



# **The Nomination of Judge Sonia Sotomayor: A Review of Second Circuit Decisions Relating to Reproductive Rights**

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## Summary

On May 26, 2009, Judge Sonia Sotomayor of the U.S. Court of Appeals for the Second Circuit was nominated to replace retiring U.S. Supreme Court Justice David H. Souter. During her tenure with the Second Circuit, Judge Sotomayor has not addressed substantive legal questions involving abortion, such as the extent of the Constitution's protection of a woman's right to choose. Judge Sotomayor has, however, authored opinions that have considered the impact of foreign funding restrictions on domestic nonprofit organizations that promote abortion, discussed the effect of forced abortions and involuntary family planning practices in the context of applications for asylum, and examined possible municipal liability resulting from anti-abortion demonstrations. This report reviews Judge Sotomayor's opinions involving abortion and family planning practices.

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On May 26, 2009, Judge Sonia Sotomayor of the U.S. Court of Appeals for the Second Circuit was nominated to replace retiring U.S. Supreme Court Justice David H. Souter.<sup>1</sup> During her tenure with the Second Circuit, Judge Sotomayor has not addressed substantive legal questions involving abortion, such as the extent of the Constitution's protection of a woman's right to choose. Judge Sotomayor has, however, authored opinions that have considered the impact of foreign funding restrictions on domestic nonprofit organizations that promote abortion, discussed the effect of forced abortions and involuntary family planning practices in the context of applications for asylum, and examined possible municipal liability resulting from anti-abortion demonstrations.

This report reviews Judge Sotomayor's opinions involving abortion and family planning practices. Some have questioned Judge Sotomayor's position on abortion, particularly in light of her affiliation with the Puerto Rican Legal Defense and Education Fund, which joined other advocacy organizations in promoting abortion rights in amicus briefs filed with the Court between 1980 and 1992. A review of Judge Sotomayor's opinions on abortion and family planning, however, suggests a respect for precedent and an adherence to established legal standards.<sup>2</sup>

## Mexico City Policy

In *Center for Reproductive Law and Policy v. Bush*, the Second Circuit considered an appeal brought by a nonprofit organization devoted to the promotion of reproductive rights.<sup>3</sup> The Center for Reproductive Law and Policy (CRLP) challenged the federal government's policy of conditioning the availability of U.S. government funds for foreign nongovernmental organizations on their agreement to neither perform nor promote abortion. The CRLP argued that the so-called "Mexico City Policy" deprived the organization of its rights to freedom of speech and association under the First Amendment by limiting its interactions and communications with foreign nongovernmental organizations.<sup>4</sup> The CRLP maintained that the Mexico City Policy discouraged foreign nongovernmental organizations from collaborating with it because the organizations feared being viewed as promoting abortion.

The Second Circuit affirmed the district court's dismissal of the CRLP's claim on the grounds that the Mexico City Policy did not prohibit the organization from exercising its First Amendment rights. Writing for the court, Judge Sotomayor relied heavily on *Planned Parenthood Federation of America, Inc. v. Agency for International Development*, a 2002 decision by the Second Circuit

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<sup>1</sup> Remarks on the Nomination of Sonia Sotomayor To Be a Supreme Court Associate Justice, Daily Comp. Pres. Doc. 200900402 (May 26, 2009).

<sup>2</sup> See, e.g., Raymond Hernandez and David W. Chen, *Nominee's Links With Advocates Fuel Her Critics*, N.Y. Times, May 29, 2009, at A1.

<sup>3</sup> 304 F.3d 183 (2d Cir. 2002).

<sup>4</sup> The restriction on federal funds to foreign nongovernmental organizations is referred to as the "Mexico City Policy" because it was first announced at a 1984 United Nations conference in Mexico City. Pursuant to the Mexico City Policy, foreign nongovernmental organizations that were interested in receiving U.S. government funds had to agree to a provision called the "standard clause" in family planning agreements and contracts with the United States Agency for International Development. The standard clause prohibited the organizations from engaging in activities that promoted abortion. In January 2009, President Barack Obama rescinded the Mexico City Policy. For additional information on the Mexico City Policy, see CRS Report RL33250, *International Population Assistance and Family Planning Programs: Issues for Congress*, by (name redacted).

that also involved a First Amendment challenge to the Mexico City Policy by a domestic nonprofit organization.<sup>5</sup> Judge Sotomayor explained, “*Planned Parenthood* not only controls this case conceptually; it presented the same issue. *Planned Parenthood* rejected the same First Amendment challenge to the same provision ... and no intervening Supreme Court case law alters its precedential value.”<sup>6</sup>

