

Intellectual Hero or Fanatical Villain:

How Sonia Sotomayor's Confirmation Process

Will Say More About Us Than Her

We have again come to a point in our nation when history is being made: President Obama's May 26, 2009 nomination of the Honorable Sonia Sotomayor to the United States Supreme Court may very well be one of the most lasting historic events of a most historic presidency.

We recognize that by writing this article we are stepping into the fray – the now ubiquitous and often vitriolic discussion of the President's selection of Judge Sotomayor. We do not opine on this subject because of a dearth of op-ed pieces; to the contrary, there are scores of articles and blog commentary. Nor do we look for an easy opportunity to espouse a particular ideology, only to invite the backlash sure to follow. Instead, we venture down this path in an effort to shape the debate.

Missing from much of the reporting and commentary on Judge Sotomayor, is a discussion about what really matters. We think this current deficiency, like so many other issues our society faces, presents our profession with an opportunity to challenge the status quo and elevate the debate. In the words of President Ronald Reagan: "If not us, who? If not now, when?"¹

In the frenzied midst of competing sound-bites—accolades v. fear mongering, and glowing testimonies v. polarizing accusations—the critical question for those in our profession is relatively simple: How will you help shape the debate regarding the merits of Judge Sotomayor's nomination and her fitness for this esteemed position?

Will you stand idly by while talking heads frame the issues for the American people? Or do you feel, as we do, a greater obligation to guide and improve the quality of the debate within our communities—

¹ Rabbi Hillel and Robert F. Kennedy are other great men in history to whom this quote has been attributed.

both the legal community and perhaps more important, the broader community.

Over the coming months there will be dozens of water cooler conversations, backyard BBQs, kids' ballgames, dinner parties and a host of other social gatherings at which your opinion will be sought on both the nominee and the process, including requests for your "professional opinion." What you say may not affect the outcome of the nomination (it seems that is all but a forgone conclusion), but it will affect the community's understanding and respect for our profession and the importance of the often overlooked and undervalued "third branch" of government.

So far the debate has centered on Judge Sotomayor's "personal story"—both pro and con. Her supporters praise her path from the "school of hard knocks" to Ivy League standout as a testament to her personal fortitude, independence and empathy for those in the broader community. Her critics suggest that her ethnicity and "empathy" will lead to decisions motivated by a desire to "create policy" from the bench in favor of certain minority, gender, and socio-economic interest groups because she lacks the "intellectual capacity" to decide cases otherwise. Of course, that same "logic" could just as easily be used to argue that her adult life in the Ivy League and among Washington's elite, which led to two previous lifetime federal court appointments, has created an allegiance to the powerful corporate and financial interests associated with such institutions.

Most of the hyper-critical commentary on Judge Sotomayor is designed to gin up fundraising among certain interest group faithful. The goal of such groups is to reduce the debate to a couple of sound-bite mantras or bumper sticker slogans, and to avoid the cultivation of an honest assessment of judicial philosophy, decision making, or the proper role of the courts. In retort of course, supporters typically do similar simplistic feel-good counter points.

But what does that get us? Answer: plenty of "opinions" but very few facts.

As lawyers, we are trained from the outset that “the facts matter.” Whether drafting a pleading, negotiating a settlement, or arguing a motion, the facts—not opinions—determine the outcome. In anticipation of the inevitable “oral arguments” that you will have around the water cooler or at the ball game, know the facts and not just those facts repeated by the media. Simply validating or invalidating the chattering class’s version of what matters most is not enough.

So do your own research and encourage others to do the same. Identify a trusted resource and send it to colleagues and friends. Draft your own “top ten questions” for Judge Sotomayor – i.e., questions that you would ask if the decision was entirely up to you. And then, share your list of questions with others—including our U.S. Senators!

The facts are that Judge Sotomayor has been nominated and confirmed twice to the federal courts: first by President George H. W. Bush in 1992, and then by President Clinton in 1998. There is no doubt that her stellar educational background, coupled with her years of private practice and government service (including more than a decade as a federal appeals court judge) qualifies her for the Supreme Court. End of (personal) story.

We need to move beyond the “qualifications” question as part of the confirmation process and look for insight about how she would perform in the role of Supreme Court Justice. It is entirely unfair and unreliable to ask her how she would rule in a particular case, past or present. Instead we should demand broader-themed questions that elevate the debate and shed light on her thinking process about the role of the Court. For example:

What standards or criteria should be used to decide which cases are heard by the Supreme Court?

What resources does she draw upon to decide cases in which the text of a statute does not provide a clear answer?

How much value does she place on unanimity in Supreme Court decisions?

What factors does she consider when deciding whether to author a concurring opinion?

As a noted “pragmatist,” where does she stand on the doctrine of Obstacle Preemption and the Supremacy Clause?

What guidance can or should be taken from international norms or legal opinions on US constitutional issues?

These types of questions give us a chance to return to the heady days of law school when we were first discovering the foundation and importance of our system of jurisprudence, and what makes it great (or not so great).

This type of thoughtful inquiry gives us a chance to reflect on our careers in the law and to consider whether our system of jurisprudence has lived up to the promises it offered. We must strive to fulfill that promise, either personally or by advocating for improvements to the way we manage that system.

Too often we are led away from our foundations by the ambiguities and compromises of everyday life. Yet, in this context, our founding fathers gave us an outstanding constitutional framework under which to evaluate future decisions and actions. They also gave us a process that affords the opportunity to reflect on our foundations and to ponder their importance.

We write to encourage you to do the same with the nomination of Judge Sotomayor in hopes that, if not now, then perhaps future nominations will be afforded the respect and contemplation both the nominee and the process deserve. If another confirmation process proceeds via “politics as usual,” without a demand for more, we have only ourselves to blame. If not you, who? If not now, when?

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