CONSTITUTIONAL OPINIONS

Vote No on Sonia Sotomayor

By Doug Bandow on 7.30.09 @ 6:08AM

Absent a miracle, Judge Sonia Sotomayor will take a seat on the U.S. Supreme Court. Nevertheless, the Republican minority still has an opportunity to use her nomination to educate the American people about the dangers of politicizing the judiciary.

President Barack Obama made a politically astute pick. Sonia Sotomayor is a competent jurist who symbolizes hard work, personal achievement, and ethnic diversity.

However, as Sen. Dick Durbin (D-Ill.) argued during the hearing on John Roberts, "the burden of proof for a Supreme Court justice is on the nominee." Judge Sotomayor has not met that burden.

While talking up her background, Sotomayor's advocates have emphasized her moderate record on the 2nd Circuit Court of Appeals. However, Circuit Court judges remain constrained by the possibility of Supreme Court review -- and the hope of advancing to the high court. Judge Sotomayor's testimony was useless, as intended, in assessing her judicial philosophy. Writing in *Slate*, Dahlia Lithwick concluded: Sotomayor "dodges, hedges, and evades her way through softball and hardball questions alike." Sen. Jon Kyl (R-AZ) put it more harshly: the Judge was "evasive, lacking in substance and, in several instances, incredibly misleading."

In trying to assess how Justice Sotomayor would behave, we should consider the president's expectations. Then-Sen. Obama, who voted against both John Roberts and Samuel Alito, emphasized the "quality of empathy." While most cases can be decided on the basis of case law and precedent, said Sen. Obama, there remain five percent which "can only be determined on the basis of one's deepest values, one's core concerns, one's broader perspectives on how the world words, and the depth and breadth of one's empathy." Alas, this latter category, however few in

number, accounts for most of the important issues about which we most care and which most divide us.

Sonia Sotomayor's rhetoric and background suggests that she shares the president's general perspective. For instance, she has been involved in ethnic identity activism and politics throughout her college and professional life. She spent 12 years as a board member of the Puerto Rican Legal Defense and Education Fund, which promoted the usual ethnic agenda of coerced diversity and multiculturalism as well as the usual liberal agenda including support for abortion and opposition to capital punishment.

Moreover, her rhetoric reflects an extreme judicial vision. Perhaps Sotomayor's most famous comment, repeated in substance on at least seven occasions, came in the *Berkeley La Raza Law Journal*: "a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life." Six years ago in a speech at Seton Hall she declared: "Whether born from experience or inherent physiological or cultural differences, ... our gender and national origins may and will make a difference in our judging."

She returned to this theme many times: "My experiences will affect the facts that I choose to see as a judge." Moreover, "there is no objective stance, but only a series of perspectives -- no neutrality, no escape from choice in judging." Indeed, "our experiences as women and people of color affect our decisions. The aspiration to impartiality is just that."

There's more, however. She also believes that judges are to change the law. For instance, she complained: "The public expects the law to be static and unpredictable. The law, however, is uncertain and responds to changing circumstances." Of course, changing the law cannot be left to legislators: "Our society would be straightjacketed were not the courts, with the able assistance of the lawyers, constantly overhauling the law and adapting it to the realities of ever-changing social, industrial, and political conditions."

Indeed, "A given judge (or judges) may develop a novel approach to a specific set of facts or legal framework that pushes the law in a new direction."

After all, she contends: "change -- sometimes radical change -- can and does occur in a legal system that serves a society whose social policy itself changes. It is our responsibility to explain to the public how an often unpredictable system of justice is one that serves a productive civilized but always evolving society." As she declared in a videotaped talk, the "Court of Appeals is where policy is made" and where "the law is percolating."

One need not have an idealized vision of the law to find these sentiments profoundly disturbing.

Empathy has its place -- perhaps in a trial judge understanding a defendant's motivations, and passing sentence. However, empathy is a dubious guide to statutory and constitutional interpretation. Some of the most important cases either revolve around a party with whom empathy is impossible or involve multiple parties who all deserve empathy.

Diversity has value, but Sotomayor did not argue diversity would improve collective decision-making. She said that her ethnicity and gender would improve her decision-making.

Moreover, stereotypes can be seriously misleading. Nine white men delivered the death blow to

racial segregation in *Brown v. Board of Education*. One of the New Haven firefighters who challenged the city's "pro-minority" employment policy in *Ricci v. Destefano* was Hispanic Ben Vargas.

No one would disagree that as society changes, so must laws and practices. That is why the Constitution allows amendments and legislatures exist. Our political system leaves most decisions on "change" up to the legislative and executive branches. Turning a group of nine jurists, irrespective of how diverse and empathetic, into a continuing constitutional convention puts all liberties at risk.

WHICH BRINGS US BACK to the question: what kind of justice would Sonia Sotomayor make?

Her overall judicial record may look moderate, but her opinions in several critical cases -- President Obama's five percent -- cause real concern.

There is *Ricci v. Destefano*, for instance, the much noted case in which New Haven tossed the results of a carefully created promotion test for firefighters because it did not like the racial composition of those who passed. The 2nd Circuit, in an opinion joined by Judge Sotomayor, perfunctorily affirmed the verdict for the city. Yet without question the city had acted in a racially discriminatory fashion. And the city appeared to base its decision on political considerations, not any reassessment of "business necessity."

