The Nomination of Justice Sotomayor

formerly: The Replacement of Justice Souter

Keywords

history, justice, nomination, Richard Posner, Kathleen Sullivan, Diane Wood, Sonia Sotomayor, U.S. Supreme Court

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Introduction

On Thursday night, 30 April 2009, journalists reported rumors that Justice Souter would resign his seat on the U.S. Supreme Court at the end of the current term, in June 2009. I immediately began collecting quotations from President Obama, U.S. Senators, commentators, and journalists to chronicle the selection and confirmation of the next new Justice on the Court, as a resource for historians. A secondary purpose of this document is to explain to citizens how the selection and confirmation process actually works.

This document is partway between a formal essay and a contemporary diary of my thoughts. Quotations are obtained by a cut-and-paste from their original source and a citation to the source is given for each quotation. Any additions that I made to quoted text are enclosed in [square brackets] and any deletions are denoted by boldfaced ellipses. Journalists often write one-sentence paragraphs, so I combined some of their paragraphs into one paragraph.

This document is basically organized chronologically, with the oldest material first. Sometimes I departed from strict chronological order, in order to group related topics together, in an attempt to make the document more coherent.

Given that this document will take many tens of hours of my unpaid time,[1] I may as well enjoy it, so I include some of my intemperate personal remarks, with a <*grin*> after each, to indicate that I am not entirely serious.

Material to quote in this essay was found by daily visits to the following websites (in alphabetical order): *Congressional Quarterly, The Hill, National Law Journal, Politico, The Washington Post,* plus many searches of Google News.

[1] From 1 May to 23 July 2009, I spent 264 hours collecting material, writing and revising this document, the subsequent document on the Senate hearings for the confirmation of Sotomayor, and my nicely formatted collection of judicial opinions in the *Ricci* case.

I follow the style in THE BLUEBOOK, which tells us to upper-case the first letter in Court and Justice, when those words refer to the U.S. Supreme Court. One can easily spot writing by nonlawyers on the Internet and in newspapers, because they do not observe these style rules.

Just to show my own bias, my favorite U.S. Supreme Court Justice is William Brennan, although I disagree with Brennan's opposition to the death penalty and some of his other social positions. In First Amendment and privacy cases, I often agree with the result urged by Justice William O. Douglas, although I deplore both his lack of scholarship and they way he simply invents law. I consider myself a conservative, in that I believe in a small government, low taxes, maximum freedom[2] for the individual, and I am an advocate for increased privacy rights of people even if it means less security.

Responsibilities of a Justice

I quote the oath of office, quote the conflict of interest statute, and mention judicial ethics at the beginning of this document, because it is worth reminding ourselves of the *real* requirements for a Justice. Some of the candidates (e.g., politicians, nonattorneys, etc.) suggested by politicians would be unlikely to perform satisfactorily and therefore are *not* credible candidates.

Oath of Office

The replacement for Justice Souter will take the following oath of office, as prescribed by federal statute:

> I, [name], do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as an associate Justice of the Supreme Court of the United States under the Constitution and laws of the United States. So help me God.

28 U.S.C. § 453 (amended 1990, still current May 2009).

This oath requires two things:

1. impartiality ("administer justice without respect to persons, and do equal right to the poor and to the rich", and — in case the person misunderstood those words — the oath also specifically says "*impartially* discharge and perform all the duties ....")
2. "faithfully" follow "the Constitution and laws of the United States"

Apparently these two requirements are extraordinarily difficult for Americans, because the end of the oath invokes the help of God. <*grin*>

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[2] This value includes my strong support for civil liberties, including a high wall of separation between church and state, support for a woman's right to abortion for any reason, increasing freedom of speech, etc.

Conflict of Interest

A federal statute clearly states the obligation of *all* judges in federal courts, including Justices of the U.S. Supreme Court, to avoid any conflict of interest.

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
>
> (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
>
> (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
>
> (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
>
> (ii) Is acting as a lawyer in the proceeding;
>
> (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
>
> (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.
>
> (c) **....**

28 U.S.C. § 455 (amended 1990, current May 2009).

Section 455(a) specifically mentions "impartiality". Section 455(b) *requires* recusal of a judge when at least one of the following five conflict(s) of interest are present, in order to preserve impartiality. The quotation of § 455 shows the seriousness which judges — and lawyers in general — take conflict of interest, which conflict prevents impartiality by a judge.

Due Process

Impartiality is not just in the oath for judges and 28 U.S.C. § 455, it is *also* a constitutional requirement, as explained in the following opinions of the U.S. Supreme Court:

- *Tumey v. Ohio,* 273 U.S. 510, 523 (1927) (Mayor of town was *not* an impartial judge for hearing criminal offenses: "But it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case.");

- *Ward v. Village of Monroeville, Ohio,* 409 U.S. 57 (1972) (Mayor of town was *not* a disinterested, impartial judge for hearing traffic offenses. Violation of due process clause in Fourteenth Amendment.);

- *Schweiker v. McClure,* 456 U.S. 188, 195 (1982) ("As this Court repeatedly has recognized, due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities. E.g., *Marshall v. Jerrico, Inc.,* 446 U.S. 238, 242-243, and n. 2, 100 S.Ct. 1610, 1613, and n. 2, 64 L.Ed.2d 182 (1980).");

- *In re Murchison,* 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.");

- *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 825 (1986) ("We conclude that Justice Embry's participation in this case violated appellant's due process rights as explicated in *Tumey, Murchison,* and *Ward.*");

- *Bracy v. Gramley,* 520 U.S. 899, 904-905 (1997) ("But the floor established by the Due Process Clause clearly requires a 'fair trial in a fair tribunal,' *Withrow v. Larkin,* 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975), before a judge with no actual bias against the defendant or interest in the outcome of his particular case. See, e.g., *Aetna,* [475 U.S.] at 821-822, 106 S.Ct., at 1585-1586; *Tumey,* [273 U.S.] at 523, 47 S.Ct., at 441.").

In a case involving a state restriction on speech for judicial candidates, the U.S. Supreme Court held that the regulation violated the First Amendment.

> One meaning of "impartiality" in the judicial context — and of course its root meaning — is the lack of bias for or against either party to the proceeding. Impartiality in this sense assures equal application of the law. That is, it guarantees a party that the judge who hears his

> case will apply the law to him in the same way he applies it to any other party. This is the traditional sense in which the term is used. See Webster's New International Dictionary 1247 (2d ed.1950) (defining "impartial" as "[n]ot partial; esp., not favoring one more than another; treating all alike; unbiased; equitable; fair; just"). It is also the sense in which it is used in the cases cited by respondents and amici for the proposition that an impartial judge is essential to due process. *Tumey v. Ohio,* 273 U.S. 510, 523, 531-534, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (judge violated due process by sitting in a case in which it would be in his financial interest to find against one of the parties); *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 822-825, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986) (same); *Ward v. Monroeville,* 409 U.S. 57, 58-62, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972) (same); *Johnson v. Mississippi,* 403 U.S. 212, 215-216, 91 S.Ct. 1778, 29 L.Ed.2d 423 (1971) (per curiam) (judge violated due process by sitting in a case in which one of the parties was a previously successful litigant against him); *Bracy v. Gramley,* 520 U.S. 899, 905, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997) (would violate due process if a judge was disposed to rule against defendants who did not bribe him in order to cover up the fact that he regularly ruled in favor of defendants who did bribe him); *In re Murchison,* 349 U.S. 133, 137-139, 75 S.Ct. 623, 99 L.Ed. 942 (1955) (judge violated due process by sitting in the criminal trial of defendant whom he had indicted).

Republican Party of Minnesota v. White, 536 U.S. 765, 775-776 (2002).

These cases stand for the proposition that an impartial judge is a constitutional requirement, under the Due Process clause. A constitutional requirement is more fundamental than a federal statute or ethics.

Judicial Code of Conduct

The Code of Conduct for U.S. Judges (but *not* Justices of the U.S. Supreme Court) is posted on the Internet at http://www.uscourts.gov/library/conduct.html . Because this code of conduct was written by judges, it can *not* apply to their superior Justices. Nonetheless, the same principles should apply to *all* judges and Justices.

The new judicial code of conduct that is effective 1 July 2009 mentions the words *impartial* or *impartiality* 15 times in the rules and commentary. This repetition makes clear the importance of these words amongst judges.

Canon 3 specifically distinguishes between the ethical rules for a judge and the way a politician behaves, which has implications for why a politician is (in my view) unlikely to be a good judge.

> **CANON 3:** A JUDGE SHOULD PERFORM THE DUTIES OF THE OFFICE FAIRLY, IMPARTIALLY AND DILIGENTLY
> The duties of judicial office take precedence over all other activities. In performing the duties prescribed by law, the judge should adhere to the following standards:
>
> A. Adjudicative Responsibilities.
>
> (1) A judge should be faithful to, and maintain professional competence in, the law and should not be swayed by partisan interests, public clamor, or fear of criticism.

....

> (6) A judge should not make public comment on the merits of a matter pending or impending in any court. A judge should require similar restraint by court personnel subject to the judge's direction and control. The prohibition on public comment on the merits does not extend to public statements made in the course of the judge's official duties, to explanations of court procedures, or to scholarly presentations made for purposes of legal education.

Code of Conduct for U.S. Judges, Canon 3(A) (effective 1 July 2009).

Note that Canon 3(A)(6) prevents a candidate for the judiciary from answering specific questions about issues (e.g., abortion, gun control, etc.) that will likely come before the Court. This ethical rule will *not* stop politicians from asking such questions!

The legal requirement for impartiality means that the most important criterion for a Justice is that he/she have a reputation as an independent thinker with integrity to depart from orthodoxy, popular sentiment, and political correctness. I think such impartiality is more important than a deep understanding of constitutional law, which is also an important requirement, but *not* legally required.

Canon 3C of the Code of Conduct for U.S. Judges, corresponds to 28 U.S.C. § 455, quoted above.

why politicians undesirable on the Court

There are six reasons why I am generally opposed to appointing any politician to any judicial position.

1. It would be difficult for a former politician to shed reliance on opinion polls and obey Canon 3(A)(1), which is quoted above. Politicians survive by following opinion polls, judges must ignore opinion polls.

2. Canon 2(B) says: "A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment." If a politician were to be appointed to the Court, that politician would effectively need to stop associating with his/her former colleagues in politics. Otherwise, there would be inevitable conflicts of interest, as politicians would want to discuss current cases with the Justice, and as politicians would want to discuss issues that will come before the court with the Justice. In these ways, I think it likely that a former politician would not be able to avoid outside influences.

3. Politicians play to popular sentiment and ignore both legal and ethical rules, for example when the members of the U.S. Senate Judiciary Committee ask a judicial nominee for his/her views about issues (e.g., abortion, gun control, etc.) that will likely come before the Court, inviting the nominee to violate Canon 3(A)(6).

4. Canon 5 says "a judge should not ... make speeches for a political organization or candidate, or publicly endorse or oppose a candidate for public office" and should not "solicit funds" for a political candidate. This would effectively prevent a politician who became a judge from publicly appearing with his/her former political colleagues at future political party functions.

5. Constitutional law is one of the most complicated areas of law and it continues to evolve, as a result of U.S. Supreme Court opinions. I think it is unlikely that a politician would devote substantial time to his/her continuing study of constitutional law, such as reading cases or writing either law review articles, briefs, or judicial opinions. This is another reason why selecting a Justice from current judges or law professors is preferable to selecting a politician.

6. Politicians (i.e., executive and legislative branches) must be independent of the judicial branch of government, under the U.S. Constitution's system of checks and balances, as judges sometimes need to declare a politician's act(s) either unconstitutional or illegal. Appointing a former politician to the U.S. Supreme Court is too cozy of a relationship between the political and judicial branches of government.

Obama in Oct 2008

In early October 2008, about a month before the presidential election, the editors of *The Detroit Free-Press* interviewed Obama. Here is what was said about the choice of U.S. Supreme Court Justices:

> **Q.** You voted against confirming both Justice Alito and Chief Justice Roberts (for the U.S. Supreme Court). You said you want justices who are passionate. ... You taught constitutional law for 10 years, so I'm wondering if you can tell us, outside the context of the current court, what justices would you use as models for your pick?
>
> **A.** Well, it depends on how far you go back. I mean, Justice (John) Marshall was pretty good ... but those were some different times. There were a lot of justices on the Warren Court who were heroes of mine... Warren himself, Brennan, (Thurgood) Marshall. But that doesn't necessarily mean that I think their judicial philosophy is appropriate for today.
>
> Generally, the court is institutionally conservative. And what I mean by that is, it's not that often that the court gets out way ahead of public opinion. The Warren Court was one of those moments when, because of the particular challenge of segregation, they needed to break out of conventional wisdom because the political process didn't give an avenue for minorities and African Americans to exercise their political power to solve their problems. So the court had to step in and break that logjam.
>
> I'm not sure that you need that. In fact, I would be troubled if you had that same kind of activism in circumstances today. ... So when I think about the kinds of judges who are needed today, it goes back to the point I was making about common sense and pragmatism as opposed to ideology.

> I think that Justice Souter, who was a Republican appointee, Justice Breyer, a Democratic appointee, are very sensible judges. They take a look at the facts and they try to figure out: How does the Constitution apply to these facts? They believe in fidelity to the text of the Constitution, but they also think you have to look at what is going on around you and not just ignore real life.
>
> That, I think is the kind of justice that I'm looking for — somebody who respects the law, doesn't think that they should be making law ... but also has a sense of what's happening in the real world and recognizes that one of the roles of the courts is to protect people who don't have a voice.

"Obama: Aim for fundamental change," *Detroit Free-Press,* (3 Oct 2008)
http://www.freep.com/apps/pbcs.dll/article?AID=/20081003/OPINION01/810030434/1215/NEWS15
(see webpage 3 of 14) (all ellipses in original).

It seems to me that Obama was speaking of *both* a liberal activist judge (e.g., "one of the roles of the courts is to protect people who don't have a voice.") *and* a conservative judge (e.g., "they believe in fidelity to the text of the Constitution" and "doesn't think that they should be making law"). I don't see how one judge can be both at the same time.

Two weeks after the election, *The Los Angeles Times* recognized the significance of that interview and mentioned the names of three possible nominees by Obama:

> Three frequently mentioned candidates are Judges Diane Wood, 58, of the U.S. appeals court in Chicago; Sonia Sotomayor, 54, of the U.S. appeals court in New York; and Elena Kagan, 48, dean of Harvard Law School.
>
> ....
>
> In an interview with the Detroit Free Press editorial board in October [2008, Obama] described Warren, Brennan and Marshall as "heroes of mine. . . . But that doesn't necessarily mean that I think their judicial philosophy is appropriate for today."
>
> He credited the Warren court with ending segregation and opening doors for African Americans. "The court had to step in and break that logjam. I'm not sure you need that. In fact, I would be troubled if you had that same kind of activism in circumstances today," he said.

David G. Savage, Obama and the Supreme Court, *The Los Angeles Times,* (17 Nov 2008)
http://articles.latimes.com/2008/nov/17/nation/na-courtobama17 .

Incidentally, journalists and supporters of Obama often identify President Obama as a "professor of constitutional law". Actually, Obama was a "lecturer" at the University of Chicago Law School during 1992 to 1996, which is an adjunct position that teaches elective classes. From 1996 until 2004, Obama was a "senior lecturer" there, which is still *neither* a tenure-track professor *nor* a

tenured professor.[3] Apparently, Obama did *not* teach the Constitutional Law class that *all* law students are required to take. Instead, Obama taught elective classes in:

1. voting rights (e.g., drawing boundaries for election districts),
2. racism, and
3. Constitutional Law III (e.g., due process and equal protection).

Despite the criticisms of Obama during the 2008 campaign by various right-wing commentators and also by Hillary Clinton, I believe it is clear that Obama has a greater understanding of constitutional law than any recent president, even if one does not agree with Obama's opinions.

First Week: 1-8 May 2009

Obama's 1 May briefing

On Friday afternoon, 1 May 2009, President Obama made an unscheduled appearance at a White House Press Briefing and said:

> The reason I'm interrupting Robert [Gibbs, the White House Press Secretary] is not because he's not doing a good job – he's doing an unbelievable job. But it's because I just got off the telephone with Justice Souter. And so I would like to say a few words about his decision to retire from the Supreme Court.
>
> Throughout his two decades on the Supreme Court, Justice Souter has shown what it means to be a fair-minded and independent judge. He came to the bench with no particular ideology. He never sought to promote a political agenda. And he consistently defied labels and rejected absolutes, focusing instead on just one task – reaching a just result in the case that was before him.
>
> He approached judging as he approaches life, with a feverish work ethic and a good sense of humor, with integrity, equanimity and compassion – the hallmark of not just being a good judge, but of being a good person.
>
> I am incredibly grateful for his dedicated service. I told him as much when we spoke. I spoke on behalf of the American people thanking him for his service. And I wish him safe travels on his journey home to his beloved New Hampshire and on the road ahead.
>
> Now, the process of selecting someone to replace Justice Souter is among my most serious responsibilities as President. So I will seek somebody with a sharp and independent mind and a record of excellence and integrity. I will seek someone who understands that justice isn't about some abstract legal theory or footnote in a case book; it is also about how our laws affect the daily realities of people's lives – whether they can make a living and care for their families; whether they feel safe in their homes and welcome in their own nation.

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[3] Jodi Kantor, "Teaching Law, Testing Ideas, Obama Stood Slightly Apart," *The New York Times,* (30 July 2008) http://www.nytimes.com/2008/07/30/us/politics/30law.html ;
Joe Miller, "Was Barack Obama really a constitutional law professor?," FactCheck.org (28 March 2008) http://www.factcheck.org/askfactcheck/was_barack_obama_really_a_constitutional_law.html ;
Steve Gilbert, "Obama's Courses at Univ. of Chicago Law School," (2 Oct 2008) http://sweetness-light.com/archive/obamas-courses-at-u-of-c-law-school .

> I view that quality of empathy, of understanding and identifying with people's hopes and struggles, as an essential ingredient for arriving as just decisions and outcomes. I will seek somebody who is dedicated to the rule of law, who honors our constitutional traditions, who respects the integrity of the judicial process and the appropriate limits of the judicial role. I will seek somebody who shares my respect for constitutional values on which this nation was founded and who brings a thoughtful understanding of how to apply them in our time.
>
> As I make this decision, I intend to consult with members of both parties across the political spectrum. And it is my hope that we can swear in our new Supreme Court Justice in time for him or her to be seated by the first Monday in October when the court's new term begins.
>
> And with that, I would like you to give Robert [Gibbs, the White House Press Secretary] a tough time again. (Laughter.)

http://www.whitehouse.gov/the_press_office/Press-Briefing-By-Press-Secretary-Robert-Gibbs-5-1-09/ (beginning 14:36 EDT, ending 15:23 EDT, 1 May 2009).

I want to comment on a few phrases in President Obama's remarks. When the President says "I will seek somebody with a sharp and independent mind and a record of excellence and integrity", I will believe those words only if the President nominates someone who has written judicial decisions or law review articles that offend liberal democrats. Obviously, any president — conservative or liberal — wants to nominate a justice who agrees with the president on major issues. So talk of "independent mind" and "integrity" is just empty rhetoric.

I am also concerned when I hear President Obama say:

> I will seek someone who understands that justice isn't about some abstract legal theory or footnote in a case book; it is also about how our laws affect the daily realities of people's lives — whether they can make a living and care for their families; whether they feel safe in their homes and welcome in their own nation.
>
> I view that quality of empathy, of understanding and identifying with people's hopes and struggles, as an essential ingredient for arriving as just decisions and outcomes.

President Obama taught law classes for 12 years at the University of Chicago, while he was an Illinois state legislator. Obama should know that those "abstract legal theories" are relevant — they are the foundations for rules of law that attempt to ensure justice and fairness. And it is especially distressing to see Obama denigrate "footnotes", because citations to authority are essential in a legal system that relies on precedent. People who do not personally do legal research — and who write neither scholarly briefs to a judge nor scholarly articles for publication — will never understand the importance of citations and footnotes. Following rules of law and explaining rational reasons for a decision are how a judge avoids pandering to a vocal majority sentiment, and how a judge avoids the tyranny of the majority.[4] Obama's words, when taken literally, seem to hint that he wants to appoint a Justice who is a social activist, perhaps like Justice Thurgood Marshall or Justice William Douglas. While I would personally prefer a Justice without a social agenda, it would be refreshing to see a new Justice who might give employees more protection

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[4] See, e.g., Standler, Freedom from the Majority in the USA, http://www.rbs2.com/majority.pdf , (Nov 2005).

from wrongful dismissals by their employer,[5] and who might give people more privacy rights to protect them from intrusion by big government.[6]

I am also concerned about Obama's emphasis on "empathy". Such an emotional consideration is the antithesis from the rational intellect and impartiality that the law requires from any judge. See the comments, quoted at page 26, below.

possible candidates

Holland's list

Immediately upon hearing rumors on Thursday night of Justice Souter's retirement, journalists began publishing speculation about who might be nominated by President Obama to succeed Justice Souter. The most comprehensive list I could find on the morning of 1 May 2009 was written by Jessie J. Holland for the Associated Press:

> Court watchers think President Barack Obama will choose a woman for his first nomination to the Supreme Court, where only one of nine seats is held by a female — Justice Ruth Bader Ginsburg. With Justice David Souter expected to retire this year, here are the some of the people who are likely to get some consideration from the White House:[7]
>
> - Ruben Castillo of the U.S. District Court for the Northern District of Illinois.
> - Merrick B. Garland of the U.S. Circuit Court of Appeals for the District of Columbia Circuit.
> - Michigan Gov. Jennifer Granholm.
> - Elena Kagan, U.S. solicitor general [and Dean of Harvard Law School 2003-2008].
> - Pamela S. Karlan, law professor at Stanford University.
> - Harold Hongju Koh, dean of the Yale University Law School [since 2001].
> - Sandra Lea Lynch, chief judge of the 1st U.S. Circuit Court of Appeals.
> - M. Margaret McKeown of the 9th U.S. Circuit Court of Appeals.
> - Massachusetts Gov. Deval Patrick.
> - Johnnie B. Rawlinson of the 9th U.S. Circuit Court of Appeals.
> - Leah Ward Sears, chief justice of the Georgia Supreme Court.
> - Sonia Sotomayor of the 2nd U.S. Circuit Court of Appeals.
> - Kathleen Sullivan, former dean of Stanford Law School.
> - Cass Sunstein, University of Chicago law professor.
> - Kim McLane Wardlaw of the 9th U.S. Circuit Court of Appeals.

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[5] See. e.g., Standler, History of At-Will Employment Law in the USA, http://www.rbs2.com/atwill.htm (July 2000); Standler, Professional Ethics & Wrongful Discharge, http://www.rbs2.com/ethics.htm (July 2000); Standler, Freedom of Speech in USA for Professors and Other Government Employees, http://www.rbs2.com/afree2.htm (May 2000).

[6] See, e.g., Standler, Fundamental Rights Under Privacy in the USA, http://www.rbs2.com/priv2.pdf (Aug 1998).

[7] In order to shorten this quotation to conform to fair use in copyright law, I have omitted the biography of each candidate that appears in the Associated Press article.

- Diane Pamela Wood of the 7th U.S. Circuit Court of Appeals.

Jesse J. Holland, Associated Press, "A look at potential Obama nominees to high court," *The Washington Post,* (21:09 EDT, 1 May 2009)
http://www.washingtonpost.com/wp-dyn/content/article/2009/05/01/AR2009050100730.html

These 16 candidates are all relatively young (born between 1950 and 1960), with the exception of Judge Lynch who was born in 1946, so their appointment would likely continue for at least twenty years.

Some are members of a racial minority group (e.g., Hispanic or Black) and 10 of these 16 (63%) are female. Someday racial and gender status may not matter, but historically the U.S. Supreme Court has been a preserve for white males, with only 2 black Justices and 2 women Justices in the history of the court. It is also true that nearly all experts in U.S. Constitutional law are white males.

Two of these 16 candidates are governors, at least four of the others were active in politics, for example, Holland says:

- Prof. Kagan was "associate counsel to President Bill Clinton 1995-1996, deputy assistant to Clinton for domestic policy and deputy director of the Domestic Policy Council from 1997-1999."
- Judge McKeown "worked as a White House fellow and special assistant to the secretary of the Interior Department from 1980-1981."
- Prof. Sunstein was "nominated by President Barack Obama recently to head the White House Office of Information and Regulatory Affairs."
- Judge Wardlaw "worked for President Clinton's Justice Department transition team from 1992-1993 and for Los Angeles Mayor Richard Riordan's mayoral transition committee in 1993."

The way to get noticed by any president (or the president's advisors) is *not* to write outstanding articles in law reviews, *not* to write outstanding a law textbook or a treatise, but to work in the same office as politicians.

Halloran's list

A shorter list of candidates was given in an article at the National Public Radio website:

> However, most court observers think it unlikely that any Obama appointment to replace the liberal Souter will change the ideological mix of the court.
>
> ....
>
> Among the top tier of possible nominees are Sonia Sotomayor, a U.S. Court of Appeals judge for the 2nd Circuit; Diane Wood, a U.S. Court of Appeals judge for the 7th Circuit; and Elaine Kagan, a former Harvard Law School dean recently appointed U.S. solicitor general.
>
> Also being mentioned are Kim McLain Wardlaw, a U.S. Court of Appeals judge for the 9th Circuit, and Leah Ward Sears, chief justice of the Georgia Supreme Court.
>
> Sotomayor and Wardlaw are of Hispanic descent; Sears is African-American.

Liz Halloran, "Battle Looms Over Choosing Souter's Successor," National Public Radio (1 May 2009) http://www.npr.org/templates/story/story.php?storyId=103786842

Slate's list

Dahlia Lithwick and others at *Slate* website posted the following list of twenty candidates:

- Hillary Clinton
- Merrick Garland
- Jennifer Granholm
- Elena Kagan
- Pamela Karlan
- Harold Koh
- Lisa Madigan
- Margaret McKeown
- Martha Minow
- Janet Napolitano
- Teresa Wynn Roseborough
- Leigh Saufley
- Leah Ward Sears
- Sonia Sotomayor
- Kathleen Sullivan
- Cass Sunstein
- David S. Tatel
- Myron Thompson
- Kim Wardlaw
- Diane Wood

Emily Bazelon, Dahlia Lithwick, and Chris Wilson, "Choose Your Own Supreme Court Justice Out of our Top 20, whom do you like best?" *Slate,* (updated 5 May 2009)

http://www.slate.com/id/2217475/ .

There are only five men (i.e., Garland, Koh, Sunstein, Tatel, Thompson) — 25% — in this list of twenty candidates, so it's not looking good for males this year. There are only six people over 55 y of age (Clinton, Tatel, Thompson are over 60 y of age) — 30% — in this list of twenty candidates, so it's not looking good for the gray-haired crowd this year.

As of 17:23 EDT on 5 May 2009, visitors to the *Slate* website had chosen the following five top candidates:

Sotomayor	55 votes
Granholm	35
Karlan	33
Sullivan	31
Clinton	25

Apparently, the visitors to the *Slate* webpage who voted in their survey admire politicians (e.g., Granholm and Clinton), since two of the three politicians in the list of twenty were in the top five responses. Or maybe the visitors were unfamiliar with judges and law professors.

