in order to avoid having summary judgment granted against him.

But, of course, a plaintiff need not "prove" that the employer's claimed reason is pretextual in order to survive summary judgment. The defendant employer, as the moving party, would instead have to persuade the judge that no reasonable jury, construing the facts in the light most favorable to the plaintiff, could determine that the employer had discriminated. In other words, a plaintiff would defeat the employer's motion for summary judgment by offering evidence that, *construed most favorably to the plaintiff*, would enable a jury to find that the employer's claimed reason was pretextual and that the employer engaged in discrimination. Ford himself acknowledges that the New Haven firefighters offered such evidence--namely, evidence that "New Haven refused to certify the exam results because of political pressure to promote blacks."

3. Ford himself seems not to understand that the district court granted the City of New Haven's motion for summary judgment. Why else would he contend that Ricci "didn't argue [mixed motives] *at trial*"? Ricci and his fellow firefighters didn't argue *anything* at trial because the district court's grant of summary judgment prevented them from proceeding to trial.

Even President Obama's Justice Department has argued to the Supreme Court that the district court was wrong to grant summary judgment against the firefighters--and that Judge Sotomayor and her panel colleagues were wrong to affirm the district court. Depending on how the issues of law now before the Supreme Court are decided, it is certainly possible that the New Haven firefighters will proceed to trial on their claims and, under the sensible framework that the Supreme Court has established, fail to persuade the jury of the merits of their claims. But that possibility should not distract attention from the fact that there is ample reason, as Judge Cabranes's blistering dissent from denial of rehearing en banc illustrates, to blame Judge Sotomayor for not giving fair treatment to the firefighters' claims.

Sotomayor's "Novel Equal Protection Theor[y]"

In *Brown v. City of Oneonta*, 235 F.3d 769 (2d Cir. 2000), Judge Sotomayor joined an opinion dissenting from the denial of rehearing *en banc* that, along with another dissent, set forth what Chief Judge Walker called "novel equal protection theories that ... would severely impact police protection." Let's take a fuller look at this case.

As the panel opinion in *Brown* (221 F.3d 329) put it, "This case bears on the question of the extent to which law enforcement officials may utilize race in their investigation of a crime." The case arose from the following facts: A woman who had been attacked in her home told police that her attacker was a young black man who, in the course of the struggle, had cut himself on his hand with his knife. Police dogs tracked the attacker's scent in the direction of a nearby college. The police obtained from the college a list of its black male students and attempted to locate and question them. Over several days, the police then conducted a sweep of Oneonta in which they stopped and questioned non-white persons on the streets and inspected their hands for cuts.

Many of the individuals subjected to the police investigation then sued the police for alleged violations of the Equal Protection Clause and the Fourth Amendment (among other claims). The district court granted summary judgment for the police.

On appeal, the panel affirmed the district court on the

Equal Protection claim but reversed it on the Fourth Amendment claim:

> We hold that under the circumstances of this case, where law enforcement officials possessed a description of a criminal suspect, even though that description consisted primarily of the suspect's race and gender, absent other evidence of discriminatory racial animus, they could act on the basis of that description without violating the Equal Protection Clause....
>
> Police action is still subject to the constraints of the Fourth Amendment, however, and a description of race and gender alone will rarely provide reasonable suspicion justifying a police search or seizure. In this case, certain individual plaintiffs were subjected to seizures by defendant law enforcement officials, and those individuals may proceed with their claims under the Fourth Amendment.

The Second Circuit denied rehearing *en banc*, with five judges, including Sotomayor, dissenting. In his dissent (which Sotomayor joined, except for one part), Judge Calabresi argued that "when state officers (like the police) ignore essentially everything but the racial part of a victim's description, and, acting solely on that racial element, stop and question all members of that race they can get hold of, even those who grossly fail to fit the victim's description," the state is "creating an express racial classification that can only be approved if it survives strict scrutiny." Judge Straub also wrote a separate dissent.

In his opinion concurring in the denial of *en banc* rehearing, Chief Judge Walker, who authored the panel opinion, responds at length to the dissenting opinions of Judges Calabresi and Straub. Here are some excerpts from Walker's opinion that apply fully to the parts of the Calabresi opinion that Sotomayor embraced:

> Some of the judges dissenting from denial of rehearing in banc ... have chosen this occasion to advance, for the first time, novel equal protection theories that, in my view, would severely impact police protection.... The dissenters propose that when the police have been given a description of a criminal perpetrator by the victim that includes the perpetrator's race, their subsequent investigation to find that perpetrator may constitute a suspect racial classification under the equal protection clause....

