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## First day sets framework for hearings

By [Josh Gerstein](#) | 7/13/09 @ 8:04 PM EST

Stoke the flames, but don't burn down the house.

Heading into Tuesday's session, that's shaping up as the Republican strategy for Supreme Court nominee Sonia Sotomayor's confirmation hearings: Offer enough criticism to satisfy conservative activists and GOP stalwarts, but avoid an all-out conflagration that could draw the attention of moderates, women and Latino voters.

For different reasons, the White House is taking a somewhat similar tack — reflecting a conclusion that a high-profile, racially charged battle over her nomination might be highly damaging to Republicans in the long run but also would be an unhelpful distraction in the near term from President Barack Obama's weighty domestic agenda.

So Tuesday's hearing is shaping up as more legal seminar than showdown. Nothing has emerged that's likely to derail a future Madam Justice Sotomayor, and no one seriously expects anything to in this week's hearings, either.

Still, Republicans made clear that Tuesday's toughest lines of questioning will be over whether Sotomayor leans too heavily on her ethnic heritage in deciding from the bench — a notion Republicans believe would make many Americans uncomfortable.

Republicans previewed that they intend to grill Sotomayor about her views on gun control and property rights, as well as her ruling against white New Haven firefighters in a race discrimination case.

"It seems to me that ... Judge Sotomayor's empathy for one group of firefighters turned out to be prejudice against another," said Alabama Sen. Jeff Sessions, the ranking Republican on the Senate Judiciary Committee.

For their part, Democrats signaled their plans to stress Sotomayor's varied experience, including her work as a prosecutor putting away violent criminals.

Democratic senators also made clear that any GOP accusations of judicial activism would be met by insistent claims that recent Republican nominees, like Chief Justice John Roberts and Justice Samuel Alito, have strayed from their promises to exhibit judicial restraint.

Sotomayor indicated that she has no intention of relitigating her entire judicial history Tuesday — but is more likely to offer a judicial version of rope-a-dope. Her nine-minute opening statement addressed some criticism of her in an extremely general way, without acknowledging the most strident attacks nor providing the kind of forceful defense of experience-based judging that some liberal activists might have liked to see.

Her defense Tuesday seems likely to boil down to this: suggesting in general terms that any references she'd made to the impact of her ethnicity on her judging did not make her biased, including her famous "wise Latina" speech, in which she suggested someone like herself with her life experience would be a better judge than a white man.

"My personal and professional experiences help me to listen and understand," she said Monday, "with the law always commanding the result in every case."

Judiciary Committee Chairman Pat Leahy (D-Vt.) kicked off the hearings with a stern warning to his colleagues not to impugn Sotomayor's ethnic background or suggest that it should lead to special scrutiny of her views — "Let no one demean this extraordinary woman," Leahy said. But Democrats seemed loath to pounce as Republicans edged up to the line in some of their questions, a sign they had no interest in turning up the temperature on the hearings.

But there was ample evidence that Republicans were pulling their punches, too. Sessions even dropped a reference in his prepared remarks to how he found Sotomayor's comments on the role of ethnicity in judging to be "shocking and offensive to me."

When he actually spoke Monday morning, Sessions simply omitted that phrase and said one of Sotomayor's statements

"bothers me."

Part of the Republican strategy was reflected in statements that might be ignored by some viewers but seemed intended to resonate with Americans with a deep anxiety that the country is disintegrating.

"I think our nation's at a critical point. I think we're starting to see cracks," Sen. Tom Coburn (R-Okla.) said ominously. "The thing that binds us together is an innate trust that you can have fair, impartial judgment in this country."

Sessions also spoke of an America at a momentous tipping point.

"Our legal system is at a dangerous crossroads. Down one path is the traditional American system, so admired around the world, where judges impartially apply the law to the facts without regard to personal views," Sessions said. "Down the other path lies a brave new world, where words have no true meaning, and judges are free to decide what facts they choose to see. ... I reject that view, and Americans reject that view."

Sen. Jon Kyl (R-Ariz) also swung hard during Monday's hearings — at someone not in the witness chair. "Unfortunately, a very important person has decided it's time for a change, time for a new kind of judge, one who will apply a different standard of judging, including employment of his or her empathy for one of the parties to the dispute. That person is President Obama," Kyl said.

"President Obama is simply outside the mainstream in his statements about how judges should decide cases. I practiced law for almost 20 years. ... Never once did I hear a lawyer argue that he had no legal basis to sustain his client's position so that he had to ask the judge to go with his gut or his heart."

The GOP has also seized on another way to satisfy activists while stopping short of a knock-down battle with the nominee: Invite those activists to testify after the potential justice is safely out of the room. Several of Sotomayor's sharpest critics, including anti-abortion activist Charmaine Yoest and libertarian David Kopel, are among those who received invites for an expert panel set for later in the week.

Still, a key facet of the GOP strategy seemed to be to keep up a cheery demeanor even when expressing the gravest doubts about the nominee, the president and the future of the judiciary.

After unleashing some of the morning's most aggressive salvos, Sessions struck a decidedly compassionate, even lighthearted tone after Sotomayor spoke.

"That was a good statement," Sessions said. "If that had been the theme of her speeches over the last 15 years, I would think we would have less difficulty with the nomination than we do."

The Alabama Republican, who was turned down for a federal judgeship by the Judiciary Committee in 1986, expressed sympathy about any heartburn incurred during the senators' soliloquies.

"I give Judge Sotomayor an A for listening to that," he said. "We should have had a box of antacid for her by the time the day ended."

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