



Written by [Steven Yates](#) on July 18, 2009

Ricci Testimony Highlighted Last Day of Sotomayor Hearings

We heard a great deal about “wise Latina women” and came to realize the extent to which race/ethnicity is still a political cauldron, boiling beneath the surface of public policy. However much Sotomayor now claims to regret her statement at a diversity conference at Berkeley a few years ago, questions remain about such statements (which she actually made repeatedly), the sense that President Obama wanted a Supreme Court nominee who would express “empathy” (again she repudiated the sentiment in the form Obama expressed it), and whether or not (and to what extent) her personal views would affect how she would rule on specific cases bound to come before the nation’s highest court. Sotomayor maintains they will not affect her rulings.



Senate Democrats are expected to approve her nomination unanimously. GOP Senators are considering their options. Some, such as Richard Luger (R-Ind) and Olympia Snowe (R-Maine) have announced their intentions to vote for her. The latter praised her responses that the “job of a judge is to apply the law” instead of making policy, and that the law, not one’s empathies or sympathies, is what “compels conclusions in cases.” With the support of Democrats plus a number of Republicans, Judge Sotomayor’s confirmation for U.S. Supreme Court justice appears likely.

The most noteworthy event of the final day of the hearings was the testimony from Frank Ricci, the New Haven firefighter who brought the *Ricci v. DiStefano* lawsuit against the city when a promotions test he and 18 other firefighters had passed with flying colors was thrown out because no blacks had passed it. A trial judge had dismissed the suit; Ricci and his fellow firefighters had appealed. Sotomayor, as is now widely known, was on the three-judge panel that ruled against them and had its ruling reversed by the Supreme Court just last month.

Ricci called on those assembled to consider that “achievement is neither limited nor determined by one’s race, but by one’s skills, dedication, commitment and character.” He went on to criticize Sotomayor’s panel for originally handing down a decision in an “unsigned, unpublished summary order that consisted of a single paragraph that made mention of my dyslexia and thus led many to think this was a case about me and a disability. This case had nothing to do with that. It had everything to do with ensuring our command officers were competent to answer the call, and our right to advance in our profession based on merit regardless of race.”

Ricci clearly felt the sting of criticism coming from some liberal blogs complaining that he had relied on the Americans With Disabilities Act to file a successful lawsuit against the city a few years ago, and thus



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had acted hypocritically in filing *Ricci v. DiStefano*. One blog expressed doubt that Ricci had regarded non-dyslexic Americans as victims of “reverse discrimination” when he won that case.

In response Ricci would argue that hiring needs to focus on measurable individual performance and not on group categorization of whatever sort. The way to end discrimination based on group characteristics is to not discriminate.

Ricci went on to criticize the lower court’s “belief that citizens should be reduced to racial statistics,” saying that it “divides people who do not wish to be divided along racial lines.”

Testifying with Ricci was Lt. Ben Vargas, an Hispanic who had passed the promotions test. Vargas praised Sotomayor for her personal achievements but joined Ricci in criticizing the lower court’s decision in the Ricci case.

Neither firefighter opposed Sotomayor’s confirmation.

That, of course, may have been a done deal all along, rendering many of these proceedings interesting but pointless from that standpoint. On the other hand, the issue of what the correct policy regarding race/ethnicity, representation (in student bodies, work forces, etc.), and preferential treatment is once again before us, all those issues encapsulated by a phrase you don’t hear as often as you used to: *affirmative action*.

Should government ever have enacted policies — or courts handed down rulings — that would have the effect of forcing employers and admissions offices to document the race/ethnicity and gender of every job applicant and every student applying at a college or university? Why even keep such statistics unless the purpose is to use race/ethnicity as a guide for who’s hired or accepted? Some argue — and continue to hold — that without such policies many professions and much of higher education would have continued as enclaves of mostly white men in an era of increasing ethnic diversity, and that without Supreme Court decisions such as *Griggs v. Duke Power* (1971) which did much to shift the emphasis of affirmative action from mere nondiscrimination to statistical classification to achieve proportional representations, laws against discrimination would have been toothless.

On the other hand, as a new generation has entered the workforce — more and more of its members not even born when the Civil Rights Act was passed or when *Griggs* was handed down — observers are asking about the fairness of using race or ethnicity as a criterion. After all, isn’t reverse discrimination a form of discrimination?

Some point out that the United States, with a majority white population, has elected its first black president, and that this is a clear indication that discrimination based on prejudicial attitudes are no longer accepted in mainstream American society. This puts us in a good position to ask the obvious question: in the case of occupations such as Frank Ricci’s — which demand careful observation and quick judgment as well as physical prowess — can an emphasis on racial/ethnic representation at the expense of personal merit and ability even be considered safe?

The Supreme Court has never responded clearly and consistently to such questions and thus has not established a strong precedent. But Sonia Sotomayor now appears likely to replace David Souter on the Supreme Court (an activist judge replacing an activist judge, perhaps), and issues such as affirmative action are going to be around for a while and will doubtless prompt lawsuits not yet filed and court battles yet unfought.

Photo of Frank Ricci: AP Images



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