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Clela A. Rorex  
**Michael Kennedy**

# Native American Rights Fund

1506 Broadway, Boulder, Colorado 80302-6296 • (303) 447-8760 • FAX (303) 443-7776

**WASHINGTON OFFICE**  
1712 N Street, N.W.  
Washington, D.C. 20036  
Ph. (202) 785-4166  
FAX (202) 822-0068

**ATTORNEYS**  
Richard A. Guest  
Dawn Sturdevant Baum

**ANCHORAGE OFFICE**  
420 L Street, Suite 505  
Anchorage, AK 99501  
Ph. (907) 276-0680  
FAX (907) 276-2466

**ATTORNEYS**  
Heather Kendall-Miller  
Natalie A. Landreth

Website: [www.narf.org](http://www.narf.org)

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**TO:** Tribal Leaders and Tribal Attorneys

**FROM:** Richard Guest, Staff Attorney, Native American Rights Fund

**RE:** The Nomination of Sonia Sotomayor to the Supreme Court of the United States –  
An Indian Law Perspective

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On Tuesday, May 26, 2009, President Obama announced the nomination of Judge Sonia Sotomayor for Associate Justice of the Supreme Court of the United States. If confirmed, Judge Sotomayor will replace Justice David Hackett Souter who, on April 30, 2009, officially announced his retirement from the Court at the close of the 2008 Term. Based on reports in the press, Sotomayor's confirmation hearings will likely begin in early July, with President Obama pushing to complete the hearings with a vote by the full Senate before the August recess.

## **Brief Biography**

Sonia Sotomayor was born in the South Bronx housing projects in 1954. Her parents had immigrated to New York from Puerto Rico during World War II. Her father, a factory worker with a third grade education, died when she was 9 years-old. Shortly before her father's death, she was diagnosed with juvenile diabetes. Her mother, a nurse, raised Sonia and her younger brother Juan (now a doctor in Syracuse, New York), instilled in them a belief in the power of education, and worked six days a week in order to send them to Catholic school where she graduated as valedictorian of her class.

Sotomayor attended Princeton University on a scholarship, graduating *summa cum laude* in 1976. She then attended Yale Law School, where she served as an editor to the Yale Law Journal, writing a student note entitled *Statehood and the Equal Footing Doctrine: The Case for Puerto Rican Seabed Rights*. Following her graduation from law school in 1979, she went to work as an assistant district attorney for the New York County District Attorney's Office, where she earned a reputation as "a fearless and effective prosecutor." In 1984, she entered private practice in a small civil litigation firm, representing corporations on matters related to international commercial law.

In 1991, Sotomayor was nominated by President George H.W. Bush for a federal judgeship in the U.S. District Court for the Southern District of New York. As a district court judge from 1992-98, she presided over roughly 450 cases, including the infamous 1995 injunction against Major League Baseball effectively ending the longest-running baseball strike in history. In 1997, President William J. Clinton nominated her to serve as an appellate judge – and the first Latina – on the U.S. Circuit Court of Appeals for the Second Circuit. As an appellate judge from 1998 to present, she has participated on over 3000 panel decisions, having authored roughly 400 opinions. Generally, Sotomayor is considered a centrist and pragmatist, in the mold of a Justice Souter.

Throughout her career she has remained involved in academia and pro bono work, teaching classes at NYU and Columbia, and serving as a chair and member to public services associations primarily for women and minorities. Before becoming a judge, she served for 12 years on the board of the Puerto Rican Legal Defense and Education Fund. She was appointed by Governor Mario Cuomo to a seat on the Board of the State of New York Mortgage Agency, an agency tasked with helping low- and moderate-income families buy homes. As a judge, Sotomayor was a member of the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts and on the board of the Maternity Center Association.

### **Federal Indian Law Experience**

An extensive review of Sotomayor’s record reveals that she has had very little exposure to, or experience in federal Indian law. Our research of her years as an Assistant District Attorney, as an attorney in private practice, or as a federal district court judge has not uncovered any cases dealing with issues pertaining to Indians or Indian tribes. During her tenure on the Second Circuit, Judge Sotomayor participated in only a handful of cases involving Indians, Indian tribes, or issues involving some aspect of federal Indian law.

Last year, in *Catskill Development v. Park Place Entertainment*,<sup>1</sup> Judge Sotomayor, writing for a unanimous panel, affirmed the district court’s dismissal of the lawsuit brought by a casino development group against its competitor which alleged tortious interference in connection with development and management of casino in the Catskills with the St. Regis Mohawk Tribe. Judge Sotomayor found that the earlier contracts formed were void under the Indian Gaming Regulatory Act (“IGRA”) since they had not been approved by the National Indian Gaming Commission (“NIGC”), allowing the Tribe to move forward with its later contract. Judge Sotomayor adopted a broad reading of IGRA (“designed to protect the best interests of Indian tribes”), rejecting arguments to narrowly define the term “Indian lands” or narrowly apply the term “management contract.”