> The fact that no legal opinion, concurrence, dissent (or other judicial pronouncement) has ever intimated, much less proposed, any such rules of equal protection confirms a strong intuition of their non-viability. But, for the benefit of anyone who in the future may be undeterred by the inability of these theories to attract judicial recognition, their practical difficulties and analytical defects should be recognized....
>
> The theories suggested by the dissenters would require a police officer, before acting on a physical description that contains a racial element, to balance myriad competing considerations, one of which would be the risk of being subject to strict scrutiny in an equal protection lawsuit. Moreover, the officer frequently would have to engage in such balancing while under the pressure of a time-sensitive pursuit of a potentially dangerous criminal. Police work, as we know it, would be impaired and the safety of all citizens compromised. The most vulnerable and isolated would be harmed the most and, if police effectiveness is hobbled by special racial rules, residents of inner cities would be harmed most of all....

Sotomayor's Fervent Hope for a "Completely Integrated Society"

In that same May 2006 speech in which Judge Sotomayor quacks like a liberal judicial activist, she states that *Brown v. Board of Education* "struck down the separate but equal doctrine and held out a hope--still not realized, unfortunately, but still fervently aspired to[--]that we would someday be a completely integrated society." (p. 7)

It's unclear to me what Sotomayor means by a "completely integrated society." As Roger Clegg's post earlier today discusses, Sotomayor thinks it's "deeply confused" for Americans both to "take[] pride in our ethnic diversity" and to "simultaneously insist that we can and must function and live in a race- and color-blind way." So insofar as one vision of a "completely integrated society" would involve equal opportunity for all in a legal regime that does not discriminate on the basis of race, Sotomayor appears to reject that vision.

An alternative vision of a "completely integrated society" would look to equal results as the measure and use racial quotas and other racial preferences to achieve those results. Is that what Sotomayor means? Is there any good reason to believe that she doesn't?

Sotomayor on Good Discrimination vs. Invidious Discrimination

Judge Sotomayor's response to the Senate questionnaire (question 11.a) reveals that she belongs to the Belizean Grove, "a private organization of female professionals." From this Politico article, it's clear that the Belizean Grove is an exclusive and elite group that provides networking opportunities that many men would be eager to avail themselves of. Sotomayor concedes, in her response to question 11.b, that the Belizean Grove discriminates on the basis of sex, but she maintains that its discrimination isn't invidious.

Perhaps Sotomayor can try explaining that to the men who can't take part in the Belizean Grove and who don't have comparable opportunities-- and who would be accused of invidious discrimination if they were able to join an all-male group that provided comparable opportunities.

Of course, Sotomayor first ought to explain to the New Haven firefighters who were denied promotions on the basis of their race why that denial wasn't invidious discrimination.

Judge Sotomayor and the Belizean Grove

As the *New York Times* reported yesterday, Judge Sotomayor has informed the Senate that (in *NYT*'s phrasing) the Belizean Grove, the "all-female networking club" she belongs to, "did not discriminate in an inappropriate way."

I don't have a settled position on what rules ought to govern a judge's membership in a men-only or women-only club (or on the broader question of what public policy towards such clubs ought to be). On the one hand, I'm generally inclined to favor a genuine diversity in which men and women would have choices among single-sex and men-and-women clubs. On the other hand, I recognize that, deliberately or otherwise, some men-only clubs may operate to deprive women of unique or important opportunities for networking and advancement in the business world. My impression is that that problem is far less common than it was 25 or 30 years ago, largely because so many business-related clubs that were previously men-only have chosen to open, or been forced to open, to women.

Whatever debate there might be over what the rules ought to be, there should be little dispute that judges ought to comply with the rules that are actually in effect. Let's consider whether Judge Sotomayor has complied with Canon 2C of the Code of Conduct for United States Judges. Canon 2C states: "A judge should not hold membership in any organization that

practices invidious discrimination on the basis of race, sex, religion, or national origin." The commentary to Canon 2C provides this additional guidance:

> Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. See *New York State Club Ass'n. Inc. v. City of New York*, 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984). Other relevant factors include the size and nature of the organization and the diversity of persons in the locale who might reasonably be considered potential members. Thus the mere absence of diverse membership does not by itself demonstrate a violation unless reasonable persons with knowledge of all the relevant circumstances would expect that the membership would be diverse in the absence of invidious discrimination. *Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex, or national origin persons who would otherwise be admitted to membership*.