The final vote at the Slate website for the top seven candidates, published sometime around 7 May:

Sotomayor	79 votes
Karlan	75
Sullivan	64
Granholm	51
Sears	44
Clinton	37
Kagan	29

These totals include my vote for Prof. Kathleen Sullivan. See my comments about Prof. Sullivan, beginning at page 22, below.

I checked the *Slate* webpage again on 21 May, but the total votes had not been updated. Either *Slate* does not believe in counting votes, or they can not count beyond 79 votes for Sotomayor. <*grin*>

New York Times' list

On 4 May 2009, *The New York Times* posted a list of 15 potential candidates (5 men and 10 women), with biographies, and let visitors to the *Times'* website vote.
http://www.nytimes.com/interactive/2009/05/04/us/politics/20090504-souter-picker.html
The 15 candidates were:

Sotomayor	25.2%
Kagan, Elena	10.9%
Sears, Leah	10.4%

Sullivan	09.1%
Wood	08.2%
Granholm	08.1%
Karlan, Pamela	06.3%
Koh	05.0%
Sunstein	04.0%
Napolitano	03.7%
Patrick, Deval	03.0%
Gregoire	02.3%
Wardlaw	01.9%
Garland, Merrick	01.4%
Moreno, Carlos	00.4%

The Times did not publish the number of votes, but only presented the results as a bar graph. On the afternoon of 24 May 2009, I measured the length of the bars and computed the percent of total votes for each of the 15 suggested candidates. The totals include my vote for Sullivan.

Visitors could also vote for a candidate who was not on the *Times'* list. Of the candidates *not* in the *Times'* list, Bill Clinton was the most preferred, followed by Al Gore, Akhil Amar, Erwin Chemerinsky, Hillary Clinton, Laurence Tribe, and four others. Bill Clinton was between Garland and Moreno in the *Times'* list, so all of the nonsuggested candidates were at the bottom of the list, when arranged by number of votes.

Finally, I note that results of such online opinion polls are essentially meaningless. Probably few voters in these polls would recognize the names of famous law professors (e.g., Kathleen Sullivan, Pamela Karlan, Cass Sunstein, Laurence Tribe, Erwin Chemerinsky, etc.). Without a personal understanding of the values of each candidate, voters can not make a meaningful choice amongst the candidates. Even if the opinion poll were restricted to practicing attorneys, few of us are familiar with *all* of the judges, professors, and politicians in the list of candidates, so — again — there is no meaningful choice. However, at least an attorney could pick a few outstanding candidates from the list, based on personal experience in reading a professor's articles or a judge's opinions.

commentary

While most speculation about President Obama's nominee naturally focused on who he might nominate, one newspaper article focused on who the President would *not* nominate:

> What do Merrick Garland, David Tatel and Jose Cabranes have in common?
>
> All are sitting federal court of appeals judges who were nominated by Democratic presidents. All three are deeply admired by their colleagues and are among a small group of the very finest federal judges in the country. And all three have names you probably won't

hear often in public discussions about whom President Obama should tap to replace retiring Justice David H. Souter.[8]

Garland: white guy. Tatel: white guy and, at 67, too old. Cabranes: Hispanic, sure, but even older.

I have nothing against the people whose names have so far been floated as possible nominees (some of them are excellent), and I'm not against diversity on the high court. Far from it: It's important to have a court that looks like America, and it is particularly important that following Sandra Day O'Connor's retirement in 2005 an additional woman join the high court.

That said, there are significant costs to the nominating system that we have developed, in which gender, ethnicity and age have, from the very start of the search for Souter's replacement, placed off-limits many lawyers and judges whose colleagues regard as some of the best in their profession. The dirty little secret is that the conservative talent pool on the federal courts these days is larger and deeper than the liberal one, mainly because Republicans have been in power far longer than Democrats recently and have therefore had more opportunity to cultivate a strong bench on the bench.

....

The age issue has particularly striking consequences. It used to be commonplace for presidents to appoint justices who were well into their 60s. Lewis Powell, Earl Warren, Charles Evans Hughes (the second time around), William Howard Taft and Oliver Wendell Holmes, for example, were at least 60 when nominated, as was Justice Ruth Bader Ginsburg when President Clinton nominated her in 1993. Older judges brought experience to the table, and because life tenure is shorter for them than for younger judges, the stakes are lower in their confirmations.

....

The result is a strange conversation about who should replace Souter — one that self-consciously omits many of the judges whose work is most actively studied by those who engage day-to-day with the courts. This may well be a reasonable price to pay for a diverse bench, and for those who don't read judicial opinions, it is in any event an invisible price. But let's be candid about paying it.

Benjamin Wittes, "The Best Judges Obama Can't Pick," *The Washington Post,* p. B01 (3 May 2009) http://www.washingtonpost.com/wp-dyn/content/article/2009/05/01/AR2009050103269.html

While one can understand a president wanting to nominate a 55 y old person to continue the president's values on the Court for the next 25 y, I see at least four problems with such a decision. First of all, there is no guarantee that a new Justice will conform to the values of the president who appointed him/her (e.g., Justice Brennan disappointed President Eisenhower, and Justice Souter disappointed President George H.W. Bush). Second, many of the current Justices on the Court

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[8] Actually, Judge Garland was on Jesse Holland's list of 16 candidates, quoted above, and both Tatel and Garland were in Slate's list of 20 candidates.

are over 65 y of age, which is evidence that older people can continue to be effective Justices. Third, criteria like age should *not* be relevant to selecting a Justice — we should be seeking someone who is very knowledgeable about constitutional law and who had a reputation as an independent thinker with integrity to depart from orthodoxy, popular sentiment, and political correctness. Fourth, I think it may be desirable to have a more rapid turnover of Justices on the Court, otherwise it could take several tens of years before the Court is purged of each bad appointment. Looking at the history of the Court, I think it is likely that politicians will nominate and confirm Justices who are *not* amongst the best-qualified people available. Perhaps we need term limits[9] for Supreme Court Justices of 20 years service or until age 80 y,[10] whichever comes first.

ignoring Judge Posner

In looking at a half-dozen news articles on 1 May 2009 about possible nominees, I am struck that no one mentioned Judge Richard A. Posner, arguably the most scholarly judge currently on the U.S. Court of Appeals and author of many significant books and articles on law. In a search of Google News for "`Sotomayor Kagan Wood Posner`" at 10:00 EDT on 1 May 2009, the only mention I could find was:

> Finally, Obama could pick Richard Posner, a nominee even conservative sources said would face little opposition before the Senate. A Seventh Circuit Appeals Court judge, Posner is widely recognized as a top legal mind. He has written several decisions upholding abortion rights and is a leading scholar in fusing law and economics.

Reid Wilson, "Court opening presents choice for Obama," *The Hill,* (09:01 EDT 1 May 2009) http://thehill.com/leading-the-news/court-opening-presents-choice-for-obama-2009-05-01.html This terse three-sentence remark is almost an afterthought in *The Hill,* appearing just before mentioning U.S. Secretary of State Hillary Clinton, the wife of a disbarred lawyer from Arkansas. <*grin*> Wilson's article mentions Koh, Kagan, Wood, Sotomayor, and Posner — in that order. I think Wilson's first four suggested nominees are credible, but (despite Posner's preeminent reputation amongst legal scholars) Posner is *not* a credible candidate for President Obama's criteria. Judge Posner is a white male, who is *not* a social activist. Judge Posner is currently 70 y old, which probably means that a candidate who is currently only 55 y old would serve on the Court for 15 y longer than Posner. And Judge Posner is an intellectual, the kiss of death for

---

[9] Term limits for Justices would require an amendment to the U.S. Constitution, because Article III, § 1 says that judges and justices "shall hold their Offices during good Behaviour," which grants them lifetime tenure.

[10] I take the suggested 80 y age limit from 28 U.S.C. § 371(c), where a judge in a U.S. District Court or U.S. Court of Appeals is eligible for "senior status" at age 80 y, even with zero years of active service on the court.

President Obama's articulated values of "empathy"[11], *not* "footnotes".[12] In summary, Judge Posner will be discriminated against on the basis of his race, gender, age, *and* because he is an intellectual. It is a recipe for disaster when the largest group of qualified candidates (i.e., white male intellectuals) are summarily rejected. Having said something that might be considered provocative, let me say that I prefer to focus on *credentials* of a candidate and ignore their race, gender, age, and other criteria that should be irrelevant.

A published study of citations of 205 judges on the U.S. Courts of Appeals, who were active in 1992 and had at least six years of experience as a judge at the end of 1995 showed that Judge Posner had more outside-circuit[13] citations than any other judge.[14]

Another published study evaluated published opinions of 98 judges on the U.S. Courts of Appeal written during 1998-2000, who had at least six years of experience as a judge on 31 May 2003.[15] Judge Posner had more outside-circuit citations than any other judge and he was 4.3 standard deviations above the mean. Judge Posner had more citations in law review and legal periodicals than any other judge and he was 3.8 standard deviations above the mean. Judge Posner had his name mentioned in the text of opinions more times than any other judge and he was 8.3 standard deviations above the mean. Because Judge Posner wrote more opinions than any other judge, the study also looked at the number of invocations of Posner's name per opinion written by Posner, which was also the greatest for any judge and 7.1 standard deviations above the mean. I believe these results show that Judge Posner is the single most influential judge on the U.S. Courts of Appeal during 1998-2000.

That Judge Posner will *not* be nominated to the U.S. Supreme Court is a tragedy for jurisprudence.

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[11] See page 13, above.

[12] See page 13, above.

[13] Judge Posner is in the Seventh Circuit, where judges in U.S. District Courts need to cite his opinions as precedent. For that reason, the study did not count citations to Posner from within the Seventh Circuit. Outside the Seventh Circuit, any citation to Posner's opinion shows his influence and good reputation.

[14] William M. Landes, Lawrence Lessig, and Michael E. Solimine, "Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges," 27 JOURNAL OF LEGAL STUDIES 271, 288 (June 1998).

[15] Stephen J. Choi and G. Mitu Gulati, "Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance," 78 SOUTHERN CALIFORNIA LAW REVIEW 23, 50, 60 (Nov 2004).

Prof. Kathleen Sullivan

I am not familiar with the record of any of the women judges (e.g., Sotomayor, Diane Wood, etc.) and Solicitor General Elaine Kagan. However, I am familiar with Prof. Kathleen Sullivan, from reading some of her law review articles on constitutional law. She is also the co-author (with Prof. Gerald Gunther) of a textbook on constitutional law. Moreover, Sullivan was a professor at Harvard Law School during 1984-93, then a professor of law at Stanford since 1993. Sullivan was dean of the Stanford Law School during 1999-2004, evidence that she is held in high esteem by her colleagues at one of the best law schools in the nation.

On 1 May and again on 4 May, I searched Google News for articles touting the candidacy of Prof. Sullivan, but found only one article in the mainstream media. The final three paragraphs of an article in *Politico* say:

> The confirmation process for Sotomayor would draw a lot of attention to the divisive practice of affirmative action — a practice that Obama has expressed ambivalence about.
>
> A nod from Obama for former Stanford Law School Dean Kathleen Sullivan could trigger a similar fight. Sullivan has openly acknowledged that she is a lesbian, a fact that would make history on the court and surely draw extra attention to her advocacy for gay rights.
>
> "I think that would be a bridge too far for him, to be honest, because that would enter a whole new element into the debate that I don't think he's ready for," said Tony Perkins of the Family Research Council.

Josh Gerstein, "Obama's search for 'empathy' shapes Supreme Court replacement debate," *Politico* (04:15 EDT, 4 May 2009) http://www.politico.com/news/stories/0509/22058.html .

I find it very distressing that Prof. Sullivan's nearly thirty years of scholarship on constitutional law, and her advocacy in appellate litigation, is quickly dismissed with an irrelevant remark about her being a lesbian. If americans truly value diversity, they would stop labeling people by race, gender, sexual orientation, religion — each of which suggests to bigots that a labeled person is somehow "not in the mainstream" or "too different from us (i.e., the majority) to be trusted". If Prof. Sullivan is dismissed by politicians because she is a lesbian, then politicians have failed to lead us away from bigotry.

So — given the unfortunately reality that Obama will ignore Judge Posner and other white males — I suggest that President Obama nominate Prof. Sullivan, because she is a preeminent attorney who is possibly the most knowledgeable women in the USA about constitutional law. The incidental fact that she is a lesbian will cause the homophobic extremists in the Republican party to have convulsions is just an added benefit. <*grin*> My only worry is that Obama may not be that ~~confrontational~~ daring, which would make him a coward, after all of his rhetoric about avoiding prejudices and bigotry.

On 5 May, *Politico* ran another story about lesbian candidates:

> President Barack Obama is looking to advance diversity with his pick to replace retiring U.S. Supreme Court Justice David Souter — and early speculation has focused on whether he'll pick a woman, or perhaps the first Hispanic justice.[16]
>
> But gay rights groups — disappointed that Obama didn't pick an openly gay man or woman for his Cabinet — are pushing him to put the first openly gay justice on the Supreme Court.
>
> Within hours of word of Souter's departure, the Gay and Lesbian Victory Fund was hailing the candidacy of a First Amendment scholar and former dean of Stanford Law School, Kathleen Sullivan. "Out lesbian a contender for Supreme Court," one of the group's web sites declared.
>
> Another Stanford law professor on the "frequently mentioned" lists, Pam Karlan, has been open about being a lesbian, colleagues and former students say. In response to an e-mail from POLITICO, Karlan expressed no reticence about discussing her sexual orientation, though she downplayed talk about being a possible nominee.

Josh Gerstein, Groups push for first gay Supreme Court justice, *Politico,* (10:46 EDT 5 May 2009) http://www.politico.com/news/stories/0509/22106.html .

I would never suggest that someone, or some group, remain silent and thus disappear from the discussion. However, it is nevertheless true that the more homosexual organizations promote their candidate, the more that candidate becomes burdened with the homosexual label. So, please, let's nominate and confirm Prof. Sullivan because she is the best qualified woman in constitutional law, *not* because she is the best lesbian that Obama could find.

schedule

In his remarks on the afternoon of 1 May 2009, President Obama said he wanted a new Justice to be confirmed by the Senate before October 2009.

> The chairman of the Senate Judiciary Committee says he expects President Barack Obama's nominee for the Supreme Court to be on the bench when in time for the court's new term in October.
>
> Democratic Sen. Patrick Leahy of Vermont says he will schedule confirmation hearings for the nominee after the president announces his selection. Obama has not set a timetable for naming a replacement for retiring Justice David Souter.

Associated Press, "Leahy: Confirmation of new justice likely by Oct.," *The Washington Post,* (09:46 EDT 3 May 2009) http://www.washingtonpost.com/wp-dyn/content/article/2009/05/03/AR2009050300746.html .

Confirmation of the new nominee should be no problem, because Democrats currently hold 59 of the 100 seats in the U.S. Senate, so it is unlikely that Republicans would attempt a filibuster to prevent the confirmation of the choice of a democratic president. The bigger problem is timing.

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[16] One could argue that Justice Cardozo, who served during 1932-38, was the first Hispanic Justice, since his ancestors immigrated from Portugal to North America in the mid-1700s.

The Senate is currently scheduled to be in recess from 10 August until 8 Sep 2009. Given the 5 Oct deadline, either the Judiciary Committee hearings will need to be during 6 July – 7 Aug, or there will be a big rush after 8 Sep. Whether there can be *both* careful consideration of a nominee *and* confirmation before 5 Oct depends on the nominee's credentials, and how much opposition the nominee has (i.e., how controversial their written record is). I would like to see at least two months between the President's nomination and the beginning of the Senate Judiciary Committee hearings, so there is ample time to inspect and analyze the nominee's writings (e.g., judicial opinions, law review articles, speeches, etc.). President Obama needs to nominate someone as soon as possible, if the 5 Oct deadline is to be met. For the benefit of readers in future years, I mention that Obama already has plenty of crises: a continuing major recession in the USA that left many people unemployed,[17] North Korea's withdrawal from treaties and resuming production of nuclear weapons and long-range rockets, Iran's continuing development of nuclear weapons and threats to annihilate Israel, the continuing problem of Islamic militants in Afghanistan and Pakistan, a situation in the USA where many people can afford neither medical care nor health insurance, for more than twenty years scientists have known that burning fossil fuels releases CO_2 into the atmosphere and contributes to global warming, for more than thirty years we have been burning too much fossil fuel and importing too much petroleum, ...

At the end of a White House press briefing on Friday afternoon, 8 May,[18] it was announced that President Obama would *not* nominate a Justice during the next week, because "we're in the very beginning of this process" of selecting a nominee.

judicial monastery ?

Senator Patrick Leahy, chairman of the Senate Judiciary Committee, appeared on a Sunday morning talk show on ABC television and actually said:

> I would like to see more people from outside the judicial monastery, someone who has had some real-life experience, not just as a judge.

ABC News, " 'This Week' Transcript: Senators Leahy and Hatch," http://www.abcnews.go.com/ThisWeek/Story?id=7491153&page=2 (3 May 2009); Douglass K. Daniel, "Senators: Pick next justice from outside judiciary," Associated Press (21:53 EDT, 3 May 2009); R.M. Schneiderman, "Specter Re-emphasizes Independence," *The New York Times,* http://www.nytimes.com/2009/05/04/us/politics/04talkshows.html .

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[17] In April 2009, the national unemployment rate was 8.9%, the highest since the year 1983.

[18] http://www.whitehouse.gov/the_press_office/Briefing-by-White-House-Press-Secretary-Robert-Gibbs-5-8-09/ (8 May 2009).

I think Leahy's words are absolute nonsense. A Justice on the U.S. Supreme Court routinely considers highly technical arguments about constitutional law. The people who have the most experience with this specialized subject area are: (1) judges on the U.S. Courts of Appeals and (2) law professors who have written books or many scholarly papers on constitutional law. If President Obama nominates a Justice who is outside of these two sources of expertise on constitutional law, he risks replacing legal scholarship with politics.

Moreover, I believe it was very bad form for Leahy to denigrate judges by referring to their profession as a "monastery", as if judges were somehow isolated from "real-life experiences" by being a judge. I hope that Senator Leahy's remarks were just demagoguery intended for consumption by people who had never read any U.S. Supreme Court opinion in their entire lifetime. Still, one expects — and the nation deserves — better from the chairman of the Senate Judiciary Committee.

Another reason why Senator Leahy is wrong is that a monastery only admits men, while the U.S. Courts of Appeals have a number of women judges. There are also women on state courts, who, while less experienced with U.S. Constitutional law than a judge in a federal court, might still be a reasonable nominee for the U.S. Supreme Court.

Unlike politicians who want the U.S. Supreme Court to look like a cross-section of the entire population in the USA (e.g., five female Justices, one Black Justice, one Hispanic Justice, etc.),[19] I want the Supreme Court to look like a cross-section of a symposium on constitutional law that is attended by judges, law professors, and attorneys who practice in constitutional law. I believe that the most important credentials for a Justice is personal characteristics of integrity and independence, plus knowledge of constitutional law. Unless, one wants to politicize the Court and turn it into an instrument of social change, race and gender of the Justices should be irrelevant. Indeed, it is insulting to say that white males are somehow incapable of understanding minorities — and history shows that white males on the U.S. Supreme Court during the 1950s enthusiastically supported desegregation. The Court is *not* supposed to be a representative body like a legislature, and the Court is supposed to be independent of politics.

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[19] According to the U.S. Census in the year 2000, 13% of Americans identify themselves as Black or African-American, and 12% of Americans identify themselves as Hispanic or Latino. 49% of Americans are male. http://www.census.gov/

In October 2005, Justice Scalia derided the idea that Justices needed to be diverse.

> Justice Antonin Scalia, in an interview last month with CNBC, dismissed the suggestion that having people of different races, religions and genders on the court has any effect on the outcome. "As far as the product of the court is concerned, it makes no difference at all," Scalia said. "I don't think there's . . . a female legal answer to a question and a male legal answer to the same question. That's just silly."

Ruth Marcus, "Diversity Gets Benched," *The Washington Post,* p. A25 (1 Nov 2005) http://www.washingtonpost.com/wp-dyn/content/article/2005/10/31/AR2005103101385.html .

commentary about "empathy"

I was interested to read comments on Obama's 1 May criteria for a new Justice, in which Obama stressed the need for "empathy",[20] which Obama said meant "identifying with people's hopes and struggles".

> The word "empathy," according to its Greek derivation, means "physical affection, passion, and partiality." I thought Aristotle said the law is reason free from passion? And, if justice is blind, I'm fairly certain she's also impartial.
>
> But more importantly who is on the receiving end of it by Obama's definition?
>
> How do we administer an empathy test? Will the Judiciary Committee present potential appointees with a hypothetical empathy stress test? "Box of Puppies: Good or Bad?"
>
> And what are the "hopes and dreams" of the American people? While I like to think most people are good, upstanding citizens, I certainly know there are plenty whose "hopes and dreams" may involve graft, greed, corruption, sloth, theft, dishonesty, and even violence. Serial murderers have dreams about killing people. O.J. Simpson probably hopes he'll be paroled. Are these the hopes and dreams Supreme Court justices must protect?
>
> ....
>
> The problem with Obama's Montessori School vision of the Supreme Court is that empathy is ambiguous. So are hopes and dreams. Worse, though, they are irrelevant. As former Republican Party chair Ed Gillespie said on "Meet the Press," "I may have empathy for the little guy in a fight with a big corporation, but the law may not be on his side."
>
> The president's poetic obscurities are made more unnerving by the Democrats' push for symbolic, liberal pieties, and an overt desire to turn this appointment into some kind of 70s-era social protest. "I think we should have more women," said Judiciary Committee chairman Pat Leahy, Democrat of Vermont. "We should have more minorities."
>
> As embarrassing as the push for Caroline Kennedy to fill Hillary Clinton's Senate seat was — the result of pressure from feminists to put another woman in office — Democrats like Leahy are gearing up once again to ignore qualifications and experience in favor of anatomy and skin color. And Republicans are supposedly the bigots?
>
> Empathy, hopes and dreams should play no part in selecting a Supreme Court justice. The leadership on President Obama's revamped Office of Faith Based Initiatives should have "empathy." The administrators of his "volunteer corps" should want to identify with the

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[20] See Obama's speech, quoted above at page 13.

> "hopes and dreams" of the American public. Supreme Court judges need only interpret the Constitution of the United States.

S.E. Cupp, "S.E. CUPP: Obama's Wacky Supreme Court Vision," Fox News (16:25 EDT 5 May 2009) http://foxforum.blogs.foxnews.com/2009/05/05/cupp_supreme_court/ .

The first six paragraphs of an article in a Salt Lake City newspaper by Dr. Thomas Sowell, a senior fellow at the Hoover Institution, Stanford University, says:

> Justice David Souter's retirement from the Supreme Court presents President Barack Obama with his first opportunity to appoint someone to the high court. People who are speculating about whether the next nominee will be a woman, a Hispanic or whatever are missing the point.
>
> That we are discussing the next Supreme Court justice in terms of group "representation" is a sign of how far we have already strayed from the purpose of law and the weighty responsibility of appointing someone to sit for life on the highest court in the land.
>
> That Obama has made "empathy" with certain groups one of his criteria for choosing a Supreme Court nominee is a dangerous sign of how much further the Supreme Court may be pushed away from the rule of law and toward even more arbitrary judicial edicts to advance the agenda of the left and set it in legal concrete, immune from the democratic process.
>
> Would you want to go into court to appear before a judge with "empathy" for groups A, B and C, if you were a member of groups X, Y or Z? Nothing could be further from the rule of law. That would be bad news, even in a traffic court, much less in a court that has the last word on your rights under the Constitution of the United States.
>
> Appoint enough Supreme Court justices with "empathy" for particular groups and you would have, for all practical purposes, repealed the 14th Amendment, which guarantees "equal protection of the laws" for all Americans.
>
> We would have entered a strange new world where everybody is equal but some are more equal than others. The very idea of the rule of law would become meaningless when it is replaced by the empathies of judges.

Thomas Sowell, "Supreme Court being pushed too far away from rule of law," *Deseret News,* (00:10 MDT 7 May 2009) http://www.deseretnews.com/article/705301857/Court-being-pushed-too-far.html .
Thomas Sowell, " 'Empathy' Versus Law" (5 May 2009) http://townhall.com/columnists/ThomasSowell/2009/05/05/empathy_versus_law .

Like the previous two commentaries above, the following commentary is also concerned about President Obama's use of the word "empathy".

> Obama's watchword for a Supreme Court pick appears to be "empathy." He's been using it for years. **....** I looked up the oath of office that Souter's successor will take. I don't see "empathy" there, either, but you're welcome to look for yourself. [quoting the oath[21]]
>
> **....**
>
> "Empathy" is the only thing Obama has defined: "understanding and identifying with people's hopes and struggles as an essential ingredient for arriving as just decisions."

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[21] The oath is quoted at page 5, above. I spent more than ten hours searching the Internet during 1-7 May 2009 for articles about nominating a new Justice to the U.S. Supreme Court. In all of those many articles that I read, only this article mentioned the oath of office taken by a Justice.

> The trouble is, that definition cannot co-exist with the principle of equal protection under the law, which is a bedrock of American jurisprudence, explicitly stated in the Fourteenth Amendment.
>
> Empathy assumes partiality. Empathy demands a respect to persons. Basing judgments on empathy necessitates putting some individual's circumstances above a law that is supposed to apply to everyone. He's "poor, or African-American, or gay, or disabled, or old," and therefore deserving of an interpretation of the law that no one else gets.

Kevin O'Brien, "A new justice who cares about the Constitution? Probably not:," *Cleveland Plain-Dealer,* (04:11 EDT 7 May 2009) http://www.cleveland.com/obrien/index.ssf/2009/05/a_new_justice_who_cares_about.html .

Also see the comments by Jacoby in *The Boston Globe* on 10 May, quoted at page 37, below.

other commentary

A reporter for the McClatchy newspapers wrote an interesting article on diversity:

> Supreme Court diversity could mean many different things to President Barack Obama, if he wanted it to.
>
> Justice David Souter's pending departure will leave Obama with a court consisting of six white men, one white woman and one African-American man. Even if the president appoints another woman, as many expect, the court will remain strikingly uniform.
>
> "We have a Supreme Court now that doesn't look like the American bar, let alone the country," Stanford Law School professor Pamela Karlan noted. "There are a lot of things this court is missing."
>
> The Supreme Court, for instance, has never had a Latino justice, an Asian-American justice or an openly gay justice. None of the current justices has disabilities. None of the current justices has ever held elected office.
>
> Potential candidates exist in each category, if Obama wants to opt for one.
>
> Sonia Sotomayor, a judge on the New York-based 2nd U.S. Circuit Court of Appeals, was born to Puerto Rican parents. Former Stanford Law School Dean Kathleen Sullivan has identified herself publicly as gay in recent years. David Tatel, a highly regarded judge on the U.S. Court of Appeals for the District of Columbia Circuit, is legally blind. Outgoing Yale Law School Dean Harold Koh, now nominated to serve as the State Department's legal adviser, is Korean-American.
>
> ....
>
> In many ways, the court has always been monochromatic. The five current justices who graduated from Harvard Law School sustain a tradition of dominating the court. Harvard, Obama's alma mater, has produced more than twice as many Supreme Court justices over the past 220 years as the next most prolific law school.
>
> Religious fidelity appears even more de rigueur: Only one justice in the court's history failed to declare membership in a church, and that was in the mid-19th century.