In 2006, Judge Sotomayor wrote an opinion for a unanimous panel in *Jones v. Parmley*,<sup>2</sup> a case which involved a § 1983 lawsuit by several dozen members of the Onondaga Nation and their supporters against state and county law enforcement officers in relation to their mass arrest during a peaceful protest to express their disapproval of a tribal-state agreement regarding state taxation of on-reservation sales of cigarettes. Judge Sotomayor affirmed the district court’s

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<sup>1</sup> 547 F.3d 115 (2d Cir. 2008)

<sup>2</sup> 465 F.3d 46 (2d Cir. 2006)

denial of the law enforcement officers' motion for summary judgment on the basis of qualified immunity in relation to the plaintiffs' First Amendment (free speech and right to assemble) and Fourth Amendment (freedom from excessive force) claims. In recounting the facts in this case, Judge Sotomayor detailed the background leading up to the arrest of plaintiffs, including the formation of an "Indian Detail" by the New York State Patrol which "consisted of seventy State troopers dressed in full riot gear and bearing riot batons" who removed their name tags in violation of the State Police Manual directive and who, without any prior warning or order to disperse, "charged into the demonstration and began arresting protesters allegedly indiscriminately, assaulting plaintiffs, beating them with their riot batons, dragging them by their hair and kicking them."

In 2004, in *Freedom Holdings, Inc. v. Spitzer*,<sup>3</sup> the Second Circuit dealt with various challenges to the "Contraband Statutes," legislation enacted by New York in connection with the "Master Settlement Agreement" executed between the four major domestic manufacturers and most of the states. Companies who import cigarettes for resale from foreign manufacturers argued, in part, that New York selectively enforced the Contraband Statutes so as to "economically favor [wholesalers and importers] on Native American Reservations situated in the State of New York," thereby discriminating against plaintiffs in violation of the Equal Protection Clause ("EPC"). Judge Sotomayor joined a unanimous panel remanding this question back to the district court which had held that appellants could not satisfy a requisite element to establish a violation of the EPC – an impermissible consideration of race, religion, etc. The district court relied on *Washington v. Yakima Indian Nation* (finding that a legislative classification singling out tribal Indians was not "suspect," because of the unique legal status of Indian tribes under federal law), and *New York Ass'n of Convenience Stores v. Urbach* (applying rational basis review to a New York State policy of not enforcing tax laws with respect to on-reservation cigarette sales). The panel concluded that it should remand, in part, based on its determination that district court's reliance upon *Yakima Nation* and *Urbach* was unclear since those decisions only dealt with the exercise and non-exercise respectively of state jurisdiction on reservation land.

In 2001, in *U.S. v. White*,<sup>4</sup> Judge Sotomayor wrote an opinion for a unanimous panel involving members of the St. Regis Mohawk Tribe who operated wholesale warehouses which sold large quantities of cigarettes and liquor on the St. Regis Mohawk Indian Reservation. The tribal member defendants had entered conditional guilty pleas in federal district court, reserving review by the U.S. Court of Appeals for the Second Circuit of their conviction for willfully violating Section 6050I of the Internal Revenue Code by failing to file Form 8300 reports of transactions in which they received payments in excess of \$10,000. Judge Sotomayor upheld their conviction rejecting defendants' argument that their cash transactions fell within "foreign cash transaction" exception to Section 6050I, having taken place entirely within the St. Regis Mohawk Indian Reservation. Judge Sotomayor, citing a long list of Indian law precedent, held that reservations have been incorporated into the territory of the United States and are not foreign territory, and thus transactions on Indian reservations are not entitled to the "foreign cash exception." Judge Sotomayor "reinforced" this holding by reference to *Reich v. Mashantucket*

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<sup>3</sup> 357 F.3d 205 (2d Cir. 2004)

<sup>4</sup> 237 F.3d 170 (2d Cir. 2001)

*Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996), finding that Section 6050I is a federal statute of general applicability which applies to Indians and their property interests.

In 2000, Judge Sotomayor joined a unanimous panel in *Bassett v. Mashantucket Pequot Tribe*<sup>5</sup> which affirmed the doctrine of tribal sovereign immunity. This case primarily focused on a question of copyright law involving a suit by a film producer against the Mashantucket Pequot Tribe, Tribal Museum and tribal staff alleging copyright infringement under the Copyright Act, as well as state law claims of breach of contract and tortious interference with contract. The panel held that the claims against the Tribe must be dismissed under the doctrine of tribal sovereign immunity. In particular, the panel rejected plaintiff's argument that the Copyright Act is a federal statute of general application and therefore "presumably applies to Indian Tribes" based on *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996). The panel found that "the fact that a statute applies to Indian tribes does not mean that Congress abrogated tribal immunity in adopting it." However, the panel reversed the district court's dismissal of the claims against the Tribal Museum and tribal staff finding that the Tribe is not an indispensable party under Rule 19 of the Federal Rules of Civil Procedure. The panel remanded the case to the district court for a determination whether the Tribal Museum (agency of the Tribe) and the tribal staff (scope of authority) are entitled to the immunity of the Tribe.

