

Washington Summer Heat is on Sotomayor: First Hispanic Woman nominated to Supreme Court

**By Maria L. Fornella*

“There is hardly a political question in the United States which does not sooner or later turn into a judicial one.” - Alexis De Tocqueville

Over the Memorial Day long weekend, the White House announced President Obama’s nominee to replace retiring Judge David Souter in the Supreme Court. Barring any unforeseen circumstances, Circuit Court of Appeals judge Sonia Sotomayor will be confirmed by next September, in time for the new Supreme Court term starting in October of this year. Obama has pressed the Senate Judiciary Committee to start hearings and be ready to vote before the August Congress recess, but Republicans would like more time to scrutinize her sizable record and score some political points in the process.

Because the nomination was announced during the Senate’s Memorial weekend recess, the first reaction on the Conservative side came from anonymous blogs, from radio talk host Rush Limbaugh and from former speaker of the House Newt Gingrich. Needless to say, the attacks were fierce. Sotomayor was alternatively portrayed as an “activist judge” intent on making policy from the bench, a “reverse racist” and a candidate with “insufficient credentials” (the latter being the most laughable of all and the one that gives you the measure of the lack of seriousness of the rest: a Princeton *summa cum laude* graduate, and Yale Law Review editor, with over 17 years of experience as a federal judge, and over 3,000 decisions made, Sotomayor’s credentials are anything but impeccable).

This week the Republican Senators, who will actually be in charge of the process, tried to regain the initiative and significantly moderated the tone of the discourse. Indeed, the vetting process to the highest tribunal of the land should focus on Sotomayor’s earlier decisions from the bench (she has been both a US district and a circuit court judge), her views on the Constitution and the law, on the rights of states and on the importance of precedent, and not, as her anonymous detractors would like us to think, on empty slogans, her taste for Puerto Rican food or the way she pronounces her name (accentuating the last syllable, which is seen by these ignorant critics as lack of assimilation to the Anglo culture). But having been born in the Bronx from poor immigrants, and risen in class and status to where she is today, Judge Sotomayor is more than ready for the fight. Her life experiences have taught her to see the world through different perspectives. She is not in the least intimidated by other groups’ prejudices presented as righteousness, and by those who are targeting her, as Mary Sanchez from the Florida Sentinel so aptly puts it, “as if a weaker species

had wandered into their den”.

The Republican Party is in such disarray that different elements within it are constantly and recklessly trying to score points with the electorate, using any tactic at hand without much consideration of its consequences. Given the solid majority of Democrats in the Senate, and the fact that several Republicans are likely to vote in favor of Sotomayor (she was, after all, nominated by George H.W. Bush for the federal bench the first time (1992) and approved unanimously by the whole Senate), the question for Republican elected officials is how far to go in their attacks without producing an irreversible backlash at the polls from women and Hispanics for years to come. At the same time, they will be pressed by the extreme right to do some damage to the nominee and through her, to the President.

Judicial fights are part and parcel of the political struggle over the court's direction, and even if the replacement of Souter with Sotomayor is not likely to change the balance of the court, the hearings should be used as a stage to present the philosophical differences between the two parties, rather than as a nasty squabble over personal characteristics, anonymous character attacks and meaningless slogans. The ideological mix in the Court (5 conservatives-4 liberals, with Justice Kennedy as the swing vote, sometimes voting with the liberals) will remain the same; the Democrats right now have a filibuster-proof majority, and there will be other Supreme Court nominations by this President to come, so the Republicans should recognize that the only battle worth fighting in this case is a clean one, free from vitriol and toxicity.

Scholars have identified four primary selection criteria used by presidents in their appointments of Supreme Court justices: merit, ideology, friendship and representation. Obama's choice of Sotomayor was based on her impressive credentials, her experience of seventeen years in the federal judiciary, which offers some insight into her judicial philosophy (similar to Obama's), and her charisma and compelling biography as a Latina born in the Bronx. She therefore clearly meets three of those four criteria. Obama's short list included three other women with similar credentials, all close friends of his, but none of them Latinas.

