

The Scouting Report: Supreme Court Nominee Sonia Sotomayor

Senate confirmation hearings begin July 13 for President Obama's Supreme Court nominee, Judge Sonia Sotomayor.

Senate Republicans have raised concerns about the nominee, the first Hispanic American nominated for a lifetime appointment to the high court. If confirmed, Sotomayor will be only the third woman to serve as a Supreme Court justice.

Brookings expert Russell Wheeler and *Politico* Senior Editor Fred Barbash took questions about the historic nomination in this edition of the Scouting Report.

The transcript of this web chat follows.

Fred Barbash-Moderator: Welcome all. Our guest today is Russell Wheeler. Our topic is the Sotomayor nomination.

Russell Wheeler studies the selection of U.S. judges and how courts function with other branches of government and the press, among other judicial topics. He is a former deputy director of the Federal Judicial Center, research and education agency for the federal court system.

Welcome Russell. Let's get going with some reader questions.

12:30 [Comment From Jason] What do you think about the timing of Sotomayor's potential confirmation?

12:32 Russell Wheeler: Obviously, it would be best for the Court, and for her, if she were confirmed before September, when the Court gears up for its October term. And this, year, the Court held over an important campaign finance case, which it will hear argued on September 9, before the term begins. There is some talk by the Republicans about delaying the hearing, but I don't see how that helps them.

12:32 [Comment From Laurie] How likely is it that Judge Sotomayor will be confirmed?

12:33 Russell Wheeler: The conventional wisdom is that, barring some blockbuster skeleton in the closet, confirmation is almost certain. It's less a matter of whether than of when.

12:34 [Comment From Jason] Can these hearings actually make a difference?

12:35 Russell Wheeler: In Sotomayor's case, given the strong Democratic majority and the general consensus that confirmation is almost certain, not much. The only chance they might matter greatly is if she makes some major mistake, not likely. The hearings make a difference when the nomination is already in some trouble, as for example, in Robert Bork's case.

12:35 [Comment From dave] How does Sotomayor's experience measure up to her future colleagues on the Supreme Court?

12:37 Russell Wheeler: For the first time since the 1950s, we have a nominee who served as a district as well as a court of appeals judge. She's had varied experience, as a prosecutor and in private practice, somewhat broader, at least different, than some other members of the Court. But she does come to the Court from the court of appeals, like all her would-be colleagues. Look for a different pool if Obama gets another vacancy.

12:37 [Comment From Emily] What do you think the final vote will be?

12:38 Russell Wheeler: Hard to say--Roberts got 78 votes, Alito 58. I suspect she'll be closer to Roberts. One reason for the difference--which may apply here as well--as that some would-be opponents of Roberts voted for him to preserve an option to vote against the next nominee, who turned out to be Alito.

12:38 [Comment From Kenneth] Where do you think Sonia Sotomayor falls in the political spectrum? How liberal of a justice do you think she'll be?

12:40 Russell Wheeler: I think, from what I've read, that we might call her, as a person, fairly liberal. But, by most accounts, as a judge, she's been at best slightly left of center--she's known as a judge who respects precedent and is close to obsessed with following the statutory law before her.

12:40[Comment From Joanna (DC)] What do you think about lifetime appointments for Supreme Court justices?

12:42 Russell Wheeler: More important than what I think is the stirring, so far confined to the academy, of proposals to limit tenure to perhaps 15 or 18 years, with a regular schedule of vacancies and appointments. This reflects a fairly bipartisan consensus that life tenure meant something different in 1789 than it does today, creating a Court that in some ways is a vestige of the past. But it usually takes a crisis to effect major changes in the judiciary, and I don't see much chance of these proposals' success.

12:42 [Comment From mark] What about her comments that "a wise Latina woman" can make "better conclusions than a white male?" Don't you think this might hurt her?

12:44 Russell Wheeler: It will if she doesn't handle the inevitable question well. She'll probably take a cue from the White House and say that that line from a 2001 lecture was poorly worded, and it was. But she won't back down on her two pronged, basically empirical claim, that, first, it would be myopic to believe that judges of different backgrounds are incapable of understanding different groups, and two, that personal experiences inevitably have some effect on how judges judge. Judge Alito said basically the same thing in his hearings, which her defenders will surely point out.

12:44 [Comment From Suzie] It didn't seem to me that the whole "empathy" attack against Sotomayor was effective. What do you expect Republicans to try and attack her with next week?

