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What question would you most like to ask Judge Sotomayor?

Thursday Noon: Live chat with Supreme Court nomination scholar Christopher Eisgruber

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Fred Barbash, Moderator:

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11:34 **Fred Barbash-Moderator:** Good afternoon and thanks for joining us. Our guest today is [Roger Pilon](#), a distinguished Arena contributor who is Vice President for Legal Affairs at the Cato Institute where he holds the B. Kenneth Simon Chair in Constitutional Studies. He is the founder and director of Cato's Center for Constitutional Studies, the publisher of the Cato Supreme Court Review, and an adjunct professor of government at Georgetown University through The Fund for American Studies.

Yesterday, Roger posted the following comment on the Sotomayor nomination:

"In nominating Second Circuit Judge Sonia Sotomayor to fill the seat of retiring Supreme Court Justice David Souter, President Obama chose the most radical of all the frequently mentioned candidates before him. Given the way her panel recently summarily dismissed the Ricci case – involving the complaint by New Haven, Connecticut, firefighters that the city had thrown out the results of an officers exam because the results did not come out “right” – and the expectation, based on oral argument, that the Supreme Court will reverse the Second Circuit decision, there will likely be an extremely contentious confirmation battle ahead. If confirmation hearings are scheduled for summer, they will follow shortly upon the Court’s decision in that explosive case. Are we to imagine that President Obama chose as he did because he wants that battle?"

Roger Pilon will join us at noon. You may submit questions in advance. Please use a name, rather than a handle or "guest."

12:00 **Roger Pilon:** As a political matter, President Obama’s nomination of Judge Sotomayor appears to be perfect. First, it reflects his own affinity for the “identity politics” that has dominated the legal academy for decades, a politics she shares. Second, that is the politics of his base, which has been unhappy with a number of his recent decisions, especially regarding the War on Terror. And finally, Judge Sotomayor helps cement the Democratic Party’s hold on the Hispanic vote. As a legal matter, however, identity politics and the “judicial empathy” both the president and Judge Sotomayor laud raise serious questions. Law is supposed to create a neutral framework within which individuals and organizations find the freedom to live and prosper. It is not supposed to be a tool through which groups, including political majorities, are able to manipulate government power against others for their own ends. Yet that’s what we’ve come to in so many ways, and there are signs that Judge Sotomayor would only further those developments. She was restrained as a lower court judge. On the Supreme Court she will not be similarly constrained, which is why her off-court statements loom so large to so many of us. They reflect her judicial and constitutional philosophy, which if confirmed she would be freer to indulge.

12:01 **Fred Barbash-Moderator:** Roger. Welcome. You answered my first question before I asked it.. Now let's turn it over to our readers.

12:01 [Comment From Kevin MN]

Roger, you and many conservatives argue for a strict constructionist take on the Constitution. In your opinion, do you think many of the ground breaking civil rights cases of the second half of the 20th century should be overturned? Do you think the Constitution, as it was originally written, is fair?

12:06 **Roger Pilon:** A complex question, Kevin. First, I'm a classical liberal more than a conservative. But to your question, I don't stand for "strict construction" because the term is unclear. I'm an originalist. Some of the recent civil rights decisions should be overturned; but most should not. In general, I abhor public discrimination, but would allow private discrimination, even as I would condemn (most of) it on moral grounds. The Constitution was obviously not "fair" as originally written. It took the Civil War Amendments to "complete" the Constitution's promise.

12:06 [Comment From Jen]

Mr. Pilon. Do you think a President should be able to appoint someone who reflects his own views to the Supreme Court?

12:07 **Roger Pilon:** I do. That's what elections are about. But the Senate, too, has power to advise and consent, and not every nominee should be confirmed.

12:07 [Comment From Brittany]

Based on what you know now, if you were a Senator, would you reject this nomination?

12:10 **Roger Pilon:** I cannot answer that question because I don't know enough about Judge Sotomayor. I can say this, however: I would lean against confirmation based on what I know. Interestingly, 29 senators, including John McCain, voted against her when she was up for the Second Circuit.