Michael Doyle, "Obama's challenge: Selecting a truly diverse justice," *Miami Herald,* (5 May 2009) http://www.miamiherald.com/news/politics/AP/story/1033835.html .

In the name of diversity, the diversity point of view reduces a candidate's lifetime of work in law to a mere label about the candidate's ethnicity, sexual orientation, or physical disability. Such labels fit stereotypes and prejudices that "all ___ think alike", robbing a person of individuality and denying that they might not conform to expectations about their group.

Doyle's later remark about religion avoids the question of whether an atheist or agnostic would bring a fresh approach to the U.S. Supreme Court, which currently has five Catholic Justices. A Justice's religion would probably influence their initial reaction in First Amendment[22] cases, as well as in cases involving same gender marriage. I personally support a high wall of separation between church and state, and I confess that overtly religious people make me nervous. On the other hand, there are many examples where Justices who were personally religious upheld the principle of the First Amendment. Everyone, including myself, really needs to resist the temptation to characterize an individual person as *always* conforming the stereotype and dogma of a group.

One columnist explained why politicians now prefer to nominate a candidate from the judiciary, who has a long written record of showing how the judge decides cases:

> Ideologues, however, hate surprises, which is why those on both sides of the Washington aisle took a lesson from the Souter nomination. The safe thing, they concluded, was to nominate only prospective Supreme Court justices who have a track record of written opinions on federal legal questions that can be parsed and scrutinized, line by line. (President George W. Bush's disastrous attempt to nominate then-White House counsel Harriet E. Miers[23] only reinforced the lesson.)

Tim Rutten, "Obama should look far and wide for his Supreme Court nominee," *Los Angeles Times,* (6 May 2009) http://www.latimes.com/news/opinion/la-oe-rutten6-2009may06,1,1310805.column .
While a candidate from the private practice of law would not have a written record that could be scrutinized, a candidate who is a professor of law could also avoid writing on controversial topics. Without a written record, these could be "stealth candidates" whose weaknesses are invisible. On the other hand, judges can not avoid deciding cases presented to them, so judges have a written record that can be scrutinized. But then the chairman of the Senate Judiciary Committee has marginalized judges as being members of a "judicial monastery".[24] While I generally agree with Mr. Rutten's comments, it is *not* true that *all* recent nominees came to the Court with a track record from a U.S. Court of Appeals: John Roberts (appointed Chief Justice in 2005) served for

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[22] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; ...."

[23] For a history of the "disastrous attempt" see Standler, History of the Nomination of Harriet Miers, http://www.rbs0.com/miers.pdf (1 Nov 2005).

[24] See page 24, above.

only two years on the U.S. Court of Appeals (not long enough to develop a track record), previously he was in the private practice of law.

The first four paragraphs of a provocative essay by an attorney in Chicago say:

> Now that we are in the throes of selecting a new Justice to replace the retiring David Souter, we are confronted anew by demands that the next Justice satisfy a multitude of diversity requirements. These demands concern the next Justice's gender, race, and religion, as per usual. But they also concern the next Justice's sexual orientation, girth, and outlook on life. One shudders to think how President Obama is going to satisfy all, or even most of these diversity requirements; this may be one of the few times in the immediate aftermath of the Presidential election that John McCain is glad that he lost.
>
> It would, of course, be far easier if the President could simply have a free hand to choose the smartest, most learned, most conscientious and most honorable Justice, and let bean counting come second. It would also be better for the country. Alas, instead of discussing the quality of the next Justice's mind, we find ourselves mired both in the swamp of identity politics, and by the inapt qualifications the President himself has said will drive his selection of the next Supreme Court Justice.
>
> We need the next Supreme Court Justice to be meritorious, talented, and knowledgeable. The cases the Supreme Court takes on are maddeningly complex, and though the docket has been reduced in recent years, Justices and their clerks still face crushing workloads. The Court will continue to address, among other things, complex securities and corporate law cases, cases touching on deeply wrenching and difficult medical ethics issues, and cases relating to legal issues that arise out of the war on terror. All of these responsibilities require a Justice possessed of sterling intellectual skills and a splendid education to carry them out competently and responsibly.
>
> One would expect, therefore, that merit will be the primary qualification employed by President Obama and his Administration in finding and selecting a successor to Justice Souter. But no; instead, the forces associated with identity politics are helping determine the selection of the next Justice. To be sure, there is nothing whatsoever wrong with the achievement of diversity per se. Indeed, my ethnic and religious background alone ensures that I am the last person in the world to look my nose down at diversity. But diversity, if addressed, must be addressed after talent and merit are used to winnow down the number of potential candidates for a Supreme Court seat. The President may certainly choose a diverse nominee from a pool of talented candidates. It is, however, unacceptable for the President to have to choose the most talented nominee from a pool of candidates whose composition is first determined by the forces of identity politics. In this latter instance, the search for the most meritorious candidate suffers and is undermined.

Pejman Yousefzadeh, "The Supreme Court's Quotas: Putting Merit Last," *The New Ledger* (6 May 2009) http://newledger.com/2009/05/putting-merit-last/ .

A blog at *The New Republic* website considered the political feasibility of appointing a homosexual to the U.S. Supreme Court:

> Politico[25] notes that two of the people whose names are being tossed around as Supreme Court possibilities are lesbians: Kathleen Sullivan and Pam Karlan, both of Stanford Law School. **....** Obviously, putting a lesbian on the court (or a gay man, for that matter, although none appear to be under consideration) would mark a wonderful step forward for the country. But is it politically possible?
>
> The obvious, first-glance answer is that it would be a political minefield. But the more I think about it, the more I am convinced that it would be eminently doable. And not only doable: It's even plausible to envision a scenario where it ends up helping Democrats by damaging conservatives.
>
> First, history suggests that the country is willing to accept Supreme Court nominees from minority groups even at a relatively early stage in their integration into American political life. When Louis Brandeis was nominated to the court in 1916, anti-semitism was still pervasive. When Thurgood Marshall was nominated in 1967, the country was still in the throes of the civil rights struggle. Yet both men were confirmed.
>
> More significantly, though, nominating a lesbian to the court would put conservatives in a politically awkward position. As the gay rights battle has come to center more and more on the specific question of marriage, conservatives have frequently insisted that they are not anti-gay, just opposed to gays getting married. Conservatives are attached to this distinction because they know that, without it, they end up looking like bigots. But if they decide to make an issue of a Supreme Court nominee's sexual orientation, they would effectively be conceding that this distinction was a lie. **....**
>
> Of course, conservatives could try to have it both ways, and argue that they oppose a gay nominee because of gay marriage — that is, because it would bias the justice's vote should gay marriage ever come before the court. But this is a patently absurd argument — equivalent to maintaining that no women should serve on the court because it might bias their votes on abortion, or that no blacks should serve on the court because it might bias their votes on civil rights — and I think voters would be quick to dismiss it as thinly veiled bigotry.

Richard Just, "A Gay Supreme Court Justice?" *The New Republic* (20:25 EDT 6 May 2009) http://blogs.tnr.com/tnr/blogs/the_plank/archive/2009/05/06/a-gay-supreme-court-justice.aspx Reprinted at: http://www.npr.org/templates/story/story.php?storyId=103888801 (7 May 2009).

On Thursday, 7 May, Senator Orin Hatch, a conservative Republican and a former chairman of the Senate Judiciary Committee, blasted one leading candidate for Justice Souter's seat.

> Sen. Orrin Hatch (R-Utah) said Thursday that Judge Sonia Sotomayor's past statement that the "court of appeals is where policy is made" would be a problem for her if she were nominated for the Supreme Court.
>
> "That's a problem," Hatch said during an interview on Fox News after being shown a clip of the Second Circuit Court of Appeals judge's comment.
>
> "She would have, I think, a more difficult time if she was nominated because of statements like that, and, of course, she has a whole raft of opinions that I think would have to be scrutinized very carefully," he said.
>
> Hatch said that he would prefer not to talk about "any individual person at this point" because he wants to "be fair to whoever is picked."

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[25] See the article by Gerstein, quoted above, ending at page 23.

> "But I'll tell you one thing," he added. "I'm not very happy about judges who will substitute their own policy preferences for what the law really is, who think that they can run the country from the bench when they actually have a limited role."
>
> The Republican senator said that in his conversations with President Barack Obama, he has been assured that the president will pick someone "in the jurisprudential mainstream."
>
> "If he does do that," Hatch said, "he'll probably have a pretty easy time."

Andy Barr, "Hatch: Sotomayor has 'a problem'," *Politico* (11:47 EDT, 7 May 2009) http://www.politico.com/news/stories/0509/22229.html .

I interpret Senator Hatch's comments as a warning to President Obama *not* to nominate a liberal activist judge, such as Judge Sotomayor. In September 2005, I wrote an essay[26] that explained why Senator Hatch, and others, were wrong to require Justices to interpret the U.S. Constitution according to its original meaning.

On Friday, 8 May 2009, one week after Justice Souter's retirement was announced, *Bloomberg News* reported that it was almost certain that the next nominee would be a woman. The first three paragraphs of the story say:

> President Barack Obama's first U.S. Supreme Court appointment probably will be drawn from a group of women who have achieved prominence in the law or politics, ensuring more diversity and possibly more real-world experience for the high court.
>
> The replacement for retiring Justice David Souter is likely to add a strong liberal voice as a counterweight to the conservative wing, while unlikely to alter the court's philosophical balance.
>
> "I think it's a mortal lock" that it will be a woman, said Tom Goldstein, a Supreme Court lawyer with Akin Gump Strauss Hauer & Feld in Washington. "It's too hard for the president to explain why, given all the highly qualified women who could be Supreme Court justices, he didn't pick one."

Edwin Chen, "Obama Top Court List Led by Women Judges, Politicians," *Bloomberg News* (17:06 EDT 8 May 2009) http://www.bloomberg.com/apps/news?pid=20601070&sid=a5LJ3vEpHuXw&refer=home .

at least one Republican *not* a homophobe

As a conservative, I am distressed by two major policies of the Republican party dogma: (1) the Republican opposition to abortion and (2) the Republican opposition to same-gender marriage. Because one of the leading candidates for the Supreme Court is a lesbian (see page 22, above), the Republican opposition to homosexuals suddenly becomes relevant to the choice of a nominee to the Supreme Court.

Senator Specter switched parties from Republican to Democrat on 28 April 2009. On 4 or 5 May, Republicans then appointed Senator Sessions of Alabama to be the ranking Republican on the Senate Judiciary Committee. On 6-7 May, Senator Sessions shocked some of the right-wing bigots by saying he would *not* oppose a nominee because the nominee was a homosexual. On 6 May, *The Hill* reported:

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[26] Standler, Is Judicial Activism Bad?, http://www.rbs0.com/judact.pdf (2005).

> Sen. Jeff Sessions (Ala.), the ranking Republican on the Senate Judiciary Committee, said Wednesday he could consider a gay nominee for the nation's highest court. "I'm not inclined to think that's an automatic disqualification," Sessions said of a gay nominee. He said he intends to consider only the nominee's legal judgment when deciding his support for Justice David Souter's proposed replacement.
>
> ....
>
> Sessions's comments weren't voiced universally in the GOP or in conservative circles Wednesday, suggesting a split among Republicans on whether the sexual orientation of a nominee should be a factor.
>
> One Republican senator on Wednesday warned a gay nominee would be too polarizing. "I know the administration is being pushed, but I think it would be a bridge too far right now," said GOP Chief Deputy Whip John Thune (S.D.). "It seems to me this first pick is going to be a kind of important one, and my hope is that he'll play it a little more down the middle. A lot of people would react very negatively."

J. Taylor Rushing, "Sessions says he'd consider gay Supreme Court nominee," *The Hill,* (19:09 EDT 6 May 2009)
http://thehill.com/leading-the-news/sessions-says-hed-consider-gay-supreme-court-nominee-2009-05-06.html .

Politico reported on Senator Sessions' remarks on the Morning Joe program on the MSNBC cable television channel:

> "I don't think a person who acknowledges that they have gay tendencies is disqualified per se for the job," Sessions tells Mark Halperin on Morning Joe.
>
> That doesn't really answer the question of whether he thinks somebody who is openly gay, as opposed to struggling with those "tendencies," is qualified, though I think he meant to indicate he wouldn't pick that ground to fight on.
>
> ....
>
> **...** polling suggests American are broadly opposed to using sexuality as a qualification for hiring, and are moving very fast toward something more than tolerance of gays and lesbians. So there's an element of the right that could come across as straightforwardly intolerant, and a larger element that will use language ("gay tendencies") that are a bit out of step with the majority.
>
> Still, this isn't a battle Obama seems interested in having right now, and so I suspect White House political calculations will wind up seeing open homosexuality as a minus, not a plus, in what's always a zero-sum game.

Ben Smith, "Sessions open to a gay-tending justice," *Politico,* (10:53 EDT, 7 May 2009)
http://www.politico.com/blogs/bensmith/0509/Sessions_open_to_a_gaytending_justice.html .

The Republicans are fond of talking about a homosexual agenda, but the homophobia of right-wing bigots is also an agenda. In my opinion, the whole issue of homosexuals is very simple: homosexuals are *people,* and — as genuine people — they are entitled to equal protection

of the laws under the Fourteenth Amendment to the U.S. Constitution.[27] Therefore, a state *must not* discriminate between heterosexuals and homosexuals in any way, including issuing marriage licenses. If one church chooses not to allow marriage ceremonies for homosexuals, that is the legal right of that one church.

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why not a scientist/attorney on the Court ?

As feminist and ethnic groups continue to demand that one of their own be nominated to succeed Justice Souter, and as senators continue to urge the President nominate someone "outside the judicial monastery", I contemplate the President appointing someone from *my* group — someone with an earned doctoral degree in physics *and* also a law degree. <*grin*>

To the best of my knowledge there has *never* been a Justice who had earned a doctoral degree in any subject.[28] The typical Justice has four years of undergraduate college, leading to a B.A. degree, plus three years of law school, leading to an LL.B. or J.D. degree. Justice Souter was unusual in that, in addition to the education of a typical Justice, he also had earned a master's degree from Oxford University in England. However, what really matters is what a person has done with their education, *not* how many years of full-time university education they have and *not* how many academic degrees they earned. For example, my favorite candidate (i.e., Judge Richard Posner) has only seven years of full-time university education, but his scholarly output would put nearly all scholars with a Ph.D. to shame.

To the best of my knowledge, there has *never* been a Justice who has done scholarly research in any field of science or engineering. With the increasing importance of science and technology in modern life, it would be useful to have some judges who personally understood science and technology.

For example, Obama could nominate Judge Pauline Newman, of the U.S. Court of Appeals for the Federal Circuit. She earned a Ph.D. in chemistry, followed by a law degree six years later. Judge Alan Lourie, of the same court, also earned a Ph.D. in chemistry, followed by a law degree. There are probably hundreds of lawyers who have also earned a Ph.D. in science or engineering,

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[27] See, e.g., *Goodridge v. Department of Public Health,* 798 N.E.2d 941 (Mass. 2003); *In re Marriage Cases,* 183 P.3d 384, 76 Cal.Rptr.3d 683 (Cal. 15 May 2008); *Varnum v. Brien,* 763 N.W.2d 862 (Iowa 3 Apr 2009).

[28] The usual law degree since the 1960s has been a *Juris Doctor* (J.D.) which is equivalent to the former bachelor's degree in law (LL.B). The requirements for a J.D. degree do *not* include a written scholarly dissertation, which is standard for Ph.D. and D.Sc. degrees. Despite the name *Juris Doctor,* the next higher academic degree in law is a master's degree (LL.M.), which shows that a J.D. degree is really a bachelor's degree.

found few opportunities in a climate of decreasing financial support for research in science,[29] and who then turned to patent law, but there is *zero* chance that any one of them will be nominated to the U.S. Supreme Court.

Besides understanding science and technology, there is another major reason for a judge to have a background in science. I notice that judges with a liberal arts education simply ignore facts that get in the way of their reaching their desired result. A scientist is trained to look at *all* of the facts, then make a conclusion. In science, rejecting data (i.e., facts) that are inconsistent with one's preconceived notions is dishonest and is considered cheating. However, in politics, ignoring inconsistent facts is a way of life.

The above remarks indicate the fallacy of arguing that, because there never has been a Justice who is a [insert name of group here], then the next Justice should be from that neglected group. There are too many minority groups to make it possible that at least one Justice will represent each group. Most importantly, the Court is *not* — and should *not* be — a representative body.

The above remarks also show the long-standing contempt of politicians in the USA for people with true intellectual ability, such as Judge Posner.

commentary

An interesting phenomenon is that there was heavy coverage in the news media of the choice of a new U.S. Supreme Court Justice during 1-4 May 2009, and then the coverage began to decline. By 11 May, there was little coverage. No doubt the coverage will increase again when President Obama announces the name of his nominee to the Court, but then it will be too late to influence his choice of a nominee.

A columnist, who has no education in law, for the Portland Oregon newspaper wrote a defense of Obama's criterion of "empathy":

> Chief Justice John Roberts doesn't stress the need for "empathy" on the U.S. Supreme Court. He famously compares judging to umpiring, a coolly rational process for enforcing the rules of the game.
>
> I love listening to Roberts talk. He sounds so reasonable, so reassuring, as if every legal question had one right answer. Unfortunately, the Supreme Court is messier than that. Judges at that level aren't just following the rules but shaping them as they go. That's why President Obama is right, even if he sounds too liberal for saying so: Empathy counts.
>
> ....

[29] Standler, Funding of Basic Research in Physical Science in the USA, (Aug 2004) http://www.rbs0.com/funding.pdf .

> .... Obama, a constitutional scholar[30] himself, says he's looking for "somebody who is dedicated to the rule of law, who honors our constitutional traditions, who respects the integrity of the judicial process and the appropriate limits of the judicial role."
>
> Nobody pays any attention when Obama talks like this, when he sounds exactly like a conservative president nominating a conservative justice. Instead, people seize upon Obama's regular use of the word "empathy" as an essential quality of a judge.
>
> To liberals, empathy is secret code for "not a right-wing jerk."
>
> To conservatives, empathy is secret code for "soft-headed liberal social worker."
>
> "What (Obama) means is he wants empathy for one side," one of Justice Clarence Thomas' former clerks recently told *The Washington Post,* while she was making the media rounds for the conservative Judicial Confirmation Network.
>
> "A judge is supposed to have empathy for no one," she added, "but simply to follow the law."
>
> Believe it or not, this debate about whether empathy is a good or bad quality will define the entire nomination process.
>
> Obama's critics are right on a few points. It would indeed be bad for the nation if the president decided to nominate a feminist socialist who based her opinions entirely on her feelings. It would also be bad for the courts to overflow with liberal activists who rewrite or ignore inconvenient laws. As we've learned from the court's long history, lopsided benches make bad laws.
>
> However, empathy isn't a synonym for pity or partiality. It's an essential characteristic of a fair and self-restrained judge, especially in complex cases involving the limits of government power over individuals or businesses.

Susan Nielsen, "The e-word: Supreme Court and empathy," *The Oregonian,* (13:55 PDT 9 May 2009) http://www.oregonlive.com/news/oregonian/susan_nielsen/index.ssf/2009/05/supreme_court_worse_things_tha.html .

I disagree with Mrs. Nielsen about *empathy* — in my opinion, *empathy* is a violation of the legal requirement of impartiality, as explained above, beginning at page 5, and in the commentary beginning on page 26. But I agree with her interpretation of *empathy* as a code word that means different things to liberals and conservatives.

Following Senator Hatch's shot-across-the-bow on 7 May (see page 31, above), the leader of Republicans in the U.S. Senate fired a similar shot on 9 May:

> Senate Republicans may have little if any power to stop President Obama's eventual Supreme Court nominee, but on Saturday Senate Minority Leader Mitch McConnell signaled that the GOP wasn't going to give in without a fight.
>
> Delivering a commencement address to the graduating class at the Brandeis School of Law at the University of Louisville, McConnell all but warned Obama that any prospective justice who put "empathy" before interpreting law as written would meet a headwind of GOP resistance.

Alex Isenstadt, "McConnell: No 'empathetic' court pick," *Politico,* (20:12 EDT, 9 May 2009) http://www.politico.com/news/stories/0509/22305.html .

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[30] "Scholar" is an inflated word to apply to Obama, who — according to my search of law review articles on Westlaw on 11 May 2009 — is the author of *zero* published legal articles. His speech on 1 May 2009, quoted above at page 13, denigrated those of us who use footnotes, a standard tool in scholarly writing in law and history. Obama is a politician, *not* a scholar.

This kind of belligerent rhetoric reminds me of a lizard that puffs up to a larger size, to scare a potential attacker. The Republicans have a puny minority in the Senate, so all they can do is spew words like a Fourth of July sparkler. The Republican minority in the Senate is in no position to make demands of the President.

An editorial by Jeff Jacoby, a conservative attorney, who became a journalist, in the Sunday, 10 May, *Boston Globe* criticized President Obama's empathy criterion for judges:

> JUDICIAL dispassion — the ability to decide cases without being influenced by personal feelings or political preferences — is indispensable to the rule of law. So indispensable, in fact, that the one-sentence judicial oath required of every federal judge and justice contains no fewer than three expressions of it: "I . . . do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States, so help me God."
>
> There are biblical echoes in the wording of that oath — a reminder that the judge's obligation to decide cases on the basis of fact and law, without regard to the litigants' wealth or fame or social status, is a venerable moral principle.
>
> "You shall not show partiality in judgment; you shall hear the small and the great alike," says Moses in Deuteronomy, instructing the Israelite judges. "You shall not distort justice; you shall not respect persons, and you shall not take a bribe."
>
> Elsewhere they are reminded that it is not only the rich they are forbidden to favor. "Neither shall you be partial to a poor man in his dispute," Exodus firmly warns. Judges may not bend the law, not even to help the underprivileged.
>
> Without judicial restraint there is no rule of law. We live under "a government of laws and not of men" only so long as judges stick to neutrally resolving the disputes before them, applying the law, and upholding the Constitution even when doing so leads to results they personally dislike. That is why the judicial oath is so adamant about impartiality. That is why Lady Justice is so frequently depicted — as on the sculpted lampposts outside the US Supreme Court — wearing a blindfold and carrying balanced scales.
>
> And that is why President Obama's "empathy" standard is so disturbing, and has generated so much comment.
>
> ....
>
> When he voted against the confirmation of Chief Justice John Roberts in 2005, Obama declared that the "truly difficult" cases that come before the Supreme Court can be decided only with reference to "the depth and breadth of one's empathy," and that "the critical ingredient is supplied by what is in the judge's heart."
>
> But such cardiac justice is precisely what judges "do solemnly swear" to renounce. Sympathy for others is an admirable virtue. But a judge's private commiserations are not relevant to the law he is expected to apply.
>
> If Obama means what he says, he wants judges who will violate their oath of office.

Jeff Jacoby, "Lady Justice's blindfold," *The Boston Globe* (10 May 2009) http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2009/05/10/lady_justices_blindfold/ .

I think Mr. Jacoby is absolutely correct, for reasons give above, beginning at page 5.

The Washington Post reported on 10 May 2009:

> Another senior White House official, who spoke on the condition of anonymity to more freely discuss internal deliberations, said, "This is not going to be a bomb-thrower." Obama "may ultimately decide on a pick that is distinguished in being the first something. But I think they will be a pragmatist above all."
>
> One Democratic official who has discussed the court with Obama said: "My sense, for a variety of reasons, is that he would want the first one to be a home run. I don't think he will play it safe by picking just a bland nominee on the basis that the person would be easy to confirm."
>
> Obama has begun to narrow his choices. A knowledgeable source outside the White House said the list of candidates who are being put through a thorough vetting numbers six. Most outside observers think that the president is almost certain to pick a woman, and the four thought to be under the most serious consideration are Judge Sonia Sotomayor of the U.S. Court of Appeals for the 2nd Circuit, Judge Diane P. Wood of the U.S. Court of Appeals for the 7th Circuit, Solicitor General Elena Kagan and Michigan Gov. Jennifer M. Granholm (D).
>
> But White House officials cautioned that public speculation may be overlooking several strong candidates. "Not all the names that are being talked about are out there," Chief of Staff Rahm Emanuel said.
>
> White House officials hope to finish most of the vetting soon, but presidential interviews with prospective candidates are not likely to begin this week, one official said yesterday. Obama is scheduled to discuss the vacancy Wednesday [13 May] at a meeting with Senate Judiciary Committee Chairman Patrick J. Leahy (D-Vt.); Sen. Jeff Sessions (Ala.), the new ranking Republican on that panel; Senate Majority Leader Harry M. Reid (D-Nev.); and Senate Minority Leader Mitch McConnell (R-Ky.).
>
> Many officials said they expect a relatively quick decision. "We didn't start flat-footed," Emanuel said.
>
> ....
>
> But whoever he selects is likely to differ greatly from the 69-year-old Souter, whose opinions and jurisprudence were known for being meticulous but not sweeping.

Dan Balz and Robert Barnes, "In Court Pick, Obama Seeks to Be Bold but Not Provocative," *The Washington Post,* (10 May 2009)
http://www.washingtonpost.com/wp-dyn/content/article/2009/05/09/AR2009050902400.html .
I find it intriguing that Mr. Emanuel says that Obama is considering several candidates that are *not* on the lists being published by the news media.

Harvard University student(s) wrote a thoughtful editorial that outshines most of what is published in major newspapers and television news:

> However, such discussion of philosophy and qualifications has been notably and disturbingly absent from the public discourse on Souter's replacement. Instead, the discussion has been largely confined to identity politics.

> Following Souter's announcement, Sonia Sotomayor, an Hispanic federal judge on the U.S. Court of Appeals for the Second Circuit, immediately became the de facto frontrunner to replace him. Other names that have been proffered include Virginia Representative Bobby Scott, an African American being promoted by the Congressional Black Caucus, and former Dean of Stanford Law School Kathleen Sullivan, a lesbian being promoted by the Gay and Lesbian Victory Fund.
>
> While all of these individuals are well-qualified legal minds, their race, gender, and sexual orientation should not be considered among their qualifications.
>
> Explaining her support for Sotomayor, La Raza president Janet Murguia explained, "There are high expectations because of the turnout we saw in the Latino community [in the 2008 election]. I think [picking a Hispanic] would go a long way to helping the Latino community feel they were recognized in terms of that support."
>
> This mindset of regarding Supreme Court nominations as a means of rewarding a constituency for its political support is highly pernicious and poisons the nomination process. Furthermore, the pursuit of racial and sexual balance has no place in a process that should aspire to select justices based on the relevant criteria of intellect and principles, not the irrelevant criteria of complexion and anatomy.
>
> In an interview for Politico, gay-rights advocate Dixon Osburn stated, "I don't think [Obama] would shy away from [selecting a gay or lesbian nominee], but first and foremost he's going to pick someone he thinks has constitutional gravitas."
>
> Osburn is correct; while it would indeed be ideal to have a sexually and racially balanced court, concern for diversity should not compromise the ideal of meritocracy.

anonymous, "A Mockery of Meritocracy," *The Harvard Crimson,* (23:01 EDT 10 May 2009) http://www.thecrimson.com/article.aspx?ref=528181 .

