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HEADLINE: EDITORIAL SOTOMAYOR FOR SOUTER OBAMA MAKES FIRST PICK FOR HIGH COURT

BODY:

President Barack Obama surprised some court watchers with his choice of Sonia Sotomayor of the 2nd U.S. Circuit Court of Appeals in New York to replace the retiring Justice David Souter on the Supreme Court. In several respects it was a shrewd choice, although some of the factors that made it shrewd speak poorly of the current state of American politics.

As Erwin Chemerinsky, dean of the UC Irvine law school, put it to us, Senate Republicans will have a difficult time opposing a person who would be the first Hispanic on the high court since Hispanics are such an important voting group that can be up for grabs. And Judge Sotomayor has a compelling personal story: She is a second-generation Puerto Rican-American raised in Bronx housing projects by a single mother after her father died when she was 9, graduated second in her class from Princeton and went on to Yale Law School and the federal bench.

Interestingly, some aspects of that story may provide an opening for opponents of Ms. Sotomayor's nomination. President Obama made no secret of the fact that he views empathy, an ability to identify with different life experiences and view the law not as an abstract absolute but as something that impacts ordinary people in sometimes perverse ways, as a qualification -- beyond judicial experience and expertise -- to sit on the high court. With Judge Sotomayor some valid questions have arisen as to whether her sex and/or ethnicity will affect her decision-making in ways that depart from the ideal of impartiality.

In a 2001 speech at UC Berkeley, for example, she challenged the notion that a wise old woman and a wise old man will reach the same conclusion in judicial cases. Indeed, she went so far as to say, "I would hope 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." In 2005 at Duke University she asserted that a "court of appeals is where policy is made," followed by an immediate "we don't make law" backtrack.

Roger Pilon, vice president for constitutional studies at the libertarian Cato Institute, views the Sotomayor nomination and record as "identity politics pure and simple." He views the Ricci v. De Stefano case as an example of Judge Sotomayor's identity-grounded approach. Ricci is a white firefighter with dyslexia who spent \$1,000 to have a friend put textbooks and other materials on tape so he could study for a promotion test. When the test produced no

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black candidates with grades that qualified them for promotion, the city of New Haven, Conn., ignored the results and promoted nobody, so Ricci sued. A 2nd Circuit panel including Judge Sotomayor upheld the city's action in an unpublished summary judgment. The Supreme Court is likely to overturn that decision in the next few weeks.

There may be bumps along the way, but Judge Sotomayor is President Obama's choice, and, in the end, she is likely to be confirmed.

Part Two, tomorrow: Her freedom views

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