I'm certainly not going to contend that this guidance is crystal-clear. But my initial take is that none of the factors that would tend to excuse discrimination on the basis of sex are present in the case of the Belizean Grove. Judge Sotomayor contends only:

> Men are involved in its [the Belizean Grove's] activities--they participate in trips, host events, and speak at functions--but to the best of my knowledge, a man has never asked to be considered for membership. It is also my understanding that all interested individuals are duly considered by the

membership committee.

As Jennifer Rubin points out, the "we let the guys come to party" defense "is reminiscent of the 'we let women be social members' excuses that exclusive men's clubs routinely gave for decades--and which were scorned by women's groups." Further:

> [T]he line about "no one ever asking to join" is rich. Certainly if one declares the organization to be "all men" or "all white" or "all anything" those not in the "all" group are going to be dissuaded from seeking membership. Isn't the mere statement of exclusivity enough to raise concerns?

It would therefore seem that the default rule set forth in the last sentence of the commentary to Canon 2C (which I have italicized) presumptively applies. It's also worth noting that Judge Sotomayor, before becoming a member of the Belizean Grove, could have requested that the Committee on Codes of Conduct provide her a confidential advisory opinion about the propriety of membership.

I won't claim that Sotomayor's membership in the Belizean Grove is itself a matter of any concern to me. But her apparent violation of Canon 2C and her readiness to rationalize her own participation in reverse discrimination tie into broader concerns about her impartiality.

Further, what's sauce for the goose ought to be sauce for the gander. In that regard, I'll highlight Jeffrey Lord's essay on Judge Brooks Smith's confirmation travails ("Pat Leahy's Fish Story"), which discusses how Senate Democrats in 2002 went into conniptions over Smith's *former* membership in an all-male *fishing* club.

Sotomayor Resigns Membership in Belizean Grove

Judge Sotomayor informed the Senate Judiciary Committee today that she has resigned from the Belizean Grove. Her letter states that "I believe that the Belizean Grove does not practice invidious discrimination and my membership did not violate the Judicial Code of Ethics, but I do not want questions about this to distract anyone from my qualifications and record."

As I've spelled out, although I'm disinclined to think that the Code of Conduct for United States Judges *should* forbid Sotomayor's membership in the Belizean Grove, I believe that it appears to do so. I also don't see why she supposes that her resignation should eliminate questions about her previous membership or about her reasoning on the issue of "invidious"

discrimination.

Re: She Doesn't Impose Her Own Quotas

Kathryn: Your post about Judge Sotomayor's hiring of law clerks reminds me of the tension between Justice Ginsburg's employment practices (as of the time she was nominated to the Supreme Court) and her own aggressive support for disparate-impact statistics as evidence of intentional discrimination. In her 1993 Supreme Court confirmation hearing, it was learned, much to Ginsburg's visible embarrassment, that in her 13 years on the D.C. Circuit she had never had a single black law clerk, intern, or secretary. Out of 57 employees, zero blacks.

Sotomayor's own hiring practices reinforce the concerns of counsel for the plaintiff firefighters in *Ricci v. DeStefano* that Sotomayor regarded their own highly skilled work, in which they put their lives at risk to protect the public safety, as the equivalent of garbage collection.

Goldstein on Judge Sotomayor and Race

At SCOTUSblog, Tom Goldstein, an early and ardent supporter of Judge Sotomayor's nomination, has two posts in which he undertakes to "review[] every single race-related case on which she sat on the Second Circuit." Goldstein's review has gotten a lot of attention, but as Jonathan Adler points out, the sort of statistical review that Goldstein provides, even if done accurately and transparently, can go only so far in providing reliable insights.

Further, I'll note that (from what I can tell) Goldstein's review omits the important case of *Brown v. City of Oneonta*, 235 F.3d 769 (2d Cir. 2000), in which Judge Sotomayor joined an opinion dissenting from the denial of rehearing en banc that set forth what Chief Judge Walker called "novel equal protection theories that ... would severely impact police protection."

It may be that Goldstein has for some odd reason omitted en banc proceedings entirely from his review. Jonathan notes that Goldstein's review doesn't include Sotomayor's dissent in *Hayden v. Pataki*, in which the en banc majority rejected a Voting Rights Act challenge to New York's felon-disenfranchisement law.