Sotomayor's ideology appears to match Obama's, himself a constitutional scholar, in that both share a penchant for pragmatism and a conscientious quest for justice and fairness under the law. For example, although she has a thin record on abortion cases and therefore her position is not clear, in one case concerning the right of the federal government to attach conditions to the use of its foreign aid money, she ruled against the pro-abortion group. In several cases of gender or racial discrimination she decided against the minority or female plaintiff. This makes some groups on the Left somewhat apprehensive. It would not be the first time that a President nominates a judge based on compatible ideology and is later disappointed when his appointee votes with the "other" block. But her vote affirming the decision by the city of New Haven to scrap a promotion test which only white firefighters had succeeded in (*Ricci v. De Steffano*) is what is making the headlines: the Right's intention is to portray her as a "reverse racist" and an unequivocal defender of affirmative action. Ironically, this case will come before the Supreme Court this summer,

and many think her decision (unanimously made by a panel of three judges) could be overturned just before her hearings get under way, thus providing more ammunition to the opposition.

Also making the headlines is her 2001 statement, during a *La Raza* Law Symposium, that “a wise Latina woman, with the richness of her experience, would reach “better” conclusions than a white male “who hasn’t lived that life.” This week Obama regained control of the debate that Republicans had been craftily shaping, by excusing her for the wrong choice of the word “better” and by explaining that what she meant was that “her life experience will give her more information about the... hardships people are going through.” This was an allusion to the fourth criteria listed above, that is, the one of representation, in this case, of Hispanics/Latinos. Since the Supreme Court is not an elected body, it follows that its representativeness is not a must. Credentials, wisdom and judicial temperament should suffice for judges to fulfill their role as interpreters of the Constitution and neutral arbiters of the law.

However, the history of the Supreme Court suggests that Presidents do make efforts at representativeness when choosing their nominees, certainly to gain the political sympathies of new groups, but also to give legitimacy to the body and its main function of judicial review. (Indeed, such legitimacy has been disputed on and off since the *Marbury v. Madison* decision of 1803 gave its judges, appointed for life, unelected and unaccountable to nobody, the exclusive authority to decide on the constitutionality of laws for all spheres, including those of the other branches of government. This was a power that Thomas Jefferson vehemently opposed because it was nowhere to be found in the Constitution and it undermined the principle of checks and balances.)

In the early part of the twentieth century, religious affiliation became a major focus, and by 1916 both a Catholic and a Jewish judge had been appointed. As different religious groups became more assimilated and religion became a non-issue to the appointment process, the imbalance of race and gender became the major considerations. But a quick review of the “representatives” of those categories shows that their representation can at times be symbolic or passive. While Sandra Day O’Connor, a conservative appointed by Reagan to close the “gender gap”, actively represented women’s interests in her jurisprudence and many times voted with the liberal block, Clarence Thomas, the second black judge to accede to the Supreme Court, has actively opposed affirmative action, which he regards as a noxious policy that undermines personal merit and creates resentment in the majority group. In contrast, the justice he replaced, Thurgood Marshall, the first African American in the court, was a leader of the civil rights movement who had made his reputation as a young lawyer, successfully arguing before the court the unconstitutionality of segregation in public education in *Brown v Board of Education*. Finally, both Justice Brennan and Justice Scalia are Catholic but find themselves at opposite sides of the ideological spectrum.

In sum, to paraphrase Justice Day O’Connor, if human beings are the sum total and the product of their experiences, they cannot be defined by their gender, ethnicity, race or religion alone. Sonia Sotomayor is a very experienced federal judge with remarkable credentials who will, according to her own statements,

attempt to decide every case based on its merits as it relates to the law, using objective legal standards. She also happens to be a woman of Puerto Rican origin, proud of her humble origins and of her cultural roots. And she meets all of the criteria Obama was looking for in a Supreme Court judge. Given the predominance of Democrats in the Senate, her confirmation is almost certain. Let us hope that the confirmation process itself is guided by honest inquiries and arguments on the merits of her appointment, on her judicial temperament and philosophy, and not turned into a media circus of innuendo, slurs and empty slogans that can scar a nominee for life, and in the process, devalue our democracy.

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