On 11 May, Senators Boxer (D-Cal.) and Snowe (R-Maine) urged the President to appoint a woman to the U.S. Supreme Court:

> "Women make up more than half of our population, but right now hold only one seat out of nine on the United States Supreme Court," Boxer and Snowe wrote. "This is out of balance. In order for the Court to be relevant, it needs to be diverse and better reflect America."

Seth Stern, "Boxer and Snowe Say Pick a Woman," *Congressional Quarterly,* (11:25 EDT 12 May 2009) http://blogs.cqpolitics.com/legal_beat/2009/05/boxer-and-snowe-say-pick-a-wom.html .
The letter is posted at http://boxer.senate.gov/news/releases/record.cfm?id=312861 .
Even if all nine of the Justices were male, the Court would still be "relevant", despite what these two senators say. The Court is *not* intended to be a representative body. The fact, the Court was occupied exclusively by white males until 1967 when Justice Thurgood Marshall was appointed and until 1981 when Justice Sandra Day O'Connor was appointed. Gender and racial discrimination in the USA simply resulted in white males dominating most learned professions, including law and medicine. Some of this discrimination was subtle: even in the 1950s, women were expected to marry and become full-time housewives, while men had an opportunity to develop a professional career. The result of such discrimination was that there were few well-qualified female candidates to appoint to the U.S. Supreme Court.

On 12 May 2009, *The Washington Post* reported:

> Whatever selection Obama makes will emerge from a complicated political and legal calculation that pulls at competing elements of his presidency. The political landscape may never be more favorable for Obama to appoint whomever he most wants. His popularity is high and Democrats have firm control of the Senate, which considers the president's appointment.
>
> But such conditions can be fleeting, and there is never a guarantee that more openings will materialize.
>
> White House officials believe that Obama may get at least two more appointments. Justices John Paul Stevens, 89, and Ruth Bader Ginsburg, 76, are most often mentioned as possibilities to leave, though neither has given such an indication.
>
> That would give Obama more freedom if he decided Judge Sonia Sotomayor or another Hispanic is not the right choice in the short term. He could appoint a woman this time, the thinking goes, and appoint a Latino or Latina later.
>
> The pressure to name a Hispanic justice is building, with Hispanic legal groups calling — ever so gently — for the court's first Latino member. That call was backed up by the Congressional Hispanic Caucus, which told Obama that "appointing our nation's first Hispanic justice would undoubtedly be welcomed by our community and bring greater diversity of thought, perspective and experience to the nation's legal system."

Robert Barnes and Michael D. Shear, "Hispanics See Stars Aligned on High Court For President, Diversity Is One Of Many Factors," *The Washington Post,* (12 May 2009) http://www.washingtonpost.com/wp-dyn/content/article/2009/05/11/AR2009051103503.html .

Notice that the three likely retirees from the Court (i.e., Souter, Stevens, Ginsburg) are all liberal Justices, so that it is unlikely that a presumedly liberal Justice nominated by President Obama would change the ideological balance on the Court.

Following the demand on 11 May by Senators Boxer and Snowe for a female Justice, on the morning of 12 May, Senator Dianne Feinstein (D-Cal.) called the White House:

> The California Democrat, who placed a phone call to the White House on Tuesday [12 May] morning, is pitching the names of Kim Wardlaw, who is a judge on the U.S. Court of Appeals for the Ninth Circuit, and Carlos Moreno, an associate justice of the state's Supreme Court. Wardlaw was nominated to the court by President Bill Clinton in 1998 and is the first Hispanic judge appointed to that court of appeals.

Manu Raju, "Feinstein pushes two Hispanic judges," *Politico,* (15:00 EDT 12 May 2009) http://www.politico.com/news/stories/0509/22421.html .

Frankly, it's difficult for me to take Senator Feinstein seriously on matters of law. She is currently the only member of the U.S. Senate Judiciary Committee who did *not* attend law school. As for Judge Carlos Moreno, Obama can discriminate against Moreno on the basis of both gender and age, because Moreno is a 60 y old male.

Adding to the demands of feminists for a female Justice, Hispanics for a Hispanic justice, Blacks for a Black Justice, and homosexuals for a lesbian Justice, now comes ethnic recommendations from Asian-Americans:

> With groups lining up on both sides of the aisle, steeling for a fight over President Obama's first nomination to the Supreme Court, Rep. Mike Honda (D-Calif.) said the Asian Pacific-American caucus will also get in the mix.
>
> ....
>
> But Honda seemed to be growing impatient that the meeting [with the White House] — which he said will join CAPAC [Congressional Asian Pacific American Caucus], the Congressional Black Caucus (CBC) and the Congressional Hispanic Caucus (CHC) — has yet to take place.

Sam Youngman, "Rep. Honda: Asian caucus will offer SCOTUS names," *The Hill,* (13:06 EDT 16 May 2006) http://thehill.com/leading-the-news/rep.-honda-asian-pacific-group-will-offer-scotus-names-2009-05-16.html .

While feminists will probably be satisfied with Obama's nomination, it is *not* possible to nominate *one* candidate who is Black, Hispanic, *and* Asian-American. It's a smart move for the White House to schedule all three racial/ethnic groups to meet simultaneously in one room, so that they can *all* confront the impossibility together. I find the whole racial/ethnic identity to be silly, because the point of immigrating to the USA is to become integrated into mainstream American culture and to abandon the culture and language of the old country. If they preferred the culture in the old country, they should have stayed there.

White House Press Briefing 12 May

On the afternoon of Tuesday, 12 May 2009, the White House Press Secretary gave a briefing about the schedule and the selection of the nominee to the U.S.Supreme Court.

> MR. GIBBS: Well, in terms of timing for confirmation hearings, I think, first and foremost, the President strongly believes that, as I've said repeatedly, we have to have somebody in place when the Court next hears fresh business in October. I think the best way to ensure that that's the case would be to get this done before the lengthy August recess. That's presumably the best way to ensure that we have somebody in place for the Court's opening in October.
>
> ....
>
> Question: Throughout the presidential campaign, certainly the vice presidential selection process, secrecy was a big sort of hallmark of the process of —
>
> MR. GIBBS: I'd say privacy — but, yes.
>
> Question: Okay, privacy — on how you all went along toward picking Vice President Biden; the same with the Cabinet. Do you believe that you will be able to maintain the same privacy in this selection of a Supreme Court Justice, and is that the President's wish and desire?

> MR. GIBBS: Look, obviously, I think the way the President conducted his vice presidential search, and the way he conducted a search for a Cabinet was his strong desire not to drag names through and vet names through the public. The President obviously, based on his understanding of the law, his understanding and teaching of the Constitution, and his studying of the Court, I think he has a pretty firm understanding of what he's looking for — somebody who understands and can apply the rule of law, but also understand how the law applies to individuals' everyday lives.
>
> I think he will be — I think this is a decision that he alone will make. **I don't think that the lobbying of interest groups will help. I think in many ways lobbying can and will be counterproductive.**[31] The President does take some heart in knowing that in all of the lists that have been seen and produced, there hasn't yet been one produced with the totality of names under which are being considered.

Robert Gibbs, Press Briefing (13:14 to 13:56 EDT, 12 May 2009)
http://www.whitehouse.gov/the_press_office/Briefing-by-White-House-Press-Secretary-Robert-Gibbs-5-12-09/ .

Note that President Obama wants his nominee confirmed *before* 7 Aug 2009. This is a very ambitious schedule.

schedule

On 12 May 2009, *The Hill* reported that President Obama is more concerned with timing and scheduling than with the selection of a nominee. It seems that the President wants a quick confirmation process, rather than allowing his opponents months of time to beat the stuffing out of his nominee. Beginning with the failed confirmation of Judge Robert Bork in 1987, confirmation of nominees to the U.S. Supreme Court have often resulted in bitter, partisan battles in the U.S. Senate.

> The question of timing appears to weight more heavily on the president's mind than what type of candidates to consider.
>
> A source familiar with White House discussions said Obama has had a shortlist of candidates for months.
>
> With an August recess of up to nearly a month, Obama needs to give the Senate enough time to confirm his pick before leaving town. But if he announces his choice next week or in early June and confirmation drags on, the recess could push a final vote into September, leaving his nominee twisting in the political winds for three months.
>
> ....
>
> Lawmakers and activists who follow judiciary issues closely point to signs that Obama has three or four candidates to replace retiring Justice David Souter firmly in mind.
>
> The suspects are Sonia Sotomayor, a judge on the 2nd U.S. Court of Appeals; Diane Pamela Wood, a member of the 7th circuit; Elena Kagan, Obama's solicitor general; Kathleen Sullivan, former dean of Stanford Law School; and Jennifer Granholm, Michigan's Democratic governor.

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[31] Boldface added by Standler.

....

It appears instead that Obama would like to get a sense of how long the confirmation process will take before unveiling his choice to public scrutiny.

Alexander Bolton, "Clock ticks for nominee," *The Hill,* (20:09 EDT 12 May 2009) http://thehill.com/leading-the-news/clock-ticks-for-nominee-2009-05-12.html .

During a meeting at the White House on 13 May, Minority Leader Mitch McConnell (R-Ky.) and Judiciary Committee ranking member Jeff Sessions (R-Ala.) told President Obama they wanted at least sixty days to review his nominee for the Court:

Senate Republicans said Wednesday that they would like to have the traditional 60 days to review President Obama's pick to replace retiring Supreme Court Justice David Souter, but Democratic leaders said they will not set any "arbitrary timelines."

....

Leahy did say he has little doubt that the Senate will be able to meet the president's deadline of October. "That should be the easiest thing in the world to do," he said.

Sam Youngman. "GOP wants 60 days to review court pick," *The Hill,* (12:39 EDT 13 May 2009) http://thehill.com/leading-the-news/gop-wants-60-days-to-review-obamas-court-nominee-2009-05-13.html .

Another source also reported that the Republicans want sixty days to review the nominee.

"I think it would be irresponsible not to have the ninth justice there when the new session opens up," said Sen. Patrick Leahy (D-Vt.), chairman of the Judiciary Committee. "That should be the easiest thing in the world to do."

Minority Leader Mitch McConnell (R-Ky.) and Sen. Jeff Sessions (R-Ala.), the ranking Republican on the Judiciary Committee, urged Democrats to allow the standard 60-day vetting period after the nomination is announced before launching hearings.

"That's important to give the committee the opportunity to review the record," McConnell said. "In all likelihood, unless the president sends up a very controversial nominee, the vote should be able to occur well in advance of the first Monday in October."

Said Sessions: "There should not be any perception of ramming this through on some artificial deadlines, because there's plenty of time between now and October 1."

... Majority Leader Harry Reid (D-Nev.) said, "I told the president that we're going to do the best we can, do this as quickly as we can, without any arbitrary deadlines." Reid also said if senators are prepared to call a hearing less than 60 days after Obama names a nominee, they will. "We're going to do the best we can with no, I repeat for the third time, no arbitrary deadlines," he said.

Carol E. Lee, "Obama nears SCOTUS pick for Souter replacement?," *Politico,* (17:05 EDT 13 May 2009) http://www.politico.com/news/stories/0509/22484.html .

Let's do the math. Assume that President Obama nominates someone on Friday, 22 May. Sixty days later is 21 July. That leaves only 14 days — excluding 4 days on weekends — for the Senate Judiciary Committee to hold hearings, take a vote, and for the full Senate to debate and take a vote, before Obama's 7 Aug deadline occurs. One does not need to be an experienced politician

to see that this is *not* a workable schedule. Note that Senator Leahy set a 1 Oct deadline, and did *not* agree to Obama's 7 Aug deadline.

Looking at recent history, since 1987, the time between nomination by the President and confirmation by the Senate has ranged from 42 days (for Justice Ginsburg) to 99 days (for Justice Thomas).[32] If we apply these numbers to a hypothetical nomination on 22 May, then the nominee will be confirmed sometime between 3 July and 30 Sep (allowing for the 8 Aug to 8 Sep recess).

In all of this discussion of schedules, there is *no* consideration of the personal impact on the new Justice. When I was 21 y old, I could pack all of my belongings in one day and then move. By age 45 y, I had accumulated so many books, files, music, scientific instruments, etc. that packing took two weeks (with the help of two packers), and unpacking and arranging things in a new house took a month. I suspect that the same is true of a more than 50 y old judge or law professor. Finding a new house, arranging for a mortgage, making necessary repairs or improvements to the house, etc. will require more time. Realistically, one needs at least 50 days of preparation for a move (including house-hunting and packing) *plus* at least 30 days after the move. Politicians who pretend they can confirm a new Justice in September and have her ready to work on 5 Oct are being enormously inconsiderate of that Justice.

list of candidates

Wednesday evening, 13 May, the Associated Press reported an anonymous source in the White House as saying that Obama is considering at least six candidates, of whom at least two are Hispanic, and only one is male. No law professors (e.g., Prof. Kathleen Sullivan) are on the list of the top six, although Kagan is the former dean of Harvard Law School.

> Among those under consideration are California Supreme Court Justice Carlos Moreno, Solicitor General Elena Kagan, Michigan Gov. Jennifer Granholm, Homeland Security Secretary Janet Napolitano and U.S. Appeals Court judges Sonia Sotomayor and Diane Pamela Wood.
>
> Sources familiar with Obama's deliberations confirmed the names to The Associated Press on condition of anonymity because no candidates have been publicly revealed by the White House. One official said Obama is considering other people, too, and that other names may be added.

Ben Feller, "AP source: Obama has more than 6 people for court," Associated Press (17:18 EDT 13 May 2009).

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[32] Denis Steven Rutkus and Maureen Bearden, "Supreme Court Nominations, 1789 - 2005: Actions by the Senate, the Judiciary Committee, and the President," Report RL33225, *Congressional Research Service,* (5 Jan 2006) http://assets.opencrs.com/rpts/RL33225_20060105.pdf .

The final version of this Associated Press story says:

> Focusing on specific candidates for the nation's highest court, President Barack Obama is considering a diverse list dominated by women and Hispanics. The six names confirmed as being under review by Obama include three judges, two members of his administration and one governor.
>
> Officials familiar with Obama's deliberations say other people are also being discussed, including names that have not triggered public speculation.
>
> Among those Obama is considering are Solicitor General Elena Kagan, Michigan Gov. Jennifer Granholm, Homeland Security Secretary Janet Napolitano and U.S. Appeals Court judges Sonia Sotomayor and Diane Pamela Wood. California Supreme Court Justice Carlos Moreno is also under review by Obama.
>
> Sources familiar with Obama's deliberations confirmed the names to The Associated Press on condition of anonymity because no candidates have been revealed by the White House. The confirmation amounts to the first time any name has been directly tied to Obama.
>
> More candidates may be added to the list as Obama considers a replacement for retiring Justice David Souter. The president's review process is expected to intensify in the coming days, with a decision expected by or near the end of May.
>
> ....
>
> The president is widely expected to choose a woman for a Supreme Court that has nine members but only one female justice, Ruth Bader Ginsburg. He is also under pressure from some Latino officials to name the nation's first Hispanic justice. Moreno and Sotomayor are Hispanic.

Ben Feller, "AP sources: Obama considering 6 for high court," Associated Press (03:09 EDT 13 May 2009).

Nina Totenberg at National Public Radio reported the same five female candidates, but a different token male candidate:

> Obama is said to be mulling over a short list of six names, but it's questionable how many of those names are for real. And those who know the president are not ruling out the possibility of other names as well.
>
> In short, the list being passed around in the past 48 hours includes these names: Judge Sonia Sotomayor, of the federal appeals court in New York; Judge Diane Wood of the federal appeals court in Chicago; and new Solicitor General and former Harvard law school Dean Elena Kagan. Also, two political figures with good, but not scholarly, legal credentials: Michigan Gov. Jennifer Granholm and Department of Homeland Security Secretary Janet Napolitano. And one man, Judge Merrick Garland, of the federal appeals court in Washington, D.C.

[Totenberg says there are three "long-shots" in the list of six: (1) Garland because he is male, (2) Napolitano because "The president is said to trust and rely on her. So it's doubtful that he would let her go so soon, especially since he will almost certainly have another court vacancy, if not two." and (3) Gov. Granholm.]

> That leaves the triumvirate mentioned most often: Sotomayor, Wood and Kagan.

....

White House sources say those are not the only names under consideration.

There are Georgia Chief Justice Leah Ward Sears and federal Judge Ann Williams, both African-Americans; Interior Secretary and former Sen. Ken Salazar and federal Judge Kim Wardlaw, both Hispanic; and academics such as former Stanford Law School Dean Kathleen Sullivan, Stanford's Pam Karlan and Harvard's Martha Minow.

Nina Totenberg, "Women Dominate Supreme Court Short List," National Public Radio, (13 May 2009) http://www.npr.org/templates/story/story.php?storyId=104103838 .

At the moment, it is *un*known how accurate these lists of candidates are.

People have a natural instinct for tribal behavior: to associate with other people who are similar to themselves in race, religion, politics, occupation, ..., etc. — and to view members of other groups with at least suspicion, if not hostility. Applying that rule to President Obama, I am afraid he may pick a professional politician (i.e., a career similar to Obama himself) to be his nominee to the U.S. Supreme Court, despite that person's lack of expertise in constitutional law. Every time I see a list of candidates that includes several governors and omits Prof. Sullivan, my fear grows. As stated above (page 22), I personally prefer Prof. Sullivan, although I could also easily support Judge Diane Wood of the Seventh Circuit.

opinion poll

Feminist, hispanics, and other groups who are clamoring for one of their own to be appointed to the U.S. Supreme Court will probably be dismayed by the results of an opinion poll conducted 7-10 May 2009 by the Gallup organization:

- 64% of Americans say it "does not matter" if the next Justice is a woman
- 68% of Americans say it "does not matter" if the next Justice is a Hispanic
- 74% of Americans say it "does not matter" if the next Justice is Black

- only 6% of Americans say it is "essential" that the next Justice be a woman
- only 1% of Americans say it is "essential" that the next Justice be either Hispanic or Black

- 38% of American women say it is either a "good idea" or "essential" that the next Justice be a woman, while 58% of women say it "does not matter".

The margin of error of this poll of 1015 adults is ±3%.

Frank Newport, "No Clamor for High Court Appointee to Be Woman, Minority," *Gallup,* (13 May 2009) http://www.gallup.com/poll/118342/No-Clamor-High-Court-Appointee-Woman-Minority.aspx ;

Mark Silva, "Americans not concerned with diversity on Supreme Court, poll shows," *Los Angeles Times,* (06:52 PDT 13 May 2009) http://www.latimes.com/news/nationworld/nation/la-na-supreme-court-poll14-2009may14,0,2842269.story ; Michael McAuliff, "Sex, Race Not Issue for Court Pick," *The New York Daily News,* (13 May 2009) http://www.nydailynews.com/blogs/dc/2009/05/sex-race-not-issue-for-court-p.html ("Somehow, we don't think President Obama will be impressed that Americans don't think putting a woman, Hispanic or African-American on the Supreme Court is all that important. But that's the finding of a Gallup Poll out today.").

Opinion Dynamics Corp. conducted a poll of 900 registered voters (42% of whom were Democrats, 30% were Republicans, 24% were independents) in the USA during 12-13 May:

> Supreme Court Justice David Souter recently announced he will resign at the end of his term, which will give Barack Obama his first chance to nominate a Supreme Court justice. I'm going to read a list of qualities that might be considered when selecting a new justice. For each one, please tell me whether you think it:
> SCALE: 1. Should be the single most important factor
> 2. Should be a factor,but not the most important
> 3. Shouldn't matter
> 4. Should be a disqualifying factor
> 5. Don't know

	Single most important	Not most important	Shouldn't matter	Disqualify factor	Don't know
The nominee being a woman	5%	18 %	75 %	1%	0%
Democrats	8%	22	69	1	1
Republicans	3%	12	82	3	0
Independents	4%	19	75	1	1
The nominee being a minority	4%	17	75	2	2
Democrats	6%	21	69	2	2
Republicans	4%	12	80	3	2
Independents	4%	17	77	1	2
The nominee being a homosexual	4%	11	66	17	2
Democrats	4%	10	75	09	2
Republicans	4%	10	55	29	2
Independents	3%	15	64	15	3
The nominee having judicial experience	45%	44	08	1	1
Democrats	42%	44	11	2	2
Republicans	48%	48	04	0	0
Independents	47%	42	09	1	1

Dana Blanton, "FOX News Poll: Pick Supreme Court Justice Based On Experience," Fox News (14 May 2009) http://www.foxnews.com/politics/2009/05/14/fox-news-poll-pick-supreme-court-justice-based-experience/ . full results: http://www.foxnews.com/projects/pdf/051409_release_web.pdf .

The Opinion Dynamics poll seems inconsistent in that 90% of Americans say judicial experience is an important criterion for a Justice, but, in another question, 38% of Americans say "a regular everyday American" (i.e., a nonlawyer) would be "the better choice" for a new Justice than "the smartest legal mind available". It's difficult for me to take the results of an opinion poll seriously when 38% of those polled say a nonlawyer would be a better Justice than the smartest lawyer — obviously, the 38% who chose that response have never read a Supreme Court opinion and do *not* understand how the Court operates. Maybe 38% of Americans would also prefer to go to a physician or surgeon who had never attended medical school. <*grin*>

The Gallup poll and the Opinion Dynamics poll both agree that fewer than 9% of Americans see gender or race as an "essential" or "single most important" criteria for a Supreme Court Justice, while at least 64% of Americans say gender or race "does not matter".

The U.S. Supreme Court is *not* a representative body. It appears that Americans — who probably are clueless about what the U.S. Constitution says — agree that the Court needs neither women nor racial minorities amongst the Justices. That raises the interesting question of whether a paternalistic President ought to *impose* diversity on the Court, despite the opinion of citizens who are apparently happy with the current Court dominated by white males. This is *not* an easy question to answer. On one hand, the idea of a President imposing diversity on the Court sounds elitist and *un*democratic, as if the king knows what is best for the uneducated peasants. On the other hand, the U.S. Constitution gives the President the discretion to nominate judges and Justices. Any answer to a question about diversity will make a sizeable minority, perhaps a majority, of people unhappy or uncomfortable.

But, to answer my own question, I believe that a competent judge of any race or any gender can deliver justice to anyone of any race or gender. If we don't believe that, then how can *any* judge fairly decide a case involving a white male plaintiff and a black female defendant?

I think it is more important to focus on candidates' knowledge of constitutional law and their ability to be impartial, and I would advocate ignoring race, gender, religion, etc. As I wrote on 4 May (page 25, above), I think the Court should reflect the race and gender of a symposium on constitutional law, not necessarily reflect the composition of the population of the USA.

15 May: interviews not begun

At a press briefing on Friday, 15 May 2009, it was announced that the President had not yet interviewed any candidate for the U.S. Supreme Court:

> **Q.** If I can ask — has the President conducted interviews to your knowledge, for the Supreme Court?
>
> MR. GIBBS: He has not.

Robert Gibbs, Press Briefing (begun 14:20 EDT 15 May 2009)
http://www.whitehouse.gov/the_press_office/Briefing-by-White-House-Press-Secretary-Robert-Gibbs-5-15-09/ .

The President has a constitutional duty to nominate a Justice of the U.S. Supreme Court. The President has asked the Senate to confirm a new Justice *before* 7 Aug 2009, something the Senate can not begin until the President nominates a candidate. So how has the President been spending his time, during the past week, in the second week since the retirement of Justice Souter was announced? The President gave a funny speech at the annual White House Correspondents' Dinner on 9 May, attended a poetry reading on 12 May, delivered a college commencement speech in Arizona on 13 May (and several more speeches the following week), met with a basketball team from Philadelphia on 15 May, ... It appears that the President is more focused on ephemeral distractions than on his constitutional duties of historic significance.

a rational method for choosing

There is a rational way to select an outstanding judge, and the method is described in a law review article.[33] Incidentally, it seems that the answers to most problems can be found in a local library, but people — especially politicians — seem determined to ignore the wisdom contained in a library. One can use online databases of judicial opinions and legal periodicals to calculate:

- the number of opinions written by a judge (productivity)
- number of citations in other judicial opinions to the twenty most cited opinions of the judge under evaluation
- number of citations in law review articles and other legal periodicals
- number of times that an opinion by another judge mentions the name of the judge under evaluation (i.e, what Choi and Gulati call an "invocation")

Just counting citations can be misleading, because the author of the citation may have cited the opinion as a bad example, which is criticized by the author. On the other hand, *any* decision on a controversial topic will be criticized by someone, so being cited as a bad example does not mean that the judge under evaluation was wrong. A judge who produces opinions that are infrequently cited is having little effect on jurisprudence, and should not be rewarded with a promotion to the Supreme Court.

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[33] Stephen J. Choi and G. Mitu Gulati, "Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance," 78 Southern California Law Review 23 (Nov 2004).

My comments on how to select a new Justice for the U.S. Supreme Court are contained in a separate essay at http://www.rbs0.com/sctjustices.pdf .

Judge Sonia Sotomayor — who is often mentioned by journalists as a leading candidate for nomination by President Obama because she is both female and Hispanic — was appointed to the bench in 1998, which means that Choi and Gulati did not have complete data on her for their survey of judicial opinions published in 1998, 1999, and 2000. So Prof. Eric Posner used the methods of Choi and Gulati to compute "her data for the years 1999-2001." His conclusions:

> *Productivity* **....** Judge Sotomayor published 73 opinions. She would have ranked 68th out of 98. **....** (Judge Wood is fourth; then-Judge Alito was 72nd.)
>
> *Quality* **....** Judge Wood's top twenty cases over three years received 327 outside-circuit citations, putting her 26th. **....** Judge Sotomayor's statistic is 231, which would place her 59th. (Alito was 70th.)
>
> Judge Sotomayor's opinions from 1999-2001 were cited 289 times in law reviews and other legal periodicals through May 31, 2004. Judge Wood's opinions from 1998-2000 were cited 513 times through May 31, 2003 (16th). (Alito's were cited 240 times (73rd).) Sotomayor would have ranked 65th.
>
> Choi and Gulati also check what they call "invocations" — the frequency with which opinions written by other judges refer to the judge in question by name. They argue that invocations are most likely when the judge in question either has a good reputation or has written a particularly helpful opinion. Invocations range from 0 to 175 (excluding two outliers, the highest is 23), with a mean of 32. Judge Sotomayor was invoked 0 times (tied for last). Judge Wood was invoked 10 times (9th), and Judge Alito was invoked 5 times (28th).
>
> **....**
>
> The bottom line is that Judge Sotomayor is about average, or maybe a bit below average, for a federal appellate judge. These results are far from conclusive, but one might think that put the burden on Judge Sotomayor's defenders to come forward with stronger reasons for her nomination than they have so far. Judge Wood is stronger — I would say that she is impressive, but others might weight the factors differently.