Sotomayor and Abortion

Some conservatives and pro-lifers evidently continue to harbor the hope that Judge Sotomayor will not be hostile on the issue of abortion. This *Washington Times* editorial ought to force them to examine

carefully whether they have any plausible basis for their hope. Here's some information from the editorial that was new to me:

> Consider that from 1980 until October 1992, Judge Sotomayor served on the board -- at times as vice president and at times as chairman of the litigation committee -- of the Puerto Rican Legal Defense and Education Fund. The *New York Times* in 1992 described her as "a top policy maker on the board." During that time period, the fund filed briefs in not one, not two, but at least six prominent court cases in strong support of "abortion rights."
>
> The cases began with an abortion-funding case, *Williams v. Zbaraz*, just as she joined the board, and they continued through the landmark cases of *Rust v. Sullivan*, *Webster v. Reproductive Health Services*, and *Planned Parenthood v. Casey*. Especially in the *Webster case*, in which all nine justices joined at least part of the decision saying that states need not provide public funds for abortions, the fund supported positions far more pro-abortion than the court itself did. Also, in the case *Ohio v. Akron Center*, the fund wrote that it "opposes any efforts to overturn or in any way restrict the rights recognized in *Roe v. Wade*."
>
> No statement could be more categorical. The Puerto Rican Legal Defense and Education Fund thus presumably would oppose any restriction, including those on late-term abortions, partial-birth abortions, abortions for minors and the like.
>
> It is possible to serve on the board of a group while not being responsible for a single random legal brief. However, Judge Sotomayor's group filed such suits at least six times - and as the *New York Times* reported on May 28 (while discussing a different case), "The board monitored all litigation undertaken by the fund's lawyers, and a number of those lawyers said Ms. Sotomayor was an involved and ardent supporter of their various legal efforts."

The Abortion-Assurance Mysteries

Judge Sotomayor's response to the Senate

questionnaire presents some puzzles.

Question 26.b asks whether anyone involved in the selection process "ever discussed with you any currently pending or specific case, legal issue, or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question." It also asks that Sotomayor identify each communication with anyone in the White House "referring or relating to your views on any case, issue, or subject that could come before the Supreme Court."

Sotomayor's answer to question 26.b is "No." But if, as reported , President Obama sought and received assurances that Sotomayor is pro-*Roe*, it would seem that the answer should be yes. White House spokesman Robert Gibbs says that Obama "was careful not to ... *ask specifically* how one might rule ... in a case that could come before the Supreme Court," but the scope of question 26.b is far broader than specific inquiries.

Perhaps Obama and Sotomayor did a very clever wink-wink routine. But I'll again suggest that, consistent with Obama's stated commitment to transparency, the White House ought to make publicly available any record (including any audio recording) of Obama's interview with Sotomayor so that the American people can know just what commitments and assurances he extracted or received.

Question 26.c asks Sotomayor to describe "any representations" "made by the White House or individuals acting on behalf of the White House" "to any individuals or interest groups as to how you might rule as a Justice." Sotomayor's response indicates that she is not aware of any such representations. But it's been reported that the White House has "deliver[ed] strong but vague assurances" to abortion groups that Sotomayor is pro-*Roe*. Does Sotomayor really not know of those reports? Or does she somehow regard them as beyond the scope of the question?

Sotomayor Commends Liberal Lawsuits on Abortion, Illegal Immigration, and Welfare Reform

From a speech (p. 9) by Judge Sotomayor in June 2001:

> In 1996, Congress prohibited lawyers receiving federal legal-services monies from taking on class-action lawsuits or lawsuits involving abortion, illegal immigration and welfare reform. Commendably, I know Brooklyn Law School's clinical programs ... have redoubled their efforts to help address the need created by this legislation.

> These efforts, and the volunteer efforts of other law schools, bar groups and lawyers in private law firms, are not enough. The need is very great.

Sotomayor as Trailblazer of Good-Faith Exception to Exclusionary Rule?

More misleading White House spin: The backgrounder that the White House is circulating on Judge Sotomayor hypes "her sensible practicality in evaluating the actions of law enforcement officers":

> [I]n *United States v. Santa*, Judge Sotomayor ruled that when police search a suspect based on a mistaken belief that there is a valid arrest warrant out on him, evidence found during the search should not be suppressed. Ten years later, in *Herring v. United States*, the Supreme Court reached the same conclusion.

That's a wild misreading of the relationship between the two cases.

In *United States v. Santa*, 180 F.3d 20 (1999), Judge Sotomayor merely applied already-existing Supreme Court precedent--namely, *United States v. Leon* (1984), which recognized a good-faith exception to the exclusionary rule, and *Arizona v. Evans* (1995), which extended that good-faith exception to situations where police rely on police records that contain erroneous information resulting from clerical errors of court employees. The specific question in *Santa* was whether the *Evans* exception applied to the facts of that case, and Judge Sotomayor and her panel colleagues ruled that it did: the arresting officers' reliance on the erroneous record was objectively reasonable, and court employees were responsible for the error.

