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It Comes Down To Sotomayor Or Constitution

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Judge Sonia Sotomayor appears bound for a seat on the Supreme Court. Even so, Republicans should use her nomination to educate the American people about the dangers of politicizing the judiciary.

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." She has not met that burden.

Judge Sotomayor's advocates have emphasized her moderate record on the 2nd Circuit Court of Appeals. But in several decisions she has summarily dismissed protection of fundamental liberties. Moreover, Circuit Court judges remain constrained by the possibility of Supreme Court review — and the hope of advancing to the high court.

How would Justice Sotomayor act? She's been involved in ethnic identity activism 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 and liberal agenda.

Her judicial vision is extreme. Perhaps her most famous comment was that "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 she declared: "Whether born from experience or inherent physiological or cultural differences ... 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." Indeed, "our experiences as women and people of color affect our decisions. The aspiration to impartiality is just that."

She also believes judges are to change the law: "The public expects the law to be static and unpredictable. The law, however, is uncertain and responds to changing circumstances."

In fact, "Our society would be straitjacketed 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."

Thus, "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."

One need not have an idealized vision of the law to find these sentiments profoundly disturbing. Empathy is a dubious guide to statutory and constitutional interpretation. Diversity has value, but Sotomayor's claim that her ethnicity and gender make her a better decision-maker is bizarre.

Moreover, her stereotypes are seriously misleading. Nine white men outlawed racial segregation in *Brown v. Board of Education*. A Hispanic firefighter challenged New Haven's "pro-minority" employment policy in *Ricci v. DeStefano*.

No one would disagree that as society changes, so must laws and practices. But the Constitution leaves that job up to the legislative and executive branches. Turning a group of nine jurists into a continuing constitutional convention puts all liberties at risk.

Another issue of concern is the use of international law to interpret the U.S. Constitution and law. Thoughtful legislators should consider foreign experiences in assessing social problems and deciding how to resolve them.

But Steven Groves of the Heritage Foundation has detailed how Sotomayor argues that foreign cases should be used by judges — and justices — to shape U.S. law.

Early this year she said: "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 said "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."

Why should the judiciary worry about America's international influence?

In 2007, Judge Sotomayor wrote: "The question of how much we have to learn from foreign law and the international community when interpreting the Constitution is ... worth posing."

Why should foreign cases have any role in interpreting the Constitution?

Sonia Sotomayor is a decent person and capable jurist. But her radical ideas suggest she would 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. Judge Sotomayor has not met Sen. Durbin's burden of proof. The Senate should vote no on her appointment.

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