While the district court dismissed the CRLP’s claim on the grounds that the organization lacked standing under Article III of the Constitution, the Second Circuit reached its decision after considering the merits of the claim and declining to resolve the standing question. After reviewing several decisions by the Supreme Court involving the assumption of standing by a court in order to proceed directly to the merits of a case, the Second Circuit reasoned that where a governmental provision is challenged as unconstitutional and another case has already entertained and rejected the same constitutional challenge to the same provision, a court may dispose of the case on the merits without addressing a novel question of jurisdiction.<sup>7</sup>

Citing *Planned Parenthood*, the Second Circuit maintained that the Mexico City Policy did not implicate any constitutional rights.<sup>8</sup> Domestic nonprofit organizations remained free to use their own funds to pursue abortion-related activities in foreign countries. The decision not to collaborate with the CRLP because of the acceptance of U.S. government funds by a foreign nongovernmental organization had only an “incidental effect” on the activities of the CRLP that did not rise to the level of a constitutional violation.

## **Involuntary Family Planning Practices and Applications for Asylum**

In *Shi Liang Lin v. U.S. Dept. of Justice*, the Second Circuit reviewed three orders issued by the Board of Immigration Appeals (BIA) that denied applications for asylum submitted by three unmarried partners of individuals who were forced to have abortions in China.<sup>9</sup> The BIA’s denials were based on its conclusion that spouses of individuals who were forced to abort a pregnancy or submit to involuntary sterilization, but not the unmarried partners of such individuals, could automatically qualify for asylum as refugees under federal immigration law. In reviewing the BIA’s orders, the Second Circuit sought to determine whether Section 601(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which amended the definition for the term “refugee” to include individuals who were forced to abort a pregnancy or submit to involuntary sterilization, was ambiguous, so that the BIA’s construction of the term was entitled to deference.

The Second Circuit evaluated the BIA’s interpretation of Section 601(a) in accordance with the principles articulated by the Supreme Court in *Chevron U.S.A. v. NRDC*.<sup>10</sup> In *Chevron*, the Court

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<sup>5</sup> 915 F.2d 59 (2d Cir. 1990).

<sup>6</sup> *Center for Reproductive Law and Policy*, 304 F.3d at 190.

<sup>7</sup> *Id.* at 194-95.

<sup>8</sup> *Id.* at 190.

<sup>9</sup> 494 F.3d 296 (2d Cir. 2007), *cert. denied*, 128 S.Ct. 2472 (2008).

<sup>10</sup> 467 U.S. 837 (1984).

established a two-part test for determining when an agency's interpretation of a statute that it administers is entitled to deference. First, a reviewing court will consider whether Congress has spoken on the question at issue. If the intent of Congress is clear, the court must "give effect to the unambiguously expressed intent of Congress."<sup>11</sup> If the statute is silent or ambiguous, however, a court will examine whether the agency's interpretation constitutes a permissible construction of the statute.

The Second Circuit rejected the BIA's interpretation of Section 601(a), finding that Congress has spoken unambiguously about who may be deemed a refugee for purposes of asylum eligibility. The court maintained that nothing in the definition for the term "refugee" permits a person to obtain asylum if he or she has not personally experienced persecution or a well-rounded fear of future persecution. The Second Circuit explained,

We do not deny that an individual whose spouse undergoes, or is threatened with, a forced abortion or involuntary sterilization may suffer a profound emotional loss as a partner and a potential parent. But such a loss does not change the requirement that we must follow the "ordinary meaning" of the language chosen by Congress, according to which an individual does not automatically qualify for "refugee" status on account of a coercive procedure performed on someone else.<sup>12</sup>

Thus, the Second Circuit maintained that Section 601(a) seemed to deny asylum protection to the spouses of individuals forced to abort a pregnancy or submit to involuntary sterilization, as well as the unmarried partners of such individuals.