The Supreme Court's ruling in January 2009 in *Herring v. United States* concerned, as the Court stated it, an issue that "*Evans* left unresolved" and that *Santa* did not involve: "'whether the evidence should be suppressed if police personnel [rather than court employees] were responsible for the error'" in the records on which the police relied. The Court divided 5-4 on this question, with President Obama's favorite justices in dissent. Nothing in *Santa* provides any reason to believe that a Justice Sotomayor wouldn't be with the dissenters.

Hook, Line, and Sinker

I see from Jonathan Adler's post on the Volokh Conspiracy that *Wall Street Journal* reporters Jess

Bravin and Nathan Koppel, in their article yesterday titled "Nominees's Criminal Rulings Tilt to Right of Souter," fell for the White House's wild misrepresentation of Judge Sotomayor's 1999 ruling in *United States v. Santa*, which merely applied existing Supreme Court precedent on the good-faith exception to the exclusionary rule. Their misrepresentation of *Santa*, and of its relationship to the Supreme Court's January 2009 ruling in *Herring v. United States*, is their lead example of how Sotomayor might be to Justice Souter's right on issues of criminal law. But as Jonathan points out, Souter in fact joined the 1995 precedent that Sotomayor applied in *Santa*.

Memo to reporters: Trust the White House at your peril.

Sotomayor on Campaign Finance Reform and the First Amendment

Here's an interesting *Politico* article by Kenneth P. Vogel on Judge Sotomayor's support for limits on fundraising by political campaigns.

Re: Sotomayor Questionnaire Omits Death Penalty-Racism Memo

Wendy: Great letter. If a Republican judicial nominee had failed to provide something of this nature, Democrats would be screaming "cover-up" and calling on the nominee to withdraw. What else, one must wonder, hasn't been provided? When will it be?

(I noted yesterday, in The Abortion-Assurance Mysteries, other apparent deficiencies in Sotomayor's response.)

Former (?) Puerto Rican Nationalist Nominated to North American Supreme Court

On *National Journal*'s new "Ninth Justice" blog, Stuart Taylor passes along history professor K.C. Johnson's very favorable assessment of Sonia Sotomayor's senior thesis at Princeton, as well as the "few jarring elements" that Johnson finds, including:

> First, I'm curious as to when Sotomayor ceased being a Puerto Rican nationalist who favors independence -- as she says she does in the preface. (The position, as she points out in the thesis, had received 0.6 percent in a 1967 referendum, the most recent such vote before she wrote the thesis.) I don't know that I've seen it reported anywhere that she favored Puerto Rican independence,

> which has always been very much a fringe position....
>
> Second, her unwillingness to call the Congress the U.S. Congress is bizarre -- in the thesis, it's always referred to as either the 'North American Congress' or the 'mainland Congress.' I guess by the language of her thesis, it should be said that she's seeking an appointment to the North American Supreme Court, subject to advice and consent of the North American Senate. This kind of rhetoric was very trendy, and not uncommon, among the Latin Americanist fringe of the academy.

Sotomayor's "Affirmative Action Plan for Puerto Rico"

The apparent answer to history professor K.C. Johnson's question (see "Former (?) Puerto Rican Nationalist Nominated to North American Supreme Court") about "when Sotomayor ceased being a Puerto Rican nationalist who favors independence": By the time she was in law school and was instead advocating what law professor Roger Alford (on the Opinio Juris blog) calls an "affirmative action plan for Puerto Rico" statehood. Excerpts from Alford's post about Sotomayor's law-review piece:

> Judge Sonia Sotomayor's student note in the 1979 *Yale Law Journal* is a piece of work. It makes an extravagant case for Puerto Rican statehood based on terms of accession that are more favorable to Puerto Rico than any other state in the Union. Her proposal is a sort of affirmative action plan for what she describes as a "small, economically poor dependency" acquired as a result of the "American experience with colonialism."
>
> While her legal arguments are complex, her economic and political conclusions are simple: Puerto Rico should become a state and accede to the Union in a manner that grants her ownership rights over the offshore oil, gas and mineral deposits within a two-hundred mile radius of Puerto Rico. It should do so despite the fact that no other state enjoys similar rights and despite over two centuries of federal practice that provide for states to enter the Union "on an equal footing with the original States in all respects whatever." ...
>
> In short, in proposing preferential

treatment for Puerto Rican statehood, Sotomayor manages to provide justifiable grounds to (1) upset environmentalists; (2) upset those sensitive to the equality of states; (3) upset those opposed to affirmative action and preferential treatment; and (4) upset those who do not take kindly to assertions that the United States is a colonial power. I would think almost every United States Senator falls into at least one of those four categories.