Judge Sotomayor has also participated in two cases in which unsigned summary orders were issued. First, in *Atlantic States Legal Foundation, Inc. v. Whitman*,<sup>6</sup> the panel denied a challenge by the Atlantic States Legal Foundation ("ASLF") which sought to enjoin the Environmental Protection Agency ("EPA") from releasing federal funds for construction of a sewer treatment facility. On appeal, the Onondaga Nation, as an amicus party, raised the argument that the EPA also violated the National Historic Preservation Act by failing to consult with the Tribe concerning the effects of the facility on potential historical and archaeological sites. The panel determined that, in general, an argument raised for the first time on appeal will not be considered; that the Onondaga Nation is not a plaintiff in this action; and that there is a likelihood that the Tribe will be able to file an action against the EPA on these grounds at another appropriate stage of construction of the facility. Second, in *Stoddard v. U.S.*,<sup>7</sup> the panel affirmed the district court's dismissal of a *pro se* plaintiff's complaint against the United States alleging that Liberty Island, located in New York Harbor and owned by the United States government, was never properly purchased from its Native American owners. On appeal, appellant contended that federal law conflicts with "constitutional Indian law" and that he should have "third-party adjudication in relation to the jurisdictional conflict over Liberty Island." The panel held that the district court properly dismissed the action on the grounds, *inter alia*, lack of subject matter jurisdiction in light of the absence of evidence that the United States has waived its sovereign immunity from suit in this matter.

Judge Sotomayor's direct experience with Indian Law is too thin to form any solid theories regarding her potential approaches to Indian law cases that may come before the Court in the future. None of the opinions she authored reveal her views regarding tribal sovereignty, tribal authority over non-Indians, state authority on Indian reservations, or the scope of the

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<sup>5</sup> 204 F.3d 343 (2d Cir. 2000)

<sup>6</sup> 14 Fed.Appx. 76 (2d Cir. 2001)

<sup>7</sup> 216 F.3d 1073 (2d Cir. 2000)

federal trust responsibility to Indian tribes. As we have learned directly from federal judges who are unfamiliar with Indian law, judges seek parallels with areas of law and modes of analysis with which they are most familiar. For Judge Sotomayor, her approach to issues of importance to Indians and Indian tribes may best be informed by her background as a corporate litigator when gaming, commercial and tax issues are at issue; as an assistant district attorney when law enforcement and public safety issues arise on Indian reservations; and even perhaps as a Puerto Rican law student writing a note arguing for territory's right to exploit its offshore seabeds without violating the equal footing doctrine when tribal sovereignty issues arise.<sup>8</sup>

### **Should Indian Country support or oppose Sotomayor's nomination?**

As a replacement for Justice Souter who has been on the Court for nearly 20 years,<sup>9</sup> Judge Sotomayor offers a fresh opportunity for Indian country to re-energize its efforts to slow and eventually reverse the erosion of tribal sovereignty by the Court. Although there is very little possibility that Judge Sotomayor's vote on the Court, by itself, will change the outcome in future Indian law cases, Indian country needs a champion on the Court – a Justice who will look beyond just the last 30-years of Indian law. As Dean David Getches noted in his 2001 article, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color Blind Justice, and Mainstream Values*, Indian country needs an intellectual leader among the Justices to emerge – one who “can assume the hard work of understanding Indian law, its historical roots, and its importance as a distinct field.”<sup>10</sup> Failing an intellectual “rediscovery” he warns, means Indian law will continue to unravel and Indian interests will suffer.

Most observers already see a clear-path for Judge Sotomayor's confirmation. Indian country should carefully consider expressing their support for her confirmation, perhaps exploring early opportunities for her to accept a role as their intellectual leader. Once confirmed, Indian country can extend her an invitation to visit tribal courts, meet with tribal leaders and judges, and to observe first-hand the challenges confronting tribal governments.

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<sup>8</sup> Her article reveals exposure to and interest in the special status of territories possessed by the United States struggling with sovereignty, identity, and a dearth of natural resources. Sonia Sotomayor, Note, *Statehood and the Equal Footing Doctrine: The Case for Puerto Rican Seabed Rights*, 88 YALE L.J. 825 (1979).

<sup>9</sup> A summary of Souter's Indian law jurisprudence is available at <http://turtletalk.wordpress.com/2009/05/03/justice-souters-federal-indian-law-legacy/>. In general, his record sides with tribal interests over questions of treaties and treaty interpretation, and when the U.S. is a defendant, but regularly opposes tribal interests over questions of taxation and tribal jurisdiction over non-Indians.

<sup>10</sup> 84 Cal. L. Rev. 1573 (2001)