

## OPINION

## Five questions for Sotomayor

**GOP senators should probe her views on key Supreme Court decisions.**

By Ilya Shapiro  
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**WASHINGTON** - Whether the Republicans will muster strong opposition to the president's Supreme Court pick is beside the point.

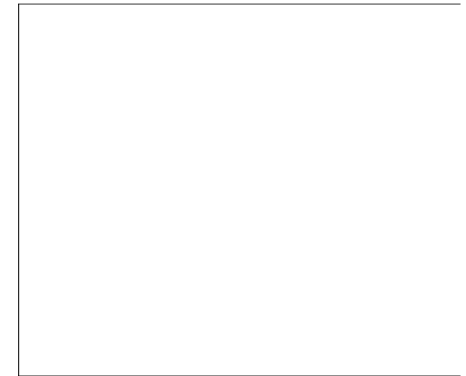
The minority on the Senate Judiciary Committee has the opportunity – and the responsibility – to educate the public about the distinctions between judicial philosophies that limit judges to a judicial role, and those that demand they be super-legislators. Some people think that when a jurist is confronted with a perceived social injustice, she should fix it. Judges, after all, are expected to use judgment.

But this is a misperception of the judicial role. Judges use their constitutional authority – and judgment – to decide particular cases by applying law to particular facts. They should not bend or otherwise change the law to fit their policy preferences. There are indications, however, that Sonia Sotomayor is willing to venture outside of written law to reach the policy result she wants. Her Senate confirmation hearings are the proper forum to determine if this is so. US Solicitor General and Supreme Court short-lister Elena Kagan said in a 1995 article that our "confirmation mess" can be blamed on a lack of "meaningful discussion of legal issues." That's because nominees often duck senators' questions by saying they wouldn't want to "prejudge" an issue that might come before them on the bench. But what legal issue can't?

Unless we want confirmation processes to continue focusing on pot smoking, illegal-immigrant nannies, and the like, senators from both parties should ask probing questions that can cut through the "that case may come before me" clutter and actually shed light on Judge Sotomayor's judicial philosophy. Here are five:

1. *Can the government rewrite leases, mortgages, and other contracts?* The Depression-era Supreme Court said yes in a case called *Home Building & Loan Association v. Blaisdell* because constitutional protections for property and contract rights can be sacrificed to "protect" homeowners. While such reasoning may promote a crude form of social justice, it prevents people from planning their affairs because it undermines their confidence that contracts they sign today will be enforced tomorrow – and thereby destroys the credit and capital markets upon which modern life rests. Is this the kind of "empathy" the nominee shares?
2. *Can the government regulate activity that is neither commerce nor crosses state lines?* The Interstate Commerce Clause of the Constitution says no, but the 1942 case of *Wickard v. Filburn* allowed the Department of Agriculture to fine a farmer for growing too much wheat and not taking enough of it to market – because his actions, when aggregated with other farmers, could affect the interstate price of wheat. Sixty-three years later, the court used similar logic to stop a seriously ill woman from growing marijuana for "compassionate use" under California law.
3. *Where in the Constitution is the right to privacy – and other unspecified rights – located?* Cass Sunstein, a legal adviser to President Obama, has said that *Roe v. Wade* was poorly reasoned and not rooted in

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constitutional text or precedent. Does Sotomayor agree? The point here is not to tease out whether she is pro-choice. Rather, does she agree that the right to privacy comes from, as the court explained in *Roe*, penumbras formed by emanating constitutional amendments? If so, what else lurks in those shadows? Or is the right to privacy – at least as it relates to issues such as sodomy and contraception, which, unlike abortion, don't involve claims to potentially competing rights – really found in the Ninth Amendment, which protects "others retained by the people?" If so, what are other examples of retained rights? The right to pursue an honest living or otherwise be free from government interference with economic liberty?

4. *What does the nominee think of Kelo v. City of New London?* This is the case in which the city decided to take people's houses and give them to a private company, which promised to use the land in a way that would create jobs and generate more tax revenue. The Supreme Court approved this eminent domain abuse because the Fifth Amendment's "public use" requirement included the "public benefit" contemplated here. Justice O'Connor was forceful in dissent: "Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory." What is Sotomayor's understanding of "public use"?

5. *Should the Supreme Court refer to foreign court decisions to help interpret US law and the Constitution?* Certain members of the court increasingly cite foreign sources to support their arguments, typically in disputes over the death penalty and other hot-button issues. The problem is that, while it is perfectly appropriate to look abroad when interpreting international commercial contracts, the views of foreign lawyers are simply irrelevant to the meaning of our founding document. And while Congress should look to foreign example when crafting legislation – much as the founders did when designing the Constitution – interpretation should be done solely with reference to national legal traditions. Otherwise, we not only delegitimize our own law but move it in unexpected directions. For example, US law is much more "liberal" than that in the rest of the world in areas such as abortion and free speech.

There are more questions that need to be asked. If Sotomayor refuses to answer them substantively or offers anodyne truisms, she will not have met the appropriate burden. More important, she will not have gained the trust of the American people.

If, on the other hand, the Republican committee members refuse to ask these tough questions, they will have themselves to blame when the public fails to buy their claims of "judicial activism."

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