In a concurring opinion, Judge Sotomayor criticized the majority opinion for its lack of judicial restraint. In response to the majority's conclusion that even spouses of individuals forced to abort a pregnancy or submit to involuntary sterilization may not be automatically eligible for asylum, Judge Sotomayor noted,

Instead of answering the limited question before us—whether the BIA's denial of asylum to the unmarried partners of women forced to undergo abortions or sterilization was unreasonable—the majority has chosen to go beyond it to address an issue that is unbriefed, unargued, and unnecessary to resolve this appeal.<sup>13</sup>

Judge Sotomayor noted that because Congress did not indicate how direct the harm or injury must be before it can be determined that an individual suffers persecution and should be considered a "refugee" for purposes of asylum protection, the BIA's construction of the term should be entitled to deference so long as it is reasonable. Judge Sotomayor maintained that the majority opinion failed to explain why the harm of forced abortion or sterilization constituted persecution only for the person undergoing the procedure and not for the spouse. Forced abortion, Judge Sotomayor observed, could be devastating for the spouse, as well as the woman:

The termination of a wanted pregnancy under a coercive population control program can only be devastating to any couple, akin, no doubt, to the killing of a child ... In the end, I fail to understand how the majority can claim that the harm caused by a spouse's forced abortion or sterilization is not a personal harm to both spouses—either or both of whom can be

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<sup>11</sup> *Id.* at 843.

<sup>12</sup> *Shi Liang Lin*, 494 F.3d at 309.

<sup>13</sup> *Id.* at 327.

sterilized for violations of the population control programs—especially given the unique biological nature of pregnancy and special reverence every civilization has accorded to child-rearing and parenthood in marriage.<sup>14</sup>

In *Zheng v. Gonzales*, the Second Circuit reviewed a BIA order that dismissed an appeal by a woman seeking asylum based on the involuntary insertion of an intrauterine device (IUD).<sup>15</sup> The immigration judge that first considered the petitioner’s case denied her application for asylum on the grounds that IUD implantation did not constitute persecution and that “Congress did not intend to include birth control methods other than abortion or forced sterilization in its definition of persecution ...”<sup>16</sup> The BIA agreed with the immigration judge and noted that Zheng had not been persecuted, in part, because she did not experience a “significant degree of pain or restriction as a result of the procedure.”<sup>17</sup> The BIA also acknowledged the widespread use of IUDs as a method of birth control and observed that there is nothing so inherently egregious about the procedure to conclude that Zheng was persecuted.<sup>18</sup>

Judge Sotomayor, writing for the court, remanded the case to the BIA “so that it might articulate its position concerning whether and under what conditions the forced insertion of an IUD constitutes persecution.”<sup>19</sup> The BIA had taken contrary positions on whether the involuntary insertion of an IUD constituted persecution, finding in at least one other case that such insertion was persecution.<sup>20</sup> Judge Sotomayor also noted that the BIA had not discussed the issue in a published, precedential opinion.<sup>21</sup> Thus, the BIA’s failure to explain when the involuntary insertion of an IUD would constitute persecution “depriv[ed] the bench, the bar and potential asylum applicants of guidance concerning whether and how they might approach the issue.”<sup>22</sup>

## Municipal Liability and Anti-Abortion Demonstrations

In *Amnesty America v. Town of West Hartford*, five anti-abortion demonstrators and a self-described “pro-life” organization appealed a Connecticut district court decision that granted summary judgment in favor of the Town of West Hartford (Town).<sup>23</sup> The case arose out of two

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<sup>14</sup> *Id.* at 330-31.

<sup>15</sup> 497 F.3d 201 (2d Cir. 2007).

<sup>16</sup> *Id.* at 202.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 203-4. Although the BIA acknowledged that a number of circuit courts of appeals had suggested that nonviolent, involuntary IUD insertions might constitute persecution, it nevertheless concluded in *Zheng* that involuntary insertion did not constitute persecution.

<sup>20</sup> See *Yahong Zheng v. Gonzales*, 409 F.3d 804 (7<sup>th</sup> Cir. 2005).

<sup>21</sup> See *Zheng*, 497 F.3d at 203 (“The BIA’s opinion in Zheng’s case was non-precedential and was signed by a single member of the Board.”).

<sup>22</sup> *Id.* See also *Jiang v. Bureau of Citizenship and Immigration Services*, 520 F.3d 132 (2d Cir. 2008) (remanding BIA order denying application for asylum to allow BIA to articulate a consistent position on whether and under what conditions involuntary insertion of an IUD constitutes persecution).

