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The Sotomayor Hearings: A Waste of Time?

By *THE EDITORS*

Photo: Charles Dharapak/Associated Press Supreme Court nominee Sonia Sotomayor testified on Capitol Hill on Wednesday before the Senate Judiciary Committee.

Updated, July 15, 10:30 p.m. | Olati Johnson of Columbia Law School says the process doesn't allow for measuring a nominee's wisdom.

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Judge Sonia Sotomayor [in confirmation hearings](#) this week explained (many times) what she meant by her “wise Latina” remark, defended herself against charges of being a bully on the bench, and tried to navigate carefully through [discussions about abortion and gun control](#). She strove to be [as circumspect about her views as possible](#), while the Senate Judiciary Committee members played their preset roles as defenders and interrogators.

We asked some legal scholars and others who've been following the hearings what's the most interesting thing they've learned. And if the hearings have revealed nothing new about Judge Sotomayor or her questioners, do they still hold some other kind of value?

[Alan M. Dershowitz](#), Harvard Law School

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[Ilya Somin](#), George Mason University School of Law

[Olati Johnson](#), Columbia Law School

Posturing and Hypocrisy

Alan M. Dershowitz is the Felix Frankfurter Professor of Law at Harvard Law School. He is the author of many books, including, “Rights from Wrongs: A Secular Theory of the Origins of Rights.”

For the most part confirmation hearings for Supreme Court Justices bring out the worst in the senators and in the nominee. The Sotomayor hearings are worse than most. Senators pretend to be outraged by the thought that a judge might be influenced by ethnicity,

gender, religion, political affiliation or other such factors. The nominee pretends that she misspoke, or was misunderstood, when she acknowledged, in a moment of candor, that her Latina background might put her in a better position to understand certain legal or constitutional issues.

Senators pretend to be outraged that a judge might be influenced by her background; and a nominee pretends she misspoke.

Every practicing lawyer knows that these external factors matter — and matter a great deal. Any lingering doubt was put to rest forever by the Supreme Court's shameful performance in *Bush v. Gore*, where five Republican justices voted like five Republican politicians, casting aside their own precedents and their constitutional obligation to do justice without regard to the identity of the litigants. I know of no honest lawyer who believes the case would have come out the same way had the party affiliations of the litigants been switched.

Oliver Wendell Holmes once wisely observed that the job the lawyer is to predict what the courts will do in fact. Lawyers are paid enormous sums of money to make these predictions. Among the most salient items of information a lawyer needs to predict accurately are precisely the factors that the senators and the nominee claim should make no difference in the outcome of cases.

It is precisely because these factors matter so much that it is important to have individuals from different backgrounds on the Supreme Court.

She'll Fit In Just Fine

Charles Fried teaches contract and constitutional law at Harvard Law School and this year is a visiting professor at Columbia Law School. He was the U.S. solicitor general from 1985 to 1989.

Judge Sotomayor has shown that she is smart, strong, experienced and knowledgeable. She should and will be confirmed.

Tom Korologos, who had been assigned by the Reagan Administration to guide me through my confirmation hearings to be solicitor general, explained to me at the time that for a nominee the purpose of a confirmation hearing is to be confirmed, not — as Judge Robert Bork evidently thought — to engage and best the senators in debate.

On the other hand, Judge Sotomayor has given no evidence that she will change the Court, which is made up of similarly able and knowledgeable people, but has been stuck — like the parties, to a long but not quite happy marriage — in endlessly repeated familiar arguments and in a depressingly predictable pattern of 5-4 splits on the most important uses before them.

Of course, any nominee who had the freshness to point the way out of that wilderness had

better give no evidence of it during the hearings, and so there is always room for hope.

A False Depiction of Judging

***Heather K. Gerken** is the J. Skelly Wright Professor of Law at Yale Law School. She is a former law clerk for Justice Souter.*

I have always believed in confirmation hearings. The Constitution belongs to all Americans, and confirmation hearings offer dramatic proof of that fact. The problem is that what appears to be emerging from the hearings is a depiction of judging that is unrecognizable to lawyers of any jurisprudential stripe.

Americans watching the hearing will never catch a glimpse of what judging really involves.

A New York Times reporter has already observed that the hearings seem **to have drained all the life out** of Judge Sotomayor. My worry is that confirmation hearings will inevitably drain the life out of the law itself, at least in the public's eyes. Judge Bork was once criticized for thinking of the job as an "intellectual feast," but we now seem to have reached the point where nominees must claim that the job involves an intellectual famine.

The turning point may have been the confirmation hearings of Chief Justice Roberts, where he compared the Justice to an umpire, calling balls and strikes. Judge Sotomayor now appears to be out-Robertsing Roberts. Her answers sometimes suggest that the job involves even less discretion.