Eric Posner, "Judge Sonia Sotomayor: What the Data Show," *The Volokh Conspiracy* (11:40 13 May 2009) http://www.volokh.com/archives/archive_2009_05_10-2009_05_16.shtml#1242229209 .

Prof. Posner was being charitable to Judge Sotomayor when he said she was "maybe a bit below average" — anyone who has a ranking larger than 49th is definitely below average. Judge Sotomayor is *below average* in each of the four measures of productivity and quality that are quoted above.

Prof. Eric Posner's blog entry was reported by a nationwide legal newspaper:

> Judge Diane Wood of the U.S. Court of Appeals for the 7th Circuit should beat out federal appellate bench colleague Judge Sonia Sotomayor of the 2d Circuit for the nod as a U.S. Supreme Court candidate — at least according to an empirical view of one Chicago law school professor with a judicially prominent last name.

> University of Chicago Law School Professor Eric Posner this week expanded on a 2004 study of 98 federal appellate judges in determining that Wood outranks Sotomayor in a composite rating based on quantity, quality, and independence of court opinions. Posner, who is the son of 7th Circuit Judge Richard Posner, in a posting on the Volokh Conspiracy blog, used the study's analysis of opinions to rank Wood eighth and **Sotomayor in the lower half.**[34] He included Justice Samuel Alito Jr., previously a judge on the 3d Circuit, for perspective, ranking him at No. 16 .
>
> ....
>
> Posner was responding to the glut of speculation as to whom President Barack Obama will chose to replace Justice David Souter, who said recently that he plans to step down from the Court in June. Posner said he wanted to bring some data to the discussion on which of the two judges, both of whom have been widely cited as likely candidates, would be most qualified, though he noted his own bias in that Wood also teaches at the University of Chicago.
>
> "I just want to get people to think about how they can use this publicly available information in a systematic, objective way," Posner said in an interview. "Just focusing on the data confirmed the very high reputation [Wood] has around here."

Lynne Marek, "Chicago law professor says Wood outranks Sotomayor, based on empirical study," *The National Law Journal,* (14 May 2009)

http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202430712585&Chicago_law_professor_says_Wood_outranks_Sotomayor_based_on_empiri cal_study_&slreturn=1 .

My search of Google News on 14:00 EDT on 23 May shows that Lynne Marek was the only journalist to notice Eric Posner's blog entry. Apparently, journalists also avoid the wisdom in law libraries and websites.

Judge Sotomayor

Back on 4 May, the legal affairs editor of *The New Republic* wrote the following about Judge Sotomayor:

> But despite the praise from some of her former clerks, and warm words from some of her Second Circuit colleagues, there are also many reservations about Sotomayor. Over the past few weeks, I've been talking to a range of people who have worked with her, nearly all of them former law clerks for other judges on the Second Circuit or former federal prosecutors in New York. Most are Democrats and all of them want President Obama to appoint a judicial star of the highest intellectual caliber who has the potential to change the direction of the court. Nearly all of them acknowledged that Sotomayor is a presumptive front-runner, but nearly none of them raved about her. They expressed questions about her temperament, her judicial craftsmanship, and most of all, her ability to provide an intellectual counterweight to the conservative justices, as well as a clear liberal alternative.
>
> The most consistent concern was that Sotomayor, although an able lawyer, was "not that smart and kind of a bully on the bench," as one former Second Circuit clerk for another judge put it. "She has an inflated opinion of herself, and is domineering during oral arguments, but her questions aren't penetrating and don't get to the heart of the issue." (During one argument,

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[34] Boldface added by Standler.

> an elderly judicial colleague is said to have leaned over and said, "Will you please stop talking and let them talk?") Second Circuit judge Jose Cabranes, who would later become her colleague, put this point more charitably in a 1995 interview with *The New York Times:* "She is not intimidated or overwhelmed by the eminence or power or prestige of any party, or indeed of the media."
>
> Her opinions, although competent, are viewed by former prosecutors as not especially clean or tight, and sometimes miss the forest for the trees. It's customary, for example, for Second Circuit judges to circulate their draft opinions to invite a robust exchange of views. Sotomayor, several former clerks complained, rankled her colleagues by sending long memos that didn't distinguish between substantive and trivial points, with petty editing suggestions — fixing typos and the like — rather than focusing on the core analytical issues.
>
> Some former clerks and prosecutors expressed concerns about her command of technical legal details: In 2001, for example, a conservative colleague, Ralph Winter, included an unusual footnote in a case suggesting that an earlier opinion by Sotomayor might have inadvertently misstated the law in a way that misled litigants. The most controversial case in which Sotomayor participated is *Ricci v. DeStefano,* the explosive case involving affirmative action in the New Haven fire department, which is now being reviewed by the Supreme Court. A panel including Sotomayor ruled against the firefighters in a perfunctory unpublished opinion. This provoked Judge Cabranes, a fellow Clinton appointee, to object to the panel's opinion that contained "no reference whatsoever to the constitutional issues at the core of this case." (The extent of Sotomayor's involvement in the opinion itself is not publicly known.)

Jeffrey Rosen, "The Case Against Sotomayor," *The New Republic,* (4 May 2009) http://www.tnr.com/politics/story.html?id=45d56e6f-f497-4b19-9c63-04e10199a085 .

Some commentators have criticized Mr. Rosen for reporting unsubstantiated rumors. But, *if* these criticisms of Judge Sotomayor are true, then lawyers who appear in her courtroom would be *un*wise to criticize her openly, because she might retaliate against them.

A few days after Prof. Eric Posner revealed statistics showing that Judge Sotomayor was below average as a judge, journalists began reporting some of her remarks that seemed to extol the virtues of ethnic bias.

> In 2001, Sonia Sotomayor, an appeals court judge, gave a speech declaring that the ethnicity and sex of a judge "may and will make a difference in our judging."
>
> In her speech, Judge Sotomayor questioned the famous notion — often invoked by Justice Ruth Bader Ginsburg and her retired Supreme Court colleague, Sandra Day O'Connor — that a wise old man and a wise old woman would reach the same conclusion when deciding cases.
>
> "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," said Judge Sotomayor, who is now considered to be near the top of President Obama's list of potential Supreme Court nominees.
>
> Her remarks, at the annual Judge Mario G. Olmos Law and Cultural Diversity Lecture at the University of California, Berkeley, were not the only instance in which she has publicly described her view of judging in terms that could provoke sharp questioning in a confirmation hearing.

> This month, for example, a video surfaced of Judge Sotomayor asserting in 2005 that a "court of appeals is where policy is made." She then immediately adds: "And I know — I know this is on tape, and I should never say that because we don't make law. I know. O.K. I know. I'm not promoting it. I'm not advocating it. I'm — you know."
>
> The video was of a panel discussion for law students interested in becoming clerks, and she was explaining the different experiences gained when working at district courts and appeals courts. Her remarks caught the eye of conservative bloggers who accused her of being a "judicial activist," although Jonathan H. Adler, a professor at Case Western Reserve University law school, argued that critics were reading far too much into those remarks.
>
> ....

Charlie Savage, "A Judge's View of Judging Is on the Record," *The New York Times,* (15 May 2009) http://www.nytimes.com/2009/05/15/us/15judge.html .

Sotomayor's statement in 2005 that the "court of appeals is where policy is made" is wrong. *Policy* is made by the executive and legislative branches of government.[35] I hardly need a footnote to authority, since Sotomayor admits on the videotape that she was wrong. However, courts, including the U.S. Court of Appeals, make common law and interpret the U.S. Constitution. In the absence of controlling precedent, *any* judge — even at a trial court — has the opportunity to make or expand the common law.

Sotomayor's 2001 lecture

Because of my concern about what journalists had reported about her lecture on 26 Oct 2001, I went to a law library and looked at the BERKELEY LA RAZA LAW JOURNAL. In an attempt to be fair to Judge Sotomayor, I am quoting entire paragraphs of her speech, so the reader can see sentences that I find objectionable in the context expressed by Judge Sotomayor. I have added boldface to Sotomayor's words that I find objectionable:

> That same point can be made with respect to people of color. No one person, judge or nominee will speak in a female or people of color voice. I need not remind you that Justice Clarence Thomas represents a part but not the whole of African-American thought on many subjects. Yet, because I accept the proposition that, as Judge Resnik describes it, "to judge is an exercise of power" and because as, another former law school classmate, Professor Martha Minnow of Harvard Law School, states "there is no objective stance but only a series of perspectives — no neutrality, no escape from choice in judging," I further accept that our experiences as women and people of color affect our decisions. **The aspiration to impartiality is just that — it's an aspiration because it denies the fact that we are by our experiences making different choices than others.** Not all women or people of color, in all or some circumstances or indeed in any particular case or circumstance but enough

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[35] *Schall v. Martin,* 467 U.S. 253, 281 (1984) ("But it is worth recalling that we are neither a legislature charged with formulating public policy nor an American Bar Association committee charged with drafting a model statute."). Quoted in *Reno v. Flores,* 507 U.S. 292, 315 (1993) ("It may well be that other policies would be even better, but 'we are [not] a legislature charged with formulating public policy.' "); *Demore v. Kim,* 538 U.S. 510, 528 (2003).

> people of color in enough cases, will make a difference in the process of judging. The Minnesota Supreme Court has given an example of this. As reported by Judge Patricia Wald formerly of the D.C. Circuit Court, three women on the Minnesota Court with two men dissenting agreed to grant a protective order against a father's visitation rights when the father abused his child. The Judicature Journal[36] has at least two excellent studies on how women on the courts of appeal and state supreme courts have tended to vote more often than their male counterpart to uphold women's claims in sex discrimination cases and criminal defendants' claims in search and seizure cases. As recognized by legal scholars, whatever the reason, not one woman or person of color in any one position but as a group we will have an effect on the development of the law and on judging.

Sonia Sotomayor, "A Latina Judge's Voice," 13 BERKELEY LA RAZA LAW JOURNAL 87, 91 (Spring 2002). *The New York Times* reprinted her lecture at:
http://www.nytimes.com/2009/05/15/us/politics/15judge.text.html (posted 14 May 2009).
The University of California at Berkeley also reprinted her lecture:
http://www.law.berkeley.edu/4982.htm (posted 26 May 2009).

Impartiality is *not* an aspiration. Impartiality is a legal *requirement,* expressed in the judicial oath, in federal statute, and in constitutional law, as explained above, beginning at page 5. Being a Hispanic woman does *not* give Sotomayor immunity from her legal obligation to be impartial. Note also that Judge Sotomayor gives no citation to the source of her quotations, although a footnote with bibliographic data is customary in academic writing.

On the next page of her speech, Sotomayor says:

> Whether born from experience or inherent physiological or cultural differences, a possibility I abhor less or discount less than my colleague Judge Cedarbaum, our gender and national origins may and will make a difference in our judging. Justice O'Connor has often been cited as saying that a wise old man and wise old woman will reach the same conclusion in deciding cases. I am not so sure Justice O'Connor is the author of that line since Professor Resnik attributes that line to Supreme Court Justice Coyle. I am also not so sure that I agree with the statement. First, as Professor Martha Minnow has noted, there can never be a universal definition of wise. Second, **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.**
>
> **....**
>
> However, to understand takes time and effort, something that not all people are willing to give. For others, their experiences limit their ability to understand the experiences of others. Other simply do not care. Hence, one must accept the proposition that a difference there will be by the presence of women and people of color on the bench. **Personal experiences affect the facts that judges choose to see.** My hope is that I will take the good from my experiences and extrapolate them further into areas with which I am unfamiliar. I simply do not know exactly what that difference will be in my judging. But I accept there will be some based on my gender and my Latina heritage.

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[36] Three paragraphs earlier, Judge Sotomayor mentioned in her text: "Vol. 77 of the *Judicature,* the Journal of the American Judicature Society of November-December 1993."

Sonia Sotomayor, "A Latina Judge's Voice," 13 BERKELEY LA RAZA LAW JOURNAL 87, 92 (2002).

On 22 May, I am aghast at Sotomayor's comment that "a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male". The plain meaning is that a "wise Latina woman" is a *better* judge than a "white male". I am sorry to say it, but the truth is that such a statement is blatantly racist and sexist.[37] I'm sure Sotomayor would be offended if someone told her that a white male was better judge than some Hispanic woman, and the statement is equally offensive in Sotomayor's form. She seems proud that her Latina heritage and her personal experiences will make her less than impartial.

I am also troubled by Sotomayor's statement that "personal experiences affect the facts that judges choose to see." Sotomayor was a history major at Princeton University. When I was in law school, and many times in my ten years of experience as an attorney, I notice that judges with a liberal arts background tend to ignore facts that get in the way of their desired conclusion. As a scientist, I have an obligation to consider *all* of the known facts, before I make a decision.

A blogger at *The Volokh Conspiracy* wrote a very restrained criticism of Sotomayor:

> More comments by Judge Sonia Sotomayor have surfaced that are sure to complicate her confirmation should President Obama nominate her to the Supreme Court. [quoting *The New York Times*]
>
> ....
>
> Based on the *Times* report — and without the benefit of a videotape or broader context — it seems Sotomayor's comments go beyond the simple observation that experience can influence how a judge sees a case to question the idea of judicial neutrality and endorse the idea that judging is ultimately an exercise of power instead of judgment. Insofar as this is the case, her remarks are troubling. It is one thing to recognize that judges, as people, are fallible and imperfect, and will be influenced by the personal experience and biases (even as they aspire to interpret and apply the law in a neutral and objective fashion). It is quite another to suggest that such neutrality and objectivity is not even an ideal to which judges should aspire, that "there is no objective stance but only a series of perspectives," and therefore a judge's personal experiences are license to impose his or her preferences through an exercise of judicial power. Indeed, if some perspectives are "better" — more authentic, more fair, more progressive, whatever — why shouldn't a judge embrace his or her own perspective, and abandon any pretense of trying to apply the law in a neutral fashion.

Jonathan Adler, "Would a 'Wise Latina' Judge Reach 'Better' Results than a White Male?" *The Volokh Conspiracy* (08:55 15 May 2009) http://volokh.com/posts/1242392150.shtml .

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[37] N.B. I am *not* calling Sotomayor a racist. I am only saying that her remark is racist. When speaking on a controversial topic, it is easy to say something that one later regrets.

Judge Diane Wood

Diane Wood earned her law degree in 1975, became a law professor in 1980, and in 1995 was appointed a judge on the U.S. Court of Appeals in Chicago. Her experience as a law professor concentrated in antitrust and international business law.

A published study evaluated published opinions of 98 judges on the U.S. Courts of Appeal written during 1998-2000, who had at least six years of experience as a judge on 31 May 2003.[38] When counting outside-circuit citations, only two female judges were in the top ten judges: Sandra Lynch and Diane Wood. When counting mentions of a judge's name in the text of an opinion, only two female judges were in the top ten judges: Edith Jones and Diane Wood. These results show that Diane Wood is one of the most influential female judges on the U.S. Courts of Appeals.

On 12 May 2009, *The New York Times* published a news article that described a very good reason to nominate and confirm Judge Diane Wood of the U.S. Court of Appeals in Chicago to the U.S. Supreme Court:

> When President Bill Clinton had a rare opportunity in 1995 for a Democratic president to fill a vacancy on the federal appeals court based in Chicago, a bastion of conservative thinking, he received an unusually strong recommendation from [U.S.] Senator Paul Simon.
>
> Mr. Simon, an outspoken liberal from Illinois who died in 2003, told the president the new judge should be a reliable progressive who would be cerebral enough to go up against the court's two formidable conservatives, Judges Richard A. Posner and Frank H. Easterbrook. [Simon] said it should be Prof. Diane P. Wood of the University of Chicago law school.
>
> In the years since Mr. Clinton took that advice, Judge Wood has established herself on the United States Court of Appeals for the Seventh Circuit, in the view of scholars and lawyers, as an unflinching and spirited intellectual counterweight to Judges Posner and Easterbrook. She has taken on that pair and some of the court's other conservative judges across a wide range of cases including abortion, immigration and access to courts.
>
> ....
>
> Geoffrey R. Stone, who was provost of the University of Chicago and dean of its law school, said, "Diane is a serious and accomplished scholar who has demonstrated the ability to go toe to toe with Dick and Frank," both of whom, he added, "can be intimidating figures."
>
> The first-name references reflect that Mr. Stone and all three judges — along with Mr. Obama — know one another from having taught simultaneously at the Chicago law school, known for its competitive hothouse atmosphere. It is a world Mr. Obama knows well and can draw on as he makes his selection.

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[38] Stephen J. Choi and G. Mitu Gulati, "Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance," 78 SOUTHERN CALIFORNIA LAW REVIEW 23, 50, 60 (Nov 2004).

> The lesson to be drawn, Mr. Stone said, is that Judge Wood would not be intimidated by any of the Supreme Court's conservative voices, like Justice Antonin Scalia, also a former professor at the law school at Chicago.

Neil A. Lewis, "Potential Justice Offers a Counterpoint in Chicago," *The New York Times* (12 May 2009) http://www.nytimes.com/2009/05/12/us/politics/12wood.html .

On 16 May 2009, *The Washington Post* published a similar news article:

> Wood's 14 years alongside Posner and Easterbrook, who often serve together as a panel of the circuit court, are being studied afresh as President Obama prepares to make his first nomination to the Supreme Court. Wood, described by associates as smart, progressive, steadfast and collegial, is a onetime colleague of Obama's at the University of Chicago and is considered by many to be on the shortlist of potential replacements for retiring Justice David H. Souter.
>
> Wood knows what it is like to duel two of the most formidable and prolific conservative jurists in the country, a key element of Obama's search as he tries to shift the dynamic of a court led by Chief Justice John G. Roberts Jr. and Justice Antonin Scalia.
>
> "She's as bright as Posner and Easterbrook and really holds her own, and I think she would hold her own with the great intellects on the high court as well," said Chicago lawyer Fay Clayton, who has argued many 7th Circuit cases. "Everything she does is based on precedent and statutory construction and the facts."

Peter Slevin, "Possible Court Pick Is Used to Dueling on Bench Wood, a Contender to Replace Souter, Often Spars With Conservative Colleagues on the 7th Circuit," *The Washington Post,* (16 May 2009) http://www.washingtonpost.com/wp-dyn/content/article/2009/05/15/AR2009051503402.html .

Instead of dividing into different tribes — liberal and conservatives — and then engaging in ad hominem attacks on the loathsome scoundrels in the other tribe, it is absolutely essential to have collegial discussions of issues and reasons, and to try to forge a consensus whenever possible. Wood's experience in working with Judges Posner and Easterbrook would be very useful in working with Justices Scalia and Alito and Chief Justice Roberts, and make her especially qualified to serve as a Justice on the Court. So, on 16 May, I am undecided between Prof. Sullivan and Judge Wood, as each have outstanding qualifications.

Third Week: 16-23 May 2009

vultures begin to circle

The *Los Angeles Times* clearly explained why President Obama wants to avoid nominating someone with extreme or inflammatory views on any controversial topic:

> Obama is determined to avoid a "culture war" over the choice, White House aides and Democratic lawyers say, and he hopes to select a candidate who will not galvanize conservative activists over wedge issues such as abortion and same-sex marriage.
>
> With that in mind, the White House is poring over the records of leading candidates for the high court, looking for potential flash points. That could lead to problems for some who are thought to be on Obama's short list.
>
> For example, Judge Diane P. Wood, a veteran of the U.S. 7th Circuit Court of Appeals in Chicago, has a strong record in support of abortion rights. She was a law clerk to Justice Harry Blackmun, the author of the *Roe vs. Wade* opinion, and she dissented when the appeals

court upheld Wisconsin and Illinois bans on a late-term abortion procedure called dilation and extraction, which opponents call "partial birth" abortion. She also wrote an opinion reviving a lawsuit against the leaders of the antiabortion group Operation Rescue for using violence and "human blockades" to shut down abortion clinics. But the Supreme Court unanimously reversed her opinion in 2006.

As the Democratic governors of Michigan and Arizona, respectively, Jennifer M. Granholm and Janet Napolitano — two other potential court candidates — vetoed state bans on dilation and extraction. (Napolitano is now secretary of Homeland Security.)

Americans United for Life, an antiabortion group, issued its evaluation of the abortion records of nine potential nominees to the high court. Charmaine Yoest, the group's president, called them "radically pro-abortion."

Obama has been a steady defender of the *Roe* decision and the right to abortion generally. But he has long sought to defuse tension over the issue.

....

Others who know Obama say he also wants to avoid a battle over same-sex marriage. "It seems to me Obama is trying very hard not to be cast as a liberal. He wants to avoid triggering a culture-war attack," said University of Chicago law professor Geoffrey Stone. "On abortion, he will not want to appoint someone who has taken an inflammatory position."

That may be one reason why some academics such as Stanford University law professor Pamela Karlan aren't being more strongly considered. Karlan has a body of work that speaks loudly on abortion and same-sex marriage.

"Gays have come out of the closet," Karlan said last year, "and women who've had abortions have gone back into the closet."

....

U.S. Solicitor General Elena Kagan may benefit from having a limited public record. Kagan, the former Harvard Law School dean and Clinton White House aide, has no such baggage — and has received support from liberals and conservatives.

With an academic background in regulatory law, she has largely stayed away from hot-button cultural issues. Like Chief Justice John G. Roberts Jr., who was nominated to the court in 2005, Kagan does not have an extensive paper trail of legal scholarship.

Another reported finalist, appeals court Judge Sonia Sotomayor of New York, has ruled in just a pair of abortion- related cases despite a long career in the federal courts.

Nearly 20 years ago, Judge David H. Souter of New Hampshire emerged as President George H.W. Bush's nominee in part because he had no public record on abortion. (Souter proved to be a supporter of the *Roe* decision, which disappointed Republicans.)

James Oliphant and David G. Savage, “Abortion, gay marriage complicate Supreme Court selection,” *Los Angeles Times,* (16 May 2009)

http://www.latimes.com/news/nationworld/nation/la-na-court-abortion16-2009may16,0,5600569.story .

I am distressed to see that President Obama is apparently seeking a nominee who has avoided a strong position on any controversial issue. A famous conservative, before the Christian zealots hijacked the Republican party in the late 1970s, said:

> I would remind you that extremism in the defense of liberty is no vice. And let me remind you also that moderation in the pursuit of justice is no virtue.

Barry Goldwater, Acceptance Speech for Presidential Nomination of Republican Party (16 July 1964). I don't think Goldwater meant "extremism" in the sense of a bomb-throwing anarchist, instead I interpret Goldwater to mean that showing enthusiasm for maximum liberty is desirable. The real point is that we shouldn't be seeking judges who desire just a smidgen of liberty, or just a moderate amount of justice. However, the lesson from history is that Goldwater, who took strong public positions on controversial issues, was a loser. And I think Goldwater made a poor choice of the word "extremism" in the above quotation, perhaps "zeal" or "enthusiasm" would have been a better word.

The Washington Post published an article that predicted that same-gender marriage, *not* abortion, would be the hot issue in the confirmation hearings. I am sure that will be true if President Obama nominates a lesbian.

> As President Obama prepares to name his first Supreme Court justice, conservatives in Washington are making clear that his nominee will face plenty of questions during the confirmation process on the legal underpinnings of same-sex marriage.
>
> ....
>
> Questions on social issues in confirmation hearings have tended for the past 30 years to focus squarely on abortion, with partisans from both sides poring over a nominee's writings and rulings and presidents typically denying that any "litmus test" was employed in the selection.
>
> Same-sex marriage carries the same freighted potential to dominate a hearing, conservatives say.
>
> "It is now the flash point where politics and law meet. That flash point used to be abortion. I don't think anybody thinks that's going to be the flash point in this nomination," said William A. Jacobson, a Cornell University law professor and conservative blogger.
>
> Sen. Orrin G. Hatch (Utah), another GOP member of the Judiciary Committee, said conservatives are particularly eager to avoid a Supreme Court ruling akin to the 1973 *Roe v. Wade* decision, which legalized abortion nationwide and has divided the country ever since. "I don't think members of the court, or any of us, ever want to see a decision like that again," Hatch said. Obama assured the senator in a recent meeting that he will not pick a "radical" to replace Souter, but Hatch added: "Presidents always say that. That's why we have the hearing process."
>
> Same-sex marriage gained national resonance in the wake of last month's Iowa Supreme Court ruling that legalized the practice in that state. And in the two weeks since Justice David H. Souter announced his retirement, Maine also legalized same-sex marriage, becoming the fifth state to do so; the New Hampshire legislature sent a marriage-equality bill to the governor; the New York State Assembly approved gay-marriage legislation; and the District of Columbia voted to recognize same-sex marriages performed elsewhere.
>
> Those actions, in so short a time, have outstripped the ability of Democrats in Washington to stake out their public position on the issue.

> Obama has said that he personally opposes same-sex marriage, based on his Christian faith, but the White House said after the Iowa ruling that the president "believes that committed gay and lesbian couples should receive equal rights under the law."

Shailagh Murray, "Gay-Marriage Issue Awaits Court Pick Same-Sex Unions Supplant Abortion As Social Priority for Conservatives," *The Washington Post,* (17 May 2009) http://www.washingtonpost.com/wp-dyn/content/article/2009/05/16/AR2009051602363.html .

The New York Times reported on the nasty, ad hominem attacks that so-called conservatives (really Christians in the right-wing of the Republican party) are planning:

> If President Obama nominates Judge Diane P. Wood to the Supreme Court, conservatives plan to attack her as an "outspoken" supporter of "abortion, including partial-birth abortion."
>
> If he nominates Judge Sonia Sotomayor, they plan to accuse her of being "willing to expand constitutional rights beyond the text of the Constitution."
>
> And if he nominates Kathleen M. Sullivan, a law professor at Stanford, they plan to denounce her as a "prominent supporter of homosexual marriage."
>
> Preparing to oppose the confirmation of Mr. Obama's eventual choice to succeed Justice David H. Souter, who is retiring, conservative groups are working together to stockpile ammunition. Ten memorandums summarizing their research, obtained by *The New York Times,* provide a window onto how they hope to frame the coming debate.
>
> The memorandums dissect possible nominees' records, noting statements the groups find objectionable on issues like abortion, same-sex marriage, the separation of church and state and the propriety of citing foreign law in interpreting the Constitution.
>
> While conservatives say they know they have little chance of defeating Mr. Obama's choice because Democrats control the Senate, they say they hope to mount a fight that could help refill depleted coffers and galvanize a movement demoralized by Republican electoral defeats.
>
> ....
>
> Gary Marx, executive director of the conservative Judicial Confirmation Network, said donors, whom he declined to identify, had committed to contributing millions of dollars for television, radio and Internet advertisements that might reunite conservatives in a confirmation battle.

Charlie Savage, "Conservatives Map Strategies on Court Fight," *The New York Times,* (17 May 2009) http://www.nytimes.com/2009/05/17/us/politics/17conserve.html .

I think it is awful that some Republicans are planning to vilify the nominee to the Court, not in the hope of avoiding her confirmation, but only to "refill depleted coffers and galvanize a movement". If Republicans want to beat the stuffing out of something, they should purchase a piñata and hang it from a tree in their backyard.