12:46 Russell Wheeler: They'll ask her about some of her decisions, especially the per curium panel decision she joined in the New Haven firefighters case. They'll ask her about her decision that the 2nd amendment does not apply to the states. They'll ask her about the role that foreign judicial decisions should play in United States jurisprudence. And they'll ask about her role as a board member on the Puerto Rican Legal Defense Fund. I don't think any of these areas will be barriers to confirmation.

12:46 [Comment From Amy] Between the White House and Senate Democrats, there have been three press conferences held to praise her record on criminal law cases. Why is there such an emphasis on this issue?

12:48 Russell Wheeler: Principally because it's an area in which her decisions have been especially balanced--some for the prosecution, some for the defense. And, she has the experience of having been a Manhattan prosecutor. Criminal law --rights of defendants--is still a hot button issue and a point of contention with the general public.

12:48 [Comment From Raul] Where does Sotomayor stand on social issues like gay rights and abortion?

12:49 Russell Wheeler: As best I can tell, she doesn't have much of a judicial record on either matter. Her only decision involving abortion involved the so-called Mexico City rule, a Bush administration policy limiting the kind of reproductive counseling allowed by recipients of U.S. foreign aid. She said the rule was within the proper province of the executive and didn't upset it.

12:49 [Comment From Josh] Is there any way that the confirmation of Sotomayor is influenced by partisanship surrounding other domestic policy debates such as healthcare or energy legislation?

12:52 Russell Wheeler: One influence, not necessarily a partisan one, is that her confirmation process come at a time that the Senate has a lot on its plate, the two issues you mention included. Some senators may use the hearings to speak to the folks back home about broader issues that might conceivably come before the Court, and she won't respond substantively for that reason. It occurred to me also, given the heavy immigration caseload of her court of appeals, that somehow the whole immigration question may come up. If it does, I'm sure her answers won't go beyond her views of the Justice Department's immigration courts, if that.

12:52 [Comment From Bella M.] What do you think of the news that Louis Freeh endorses her?

12:53 Russell Wheeler: I hadn't heard that, but it's consistent with her middle-of-the-road record on criminal law and procedure. Senator Leahy has been touting her endorsement by various law enforcement groups.

12:53 [Comment From pat (rockville, md)] How do you think her most recent decision on the case about the Connecticut firefighters will impact her confirmation?

12:56 Russell Wheeler: Had the Supreme Court, which reversed the panel decision in which she participated, had said that the panel plainly misread the law, and said so unanimously, that might be a problem. But Justice Kennedy himself, in the majority opinion, said it "clarified" Title VII law, and 4 of the justices dissented from the Court's ruling. So I don't think too much will come of it, especially because SCOTUS blog's Tim Goldstein looked at all her race-related decisions and found that in the great majority of them--she decided against the discrimination claim. There might some criticism of HOW the panel announced its decision, but that's another matter, and again, not a serious one.

12:56 [Comment From Elenor] How well known was Judge Sotomayor among judicial circles before her nomination?

12:58 Russell Wheeler: She doesn't have a record as one of the leading appellate judges--a Richard Posner or J. Harvie Wilkinson, for example, among more conservative judges. But my impression is that she's been well regarded, and she serves on a court with several judges who are also supreme court material. She certainly has been on a lot of people's lips as a potential Supreme Court nominee for some time.

12:58 [Comment From Anne] Do you think the fact that she is a woman as well as Latina will help or hurt her in the confirmation process? Or do you think it will be of no consequence.

12:59 Russell Wheeler: It's hard to say it will be of no consequence. She has spoken openly of her Puerto Rican heritage as have many others. And, of course, it creates a problem for Republicans, who don't want to offend the important Hispanic voting bloc. They'll have to be careful.

12:59 [Comment From Emily] She's also come out as more of a political figure who was handpicked by Obama to push his political agenda. How do you think this may affect her in future decision-making?

1:02 Russell Wheeler: I don't know that she or Obama have characterized her that way, and I don't think I would. She certainly comports with his view of a good candidate--technically competent, good sense of the law, but, in those relatively rare cases when the law is not clear (not so rare on the Supreme Court) of someone who will have some sense of the struggles of those for whom the political process itself is not necessarily available. If confirmed, she'll be deciding issues that Obama and she cannot anticipate in 2009.