<sup>23</sup> 361 F.3d 113 (2d Cir. 2004). Summary judgment allows for the expeditious disposition of a claim when there is no dispute as to either the material facts or the inferences to be drawn from undisputed facts, or if only a question of law is involved. See also Fed. R. Civ. P. 56 (“Summary Judgment”).

anti-abortion demonstrations at a clinic where abortions were performed. The plaintiffs argued that the Town police used excessive force when they attempted to remove the demonstrators from the premises. Although many demonstrators reportedly suffered pain and physical injuries as a result of their treatment by the police, the district court found that the plaintiffs failed to show that the actions of the police were taken pursuant to a municipal custom or policy. Thus, the district court concluded that the plaintiffs had not established a basis upon which the Town could be held liable for the actions of its police officers.

On appeal, the plaintiffs maintained that the district court erred in granting summary judgment in favor of the Town. They asserted that their proffered evidence raised material issues of fact under two independent theories of municipal liability. First, the plaintiffs claimed that the Town failed to supervise its police force at both demonstrations. They contended that the Town police chief was present at the demonstrations, witnessed the use of excessive force, and failed to stop it. Second, the plaintiffs alleged that the Town acted with deliberate indifference in failing to train its police officers to arrest protesters without using excessive force, even after the Town received complaints about the use of force during the first demonstration.

Writing for the Second Circuit, Judge Sotomayor found that the plaintiffs proffered ample evidence to raise genuine issues of material fact with regard to the Town's failure to supervise its police force.<sup>24</sup> The court maintained, however, that the plaintiffs did not submit sufficient evidence from which a reasonable jury could conclude that the Town was liable for any failure to train its officers.

Citing prior municipal liability decisions by the Supreme Court, as well as the Second Circuit, the court explained that in order to support a failure to supervise claim, the evidence "must establish only that a policymaking official had notice of a potentially serious problem of unconstitutional conduct, such that the need for corrective action or supervision was 'obvious,' (citation omitted) ... and the policymaker's failure to investigate or rectify the situation evidences deliberate indifference, rather than mere negligence or bureaucratic inaction."<sup>25</sup> Applying this standard, the Second Circuit found that the plaintiffs' proffered evidence was sufficient to withstand summary judgment because it allowed the inference that the Town's police chief witnessed the misconduct, and that the actions of the police were so blatantly unconstitutional that his inaction could be the result of deliberate indifference.<sup>26</sup>

However, the Second Circuit concluded that the plaintiffs' evidence failed to raise an inference that the police were improperly trained. Citing Supreme Court precedent, the court noted that municipal liability for failing to train employees requires that a plaintiff establish not only deliberate indifference on the part of officials, but also a specific deficiency in a city's training program and a causal relationship between the deficiency and the misconduct.<sup>27</sup> In this case, the plaintiffs failed to offer any evidence as to the purported inadequacies in the Town's training program and the causal relationship between those inadequacies and the misconduct. The court

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<sup>24</sup> The Second Circuit also concluded that there were issues of material fact with regard to whether the Town's police officers used excessive force when they removed the plaintiffs from the demonstrations. See *Amnesty America*, 361 F.3d at 124 ("It is entirely possible that a reasonable jury would find, as the district court intimated, that the police officers' use of force was objectively reasonable given the circumstances and the plaintiffs' resistance techniques.").

<sup>25</sup> *Amnesty America*, 361 F.3d at 128.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 129.



observed that the use of excessive force could have resulted from other causes, such as the negligent administration of a valid program.<sup>28</sup>

In *Amnesty America*, as well as *Center for Reproductive Law and Policy*, the parties that may arguably be viewed as supporting a “pro-life” position prevailed. At least some of the claims advanced by Amnesty America and the anti-abortion demonstrators were remanded, and the dismissal of the CRLP’s case was affirmed. While Judge Sotomayor has commented on the impact of gender and personal experiences on judging, these two cases may suggest to some that such factors are unlikely to overwhelm her adherence to precedent and established legal standards.<sup>29</sup> The Second Circuit’s decision in *Zheng*, moreover, may arguably illustrate an intent to seek clarification of the appropriate standard when it is unclear. Nevertheless, Judge Sotomayor’s comments and the absence of substantive opinions of abortion, as well as distinctions between the perceived roles of the courts of appeal and the Supreme Court, are likely to result in a continued examination of Judge Sotomayor’s opinions during the confirmation process.

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<sup>28</sup> *Id.* at 130.

<sup>29</sup> See Sonia Sotomayor, *A Latina Judge’s Voice*, 13 Berkeley La Raza L.J. 87, 92 (2002) (“Whether born from experience or inherent physiological or cultural differences, a possibility that I abhor less or discount less than my colleague Judge Cedarbaum, our gender and national origins may and will make a difference in our judging.”).

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