

08-06-2009 16:14

   PRINT

Protect Constitution

By Doug Bandow

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

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." She has not met that burden.



Judge Sotomayor's advocates have emphasized her moderate record on the 2nd Circuit Court of Appeals. However, 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 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 and liberal agenda.

Moreover, her judicial vision is extreme. Perhaps Sotomayor's most famous comment, repeated multiple times, 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 ... 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." Indeed, "our experiences as women and people of color affect our decisions. The aspiration to impartiality is just that."

She also believes that 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 straight-jacketed 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 Judge Sotomayor argues that foreign cases should be used by judges — and justices — to shape U.S. law through judicial interpretation.

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, then we are going to lose influence in the world." Why should the judiciary worry about America's international influence?

In 2007, 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?

Sotomayor is a decent person and capable jurist. But her radical ideas suggest that 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 U.S. Senate should vote no on her appointment.

Doug Bandow, a senior fellow at the Cato Institute, is a graduate of Stanford Law School and a member of the California and D.C. bars. This article is adapted from a talk for the Federalist Society. He can be reached at ChessSet@aol.com. The views expressed in the above article are those of the author and do not reflect the editorial policy of The Korea Times.