12:10 [Comment From Hannah]

I believe that Cato Institute scholars were among the strongest opponents of the executive powers assumed by President Bush. Do you have any reason to believe that Judge Sotomayor might share Cato views on this?

12:12 **Roger Pilon:** Well, a number of people at Cato took that view. I did not. I do not know her views on executive power. Perhaps they are evolving like those of her benefactor, once he has to deal with the real world!

12:12 [Comment From Steven G.]

Some of Sotomayor's critics cite the claim that she has been reversed repeatedly by the Supreme Court. Is that a cause for concern? Is there a decent appeals court judge in America who hasn't repeatedly been reversed by one Supreme Court majority or another?

12:15 **Roger Pilon:** I take "repeatedly" to be the operative word in your question. My early research indicates that she has a fairly high rate of reversals as these things go. More important, it is the grounds for reversal that matter as much, and some of those, in her case, involve tendentious readings of statutes, for which she has been called up.

12:15 [Comment From Bruce G.]

Mr. Pilon. Thanks for being here. Do you think this "empathy" issue is overblown? Have not many justices--Conservative and Liberal--cited the ability to "put myself in others' shoes" as a useful attribute for serving on the bench?

12:20 **Roger Pilon:** Good question! Yes, empathy, rightly understood, is an important quality in a judge. But the way both she and the president have employed the term suggest more than an ability to put oneself in another's shoes. It's when a judge puts his thumb on the scales of justice that red flags should go up. Where, for example, was her "empathy" for Frank Ricci, the dyslexic firefighter who studied long and hard to pass the exam for advancement, only to be told that the test results would be thrown out because they were racial unbalanced?

12:20 [Comment From Sarah]

With a Democratic Congress (for now) and a Democratic President, is it possible that any other Supreme Court Justices may step down in the next few years? And should we expect any less controversial picks in such instances?

12:22 **Roger Pilon:** Well, Justices Ginsburg and Stevens are the most likely to step down in the near future. As for the kinds of picks we should expect from this president, I doubt they'd be any less controversial. He seems to have a clear picture of what he wants: he's a "government man."

12:22 [Comment From Renee]

I don't follow your response (above) when asked if you would reject/confirm this nominee because you "don't know enough about Judge Sotomayor." Yet, your quote from yesterday about her was "...President Obama chose the most radical of all the frequently mentioned candidates before him." Can you make that kind of statement with any authority if you don't know enough about her?

12:24 **Roger Pilon:** It was a comparative statement that I made yesterday. You don't have to know everything about potential nominees to make that kind of statement. You have to know more than I presently know to answer the first question.

12:25 [Comment From Bruce Blevins]

When seen in context, Judge Sotomayor's comment regarding "making policy" is about the difference between appellate and trial judges and the influence on a single case vs an entire class of cases. Is there any other evidence to pin the activist label on her?

12:25 **Fred Barbash-Moderator:** Friends. We've got five more minutes. I hope we'll have Roger Pilon back again soon for more.

12:29 **Roger Pilon:** First, appellate judges are the last stop for most litigants. And while they focus more on the law than the facts in many cases, they can and sometimes do "make policy," so I'm not quite sure what you're getting at. Second, far more troubling than her Duke statements are those she made in 2001 in a speech at Berkeley. See Stuart Taylor's National Journal article for more on that.

12:29 **Fred Barbash-Moderator:** That's it for now. I'd like to thank everyone for joining us today and especially thank Roger Pilon for sharing his knowledge and views with us. Tomorrow our topic will also be on the nomination, especially the process, and our guest will be Christopher Eisgruber, the provost at Princeton who, among other things, clerked at the Supreme Court and wrote a terrific book on the

nomination process called "The Next Justice."

Meanwhile, thanks Roger and thanks readers for joining us. Those interested in the Middle East conflict can now move over to that chat on our page.

12:29



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