It's hard to know whom to blame in all of this. Nominees like Chief Justice Roberts and Judge Sotomayor have been thrust into an untenable position. It's hard to give the right answer when you are asked the wrong question.

The inexorable logic of politics has led both senators and nominees to depict judging as an either/or choice: either the law involves the technocratic application of rules to fact, or it involves free-form democratic engineering. But there is a vast space between those two positions, and somewhere in that space lies the reality of judging. It's too bad that Americans watching the hearing will never catch a glimpse of that reality.

Too Scripted to Have Any Meaning

***Philip K. Howard**, a lawyer and the founder of [Common Good](#), is the author of "Life Without Lawyers: Liberating Americans From Too Much Law." He blogs at [TheAtlantic.com](#)*

These hearings are almost devoid of substance, so the lessons are mainly negative. The one useful conclusion is that Judge Sotomayor's skill at parrying loaded questions demonstrates that she is as smart as her resume suggests.

Otherwise, the hearings are a waste of time. We don't know what Judge Sotomayor really

believes, because everything has been scripted to avoid any discussion of substance. The hearings are more about the senators campaigning to the television audience.

The attention given to the role of a Sotomayor's background takes to a new level the concept of beating a dead horse.

And the speeches are not interesting — the attention given to the role of a candidate's background takes to a new level the concept of beating a dead horse. A discussion in a freshman psychology class would be more illuminating. You have to marvel how the senators can switch philosophical positions depending on who's in power — with Democrats arguing that the main issue is whether Judge Sotomayor is qualified, while Republicans assert that it is important to probe deeply into her philosophy and potential biases — precisely the opposite of their respective positions in the hearings for Samuel Alito and John Roberts.

I wish the hearings could have resulted in a more intelligent discussion about “[judicial activism](#),” and the role of “[empathy](#)”. But those phrases continue to be slogans devoid of substance. These hearings are further evidence that Congress is broken, and more interested in partisan posturing than governing.

The one fresh note sounded in the hearings, at least that I've heard, was from Senator Lindsay Graham, Republican from South Carolina, who basically said: We lost the election, and President Obama gets to appoint any qualified person he wants. Sounds right to me.

Who's Empathetic Now?

Glenn Greenwald, a former constitutional lawyer, is a [columnist at Salon.com](#) and the author, most recently, of “[Great American Hypocrites: Toppling the Big Myths of Republican Politics](#).”

The most significant revelation of this hearing is how transparently insincere is the Republican claim that it desires fidelity to the law. As has become evident from Judge Sotomayor's answers -- and as many litigators who appeared before her already knew -- she is, if anything, an excessively mechanistic and legalistic judge.

Adherence to doctrinal precedent and legalism is her defining trait, which is why her actual 17-year record as a jurist is devoid of any sympathy-driven rulings. She rules against even the most sympathetic parties with a high (perhaps even disturbing) frequency and unhesitating certainty. If fidelity to the law were what the G.O.P. really sought, they would be her most stalwart champions.

While Sotomayor clearly adheres to the law, it's the senators who are trying to appeal to our emotions.

But adherence to law is not what they want. They want instead to assess judges on outcome preferences and sympathies rather than law. Just consider their objections to her

ruling in the Ricci case: they are grounded almost entirely in general claims about fairness (these white firefighters deserved the promotion) and are completely detached from arguments about binding legal precedent.

And if Republican senators truly believe that ethnicity and personal background have no role whatsoever to play in judging, why didn't any of them – even a single one – object to Samuel Alito's proud declaration at his confirmation hearing that he “do[es] take into account” his Italian-American heritage when deciding cases?

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At Least, It Hasn't Been War

Tom Goldstein is co-head of the litigation and Supreme Court practices at Akin Gump Strauss Hauer & Feld. He founded [SCOTUSblog](#) and teaches Supreme Court litigation at Stanford and Harvard Law Schools.

Two things stood out. First, I thought that Al Franken, in his opening statement, introduced himself nicely to the public. He was very serious and cordial to his colleagues. It will be really interesting to see if he can follow through with good substantive questions.

Second, Lindsay Graham is fantastically candid. He's honest about the conservative and liberal politics driving the process. He raises the genuine concerns conservatives have and gives Judge Sotomayor the chance to answer.

It's nice to see that the Republican senators have behaved responsibly and the Democrats haven't tried to play the race card.

Though some objected to his own tone in discussing complaints about Judge Sotomayor's tone on the bench, my perspective in the hearing room was that he was just flagging something he sincerely thought she would benefit from considering. And he's consistent: his view is that elections matter, and that President Obama deserves deference, just as President Bush did.