Sotomayor's opinion was even worse on procedural grounds. Her one paragraph dismissal seemed intended to limit the likelihood of Supreme Court review. Yet Judge Jose Cabranes, a Clinton appointee, complained that the controversy involved "significant questions of unsettled law," and was a case of first impression with no relevant Supreme Court precedent. The high court took the case and the majority of five ruled for the firefighters. The minority of four also disagreed with Sotomayor's opinion, indicating that the case should have been remanded for trial to assess the city's conduct.

Another worrisome case is *Didden v. Village of Port Chester* (New York), in which Judge Sotomayor demonstrated her disdain for property rights. In 1999 the city created a "redevelopment" area and designated a developer to handle all land seized by Port Chester. In 2003 he asked the property owners who planned to build a pharmacy on their land for either $800,000 or a half interest as partner in the project. They refused, and the next day the city condemned the property, transferring it to the developer so he could build a Walgreens. Sotomayor dismissed the owners' claim in six paragraphs.

Judge Sotomayor said the statute of limitations for the redevelopment law expired in 2002 -- a year *before* the disputed taking occurred. She went on to uphold the extortionate seizure of property as required by the Supreme Court decision in *Kelo v. City of New London*. Yet the majority in that case warned: "the mere pretext of a public purpose, where its actual purpose was to bestow a private benefit," was not a "public use" as required by the Constitution. And what could be a better example of the use of eminent domain for private benefit than a well-connected developer getting the city to back his attempt at private extortion?

Then there is *Maloney v. Cuomo*, which involved a challenge to state gun restrictions after the Supreme Court voided Washington, D.C.'s gun ban in *District of Columbia v. Heller*. Judge Sotomayor dispensed with the claim in an 11-word conclusion relying on an 1886 case (*Presser v.*

Illinois) which applied the 2nd Amendment only to the federal government. However, *Presser* did not address the so-called "incorporation" doctrine, by which the Bill of Rights was applied to the states through the 14th Amendment (the "incorporation" process did not begin until decades later).

Moreover, in *Heller* the Supreme Court for the first time affirmed an individual right to own firearms. The Court distinguished *Presser* and indicated that an inquiry into incorporation would be necessary in the future. In fact, the liberal 9th Circuit confronted the challenge, ruling in April that the 14th Amendment did "incorporate" the right to own firearms. Judge Sotomayor apparently relied on ancient precedent to avoid having to make a pro-gun ruling.

In *Hayden v. Pataki* Judge Sotomayor ruled that the Voting Rights Act did not bar states from disenfranchising felons. Indeed, the 14th Amendment explicitly authorized states to do so. In three short paragraphs the judge asserted that the law was clear -- after the majority spent 36 pages detailing evidence on why the VRA did not intend to overturn a nondiscriminatory process predating the sort of discrimination the VRA was passed to combat.

Perhaps most important is the case which received little attention but which underlies every Supreme Court nomination: *Roe v. Wade*. Judge Sotomayor has said nothing about the issue and her few rulings on the issue shed little light. However, the White House has assured its supporters on the issue. Moreover, the Puerto Rican Legal Defense and Education Fund in which she was active was a leading proponent of abortion.

The issue is not whether one believes abortion should be legal. But *Roe* does not deserve to be called constitutional law. Rather, it is an act of judicial usurpation, unsupported by constitutional purpose, original intent, and legal precedent. For a nominee for the high court to embrace *Roe* suggests that they will not carry out their duty to faithfully interpret and apply the Constitution.

ONE FINAL ISSUE OF NOTE is the use of international law to interpret the U.S. Constitution and law. No doubt, thoughtful legislators will consider foreign experiences in assessing social problems and deciding how to resolve them.

But as Steven Groves of the Heritage Foundation detailed, Judge Sotomayor appears to believe that foreign cases should be used by judges -- and justices -- to shape U.S. law through judicial interpretation, never mind what the American legislators who passed the law believed.

Earlier this year Judge Sotomayor opined: "international law and foreign law will be very important in the discussion of how to think about the unsettled issues in our legal system." She also declared: "unless American courts are more open to discussing the ideas raised by foreign cases, by international cases, that we are going to lose influence in the world." That's a dubious claim, but even if true, why should the judiciary worry about America's international influence?

Judge Sotomayor tried to walk back her earlier remarks when she testified. Nevertheless, her basic beliefs seem clear. In her foreword to *The International Lawyer*, published in 2007, she said: "the question of how much we have to learn from foreign law and the international community when *interpreting* the Constitution is ... worth posing." [Emphasis added.] It is not xenophobic to ask: why should international cases have any role in interpreting the Constitution?

The interpretation of the U.S. Constitution and law should be based on the intentions of the

Americans who drafted and approved the measure at issue.

Sonia Sotomayor appears to be a decent person and a capable jurist. But her oft-expressed radical ideas and dismissive treatment of fundamental liberties suggest that she is likely to be a less measured justice than judge. The rule of law, and thus the original constitutional system based on individual liberty and limited government, would suffer. Average Americans of all backgrounds would be the ultimate victims.

Judge Sotomayor has not met Sen. Durbin's burden of proof. The Senate should vote no on her appointment.

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