

Guess what? All judges make policy

By [Doug Lasdon](#)

Thursday, July 16th 2009, 4:00 AM

In 1998, I appeared before [Judge Sonia Sotomayor](#) - then sitting in federal district court - on behalf of hundreds of homeless people in [New York](#) who were challenging the failure of the [Grand Central Partnership](#), a business improvement district, to pay them minimum wage. The partnership claimed its Pathways to Employment Program constituted a training program and allowed it to pay workers just \$1 an hour. The judge disagreed.

At the time, critics charged that Sotomayor was expanding employment laws and that she was guilty of that dirtiest of judicial crimes: policy-making. She had ruled on behalf of the homeless - against business. To supporters of the Grand Central Partnership, a charge of legislating from the bench sounded real. Her elevation to the federal appeals court was even held up in part because of this decision.

But these accusations of policy-making were just a cheap way to disagree with the Sotomayor's decision, and they have become a perennial tactic in judicial confirmations. Sotomayor has herself acknowledged, with some controversy, that the higher courts sometimes end up making policy. That, however, is not the same as legislating, being "activist" or filtering every decision through an ideological sifter.

It's time we just accept it: All judges make policy.

Judges invariably make policy because laws consist of words, words are inherently vague and their meaning must be interpreted and applied. When making a decision, a judge determines the reach of the law. By defining words either narrowly or broadly, judges - in either instance - make policy.

The [United States](#) Constitution, of course, offers plenty of extremely vague words to interpret. Words like "speech," "religion," "due process," "search," "equality" and "probable cause" - to name a few - allow judges wide latitude in defining the reach of the Constitution's provisions.

In 1967 in *Katz vs. United States*, for example, the [Supreme Court](#) had to decide if electronic eavesdropping constituted a "search" under the Fourth Amendment. If such bugging did not amount to a search, the government did not need a warrant before listening in on our conversations in our homes. Is electronic bugging a search? Certainly, the framers could not have had electronic anything in mind. Just as certainly, though, they intended that the Constitution should protect citizens in their homes from intrusions by the government.

The court in the Katz case ruled that the Fourth Amendment did protect us from warrantless searches by electronic eavesdropping; if it had not, we would live in a very different society. Whichever way the court decided, however, it was inevitably establishing policy. By defining the reach of the Fourth Amendment in this case, though, the justices were interpreting the words of the Constitution, not legislating.

My case, Archie vs. Grand Central Partnership Inc., called for Sotomayor to determine if the Grand Central Partnership's program qualified as a "training" program. The word "training" presented her a word with significant latitude in its meaning. Are you being "trained" if you sit on a stool in a bank vestibule for 10 hours a day shooing away homeless people, with little supervision or instruction?

To make her decision, Sotomayor considered a wide variety of factors and preexisting regulations: the financial benefit to the partnership, the minimal amount of supervision for the homeless, the lengthy periods the homeless stayed in the program, overtime hours during graveyard shifts, expectations of compensation, ineffective counseling programs and expert opinions. She also gave significant weight to the very real benefit to the homeless of developing their workplace skills and habits.

"Training" was not the appropriate label for this kind of employment, Sotomayor concluded, and her decision had a significant policy impact. Sotomayor's decision ensured that training programs - allowing for stipends below the minimum wage - would have to have limited time periods, include adequate supervision and counseling, require only reasonable work assignments and be designed to make it clear that training, not income, was the primary benefit for the enrollee. Most important, the benefit to the trainees would have to outweigh the benefit to the program.

Had she ruled the other way, the landscape of work opportunities for poor people would now be much wider - but all for a dollar an hour.

Yes, some judges might stretch words beyond their reasonable meaning. But those are exceptional cases, and there is no evidence that Sotomayor falls into that category. Other judges, as well, will interpret words legitimately but more or less broadly - still, they are not creating policy out of whole cloth.

The important question, then, is not whether judges follow the law (almost all of them do - at least consciously), or make policy (again, almost all do), but how they go about interpreting words.

So let's get beyond the empty name-calling and focus on how Sotomayor will interpret the grand, sweeping phrases of the Constitution. Even if it means making policy.

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