1:02 [Comment From Josh] Does the Sotomayor for Souter substitution shift the balance of the court more to the right, and if so, do you see this as a strategic pick to set up a likely second appointment somewhere in Obama's second term?

1:03 Russell Wheeler: I don't see it as a shift to the right, although some have said she might be somewhat more sympathetic to the prosecution in criminal cases. In some ways, it's hard to predict, because her decisions as a court of appeals judge are cabined by binding Supreme Court precedents. As a justice, she'll have somewhat more leeway to reconsider existing Supreme Court precedents.

1:04 [Comment From Suzie] Considering her ruling on the Mexico City rule, do you think Sotomayor will receive fire from women's legal rights groups? And shouldn't she? I mean this sounds too much like Obama's (lack of) effort for gay rights.

1:05 Russell Wheeler: I think women's legal rights groups have already voiced some hesitation about her--not so much about her decisions on abortion, because there aren't many, but because they don't know her positions. And, on this specific matter, the point is moot, because one of the first things Obama did was to void the Mexico City rule.

1:05 [Comment From Kenneth] Do you anticipate any major cases in what could be her first term?

1:07 Russell Wheeler: There's a bunch of them, including the case I mentioned on campaign finance. The court has granted certiorari in a case about the Sarbanes-Oxley oversight board, life imprisonment for juveniles, class actions, the case involving the federal law banning a certain form of cruelty to animals. It should be an interesting term.

1:07 [Comment From Sally] The women's groups have been fairly silent on this nomination. Does that mean anything? Would their vocal support just hurt her?

1:08 Russell Wheeler: That may be--why upset a process that appears to be moving in a direction that they likely favor?

1:08 [Comment From Damien] Do you think there's any weight to the argument that Sotomayor endorses "judicial activism?" Aren't justices supposed to be impartial? How does a Justice make unbiased decisions when their world view is determined by past experiences?

1:10 Russell Wheeler: From all I've read about her decisions, and the relatively few I've read myself, her decisions are characterized by respect for precedent and legislative intent. While opponents have called the panel decision in the New Haven fire fighters case, "activist" I think it was a decision deferential to the political bodies and consistent with precedent as understood at the time.

1:10 [Comment From Joe in NY] Are Republicans going to be able to muster much of an attack? They seem lost and lacking any sense of focus.

1:11 Russell Wheeler: I see this confirmation process as something like a baseball game between a very powerful team and one not so powerful. It's fairly easy to predict the outcome, but the players have to go through the nine innings according to the rules. The lines of attack that the Republicans have developed haven't gained much traction at all.

1:11 [Comment From Charles (New York)] As someone who studies the SCOTUS nomination process, can you shed some light on how the moves the various groups opposed to the nomination have made to date compare with previous SCOTUS nominations?

1:13 Russell Wheeler: I don't see much difference in this process with those over the last two decades or so. Keep in mind that to many of the groups--on the left and right--confirmation battles are as much about shoring up their bases and appealing for funds, as they are about actually thinking their actions will influence the outcome in the long run. It's a far cry, though, from the process even in the 1960s and certainly in years earlier.

1:13[Comment From Quentin] Would it be correct to assume that if the court has been positioned center-right these past few years, Sotomayor will contribute a center-left voice? Secondly, do you see any potential for her to parlay w/ any of the more solidly conservative court members?

1:15 Russell Wheeler: The conventional view, which I think is on target, is that replacing Souter with Sotomayor won't have much of an influence on the decisional outcome. I suspect that she'll get along well with the more conservative members of the Court--she's gregarious and considerate--but that's not going to change the jurisprudential direction. Keep in mind that Justice Ginsburg and Justice Scalia are the best of friends, but you wouldn't know it from their votes.

1:15 [Comment From James] If she is such a good judge why are her most important decision overturned in the Supreme court, she doesn't have much of a record there

1:16 Russell Wheeler: Most of the time that the Court takes a case, it overturns the court below. I don't think that says too much about her abilities.

1:16 [Comment From Emily] How would you term her allegiance to the United States? Does she believe in American sovereignty?

1:18 Russell Wheeler: I have no reason to think she doesn't, but it's a good question into the window of how she regards U.S. judges' citing foreign judicial decisions, which has been a hot-button issue for some time. She's been criticized for endorsing the practice, but her response, like those of Breyer, Ginsburg, and Kennedy, is that it's one thing to look at how similarly situated judges reasoned through a problem, quite another to use that decision as a precedent. She'll make clear she's opposed to the latter.