Overall, I'm now slightly optimistic that we aren't headed into a permanent death spiral between Democrats and Republicans with each party relentlessly attacking the other's nominees and voting on party lines. Republican senators have behaved almost uniformly responsibly. Democrats haven't tried to caricature Republicans and play the race card with them. If we could take a step back from the brink of the judicial wars, that would be a tremendous step forward.

Cool Under Questioning

Elie Mystal, a graduate of Harvard Law School, is an editor of [Above the Law](#) and a contributor on [True/Slant](#).

I was hoping that Judge Sotomayor would reenact Samuel L. Jackson's famous testimony in "A Time To Kill" and say "Yes, I'm a wise Latina and I hope you burn in hell." Clearly, we've learned that she can keep her cool under intense questioning.

It's hard to get a lot out of the hearings when senators constantly ask the judge questions that they know she can't answer.

More than that — while she has backtracked from her "wise Latina" word choice — she has stuck to her argument that life experiences are things that judges bring with them into a courtroom. Those experiences must be subjugated to the rule of law, but they do matter and she's not backing off from that.

Beyond the character stuff, the quality of the hearings has much more to do with the knowledge and skill of the senators than the nominee. Yesterday, Senator Orrin Hatch did a great job breaking down the various Second Amendment arguments and really taught us a lot about what Judge Sotomayor thinks about the right to bear arms.

Likewise, Senator Charles Schumer by his questions showed that — despite whatever "empathy" Sotomayor may have — she's willing to rule based on the law rather than her personal feelings. Americans wouldn't have first-hand access to this kind of information without the confirmation hearings.

But Americans can't get a lot out of the confirmation hearings when senators constantly ask her questions that they know she can't answer, or when they use their time to make stump speeches for or against their political positions.

A Big Step Forward for Property Rights

Ilya Somin is an assistant professor of law at George Mason University School of Law. He is scheduled to testify on property rights before the Senate Judiciary Committee on Thursday.

One of the most interesting developments in the hearings was the extensive questioning of Judge Sotomayor on property rights issues. In addition to questions posed by Republicans, Senator Herb Kohl, a Democrat from Wisconsin, criticized the Supreme Court's 2005 decision in [Kelo v. City of New London](#), which allowed the condemnation of property for transfer to other private individuals to promote "economic development."

The fact that there were questions about property rights was more important than Sotomayor's answers.

Unfortunately, Judge Sotomayor's testimony on property rights was not especially impressive. She gave a [somewhat misleading account of her decision in the controversial Didden case](#), where her Second Circuit Court of Appeals panel ruled that it was constitutionally permissible for a state to condemn property because the owners had refused the developer demand for \$800,000 in payment, or a 50 percent stake in their business. She also [misstated two key aspects of Kelo](#), making that decision seem less

dangerous than it actually is.

Still, Judge Sotomayor's answers were less important than the very fact of the questioning. [Property rights are unlikely to advance](#) beyond the "poor relation" status to which the Supreme Court has generally relegated them unless liberals as well as conservatives begin to support them. The Sotomayor hearings are another step in the right direction. Along with the [widespread criticism of Kelo by liberals like Bill Clinton, Ralph Nader and the NAACP](#), the hearings represent some real progress. [Unconstrained use of eminent domain harms minorities and the poor](#), a reality that has caused some long-awaited rethinking on the left.

Measuring Wisdom

***Olati Johnson** is an associate professor of law at Columbia Law School. She is a former counsel to Senator Edward Kennedy on the Senate Judiciary Committee and a former clerk for Justice John Paul Stevens.*

It is unclear what additional insights one can gain from these confirmation hearings. After all, the most relevant information about Judge Sotomayor — her record as a trial and appellate court judge — is public and extensive, providing the necessary clues to her competence, philosophy, judicial methodology and temperament.

So far, we have what we expect from confirmation hearings. Senators make speeches, appending question marks at the end, in an apparent attempt to discern the nominee's views on a particular issue. The nominee distances herself from past controversial statements, and reveals little about her future ideological direction. While senators certainly should highlight what is at stake in a nomination, at its worst, this kind of questioning functions simply as political theater.

It seems that partisan drama is the chief value of these hearings for many tuning in. The danger is that such a process can denigrate the complex task of judging. There is "the law," as Senator Sessions says, which good judges follow, in contrast to something called "ideology" or "policy." Lost is the fact that a judge's background often colors how he or she determines close legal questions. Also lost is the idea that we seek in a judge (in addition to book smarts) those difficult-to-measure qualities of openness, self-awareness, and wisdom.

It would be wonderful to see in future confirmation hearings more questions that help reveal how the nominee takes on the complex task of judging and how she makes the hard decisions.