The following day, *The New York Times* said that Republicans admitted that they did not have the votes to reject President Obama's nominee:

> While there is growing anticipation that the summer will bring the spectacle of a pitched Supreme Court confirmation battle, some Senate Republicans are lowering expectations that they are planning any major political fight.

> President Obama has not yet named his choice to succeed Justice David H. Souter, but several Republicans acknowledge that it is unlikely they will be able to derail the nomination absent some startling revelation about the candidate.
>
> Those Republicans, including senior staff aides and some senators, suggested in interviews that they believed Mr. Obama's first nominee for the court would be confirmed without great difficulty no matter how they framed the issues during the confirmation process.
>
> Senator Jeff Sessions of Alabama, the ranking Republican on the Judiciary Committee, has said he would not necessarily be opposed to a nominee who is gay or an abortion rights advocate. **....**

Neil A. Lewis, "Republicans in Senate Lower Expectations of a Court Fight," *The New York Times,* (18 May 2009) http://www.nytimes.com/2009/05/18/us/politics/18judiciary.html .

The National Law Journal published an article about politicians nitpicking the personal lives of nominees to the U.S. Supreme Court:

> It doesn't take much to derail, or at least significantly distract, a U.S. Supreme Court nomination.
>
> Remember Samuel Alito Jr.'s long-ago membership in a group that wanted Princeton University to remain all-male? It kicked up a fuss, as did John Roberts Jr.'s ruling upholding the arrest of a 12-year-old girl for eating a single french fry in a Washington subway station. Critics called it heartless.
>
> Even David Souter, the justice whose replacement will soon be named, had his trial by innuendo. Soon after Souter was nominated in 1990, scattered rumors appeared in print that the lifelong bachelor was gay. Souter was so outraged that he tried to phone President George H.W. Bush and have his name withdrawn. His friend and sponsor Warren Rudman had to physically restrain and settle Souter down with a scotch before he agreed to stay on. Women he had dated came forward, and the rumor receded.
>
> What will be the Achilles' heel, the french fry case, for the next nominee? That question might normally wait for the nominee to actually be named. But in the accelerated, intense glare of bloggers and bloviators, President Barack Obama's presumed short-listers have already been picked over and subjected to extended criticism. Videos of different candidates, some damaging and others sleep-inducing, have blossomed on YouTube.
>
> **....**

Tony Mauro, "What old sin will haunt the next nominee?," *The National Law Journal,* (18 May 2009)

http://www.law.com/jsp/nlj/legaltimes/PubArticleLT.jsp?id=1202430759293&What_old_sin_will_haunt_the_next_nominee&slreturn=1 .

The Chicago Tribune said that the right-wing opposed *all* of the candidates that President Obama is reportedly considering:

> Which front-runner for the vacancy on the U.S. Supreme Court is favored by conservative activists?
>
> That's an easy question: None of them.
>
> The Judicial Confirmation Network, which pushes for conservative nominees for the high court, has posted critical web videos for three of the identified candidates to fill the slot opened by Justice David Souter's retirement. Should President Obama choose either U.S. Solicitor General Elena Kagan, Chicago federal appeals judge Diane Wood, or New York federal appeals judge Sonia Sotomayor, the vids outline the likely points of attack.

James Oliphant, "Supreme Court pick: Preemptive strike," *Chicago Tribune Washington Bureau,* (12:18 EDT 18 May 2009)
http://www.swamppolitics.com/news/politics/blog/2009/05/supreme_court_pick_preemptive.html .

On 19 May, Fox News, a conservative cable television news source, reported:

> President Obama has yet to announce his pick to replace retiring Supreme Court Justice David Souter, but already a political battle is brewing over the nomination online.
>
> Conservative and liberal groups are using the Internet to trade accusations, launch attack ads against potential nominees and raise money to support their cause.
>
> While political battles over Supreme Court picks are as old as the court itself, the ability to wage war online has raised the stakes as the potential increases for opposing groups to reach larger audiences, raise more money and expand their influence.
>
> ....
>
> The Judicial Confirmation Network launched a series of Web ads on Monday [18 May] throwing mud on Solicitor General Elena Kagan, Judge Diane Pamela Wood of the 7th U.S. Circuit Court of Appeals and Judge Sonia Sotomayor of the 2nd U.S. Circuit Court of Appeals — potential picks for Obama.
>
> The site `www.obamasfrontrunners.com` where the ads are posted asks visitors to decide which of the three is the "worst liberal judicial activist."
>
> Gary Marx, executive director of the group, said the ads have generated more than 2,500 hits thus far. The group plans to launch Google ads starting Wednesday.
>
> Marx told FOXNews.com that his groups wants to make sure the public is engaged in a debate over potential nominees.

Stephen Clark, "Political Battle Over Obama's Supreme Court Pick Hits the Web," Fox News Channel, (19 May 2009)
http://www.foxnews.com/politics/2009/05/19/political-battle-obamas-supreme-court-pick-goes-viral-online/ .

In a vibrant democracy, I would *expect* that intelligent, articulate people (except judges, who must remain impartial) would take public positions on the major issues of the day, including controversial topics like abortion, same-gender marriage, death penalty, etc. However, if future employment opportunities are forbidden to outspoken people, then ambitious people will learn to avoid taking public positions on controversial issues. Such silence on the important issues of the day will harm democracy by reducing the number of voices. Appointing judges who have a history of never taking a position on an important issue elevates those who don't use their First Amendment rights, and who (I fear) don't really respect the First Amendment.

Appointing stealth candidates, who have no written record on controversial topics, not only rewards silence (i.e., avoiding the marketplace of ideas), but also means that no one can predict the candidate's decisions after he/she is appointed to the bench. The lack of predictability means that the vetting process during nomination, and also the confirmation process, is perfunctory and without substance.

The goal of blasting people for their position on controversial issues is part of a strategy to silence people, and make it *appear* that there is *only one* acceptable position on each issue. There is one obvious way to defeat such a strategy — as Justice Brandeis said:

> If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.

Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

another list of candidates

On 18 May, the *National Law Journal* published an article containing the results of interviews with "more than a dozen" constitutional law attorneys and law professors about the next Justice. *Un*surprisingly, these experts in constitutional law had a different perspective than opinion polls at websites.

> **....** These scholars, who vary ideologically and geographically, most often recommended four women who are reportedly on Obama's short list, giving the most nods to Pamela Karlan, a leading constitutional law scholar, voting rights authority and founding director of the Stanford Law School's Supreme Court Litigation Clinic.
>
> **....**
>
> Close on Karlan's heels with an equal number of recommendations were: constitutional law scholar Kathleen Sullivan, the first female dean of Stanford Law School and now head of the appellate practice at Quinn Emanuel Urquhart Oliver & Hedges; Judge Diane Wood of the U.S. Court of Appeals for the 7th Circuit; and Solicitor General and former Harvard Law School Dean Elena Kagan. Barely given a nod by those surveyed was Judge Sonia Sotomayor of the 2d Circuit, strongly supported by Hispanic groups, and Homeland Security Secretary Janet Napolitano.
>
> **....**
>
> At opposite ends of the ideological spectrum, [Nadine] Strossen [a professor at New York Law School and former head of the American Civil Liberties Union] and high court scholar Douglas Kmiec of Pepperdine University School of Law surprisingly place the same person at the top of an Obama list: Kathleen Sullivan, who, like Karlan or [Paul] Smith, would be the first openly gay nominee. "A forceful advocate, a great intellect, a wonderful scholar, someone deeply involved in practice and litigating, she has the experience of being a dean, which is not just ivory tower experience, and brings diversity to the court, including ideological diversity," Strossen said.
>
> Kmiec said, "She is somebody who could go toe-to-toe with the best minds on the bench, who would at the same time break lots of stereotypes about sexual orientation and the like and would do that without hitting people over the head. She has the capacity, like William Brennan, to engage people in discussion."

Marcia Coyle, "An alternative short list for the high court," *National Law Journal,* (18 May 2009) http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202430756479&slreturn=1 .

Of course, I am pleased to see Prof. Sullivan tied for first place in the ranking by the experts. I am also pleased that the experts "barely gave a nod" to Judge Sotomayor.

new candidate and interviews

On 18 May, a small town newspaper in Colorado reported that President Obama is considering an obscure trial judge as a candidate for the U.S. Supreme Court.

> A new Hispanic judge who grew up in modest circumstances in Southern Colorado said Monday she has been approached by White House intermediaries about being considered to fill a seat on the U.S. Supreme Court. U.S. District Judge Christine Arguello disclosed the development during an inquiry from *The Pueblo Chieftain.*
>
> Numerous reports from Washington say President Barack Obama is likely to pick a woman to fill the seat Justice David Souter is vacating. Latino groups are pushing the president to put the first Hispanic on the court.
>
> Arguello said she was asked a week ago by people in Washington and in Colorado "who are in direct contact with the White House" if she "would be willing to go through the intense scrutiny" that would occur if Obama nominates her. "I said 'yes.' I wouldn't have gone this far if I didn't think I could serve my country in this way."

Robert Boczkiewicz, "Coloradan may be considered for high court," *The Pueblo Chieftain,* (23:32 MDT 18 May 2009) http://www.chieftain.com/articles/2009/05/19/news/local/doc4a1241599f406563173485.txt .

Compared to Prof. Sullivan or Judge Wood, Judge Arguello's credentials are modest. Judge Arguello was a law professor at the University of Kansas School of Law during 1991-1999, and she has been a trial judge in U.S. District Court only since Oct 2008. Arguello was in the private practice of law in Florida or Colorado for 14 y. The only reason I can see to consider Arguello is that she is female and Hispanic. I am afraid that considering her means that gender and ethnicity are more important to Obama than intellectual credentials or judicial experience. Given the secrecy of President Obama's selection process, I suspect that the President was *not* happy with Judge Arguello blabbing to a journalist. Perhaps Arguello was considered because she was a deputy to Colorado Attorney General Ken Salazar during 1999-2002, Salazar is now Secretary of the Interior for President Obama, and Salazar *may*[39] have suggested that Obama nominate Arguello.

At night on 20 May, journalists reported that President Obama had interviewed Judge Diane Wood, when Wood was in town for a legal conference at Georgetown University. On the morning of 21 May, *The Washington Post* suggested that President Obama was focusing on two candidates for the U.S. Supreme Court:

> President Obama is intensifying his search for a Supreme Court nominee and has interviewed Judge Diane P. Wood of the U.S. Court of Appeals for the 7th Circuit in Chicago, believed to be among a handful of top contenders.
>
> ....

[39] I italicize *may* because this is only speculation, reported by CNN on 21 May 2009.

> Several others mentioned as possibilities to succeed Souter also attended [a conference of judges at Georgetown University Law School], but most of the buzz centered on Wood and Solicitor General Elena Kagan, who gave the keynote address. Both are said to be on the almost entirely female shortlist of candidates Obama is seriously considering.
>
> Wood was surrounded by both reporters and lawyers at the conference, which she said she had long planned to attend. But when asked whether she would be meeting with anyone from the White House on her trip here, she ended the chat. "No, no, I'm not answering any questions on that," she said with a laugh before moving on. An individual who is familiar with the vetting process said the meeting had already taken place and was part of a series of sessions with potential nominees that is expected to continue in the coming days.

Robert Barnes and Shailagh Murray, "High Court Buzz Centers on Chicago Judge and Solicitor General," *The Washington Post,* (21 May 2009)

http://www.washingtonpost.com/wp-http://www.washingtonpost.com/wp-dyn/content/article/2009/05/20/AR2009052003537.html .

On Saturday morning, 23 May, journalists at *The Washington Post* reported on the progress in the selection of a nominee and that an announcement might be sometime between 26 May and 3 June:

> President Obama has interviewed several of the candidates on his list to replace retiring Supreme Court Justice David H. Souter and is on schedule to announce his nomination before leaving on an overseas trip slated for early June, according to sources knowledgeable about the secretive process.
>
> Obama earlier this week interviewed Judge Diane P. Wood of the U.S. Court of Appeals for the 7th Circuit in Chicago. It is unclear who else he has talked to in the one-on-one interviews he has conducted. But aides are also keenly interested in Judge Sonia Sotomayor of the U.S. Court of Appeals for the 2nd Circuit in New York, who would be the court's first Hispanic justice.
>
> ....
>
> The timing of the decision is not set and Obama has not yet made his choice, the sources said. One said he was "99 percent sure" that the president would not be conducting interviews this weekend, when he is at Camp David. Obama is scheduled to leave Tuesday for a trip out West, then return Thursday to Washington. His overseas trip, to Egypt, Germany and France, begins June 3.

Michael D. Shear and Peter Slevin, "Obama on Pace to Name Supreme Court Nominee Before Heading Overseas," *The Washington Post,* (23 May 2009)
http://www.washingtonpost.com/wp-dyn/content/article/2009/05/22/AR2009052203496.html .

Obama interview on 22 May

On Friday, 22 May, President Obama was interviewed by Steven Scully of the Cable-Satellite Public Affairs Network (C-SPAN). Here are some quotations from that interview:

> STEVE SCULLY, POLITICAL EDITOR, C-SPAN: Mr. President, as we speak to you in the White House Library, a constitutional lawyer, former law professor, as you work through the process for you personally in selecting the Supreme Court nominee, what are you thinking?
>
> BARACK OBAMA, PRESIDENT OF THE UNITED STATES: Well, there are some benchmarks that you have to make sure that you hit. Obviously, you want somebody who is highly qualified, who knows the law. I want somebody who, obviously, has a clear sense of our constitution and its history and is committed to fidelity to the law.
>
> Is going to make their decisions based on the law that's in front of them, but as I've said before, I think it's also important that this is somebody who has common sense and somebody who has a sense of how American society works and how the American people live.
>
> And you know, I said earlier, that I thought **empathy**[40] was an important quality and I continue to believe that. You have to have not only the intellect to be able to effectively apply the law to cases before you.
>
> ....
>
> So, in all these cases what I want is not just **ivory tower**[41] learning. I want somebody who has the intellectual fire power, but also a little bit of a **common touch**[42] and has a practical sense of how the world works.
>
> ....
>
> SCULLY: Is it safe to say that an announcement in the next week or two with hearings in July?
>
> OBAMA: Well, I think it's safe to say that we're going to have an announcement soon. And my hope is, is that we can have hearings in July so that we end up before Congress breaks for the summer — have somebody in place.
>
> One of the things I would prefer not to see happen is that these confirmation hearings drag on and somebody has to hit the ground running and then take their seat in October without having the time to wrap their mind around the fact that they are going to be a Supreme Court Justice. I'd like to give them a little bit of lead time so that they can get prepared.
>
> ....

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[40] Boldface added by Standler. See Obama's 1 May remarks on "empathy", which are quoted above at page 13 and the comments at page 26.

[41] Boldface added by Standler.

[42] Boldface added by Standler. Let's be realistic here: the search is *not* for a hostess for a party at a homeless shelter, but for one of the most intellectual jobs in the legal profession.

SCULLY: Is there a justice current or former that you look at as a role model, as kind of the characteristics that you want in a Supreme Court justice?

OBAMA: Well you know, I mean each justice I think brings their own qualities, and you know, there are some justices who are wonderful writers, even justices I don't agree with, Justice Scalia is a terrific writer, and makes really interesting arguments.

You have people like Judge — Justice O'Connor, who again, I might not have agreed with her on every issue, but you always had a sense that she was taking the law and seeing what the practical applications of the law in this case. She wasn't a grand theoretician, but she ended up having an enormous influence on the law as a whole.

And on the other hand there are Justices like Brennan or Marshall, who really focused on the broader sweep of history and came at a time during the Civil Rights movement, where they recognized the unique role that — the unique role that courts could play in breaking the political logjam that had locked out too many people in the political process.

And so, different times call for different justices, each justice has their own strengths as well as weaknesses. And what I just want to make sure of is that any justices I appoint are people who have not only the academic qualifications or intellectual capacity, but also the heart and the feel for how Americans are struggling in their day-to-day lives.

....

SCULLY: Is that the imprint that you want on the Supreme Court?

OBAMA: **....** the criteria that I described, a strong intellectual grasp of the law, an appreciation for the timeless principles of the constitution, and a sense of common sense and compassion and **empathy** for ordinary Americans, **so that everybody is heard.**[43] Those are all qualities that I think make for a great Supreme Court justice.

Barack Obama, Interview by C-SPAN's Steve Scully (22 May 2009) http://www.c-span.org/pdf/obamainterview.pdf .

Notice in reviewing his favorite Justices, Obama spoke of civil rights, but said *nothing* about either the First Amendment, privacy law, or freedom from government surveillance without a warrant.

The final paragraph quoted above contains the phrase "so that everybody is heard." That's a strange remark for a lawyer to make, and especially for a former lecturer in constitutional law to make. The only people *heard* by the U.S. Supreme Court are the appellant and appellee in each case before the Court, plus whoever submits an amicus curiae brief. People are *heard* by a Court, *not* because of the personal qualities of a judge or Justice, but according to the procedural rules of the Court. Because the U.S. Supreme Court accepts fewer than 100 cases each year, very few litigants are heard by that Court. The concept of hearing everyone is for politicians, *not* judges.

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[43] Boldface added by Standler in both "empathy" and "so that everybody is heard."

anti-intellectualism

Obama's remarks about "ivory tower learning" were repeated by *Politico:*

> President Barack Obama told C-SPAN on Friday that he's "going to have an announcement soon" on his pick for the Supreme Court, and said he is looking for "not just ivory tower learning."
>
> "I want somebody who has the intellectual fire power, but also a little bit of a common touch and has a practical sense of how the world works," Obama told C-SPAN political editor Steve Scully.

Mike Allen, "Obama: Court pick coming soon," *Politico,* (00:05 EDT 23 May 2009) http://www.politico.com/news/stories/0509/22885.html .

Obama's remarks about "ivory tower learning" were also repeated by *The New York Times:*

> "What I want is not just ivory tower learning," Mr. Obama told Steve Scully, C-SPAN's political editor in the interview, which was conducted Friday in the White House library. "I want somebody who has the intellectual fire power, but also a little bit of a common touch and has a practical sense of how the world works."
>
> The current court is heavily weighted with former judges; one question is whether Mr. Obama, in seeking a balance, will try to pick someone with political experience as well. Several governors, including Jennifer Granholm of Michigan, have been mentioned as possible candidates.

Sheryl Gay Stolberg, "Obama Says Court Choice Is Coming Soon," *The New York Times,* (24 May 2009) http://www.nytimes.com/2009/05/24/us/politics/24web-obama.html .

For at least the last thirty years, it has been considered *in*appropriate to make disparaging remarks about members of some racial or ethnic group. It's in that context that I object to Obama's use of "ivory tower" to denigrate intellectuals who are employed by a university. Obama's slight is *not* an isolated misstatement, because in his 1 May 2009 briefing (quoted above at page 13) he denigrated those of us who use footnotes, which are one of the hallmarks of scholarly writing. On other occasions, Obama and his supporters laude him with the fact that he had taught constitutional law at the University of Chicago, and even call Obama a "professor", although he chose a career as a politician instead of becoming a professor.[44] Many law professors (e.g., Prof. Sullivan) have been, and continue to be, engaged in litigation on important issues in society and public policy. Other law professors write scholarly articles on injustices in society and suggest improvements in statutes or common law, etc. These professors are actively engaged in the same real world where everyone else lives and works.

What really grieves me are the repeated reports that Obama is considering nominating a governor to become a Justice, when there are ***many*** *much better* qualified candidates amongst law professors (e.g., Kathleen Sullivan, Pamela Karlan) and federal appellate judges (e.g., Richard Posner, Diane Wood). I see Obama's words and phrases like "empathy" (see page 13),

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[44] See page 12, above.

"ivory tower", "common touch", etc. as an excuse to discriminate against intellectuals with a detailed understanding of constitutional law, and as a reason to nominate an ordinary person instead of an intellectual. Judge Wood — who plays oboe in three orchestras, who continues to teach law at the University of Chicago after becoming a judge, and who writes scholarly opinions — has little in common with the majority of people in the USA. Similarly, Prof. Sullivan has lived in a world of ideas, as a professor at Harvard or Stanford for more than twenty years, and she too has little in common with the majority of people in the USA. But — because of the good work by Judge Wood, Prof. Sullivan, and many other learned professionals — people who are *un*educated live in a better society.

Fourth Week: 24-25 May 2009

Late Saturday night, 23 May, *Politico* reported on the presumed Republican tactics:

> Republicans on the Senate Judiciary Committee are resisting President Barack Obama's call for a swift confirmation of his choice for Supreme Court, opening a rift between the parties even before the nominee has even been named.
>
> Democrats contend that Republicans are planning to slow-walk an inevitable confirmation. The GOP has an incentive to do so: Conservative activists have vowed to use the court fight to raise money, fire up their base, identify troops and rebuild their movement, with millions of dollars in advertising planned.
>
> The president's pick is expected to be announced late in the coming week, or early in the next one.
>
> Obama has told the Senate leadership he would like a confirmation vote by the monthlong August recess, which is scheduled to begin Aug. 8. "I'd like to give them a little bit of lead time so that they can get prepared" for the court's opening on Oct. 5, Obama told C-SPAN's Steve Scully on Friday [22 May].
>
> But Sen. Jeff Sessions (R-Ala.), the top Republican on the Judiciary Committee, told the ABC News webcast "Top Line" on Thursday [21 May] that finishing before the August recess "would be rushing it." "I really don't think that's feasible," Sessions said.

Mike Allen, "Senate GOP: Not so fast on Court pick," *Politico* (21:41 EDT 23 May 2009) http://www.politico.com/news/stories/0509/22892.html .

U.S. Senator Jon Kyl (R-Ariz.), a member of the Senate Judiciary Committee, appeared on *Fox News Sunday* interview program with host Chris Wallace on 24 May and denounced Obama's intention to nominate someone who has "feelings" and "empathy".

> WALLACE: Gentlemen, I want to move on to another topic. We expect the president in the next week or 10 days to announce his Supreme Court nominee.
>
> Senator Kyl, back in January, in a speech before a lawyers' group, the Federalist Society in Phoenix, you said that if the president's choice is too liberal, you reserve the right to filibuster that choice. Do you stand by that, sir?
>
> KYL: I went on to say a lot of things about what I meant by that, and I was distinguishing between a person who is just liberal — and undoubtedly this nominee will be liberal — and one who decides cases not based upon the law or the merits but, rather, upon his or her emotions, or feelings or preconceived ideas. That would be a circumstance in which I could not support the nominee.

Now, be clear. Republicans don't have the votes to filibuster a nominee, and that's probably not going to happen in this case either. But we will distinguish between a liberal judge on one side and one who doesn't decide cases on the merits but, rather, on the basis of his or her preconceived ideas.

WALLACE: But I just want to make sure I have this straight, because in fact, in the numbers now, you perhaps do have — and if you could get some Democratic defections — the opportunity to filibuster. You are reserving that right if you feel that the president's choice is so far out of the mainstream.

KYL: Yes, the — the Gang of 14 back three or four years ago had a standard that I think is probably appropriate. They said that there shouldn't be a filibuster of judges except in extraordinary circumstances. And I think that's — that has it about right.

And hopefully the president won't nominate someone here who is so far out of the mainstream in terms of the way that he or she approaches deciding cases that we won't have to do that.

WALLACE: Well, let me just ask you — and I do take all of your caveats here, Senator Kyl. Back in 2005, when Democrats were — excuse me — filibustering some Bush nominees and you were considering the nuclear option to stop that, here's what you said. "It's never been the case until the last two years that a minority could dictate to a majority what they could do." So are you backtracking on that?

KYL: What I'm saying, Chris, is that in extraordinary circumstances, which is essentially the way that the Senate resolved that dispute about the nuclear option, as you say, I think both Democrats and Republicans reserve the right to not only oppose a nomination but also prevent vote on the nomination. That should be a rare case.

And I would hope that the president's nominee would not fall into that category. But I think you never say never here. And given the fact that the president has already signaled that he wants to appoint someone who has empathy and will decide cases based on that, I think you have to reserve it.

When Justice Roberts was asked the case (sic) in his confirmation hearing, "Would you vote for the little guy or the big guy," he said, "It depends on whose side the law was. If the law is on the side of the little guy, he wins. If it's on the side of the big guy, he wins."

I don't want the test to be, "Are you for the little guy or the big guy?" I want the test to be blind justice. Where is the law?

Transcript, http://www.foxnews.com/story/0,2933,521621,00.html (25 May 2009).

J. Taylor Rushing, "Kyl: GOP will hold firm on Court pick," *The Hill* (10:50 EDT 24 May 2009) http://thehill.com/leading-the-news/kyl-gop-will-hold-firm-on-court-pick-2009-05-24.html .

The Associated Press reported:

The Senate's No. 2 Republican on Sunday refused to rule out a filibuster if President Barack Obama seeks a Supreme Court justice who decides cases based on "emotions or feelings or preconceived ideas."

Sen. Jon Kyl made clear he would use the procedural delay if Obama follows through on his pledge to nominate someone who takes into account human suffering and employs empathy from the bench. The Arizona Republican acknowledged that his party likely does not have enough votes to sustain a filibuster, but he said nonetheless he would try to delay or derail the nomination if Obama ventures outside what Kyl called the mainstream.

> "We will distinguish between a liberal judge on one side and one who doesn't decide cases on the merits but, rather, on the basis of his or her preconceived ideas," Kyl said.
>
> The White House is preparing to announce Obama's pick to replace Justice David Souter, who plans to retire back to his beloved New Hampshire when the court's term ends.
>
> Sen. Dick Durbin of Illinois, the No. 2 Democrat in the Senate, said Sunday that he has been told a choice is likely to be announced this week. Those involved with Obama's decision hint that it could come as early as Tuesday [26 May].

Philip Elliott, "GOP senator threatens filibuster over court pick," Associated Press (18:57 EDT 24 May 2009).

While I agree with Senator Kyl that "empathy" is the wrong criterion for any judge, it is futile for the Republicans to engage in tactics of procedural delays and threatened filibuster, because they simply do not have the votes to prevent President Obama's nominee from being confirmed by the Senate. Aside from picking futile battles, the Republican tactics are also objectionable because:

2. The Supreme Court and its Justices are supposed to be accorded respect and dignity, *not* pelted with rotten tomatoes by politicians of the opposition party during the Senate confirmation process.
3. The confirmation process in the Senate should *not* be an opportunity for political parties to "energize" their base of zealous supporters, the way a school uses a bake sale to obtain funding.
4. Finally, demagogues miss the distinction between "judicial activism" (which is propaganda[45]) and a legitimate objection to judges deciding cases on "empathy" for one party. As explained above, empathy violates a judge's legal obligation to be impartial.