1:18 [Comment From Joe in NY] And, don't you think now would have been a better time for a more daring pick from Obama? With his high approval ratings, it would seem like now would be the time to pick someone more left of center.

1:19 Russell Wheeler: High approval ratings when he nominated her, not so high now. I think he made a choice that reflects what he said he would do, but he also made a calculated choice to make history--and build allegiances--by selecting a woman and a Latina.

1:19 [Comment From Jon] Senator Inhofe refused a meeting with Judge Sotomayor saying that he had already decided to vote against her. Is that as rare as I think it is?

1:20 Russell Wheeler: I think his Oklahoma colleague, Senator Coburn, said the same thing. It's probably not rare to think it, but is rare to say it. Inhofe said he voted against her for the court of appeals. So?

1:21 [Comment From Tom] Does she have much of a record on business issues?

1:21 Fred Barbash - moderator: We have time for just a few more questions everyone....

1:22 Russell Wheeler: I haven't looked deeply into that. Her court, of course, sitting in New York City, gets a lot of commercial cases, and I think her decisions there have been consistent with her record generally, but I apologize for not having a better sense of it.

1:22[Comment From Jo] I recently heard Justice Breyer speak and he made a compelling case that judges are underpaid. Do you agree? I know their pay is tied to congressional pay so there's a political problem. But do they deserve a pay raise?

1:24 Russell Wheeler: I think they do. You're right that Congressional insistence on linkage between judicial and legislative salaries has held back judicial salaries. Sotomayor's salary, if confirmed, will go from \$185k to \$214k, but I'm sure that's the least of the attractions of the job to her.

1:24 [Comment From Camille] If there were to be another Supreme Court vacancy during President Obama's term how likely do you think it would be that he would nominate a controversial or very left leaning judge?

1:25 Russell Wheeler: I suspect that the next nominee would, ideologically and jurisprudentially, be in the Sotomayor mold. I think he might well try to break the precedent of picking another court of appeals judge--maybe SG Kagan, H Security Sec. Napolitano, or even Gov. Granholm of Michigan. I'm pretty sure, though, that his next nominee will also be a woman.

1:26 [Comment From Devon (Berkley)] I've read that Chief Justice Roberts likes a very orderly and cordial atmosphere in the court. Would it make any sense, then, if a Democratic President wanted to upset the balance of the court to appoint someone more cantankerous and confrontational to the court -- someone who would not just challenge Roberts' decisions intellectually, but challenge Roberts' running of the court's practices themselves on a day-to-day basis?

1:27 Russell Wheeler: I think almost all justices like an orderly and cordial atmosphere--they have to get along with each other on one level. If Sotomayor challenges how Roberts runs the court, that won't happen, I suspect, until she's well into her tenure, and I wouldn't count on its happening at all.

1:27 [Comment From William OHara] President Obama has consistently said that he is looking for something with "empathy", which is a trait that is completely subjective in nature. That character trait is generally not consistent with an objective application of the law, or the idea of "equal protection under the law". How well do you think she will uphold the established precedent of the constitution, especially when applied to cases that she is empathetic to, in her "wise Latino" experience?

1:28 Russell Wheeler: Obama never said that empathy was the only quality he was looking for--only that when the precedents and statutes are unclear as to the case's disposition, he would want a judge to consider the situation of the litigants. I think she fits fairly well into the framework.

1:28 [Comment From John C. in Denver] My sense of SCOTUS history tells me that by and large, justices tend to stay out of politics. In the last decade or so, we have seen people like Scalia and Thomas voice, off the bench, decidedly political statements. Sotomayor has also made some comments that could be deemed political, but she is as yet not on the SCOTUS bench. Do you see this as a growing trend, and if so, do you find it disturbing or not much of a problem?

1:30 Russell Wheeler: The justices generally have been fairly outspoken, extra judicially. Sotomayor does strike me as having been fairly active on the law school lecture circuit. My own view, something of a minority view, is that the country and the court benefits when its members are not recluses.

1:30 Fred Barbash-Moderator: Thank you Russell Wheeler. This was extremely informative and useful. And thanks so much to all our readers for participating. Sorry we couldn't handle all your questions.

Bye for now

1:31 Russell Wheeler: There were great questions, and I appreciate the chance to speak with all of you.