



## **“What is the role of original intent & original public meaning in constitutional interpretation?”**

Today Senators have expressed interest in Judge Sotomayor’s views on “the proper role of the Framers’ intent and the original public meaning of constitutional text in interpreting the Constitution.” Originalism is an exclusive reliance on meanings of the text at the time it was ratified, whether according to the “original intent” of the Framers who drafted the text or according to the “original public meaning” of the words as they were understood by reasonable members of the public at the time. Championed by Justices Scalia and Thomas and prominent conservatives such as Robert Bork and Edwin Meese, Originalism now plays a powerful role in public discourse, legitimizing conservatives’ dominance of the federal judiciary and fomenting opposition to evolving understandings of individual liberty and equal protection.

### **Judge Sotomayor’s Judicial Record**

As Senator Cornyn notes in his question, Judge Sotomayor has occasionally mentioned the intent of the Framers in her decisions. For example, in reviewing the constitutionality of the one-year statute of limitations to file a *habeas corpus* petition, Judge Sotomayor cited Supreme Court precedent and several scholarly articles considering the Framers’ intentions when including the Suspension Clause in Article I of the Constitution and questioning whether the scope of the writ as known to the Framers was limited only to questions of jurisdiction. *Rodriguez v. Artuz*, 990 F. Supp. 275, 278 (S.D.N.Y. 1998). In another case, *Koehler v. Bank of Bermuda*, 229 F.3d 187 (2d Cir. 2000), Judge Sotomayor dissented from a denial of rehearing en banc where the Second Circuit had decided that Bermuda corporations and a Bermuda citizen were not “citizens or subjects of a foreign state” and therefore a did not fall within the alienage jurisdiction of federal courts. In her dissent, Judge Sotomayor engaged in a historical review of the meaning of the words “citizens” and “subjects” and the Framers’ intent in choosing those words. *Id.* at 191. Based on a review of Judge Sotomayor’s judicial record, the most one can conclude about her view of the role of original intent and original public meaning is that she is willing to take a historical approach to the meaning of the text when she deems it appropriate.

Judge Sotomayor does not appear to have ever announced a general intellectual or ideological preference to Originalism or to any other mode of constitutional interpretation, either in her rulings or in her speeches and articles. This is not surprising given her modest and restrained approach to judicial review. She has written frequently in her opinions about the limited role of a judge, and she has consistently approached change in the law in a very restrained and incremental fashion. The fact that she has not written extensively about her theory of interpretation should not suggest that she is likely to become a wildly activist judge who inserts her own policy preferences into constitutional law. If anything, in the more than 700 opinions she has authored during her long tenure on the bench, she has been inclined to avoid

reaching constitutional questions, and she has derided those judges who rule according to their personal policy preferences.

### **Judge Sotomayor's 1998 Confirmation Hearings**

The clearest expression of Judge Sotomayor's view of constitutional interpretation can be found in the record of her 1997 confirmation hearing. Senator Thurmond asked Judge Sotomayor if she agreed with the former Supreme Court Justice who explained his theory of interpretation as follows: "We look to the history of the time of framing of the Constitution and the intervening history of interpretation, but the ultimate question must be, what do the words and the text mean in our time?" Judge Sotomayor replied: "No, sir, not fully. I agree with the first two parts of it, that you look at the Constitution and at what it meant at the time. The last suggests that I would be trying to change its meaning today, and no. I think the first two would inform what the last result should be, which is what did it mean then and how to apply new facts to that if the issue is new facts." *Nominations of Ronald Lee Gilman and Sonia Sotomayor (U.S. Circuit Judges): Hearing Before the Senate Comm. on the Judiciary, 105th Cong. 354-55 (1997).*

Senator Sessions asked Judge Sotomayor if she agreed that we have to enforce the Constitution, "the good and the bad parts," even if we do not agree with it, to which Judge Sotomayor replied, "Absolutely." Senator Sessions then asked whether "we really undermine and weaken that Constitution when we try to bend it to make it fit our contemporary feelings of the moment." Judge Sotomayor replied: "Sir, I do not believe we should bend the Constitution under any circumstance. It says what it says. We should do honor to it." *Id.* at 357.

Finally, then-Senator Ashcroft questioned Judge Sotomayor about whether she would "read additional rights into the Constitution," like "a right for homosexual conduct on the part of a prisoner." Judge Sotomayor replied: "I cannot do it, sir. I cannot do it because it is so contrary to what I am as a lawyer and as a judge. The Constitution is what it is. We cannot read rights into them. They have been created for us." She also stated: "I do not think that we should be making constitutional rights any greater than they exist right now. The Constitution should be amended sparingly, sir, as it has been through-out our history. It is something that should be done only after much history and much thought." *Id.* at 361.