Politico reported on opposition by conservative groups:

> As Barack Obama prepares to nominate his first Supreme Court justice, conservative activists have three words for Senate Republicans: Lock and load.
>
> While conservatives know that they can't defeat Obama's nominee without massive Democratic defections, they nevertheless want to see their senators come out with their guns blazing.
>
> "Republicans in the House have gone a long way [toward satisfying conservatives] with votes on the stimulus," says Gary Bauer, president of the anti-abortion, anti-gay-marriage group American Values. "But when it comes to the Senate, there are still a lot of people not convinced that ... what people expect is for them to carry the banner of our philosophy as boldly and with as much confidence as the other side does." "The other side does not agonize about whether they are going to give a Republican Supreme Court nominee a difficult time, they just do it."
>
> Conservatives remember Sen. Ted Kennedy's ferocious attack on "Robert Bork's America," the pubic-hair-on-the-Coke-can humiliations visited upon Clarence Thomas and the way that Samuel Alito's wife cried after Sen. Lindsey Graham recounted the Democrats' charges against her husband.

Daniel Libit & Andie Coller, "Conservatives itching for SCOTUS fight," *Politico* (04:11 EDT 25 May 2009) http://www.politico.com/news/stories/0509/22914.html .

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[45] Standler, Is Judicial Activism Bad?, http://www.rbs0.com/judact.pdf (Sep 2005).

I think it is pointless to argue whether one political party is more vituperative than the other party, they both make ad hominem attacks and they both ignore complicated substantive issues.

On the night of 25 May, for publication in the Tuesday morning, 26 May, edition of *The New York Times,* a journalist wrote about how liberals might be disappointed in President Obama's nominee:

> Pamela S. Karlan is a champion of gay rights, criminal defendants' rights and voting rights. She is considered brilliant, outspoken and, in her own words, "sort of snarky."[46] To liberal supporters, she is an Antonin Scalia for the left.
>
> But Ms. Karlan does not expect President Obama to appoint her to succeed Justice David H. Souter, who is retiring. "Would I like to be on the Supreme Court?" she asked in graduation remarks a couple of weeks ago at Stanford Law School, where she teaches. "You bet I would. But not enough to have trimmed my sails for half a lifetime."
>
> While there are clear political advantages to Mr. Obama if the perception is that he has avoided an ideological choice, Ms. Karlan's absence from his list of finalists has frustrated part of the president's base, which hungers for a full-throated, unapologetic liberal torchbearer to counter conservatives like Justice Scalia.
>
> It has been more than 40 years since a Democratic president appointed someone who truly excited the left, but Mr. Obama appears to be following President Bill Clinton's lead in choosing someone with more moderate sensibilities.
>
> The president has narrowed his list to four, according to people close to the White House — two federal appeals judges, Sonia Sotomayor of New York and Diane P. Wood of Chicago, and two members of his administration, Solicitor General Elena Kagan and Homeland Security Secretary Janet Napolitano.
>
> ....
>
> "It's quite likely the left is not going to get what it wants," said Thomas C. Goldstein, co-head of the Supreme Court practice at Akin Gump Strauss Hauer & Feld and founder of Scotusblog, a well-read Web site. "If you talk about somebody who's a true liberal, a very strong progressive and a visionary architect of the law and jurisprudence, then you're talking about somebody like Pam Karlan at Stanford. And nobody is seriously talking about Pam Karlan."
>
> Other favorites of the left who do not appear to be on Mr. Obama's short list are Kathleen M. Sullivan, who also teaches at Stanford, and Harold Hongju Koh, the dean of Yale Law School, whom the president has nominated to be the legal adviser at the State Department.

Peter Baker, "Favorites of Left Don't Make Obama's Court List," *The New York Times,* (26 May 2009) http://www.nytimes.com/2009/05/26/us/politics/26court.html .

As a conservative who is interested in limiting government interference with personal choices, I am disappointed that Prof. Sullivan — or other liberals who strongly support civil liberties — did not appear on the final list of candidates. Such liberals should be amongst the allies of true conservatives. <*grin*>

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[46] *Snarky* is not a word that I use, so I looked at the Merriam-Webster definition of *snarky:* "sarcastic, impertinent, or irreverent in tone or manner".

26 May: Obama picks Sotomayor

At 09:00 EDT on 26 May, Ben Feller of the Associated Press reported that President Obama will nominate Judge Sotomayor.

> President Barack Obama tapped federal appeals judge Sonia Sotomayor for the Supreme Court on Tuesday, officials said, making her the first Hispanic in history picked to wear the robes of a justice. **....** Two officials described Obama's decision on condition of anonymity because no formal announcement had been made. **....** A formal announcement was expected at midmorning.

Ben Feller, "AP sources: Obama picks Sotomayor for high court," Associated Press (09:00 EDT 26 May 2009).

As mentioned above (page 50), there is objective evidence that Judge Sotomayor's opinions are *below average* compared to her colleagues on the U.S. Courts of Appeals. And, as mentioned above (beginning at page 51), there has been substantial criticism of Judge Sotomayor, including an awful lecture published in a Berkeley law journal. In interviews with experts on constitutional law (see page 63, above), Sotomayor was "barely given a nod", compared with strong support for Professors Pamela Karlan and Kathleen Sullivan.

The only reasons that I can see to nominate Judge Sotomayor — when there are *many* better qualified candidates (e.g., Judge Richard Posner,[47] Judge Diane Wood,[48] Prof. Kathleen Sullivan,[49] etc.) — is that (1) Sotomayor is a Hispanic woman, which elevates ethnicity and gender over merit, and (2) Sotomayor has "empathy" for disadvantaged people, which is a lack of impartiality. Furthermore, *if* one is seeking diversity of experience on the Court, then selecting Sotomayor means that *all* nine of the Justices were promoted from being a judge on a U.S. Court of Appeals.

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[47] See page 20, above.

[48] See page 56, above.

[49] See page 22, above.

We can clearly see the lack of merit in the selection of Judge Sotomayor when we compare her with three other candidates on objective measures of productivity and influence:

	Richard Posner	Kathleen Sullivan	Diane Wood	Sonia Sotomayor
wrote:				
law review articles[50]	162	54	36	4
U.S.Ct.App. opinions	269	NA	194	73
opinions cited:				
outside-circuit citations	1406	NA	678	NA
outside-circuit citations to top 20 opinions	570	NA	327	231
cites in law reviews	1033	NA	513	289
invocations	176	NA	10	zero

Data on judicial performance for Posner & Wood comes from an analysis[51] of opinions in 1998-2000. Data on judicial performance for Sotomayor comes from an analysis[52] of opinions during 1999-2001. NA = data not available.

For intellectual stature and influence, Judge Posner is the obvious choice, but he is a white male. If the next Justice must be female, Judge Diane Wood or Prof. Kathleen Sullivan would be amongst the best choices. But, at least we can be glad that President Obama did not nominate a politician, who is more concerned about opinion polls than doing the right thing, and who lacks Judge Sotomayor's experience with the law.

Finally, I am interested in selecting the *best qualified* candidate, without regard to race, gender, ethnicity, and other personal attributes. But that is *not* the way the process really works. The President, as a politician, decides on a nominee based on political considerations, agreement with the President's opinions on controversial issues, and any other criteria that the President believes

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[50] I simply searched Westlaw on 1 June 2009 for the name of each author and reported the total number of articles. Some of the articles may have a coauthor. Two of Sotomayor's articles are nontechnical: (1) a tribute to John Sexton, (2) the awful 2001 lecture at Univ. California at Berkeley that was quoted at page 53, above. On the other hand, Sotomayor is the author of one Spanish-language article that appeared in a law journal in Puerto Rico, but is not included in Westlaw.

[51] Stephen J. Choi and G. Mitu Gulati, "Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance," 78 SOUTHERN CALIFORNIA LAW REVIEW 23, 86, 94, 100, 104 (Nov 2004).

[52] Analysis by Prof. Eric Posner, see page 50, above.

are important. Is it more important to have a Hispanic female (i.e., Sotomayor) than the brightest legal intellectual in the USA (i.e., Judge Richard Posner)? That's a political question.

The President does *not* owe anyone an explanation of why his nominee is the *best qualified* of the available candidates. In this instance, Obama does *not* need to explain *why* Sotomayor is a *better* choice than, for example, Prof. Sullivan or Judge Wood. I believe such a process for nominating a Justice gives the President far too much power.[53]

how Sotomayor was chosen

How did President Obama choose Judge Sotomayor? His advisors began with approximately 40 candidates. Evaluation of credentials and each candidate's paper trail seems to have resulted in four candidates. The president interviewed Solicitor General Elena Kagan and Judge Diane Wood for one hour each on 19 May. The president interviewed Sotomayor and Homeland Security Secretary — also former Arizona governor — Janet Napolitano on 21 May. Apparently, the president was very impressed with Sotomayor's performance during her interview, and by Friday, 22 May, he had tentatively decided to nominate Sotomayor. The president thought about his choice over the weekend and informed Sotomayor of his decision at approximately 20:00 or 21:00 EDT on Monday, 25 May.[54]

On 28 May, *The New York Times* reported:

> From the beginning, Mr. Obama had been focused on Judge Sotomayor, a federal appeals court judge from New York, officials said Wednesday. She had a compelling life story, Ivy League credentials and a track record on the bench. She was a Latina. She was a woman. She checked "each of the grids," as Mr. Obama's team later put it. And by the time the opportunity arrived, it became her nomination to lose.
>
> Over the course of the last four weeks, Mr. Obama nursed doubts about Judge Sotomayor and entertained alternatives, aides said. He called around, asking allies about her reputation for brusqueness. At times, he grew increasingly enamored of other candidates, particularly Judge Diane P. Wood, whom he knew from Chicago. But by the time Judge Sotomayor left the White House last Thursday after what Mr. Obama told aides was a "dense discussion" of constitutional law, he was pretty much sold. "You had to knock her off the pedestal," Mr. [Rahm] Emanuel [White House Chief of Staff] said, "and nobody did."
>
> ....

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[53] Standler, How to Select a Justice for the U.S. Supreme Court, http://www.rbs0.com/sctjustices.pdf (Oct 2005).

[54] Reid Wilson, "Sotomayor chosen over solicitor general, Napolitano," *The Hill* (13:01 EDT 26 May 2009); Mike Allen and Jonathan Martin, "How — and why — Barack Obama picked Sonia Sotomayor for Supreme Court," *Politico* (13:30 EDT 26 May 2009); Laurie Kellman, "Private Oval Office chat sold Obama on Sotomayor," Associated Press (19:40 EDT 26 May 2009), published in *The Washington Post,* http://www.washingtonpost.com/wp-dyn/content/article/2009/05/26/AR2009052602891.html .

> In the end, the White House considered nine candidates. In addition to Judges Sotomayor and Wood, officials said they were Solicitor General Elena Kagan; Homeland Security Secretary Janet Napolitano; Gov. Jennifer M. Granholm of Michigan; Chief Justice Leah Ward Sears of the Georgia Supreme Court; Justice Carlos R. Moreno of the California Supreme Court; Judge Merrick B. Garland of the United States Court of Appeals for the District of Columbia Circuit; and Judge Ruben Castillo of Federal District Court in Illinois.

Peter Baker & Adam Nagourney, "Sotomayor Pick a Product of Lessons From Past Battles," *The New York Times,* (28 May 2009) http://www.nytimes.com/2009/05/28/us/politics/28select.html .

On her initial Questionnaire submitted to the Senate Judiciary Committee on 4 June 2009, Sotomayor was asked about her contact with the White House during the nomination process:

> [Q.] Describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). List all interviews or communications you had with anyone in the Executive Office of the President, Justice Department, or outside organizations or individuals at the behest of anyone in the Executive Office of the President or Justice Department regarding this nomination, the dates of such interviews or communications, and all persons present or participating in such interviews or communications. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.
>
> [A.] I was contacted by Gregory Craig, White House Counsel, on Monday, April 27, 2009, with respect to the possibility of a future Supreme Court vacancy. Between that date and the present, I have had frequent telephone conversations with Cassandra Butts, Deputy White House Counsel, including near daily phone calls after Justice Souter on May 1, 2009 announced his intention to resign at the end of the current Supreme Court term. On May 14, 2009, I was interviewed in person at my office by Leslie Kiernan, an attorney at Zuckerman Spaeder LLP. I was interviewed by telephone on Saturday, May 16 by Gregory Craig, Cynthia Hogan, Counsel to the Vice President, Ron Klain, Chief of Staff to the Vice President, David Axelrod, Senior Advisor to the President, Daniel Pfeiffer, White House Deputy Communications Director and Cassandra Butts. I was interviewed on Thursday, May 21, 2009 by members of the Administration including Gregory Craig, Cassandra Butts, Associate Counsel to the President Susan Davies, Chief of Staff Rahm Emanuel, David Axelrod, Ronald Klain, and Cynthia Hogan. Finally, I was interviewed by the President on May 21, 2009, and by the Vice President by telephone on Sunday, May 24, 2009. I have also had numerous phone conversations with different groupings of the individuals listed above. Other individuals have at times participated in these conversations, including Trevor Morrison, Associate Counsel to the President, Alison Nathan, Associate Counsel to the President, and Diana Beinart, Tax Counsel.

Sonia Sotomayor, Questionnaire, Nr. 26(a) on page 171.
http://judiciary.senate.gov/nominations/SupremeCourt/Sotomayor/upload/Questionnaire-2009.pdf

Obama's speech

At 10:13 EDT on 26 May, President Obama spoke about why he selected Judge Sotomayor and introduced her. I've added a few comments in footnotes.

Of the many responsibilities granted to a President by our Constitution, few are more serious or more consequential than selecting a Supreme Court justice. The members of our highest court are granted life tenure, often serving long after the Presidents who appointed them. And they are charged with the vital task of applying principles put to paper more than 20 [sic] centuries ago to some of the most difficult questions of our time.

So I don't take this decision lightly. I've made it only after deep reflection and careful deliberation. While there are many qualities that I admire in judges across the spectrum of judicial philosophy, and that I seek in my own nominee, there are few that stand out that I just want to mention.

First and foremost is a rigorous intellect — a mastery of the law, an ability to hone in on the key issues and provide clear answers to complex legal questions. Second is a recognition of the limits of the judicial role, an understanding that a judge's job is to interpret, not make, law; to approach decisions without any particular ideology or agenda, but rather a commitment to impartial justice; a respect for precedent and a determination to faithfully apply the law to the facts at hand.

These two qualities are essential, I believe, for anyone who would sit on our nation's highest court. And yet, these qualities alone are insufficient. We need something more. For as Supreme Court Justice Oliver Wendell Holmes once said, "The life of the law has not been logic; it has been experience." Experience being tested by obstacles and barriers, by hardship and misfortune; experience insisting, persisting, and ultimately overcoming those barriers. It is experience that can give a person a common touch and a sense of compassion; an understanding of how the world works and how ordinary people live. And that is why it is a necessary ingredient in the kind of justice we need on the Supreme Court.

....

After completing this exhaustive process, I have decided to nominate an inspiring woman who I believe will make a great justice: Judge Sonia Sotomayor of the great state of New York. (Applause.)

Over a distinguished career that spans three decades, Judge Sotomayor has worked at almost every level of our judicial system, providing her with a depth of experience and a breadth of perspective that will be invaluable as a Supreme Court justice.

It's a measure of her qualities and her qualifications that Judge Sotomayor was nominated to the U.S. District Court by a Republican President, George H.W. Bush, and promoted to the Federal Court of Appeals by a Democrat, Bill Clinton. Walking in the door she would bring more experience on the bench, and more varied experience on the bench, than anyone currently serving on the United States Supreme Court had when they were appointed.

Judge Sotomayor is a distinguished graduate of two of America's leading universities. She's been a big-city prosecutor and a corporate litigator. She spent six years as a trial judge on the U.S. District Court, and would replace Justice Souter as the only justice with experience as a trial judge, a perspective that would enrich the judgments of the Court.

For the past 11 years she has been a judge on the Court of Appeals for the Second Circuit of New York, one of the most demanding circuits in the country. There she has handed down decisions on a range of constitutional and legal questions that are notable for their careful reasoning, earning the respect of colleagues on the bench, the admiration of many lawyers who argue cases in her court, and the adoration of her clerks who look to her as a mentor.

During her tenure on the District Court, she presided over roughly 450 cases. One case in particular involved a matter of enormous concern to many Americans, including me: the baseball strike of 1994-1995. (Laughter.) In a decision that reportedly took her just 15 minutes to announce, a swiftness much appreciated by baseball fans everywhere — (laughter) — she issued an injunction that helped end the strike. Some say that Judge Sotomayor saved baseball.[55] (Applause.)

....

But as impressive and meaningful as Judge Sotomayor's sterling credentials in the law is her own extraordinary journey. Born in the South Bronx, she was raised in a housing project not far from Yankee Stadium, making her a lifelong Yankee's fan. I hope this will not disqualify her — (laughter) — in the eyes of the New Englanders in the Senate. (Laughter.)

Sonia's parents came to New York from Puerto Rico during the second world war, her mother as part of the Women's Army Corps. And, in fact, her mother is here today and I'd like us all to acknowledge Sonia's mom. (Applause.) Sonia's mom has been a little choked up. (Laughter.) But she, Sonia's mother, began a family tradition of giving back to this country. Sonia's father was a factory worker with a 3rd-grade education who didn't speak English. But like Sonia's mother, he had a willingness to work hard, a strong sense of family, and a belief in the American Dream.

When Sonia was nine, her father passed away. And her mother worked six days a week as a nurse to provide for Sonia and her brother — who is also here today, is a doctor and a terrific success in his own right. But Sonia's mom bought the only set of encyclopedias in the neighborhood, sent her children to a Catholic school called Cardinal Spellman out of the belief that with a good education here in America all things are possible.

With the support of family, friends, and teachers, Sonia earned scholarships to Princeton, where she graduated at the top of her class, and Yale Law School, where she was an editor of the Yale Law Journal, stepping onto the path that led her here today.

Along the way she's faced down barriers, overcome the odds, lived out the American Dream that brought her parents here so long ago. And even as she has accomplished so much in her life, she has never forgotten where she began, never lost touch with the community that supported her.

What Sonia will bring to the Court, then, is not only the knowledge and experience acquired over a course of a brilliant legal career, but the wisdom accumulated from an inspiring life's journey.

It's my understanding that Judge Sotomayor's interest in the law was sparked as a young girl by reading the Nancy Drew series — (laughter) — and that when she was diagnosed with diabetes at the age of eight, she was informed that people with diabetes can't grow up to be police officers or

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[55] I find it distressing when the President ignores all of the many important issues in First and Fourth Amendment law, preserving the right to an abortion, legalizing same-gender marriage, and instead mentions a recreational activity like baseball.

> private investigators like Nancy Drew. And that's when she was told she'd have to scale back her dreams.
>
> Well, Sonia, what you've shown in your life is that it doesn't matter where you come from, what you look like, or what challenges life throws your way — no dream[56] is beyond reach in the United States of America.

President Obama, REMARKS BY THE PRESIDENT IN NOMINATING JUDGE SONIA SOTOMAYOR TO THE UNITED STATES SUPREME COURT (10:13 EDT 26 May 2009)

http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-in-Nominating-Judge-Sonia-Sotomayor-to-the-United-States-Supreme-Court/ .

While Sotomayor obviously had good grades in school, in order to be admitted to Princeton University and Yale Law School, Sotomayor — unlike Prof. Sullivan or Judge Wood — did *not* pursue an academic career. That may give Sotomayor more of a "common touch" than an intellectual like Prof. Sullivan or Judge Wood. But, as mentioned at page 56 above, Judge Wood has the proven ability to argue successfully with conservative intellectuals, which could be a very useful skill in forging a consensus with Justices Scalia and Alito and Chief Justice Roberts. I regret that President Obama did not nominate Judge Wood, who I believe was the clearly superior candidate amongst his final four candidates.

I find it strange that people, including President Obama, are mentioning what Sotomayor did in college and law school, when she was less than 25 y old. She is now 55 y old. I'd like to know what she has accomplished in constitutional law, in the thirty years since she graduated from law school. The answer seems to that she has accomplished very little in constitutional law. She worked for 5 years as a prosecutor for New York County, then she represented clients in trademark law for 8 years, and after that she was a federal judge. As mentioned below, beginning at page 93, in 17 years as a judge, Sotomayor has a weak paper trail on controversial issues. That's in contrast to a much stronger paper trail by Prof. Sullivan, who has written influential articles on constitutional law, as well as a textbook.

The New York Times remarked that President Obama had apparently abandoned the use of the word "empathy" when referring to judicial candidates, because that word did not appear in his 26 May announcement about Judge Sotomayor.[57] I looked at a copy of the President's remarks at the White House website and searched for the word "empathy" — *The Times* is correct: that word does *not* appear.

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[56] What about the dreams of a better qualified white male (e.g., Judge Posner) — or white female (e.g., Judge Wood) — candidates who were passed over to nominate a Hispanic female?

[57] Sheryl Gay Stolberg, "Buzzwords Shape the Debate Over Confirmation," *The New York Times* (29 May 2009) http://www.nytimes.com/2009/05/29/us/politics/29memo.html .

commentary: ethnic politics

A journalist for *The Washington Post* wrote in his blog:

> President Obama's choice of U.S. Appeals Court Judge Sonia Sotomayor to be the next justice on the Supreme Court is a pick heavy with historic significance but also a sign of the confidence the president has in his political standing.
>
> Sotomayor, if confirmed, would be the first Hispanic justice on the Court, and Obama and his senior aides had been getting serious pressure from the Latino community to make her the pick.
>
> "So far so good, said Gil Meneses, a Democratic consultant, told the Fix recently when asked to assess the Obama administration's effort at Latino outreach. "All eyes on immigration reform and of course, [Supreme Court] nominee. That will be a milestone for Latino community."
>
> In picking Sotomayor then, Obama has almost certainly solidified his standing among Hispanics, the nation's largest minority group and an increasingly influential part of any national candidate's electoral calculus.

Chris Cillizza, "Sotomayor For SCOTUS: What It Means," *The Washington Post* (10:20 EDT 26 May 2009) http://voices.washingtonpost.com/thefix/supreme-court/sotomayor-for-scotus-what-it-m.html .

Charles Schumer, a member of the Senate Judiciary Committee dared Republicans to oppose the confirmation of Sotomayor.

> New York Democratic Sen. Chuck Schumer (D-N.Y.) says if Republicans oppose Sonia Sotomayor, they'll do so at their "own peril." "I think the confirmation process will be more of a test of the Republican Party than it is of Judge Sotomayor," Schumer told reporters Tuesday. "It's a test for the Republican Party because she is a mainstream justice. ... Why would they oppose her? There's no really good reason."
>
> Conservatives groups will argue — and indeed already are arguing — that Sotomayor is an activist judge who can be blinded by her own liberal politics. Although Republicans say the Senate should take its time in considering Sotomayor's confirmation, Schumer said the timetable is up to Judiciary Committee Chairman Patrick Leahy (D-Vt.). "I think people will look at the yes or no vote on the whole record, not on the question of procedures on the Judiciary Committee," he said.

Manu Raju, "Chuck Schumer: Oppose Sotomayor at your peril," *Politico* (12:39 EDT 26 May 2009) http://www.politico.com/news/stories/0509/22971.html .

Note that Senator Schumer fails to mention any of Sotomayor's qualifications, and he fails to explain why Sotomayor is a *better* choice than Judge Diane Wood or Prof. Kathleen Sullivan. This battle is now all about politics, and in particular about ethnic politics. Note also that the Senate does *not* ask whether a nominee is the *best* qualified of available candidates, instead the Senate only asks whether a nominee is acceptable.

A journalist wrote about the risks of Republicans alienating Hispanics if they oppose Sotomayor, which distills the whole confirmation process to ethnic politics, and ignores merit.

> Senate Republicans will be put in a tough spot with regard to the nation's first Hispanic nominee to the Supreme Court.
>
> If they are tough in opposing President Obama's first pick for the court, Federal Appeals Court Judge Sonia Sotomayor, they risk alienating the growing Hispanic constituency that is already trending Democratic.
>
> But if they go too easy on her, the conservative base will rebel. Either way, the decision on a successor to retiring Justice David Souter has far-reaching political ramifications for a reeling GOP.
>
> Democratic strategist Guillermo Meneses said Republicans will stay in the minority for years to come if they try to bruise Sotomayor. "If Republicans unleash the attack dogs on Sotomayor, they will be looking at becoming a regional, minority party for the next couple of decades," Meneses said. "They really have written the playbook on how to antagonize Latinos, the fastest-growing political power in our nation."
>
> Former Republican Rep. Henry Bonilla (Texas), an ally of President George W. Bush's, told The Hill on Tuesday that Senate Republicans will have to be mindful of how they treat Sotomayor. "That is the political reality," Bonilla said. "In an ideal world, you would decide on a Supreme Court justice based on their qualifications. But in the real world, this is something Senate Republicans are going to have to deal with, and that's her ethnicity."

Sam Youngman, "Senate GOP risks alienating Hispanics over court pick," *The Hill* (12:30 EDT 26 May 2009)
http://thehill.com/leading-the-news/senate-gop-risks-alienating-hispanics-over-court-pick-2009-05-26.html .

Two journalists at *Politico* wrote an early analysis of how and why President Obama selected Judge Sotomayor:

> President Barack Obama called Judge Sonia Sotomayor at 9 p.m. on Memorial Day [25 May] to say she was his pick for the Supreme Court.
>
> Obama showed he was willing to pick a fight with his choice — Republicans do not consider her a "consensus" choice and had telegraphed that they considered her the most liberal of the four finalists.
>
> He played smart base politics with the historic choice of a Hispanic (a first) and a woman.
>
> And he fulfilled his pledge to pick someone with a common touch by nominating someone who was raised in a Bronx housing project, and lost her father at age 9.

Mike Allen and Jonathan Martin, "How — and why — Barack Obama picked Sonia Sotomayor for Supreme Court," *Politico* (13:30 EDT 26 May 2009)
http://www.politico.com/news/stories/0509/22970.html .

The Associated Press reported on the ethnic politics involved in the confirmation of Sotomayor:

> On the often bumpy road to confirmation to the nation's highest court, Sonia Sotomayor has a crucial dynamic smoothing her path: ethnic politics.
>
> Republicans, at sea as a party and having lost ground with Hispanic voters, the fastest-growing segment of the population, will have a hard time defeating the woman who would be the first Hispanic justice. And the inevitable partisan fights over Sotomayor's nomination

> hold heavy risks for a party striving to draw beyond its mostly white, Southern and conservative base.
>
> Sotomayor will field heavy criticism from right-wing groups and some conservative GOP senators, but strategists in both parties agree that Republicans will have to tread carefully — and won't likely be able to stop her.
>
> Republicans are "going to have to make a judgment based on what they think her record is, but how they talk about it and how they discuss it is going to be the difference between them alienating Hispanics or sounding reasonable to Hispanics," said Frank Guerra, a Texas-based GOP strategist who handled outreach for Hispanic voters for former President George W. Bush's presidential campaigns. "They're going to have to handle it very deftly."
>
> Democratic Sen. Chuck Schumer of New York was more blunt in his political assessment for Republicans: "They oppose her at their peril."

Julie Hirschfeld Davis, "Analysis: Ethnic politics boost Sotomayor chances," Associated Press (17:39 EDT 26 May 2009).

