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THE BIG QUESTION, May 27: Ilya Shapiro

The Big Question for Wednesday, May 27:

Will Sonia Sotomayor face serious opposition? Should she?

See all responses here.

[Ilya Shapiro](#), Senior Fellow, Center for Constitutional Studies at The Cato Institute and Editor-in-Chief, [Cato Supreme Court Review](#), said:

The issue of whether the Republicans will filibuster or otherwise muster strong opposition is beside the point. The job of the minority Senate Judiciary Committee members is to educate the public about the implications of different theories of constitutional interpretation—and probe whether Sonia Sotomayor’s theories would pervert the Constitution. The public is already with them—the “judges” issue is one of the few that has garnered consistent and solid support for the Republican position—but senators have to move beyond buzzwords to show what “legislating from the bench” actually means.

To do this, they should take a page from Solicitor General Elena Kagan, herself a potential nominee. In a 1995 article, Kagan argued that our “confirmation mess” can be blamed on a lack of debate over substantive law. Senators spend their time talking about minor non-scandals—recall Joe Biden quizzing then-Judge Sam Alito about an obscure Princeton alumni club. Nominees, meanwhile, dodge questions on the tendentious theory that the issue could come before the Court—but what legal issue can’t?

Interestingly, Kagan declined to follow her own advice at her recent hearings, causing Arlen Specter to vote against her. But that doesn’t detract from her point: Unless we want more confirmation processes focusing on pot smoking, illegal-immigrant nannies, pubic hairs on Coke cans, and the like, senators from both parties should ask questions about the scope of government power—e.g., to rewrite contracts, to regulate instate non-economic activity—and the nature of our rights.

If Sotomayor refuses to answer such questions substantively or spouts anodyne truisms, she will not have met the burden Kagan outlined. More importantly, she will not have gained the trust of the American people. If, on the other hand, Senator Sessions and the other Republican Judiciary Committee members refuse to ask these tough—but nuanced—questions, they will only have themselves to blame when the public fails to buy their claims of “judicial activism.”

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Sen. Wyden : The history of bringing about enduring change, change that is going to last, change that people are going to rally behind — that history is predicated on bringing people together. And Senator Bennett and I have always

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