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Commentary: Sotomayor pick not based on merit

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STORY HIGHLIGHTS

- Ilya Shapiro: Choice of Sotomayor is based on identity politics, not merit
- He says her life story is compelling but she should be thoroughly vetted
- Shapiro: Sotomayor may suffer from failure to deal with issues in New Haven case
- He says Republicans should educate public about differences over the law

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By Ilya Shapiro
 Special to CNN

TEXT SIZE

Editor's note: Ilya Shapiro is a senior fellow in constitutional studies at the Cato Institute, a libertarian public policy research foundation, and editor-in-chief of the Cato Supreme Court Review. Before joining Cato, he was special assistant/adviser to the Multi-National Force-Iraq and practiced law at Patton Boggs LLP and Cleary Gottlieb LLP. Earlier, Shapiro clerked for Judge E. Grady Jolly of the U.S. Court of Appeals for the Fifth Circuit.



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Ilya Shapiro says the Sotomayor appointment is a case of identity politics rather than a choice on the merits.

(CNN) -- In picking Sonia Sotomayor, President Obama has confirmed that identity politics matter to him more than merit. While Judge Sotomayor exemplifies the American Dream, she would not have even been on the short list if she were not Hispanic.

She is not one of the leading lights of the federal judiciary, and far less qualified for a seat on the Supreme Court than Judges Diane Wood and Merrick Garland or Solicitor General Elena Kagan.

To be sure, Sotomayor has a compelling story: a daughter of working-class Puerto Ricans raised in Bronx public housing projects, diagnosed with diabetes at 8, losing her father at 9, accolades at Princeton and Yale Law, ending up on the federal bench.

Still, in over 10 years on the Second Circuit, she has not issued any important decisions or made a name for herself as a legal scholar or particularly respected jurist. In picking a case to highlight during his introduction of the nominee, President Obama had to go back to her days as a trial judge and a technical ruling that ended the 1994-95 baseball strike.

Moreover, Sotomayor has a mixed reputation among lawyers who have practiced before her, some questioning her abilities as a judicial craftsman, others her erratic temperament, according to a piece by Jeffrey Rosen in The New Republic, which itself has come in for criticism.

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Such anecdotal criticism is to be taken with a grain of salt -- while Justice Antonin Scalia's bench-side manner is more vinegar than honey, even his detractors recognize his brilliance -- but it does need to be investigated. So, too, do certain statements she made in presentations at Berkeley and Duke, respectively, the former arguing that a Latina necessarily sees the law differently than a white man, the latter suggesting that, at least to some degree, judges make rather than interpret law.

Again, this does not mean that Sotomayor is unqualified to be a judge -- or less qualified to be a Supreme Court justice than, say, Harriet Miers. It also does not detract from the history she would make as the first Hispanic Supreme Court nominee -- if you don't count Benjamin Cardozo, a descendant of Portuguese Jews. But a Supreme Court nomination is not a lifetime achievement award, and should not be treated as an opportunity to practice affirmative action.

Ironically, it is race-based employment practices of another kind that will likely get this nomination in hottest water. Sotomayor was on a panel that summarily affirmed the dismissal of claims brought by firefighters, including one Hispanic, whose promotions were denied because they would be based on a (race-neutral) exam whose results didn't yield the "right" racial mix. Curiously, the Ricci v. DeStefano appellate panel issued a cursory "unpublished" opinion that failed to grapple with the complex legal issues presented in the case.



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