A journalist wrote in the *San Francisco Chronicle:*

> President Obama's pick of Judge Sonia Sotomayor for the Supreme Court represents a brilliant political strategy that could bring Latino voters, the nation's fastest-growing electorate, to the Democratic Party for generations to come, experts say.
>
> The pick is "pathbreaking," said Kevin Johnson, dean of the UC Davis School of Law, adding that Sotomayor's potential role as the first Latina on the nation's highest court is to Latinos like "the appointment of Thurgood Marshall was to African Americans in the 1960s."
>
> "It's the sign of inclusion and their coming of age, and I don't think it will be lost on many Latinos," said Johnson, the first Latino dean of a UC law school. "You have someone who comes from humble beginnings, so she'll bring a different perspective. The more perspectives, ... the better a decision is likely to be."

Carla Marinucci, "Demographic shift shows in Sotomayor pick," *San Francisco Chronicle* (18:03 PDT 26 May 2009)
http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/05/26/MNAR17JADB.DTL .

Two journalists wrote in *Politico* on early morning of 27 May:

> President Barack Obama's nomination of Judge Sonia Sotomayor to the Supreme Court was the latest and most powerful blow in the president's relentless courtship of Hispanic Americans, whose flight to the Democratic Party was central to his election.
>
> Hispanic leaders across the country, many of whom attended the White House announcement, praised the appointment swiftly and in the strongest terms, and Republican leaders signaled an awareness of the political sensitivities by avoiding any suggestion of disrespect for the first Latina nominee to the nation's highest court.
>
> "The picture of an African-American president standing next to a Hispanic woman as his first choice for the Supreme Court — that picture is the worst nightmare for the Republican Party," said Fernand Amandi, a Florida pollster whose firm, Bendixen Associates, surveyed Hispanic voters for Obama's presidential campaign.
>
> "The numbers, the symbolism and now the acts of the Democratic Party and this Democratic president underline and underscore the very bleak outlook for Republicans, where the…fastest growing demographics in the county are leaving them," he said, noting that surveys earlier this decade suggested broad hunger among Hispanic voters for a court pick.

> But the same reason that makes the nomination so politically powerful — the new president's strengthened connection with Hispanics and women — also makes it risky in some parts of the country and for some Democrats facing tough elections in 2010. The unmistakable element of raw identity politics is one that Obama explicitly and implicitly disavowed during his campaign for president, and it runs counter to the approach the party has employed in building its House and Senate majorities.
>
> Where Obama during his campaign described "identity politics" as "an enormous distraction," Sotomayor has at times been blunt in her belief in the profound importance of racial identity.
>
> Sotomayor told a California audience in 2001 that "a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion" than a "white male" judge.
>
> ....
>
> Democrats and Hispanic media outlets are sure to leap on and amplify any suggestion of disrespect from Republican politicians or — more likely — their talk radio allies, and to deepen the alliance of the nation's fastest growing minority with its governing party.
>
> "Hispanics are going to be watching this especially closely," said Janet Murguía, the president and CEO of the National Council of La Raza. "Anyone who would position themselves into opposition to Sonia Sotomayor would have a difficult time in making that case to the Latino community."

Ben Smith & Josh Kraushaar, "The politics of Sonia Sotomayor," *Politico* (04:35 EDT 27 May 2009) http://www.politico.com/news/stories/0509/22980.html .

A journalist at *Politico* suggested that if the Republicans strongly opposed Sotomayor, they would not only be called racists, but also lose influence amongst Hispanics, which are an important bloc of votes.

> Top Senate Republican strategists tell POLITICO that, barring unknown facts about Judge Sonia Sotomayor, the GOP plans no scorched-earth opposition to her confirmation as a Supreme Court justice. More than 24 hours after the White House unveiling, no senator has come out in opposition to Sotomayor's confirmation.
>
> ....
>
> Sen. Jeff Sessions of Alabama, the top Republican on the Judiciary Committee, sounded conciliatory during a round of television interviews on Wednesday. "We need to all have a good hearing, take our time and do it right, and then the senators cast their vote up or down based on whether or not they think this is the kind of judge that should be on the court," Sessions said on CNN's "American Morning."
>
> GOP officials say they realize the party needs to improve its standing among Hispanic voters in order to have any hope of winning a national election, and they admit that trashing the first Latina nominee to the court could cement stereotypes or further alienate minorities.
>
> This reality limits Republicans' options dramatically and virtually guarantees they would be called racists if they said anything that smacks of being out of bounds about such a qualified nominee. So if the president is picking a fight, it looks increasingly like one he has already won.

> Republican officials said they still plan an aggressive investigation of her paper trail, since Supreme Court fights have often taken unpredictable turns.

Mike Allen, "Sonia Sotomayor 'fight' could fizzle," *Politico* (14:36 EDT 28 May 2009) http://www.politico.com/news/stories/0509/23022.html .

The political considerations for nominating a Hispanic to the U.S. Supreme Court were made clear by a journalist at the Cable News Network (CNN):

> There are more Hispanics in the U.S. than Spaniards in Spain. That fact underscores some smart politics by President Barack Obama this week, who nominated a Hispanic judge to the U.S. Supreme Court.
>
> It's a historic first for Americans of Spanish-speaking descent, who tend to be poorer, less educated and less represented in the top tiers of government than most other U.S. citizens.
>
> It will be several months before appeals court judge Sonia Sotomayor can take her place on the high court and several years before we know her legal impact there. But you can see the political impact right away.
>
> Hispanics are the largest and fastest-growing ethnic group in the United States: approximately 45 million people, who make up 15 percent of the population. **....**
>
> Traditionally, Hispanics tend to support the Democratic Party but a shift in their preferences can swing elections.
>
> George Bush, who had been governor of the heavily Hispanic state of Texas, courted their support nationwide and got nearly half their votes when he won the presidency in 2004. Barack Obama worked hard to win them back and was elected last year on the strength of record Hispanic turnout.
>
> Now he's forcing the Republicans into a difficult decision about whether to support Sotomayor for the Supreme Court.
>
> **....**
>
> And, of course, Republicans want to win elections. They know that alienating Hispanics won't help. If Sotomayor gets the job, Obama gets the credit and if she doesn't, Republicans get the blame. It's smart politics either way.

Jonathan Mann, "Obama's historic, Hispanic choice," CNN (29 May 2009) http://www.cnn.com/2009/POLITICS/05/29/pm.sotomayor/ .

On Sunday, 31 May, *The New York Times* published an article that began:

> In the heat of his primary battle last year, Barack Obama bemoaned "identity politics" in America, calling it "an enormous distraction" from the real issues of the day. Many thought his inauguration as the first African-American president this year was supposed to usher in a new post-racial age.
>
> But four months later, identity politics is back with a vengeance. A president who these days refers to his background obliquely when he does at all chose a Supreme Court candidate who openly embraces hers. Critics took issue with her past statements and called her a "reverse racist." And the capital once again has polarized along familiar lines.
>
> The selection of Judge Sonia Sotomayor brought these issues to the fore again for several reasons. Mr. Obama's selection process was geared from the beginning toward finding a female or minority candidate, or both. Only one of the nine vetted candidates was an Anglo male, and all four finalists he interviewed were women. One of Judge Sotomayor's most

> prominent cases involved an affirmative-action claim. And her comment on her Latina background shaping her jurisprudence provided fodder for opponents.

Peter Baker, "Court Choice Pushes Issue of 'Identity' Back to Forefront," *The New York Times* (31 May 2009) http://www.nytimes.com/2009/05/31/us/politics/31identity.html .

A week after President Obama nominated Judge Sotomayor, journalists were still talking about ethnic politics:

> President Obama's decision to tap Judge Sonia Sotomayor as his nominee to serve on the Supreme Court could bring up complicated and controversial issues regarding race, gender and sexual orientation — all topics that could turn her confirmation hearings into a nasty game of name-calling.
>
> Affirmative action and racial preference cases encompassing everything from the Voting Rights Act and school integration — issues that are likely to head to the Supreme Court soon — mean Republican lawmakers are likely to put the heat on Sotomayor, thanks in some cases to her own past comments.
>
> ....
>
> But while most Republicans reject the racist label, her nomination — she would be the first Hispanic and only the third woman to serve on the court — cannot help but highlight issues of race that are likely to be decided in coming terms.

Reid Wilson, "Sotomayor nod likely to bring back identity politics," *The Hill* (07:49 EDT 2 June 2009)

About two weeks after Sotomayor was nominated, *The Wall Street Journal* published an opinion piece:

> President Obama's nomination of Sonia Sotomayor for the Supreme Court points to a dilemma that will likely plague his presidency: How does a "post-racialist" president play identity politics?
>
> What is most notable about the Sotomayor nomination is its almost perfect predictability. Somehow we all simply know — like it or not — that Hispanics are now overdue for the gravitas of high office. And our new post-racialist president is especially attuned to this chance to have a "first" under his belt, not to mention the chance to further secure the Hispanic vote. And yet it was precisely the American longing for post-racialism — relief from this sort of racial calculating — that lifted Mr. Obama into office.
>
> The Sotomayor nomination commits the cardinal sin of identity politics: It seeks to elevate people more for the political currency of their gender and ethnicity than for their individual merit. (Here, too, is the ugly faithlessness in minority merit that always underlies such maneuverings.) Mr. Obama is promising one thing and practicing another, using his interracial background to suggest an America delivered from racial corruption even as he practices a crude form of racial patronage. From America's first black president, and a man promising the "new," we get a Supreme Court nomination that is both unoriginal and hackneyed.
>
> This contradiction has always been at the heart of the Obama story. On the one hand there was the 2004 Democratic Convention speech proclaiming "only one America." And on the other hand there was the race-baiting of Rev. Jeremiah Wright. Does this most powerful man on earth know himself well enough to resolve this contradiction and point the way to a genuinely post-racial America?

> The Sotomayor nomination suggests not. Throughout her career Judge Sotomayor has demonstrated a Hispanic chauvinism so extreme that it sometimes crosses into outright claims of racial supremacy, as in 2001 when she said in a lecture at the University of California, Berkeley, "a wise Latina woman . . . would more often than not reach a better conclusion [as a judge] than a white male."
>
> The White House acknowledges that this now famous statement — both racist and dim witted — was turned up in the vetting process. So we can only assume that the president was aware of it, as well as Judge Sotomayor's career-long claim that ethnicity and gender are virtual determinisms in judging: We need diversity because, as she said in her Berkeley lecture, "inherent physiological or cultural differences . . . make a difference in our judging." The nine white male justices who decided the *Brown* school-desegregation case in 1954 might have felt otherwise, as would a president seeking to lead us toward a new, post-racial society.

Shelby Steele, "Sotomayor and the Politics of Race," *The Wall Street Journal,* p. A14 (8 June 2009) http://online.wsj.com/article/SB124442662679393077.html .

Commentators seems to agree that the choice of a Hispanic female was a *political* decision by President Obama, and Judge Sotomayor was the best Hispanic female that the President could find.

I find it disturbing that any white person who criticizes Sotomayor will be viewed as a racist. Being criticized is a way of life for people who are productive or in positions of authority, and especially for those who take a stand on a controversial topic. It will be difficult to integrate minorities into the majority (i.e., white) culture if the minorities take offense every time a white person criticizes a minority person for their work or their opinion.

White House Press Briefings: 26-29 May

On 26 May, about five hours after the nomination of Sotomayor was officially announced, the White House Press Briefing contained this little snippet:

> **Q.** Is she Catholic and did the President ask her specifically about abortion or right to privacy?
>
> MR. GIBBS: Well, there was no litmus test and the President did not ask that specifically. I believe she was raised Catholic.

Robert Gibbs, White House Press Briefing (begin 15:07 EDT 26 May 2009) http://www.whitehouse.gov/the_press_office/Briefing-by-White-House-Press-Secretary-Robert-Gibbs-5-26-09/ .

On 27 May, the day after the nomination, the White House Press Briefing contained the following two little snippets:

> **Q.** Robert, does the President know for a fact that Judge Sotomayor supports the ruling in *Roe v. Wade*?
>
> MR. GIBBS: As I said yesterday, Mark, the President doesn't have a litmus test and that question was not one that he posed to her.
>
> **Q.** Didn't he make that a campaign promise, that he would appoint justices who support —

MR. GIBBS: I'd have to look — I don't know whether — I don't remember exactly what was said on that topic, but I can look that up.

....

Q. Robert, two questions related to Judge Sotomayor. First, there's just been some commentary that if she's confirmed she would be the sixth Catholic to serve on the Supreme Court. I'm just wondering, did issues of faith come up at all in the President's conversations with her?

MR. GIBBS: I will check. The President had those conversations just with her, and staff wasn't there.

Q. Was her religious background given any consideration at all?

MR. GIBBS: Not that I know of.

Robert Gibbs, White House Press Briefing (begun 13:24 EDT 27 May 2009)
http://www.whitehouse.gov/the_press_office/Briefing-by-White-House-Press-Secretary-Robert-Gibbs-5/27/2009/
.

On Thursday, 28 May 2009, two days after her nomination, there was another Press Briefing at the White House. The President's Press Secretary *repeatedly* asserted that Sotomayor supported the right to an abortion in *Roe v. Wade,* without offering any specific evidence for his belief. Here is all of what was said about Judge Sotomayor:

Q. [by Ms. Loven] I wanted to ask you about the concern among several — many people in the abortion rights community about Judge Sotomayor, and I'm wondering if you can respond to that and talk about — I know you said there was no litmus test and no demand of an answer when the President interviewed her, but did he talk with her at all about her views on the constitutional right to privacy, sort of talk around the issue at all with her?

MR. GIBBS: Well, obviously — and we talked about this throughout the process — the President obviously is familiar with the Constitution and the teaching of constitutional law. In their discussions they talked about the theory of constitutional interpretation, generally including her views on unenumerated rights and the Constitution and the theory of settled law.

He left very comfortable with her interpretation of the Constitution being similar to that of his, though the bulk of the conversation was about her approach to judging.

Q Can you put that into non-lawyer language since I'm not a lawyer? Does that mean that he feels comfortable —

MR. GIBBS: You should have seen the language that I had earlier. (Laughter.)

Q. Let's progress a little bit further. Does it —

MR. GIBBS: Stare decisis was in the original —

Q I mean, would unenumerated rights be sort of code for the right to privacy, since it's not enumerated in the Constitution?

MR. GIBBS: Well, again, I think there was, as I said a minute ago, a general discussion about the constitutional interpretation, about how one viewed the document, and the President left very comfortable with the fact that — she says a similar interpretation that he does.

Q Does that mean he feels comfortable that she believes in a constitutional right to privacy?

MR. GIBBS: I think he feels comfortable with — comfortable that she shares his philosophy generally on the Constitution.

Q Does he think she should be asked about these issues at her hearing, whether she — she should be asked about how she would rule?

MR. GIBBS: Well, I think that the President was careful not to, as previous Presidents have been careful not to ask and I think others have been at hearings careful not to, ask specifically how one might rule when a case comes — in a case that could come before the Supreme Court. So, again, I think the President felt comfortable with — generally with her view and with, again, with her approach to judging.

....

Q. A couple questions, one following up on Jennifer's question. During a Democratic primary debate, November 15th, 2007, then-Senator Obama said, "I would not appoint somebody who doesn't believe in the right to privacy." And yet you're telling us right now that he has a general comfort with her view on the Constitution, but not necessarily with that quote — not necessarily with the right to privacy?

MR. GIBBS: Well, again, let me be specific that he was not — he did not specifically ask, as we've stated for the past several days, but as I just said I think he feels — I know he feels comfortable generally with her interpretation of the Constitution being similar to that of his.

Q Well, does that mean that when he said "I would not appoint somebody who doesn't believe in the right to privacy," he didn't mean it?

MR. GIBBS: I think — again, Jake, I think he feels comfortable with where she is.

....

Q. I just want to follow up again on the abortion issue and privacy. Mark Knoller yesterday asked you a question about what the President may have said on the campaign trail. You said you would look that up.

MR. GIBBS: I think Jake helpfully did that for us all today.

Q Right, I mean, this one was a little different than the one that Jake presented here, but it was talking about the campaign promise — the President made it a campaign promise about this issue. And the President said at this event in Florida that he "will stand up for choice." He says, "I'm a President who understands — who understands that five men on the Supreme Court don't know better than women and their doctors and their pastors." He goes on to say

that, "that's why I'm committed to appointing judges who understand how law operates in our daily lives."

So if the President is talking about it in these terms on the campaign trail, why wasn't it important for him to ask her about where she stood on abortion?

MR. GIBBS: Well, I think the President believed it was exceedingly important to get her views on how she interprets the living document of the Constitution of the United States of America.

Q But on that one question, why wouldn't he bring that question up? I mean, you've said for the last couple of days that he didn't ask the question.

MR. GIBBS: Right, because I think he feels comfortable in asking her to describe the way she interprets, to describe her views on that. He felt comfortable that they shared a philosophy on that interpretation.

....

Q. — on the same issue, on the Roe v. Wade privacy issue, you mentioned stare decisis. That actually — and I understand it's a legal term and maybe it would take some explanation — but if they talked about stare decisis in the context of unenumerated rights and perhaps even the right to privacy, that might have given us a lot more information about what went on in this meeting. So could you go back to that legal explanation?

MR. GIBBS: Let me tell you, Chip, I'm not going to get deeply into all the conversations that the President has had in private with prospective nominees.

Q But you said the President has been careful, and you're right, Presidents have been careful and they've been careful on the Hill, too, not to ask — well, they ask, but they don't get answers — on cases that come before the Court. But asking about a right to privacy and whether you agree on the right to privacy in the Constitution is not asking about a particular case that might come before the Court. I don't understand why you can't simply confirm that he did what he said he was going to do during the campaign, which is appoint somebody who believes in a right to privacy.

MR. GIBBS: Well, Chip, I feel comfortable with — as the President feels comfortable with her philosophy, I feel comfortable with my answer in having answered your question.

Q Would it be possible to get that stare decisis quote that you were talking about earlier?

MR. GIBBS: I don't believe there was a stenographer in the meeting with —

Q Well, would you go back to them and — I mean, if they were willing — that sounds like it went further than what you're talking about — than what you're giving us now.

MR. GIBBS: In what way?

Q You were talking about stare decisis in the context of unenumerated rights; that's like big code for not overturning *Roe v. Wade* in the eyes of many.[58]

MR. GIBBS: Well, I would refer you to what I said.

....

Q. Just to pick up on what Chip was saying, what I think everyone is getting at is, the President, you're saying, is comfortable that she believes in a right to privacy and shares that view that he holds, and yet —

MR. GIBBS: What I said is comfortable with her interpretation and the way she interprets the Constitution.

Q Right. But I still think what people are wondering is why — it strikes — it comes across as a little bit of artifice, or people talking in code or talking around this issue. And yet you're saying he's comfortable that she shares his views. I guess, what would be wrong with him asking, hey, do you believe the Constitution encompasses the right to privacy?

MR. GIBBS: Again, I think, as Chip noted that — my statement in saying that many past Presidents have not done that. I appreciate the opportunity to discuss some set of precedent in order to discuss the Supreme Court, but I'm simply telling you what the President did in those meetings.

Q There's a difference between asking somebody how they would rule on a case that might come before the Court and how one views whether there's a right to privacy — that's a matter of judicial philosophy —

MR. GIBBS: And the President is comfortable with her judicial philosophy.

Q How comfortable with it if he doesn't want to ask the point-blank question that would elicit her views?

MR. GIBBS: Well, I think he feels comfortable in being able to talk to her about her judicial philosophy, the way she interprets the Constitution. I'm not burdened by the knowledge of being a constitutional law professor, but obviously they're having discussions and I feel comfortable relaying to you that he feels comfortable.

Q Can I try it a different way? Is the President —

MR. GIBBS: Sure. (Laughter.)

Q Is the President at all concerned that she could be part of a 5-4 majority overturning *Roe v. Wade?*

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[58] The commonly held view that stare decisis will prevent the overruling of *Roe v. Wade* is wrong. See, e.g., Standler, Overruled: Stare Decisis in the U.S. Supreme Court, http://www.rbs2.com/overrule.pdf , (Nov 2005).

MR. GIBBS: I haven't talked to him about that.

Q Could you?

MR. GIBBS: He's in California or somewhere over the continental United States.[59] [pause] Yes, sir. [asking for next question]

Q One more time, and then I have to ask you a Germany question. (Laughter.) You mentioned settled law.

MR. GIBBS: Yes. I'm going to get into settled answers in a minute.

Q Was the issue of settled law in the context of *Roe versus Wade?*

MR. GIBBS: Jonathan, I was — not only was the stenographer not in this, I was not in that interview either. So I have —

Q But you said back to back, they talked about unenumerated rights and the concept of settled law, which everyone understands to mean *Roe v. Wade,* the super precedent, and unenumerated rights referring to the right to privacy. So I think that's why everyone is wondering if there was some talking around this issue.

MR. GIBBS: I'm simply conveying to you what was discussed. The President feels comfortable with her interpretations of the Constitution.

Q Is there any chance you could go back to those lawyers and recreate what they were telling you about stare decisis and unenumerated rights?

MR. GIBBS: I will endeavor to see if they're likely to give me anything more, and I'll predict that the chances of that are somewhere between slim and none.

Q Do you doubt that she'll be asked on the Hill?

MR. GIBBS: Do I doubt she'll be — I don't know what she'll be asked on the Hill.[60] Obviously she — we believe that when the Senate gets back next week — I don't have specific information yet on her appointments, but I assume she'll start those visits sometime relatively early next week.

....

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[59] Mr. Gibbs' made a frivolous reply to a legitimate request. Clearly, Mr. Gibbs was frustrated by the repeated questions on the issue of Sotomayor's support (or not) of a legal right to abortion and the refusal of journalists to accept the proffered answer, which was an *in*adequate answer.

[60] Mr. Gibbs' answer is ridiculous — senators will ask her about her views on the legal right to an abortion, because senators and their constituents *really care* about such views.

Q. Robert, I just want to make sure I'm not missing what might be an obvious step in this process, the conversation with Judge Sotomayor. I understand the President didn't ask her opinion or thoughts on *Roe v. Wade,* or the underlying abortion rights embedded in the privacy rights of the Constitution. Did she volunteer an opinion or an evaluation of her thoughts on that to the President without him asking?

MR. GIBBS: Not that I'm aware of, no.

Q So what would be the source then of the comfort on this question? If he didn't ask and she didn't volunteer, what's the source of the comfort?

MR. GIBBS: The general — as I said earlier, the general way in which she interprets the Constitution.

Q So it has nothing to do with a conversation in particular about privacy rights?

MR. GIBBS: I don't know how many different times I can say this —

Q No, I just asked if she volunteered; you said no. You said he hasn't asked. So apparently, taking your words, there was not a specific conversation about privacy rights. And I'm just asking —

MR. GIBBS: I said that three days ago.

Q — what's then the source of the comfort level?

MR. GIBBS: And I repeated for about the eighth time in a very short of period of time, their general conversation about their philosophy, their approach to the Constitution, and her approach to judging.

Robert Gibbs, White House Press Briefing, (beginning 13:54 EDT, 28 May 2009)
http://www.whitehouse.gov/the_press_office/Briefing-by-White-House-Press-Secretary-Robert-Gibbs-5-28-09/ .

My first comment is that Mr. Gibbs should have explained that the judicial requirement of impartiality, as interpreted in the Code of Conduct for judges (see page 8, above), prevents a judge — or a candidate for the judiciary — from answering questions about issues that are likely to come before them in court. That means the only way to know a nominee's opinion of a controversial issue is to read a law review article that they wrote about that issue, and Sotomayor wrote nothing on that issue.

My other comment is that it is ridiculous for Mr. Gibbs to assert that either (1) some general discussion of "judicial philosophy" or "constitutional interpretation" during a mere one-hour interview or (2) the doctrine of settled law/stare decisis[61] is an adequate basis for the White House's belief that Sotomayor will vote to uphold the legal right to an abortion. In my opinion, people who support a woman's legal right to an abortion should be *very worried* about the

[61] For reasons why stare decisis will *not* prevent the overruling of *Roe v. Wade,* see my essay: Overruled: Stare Decisis in the U.S. Supreme Court, http://www.rbs2.com/overrule.pdf , (Nov 2005).

nomination of Sotomayor. It was fraudulent for Obama to campaign on a promise to appoint Justices who will continue the legal right to abortion, and then nominate a Justice who has *un*known views on abortion. On the other hand, women seeking an abortion would be in a worse position if the anti-abortion Republican candidate had won the 2008 presidential election.

The same issue appeared again in the Friday, 29 May, White House press briefing:

> **Q.** [by Mr. Feller] Thanks, Robert. Two topics — first, following up on the Supreme Court — actually, a follow-up from yesterday's questioning here on the right to privacy. Can you say for the record whether the White House has reached out to pro-choice advocacy groups to reassure them that Judge Sotomayor does support a right to privacy?
>
> MR. GIBBS: We've traversed this ground on any number of occasions yesterday. I assume that people at the White House are in touch with lots of groups involved in the nomination. But again, as I said here yesterday, she and the President talked about her theory on constitutional interpretation, and the conversation left the President comfortable that they shared a view on how she would apply the Constitution.
>
> So I don't think that type of outreach is needed. The President, again, feels very comfortable with the breadth of experience, the approach to judging, that this nominee brings.

Robert Gibbs, White House Press Briefing, (beginning 14:22 EDT 29 May 2009)
http://www.whitehouse.gov/the_press_office/Briefing-by-White-House-Press-Secretary-Robert-Gibbs-5-29-09/ .

no record on controversial issues

Two journalists at *Politico* wrote an early analysis:

> Democrats contend that Sotomayor does not have a long paper trail on hot-button social issues, especially abortion. In one case, the administration will argue she came down on the side of judicial restraint.
>
> Sotomayor's record on the divisive issue of abortion is murky. In 17 years on the federal bench, she has issued no opinions dealing directly with abortion rights. And in two cases dealing tangentially with the issue — involving anti-abortion protesters and the government right to limit abortion-related speech by foreign recipients of U.S. aid — the appeals court judge's ruling favored abortion opponents. Still, anti-abortion forces are convinced that Obama would not nominate Sotomayor without being confident that she supports abortion rights.

Mike Allen and Jonathan Martin, "How — and why — Barack Obama picked Sonia Sotomayor for Supreme Court," *Politico* (13:30 EDT 26 May 2009)
http://www.politico.com/news/stories/0509/22970.html .

Another pair of journalists at *Politico* report frustration at the lack of indication of Sotomayor's values in her judicial opinions.

> It isn't easy to get a fix on Sonia Sotomayor. She's ruled on cases involving three of the hottest hot-button issues during her 17 years as a judge — abortion, gun control and affirmative action — but resolved the cases in ways that complicate critics' efforts to peg her as a liberal.

> On affirmative action, she and two other judges threw out a case by white firefighters seeking promotions they earned by passing a promotion test — because no black firefighters passed the test.
>
> On gun control, one Sotomayor ruling suggests she believes that state governments have broad rights to limit the possession of weapons.
>
> In both of those cases, Sotomayor joined in short, unsigned rulings that don't offer much of a toehold for conservatives who oppose her.
>
> But in two cases touching on abortion, Sotomayor issued rulings that came down on the side of the anti-abortion activists. And in those cases, the judge was far more voluble, offering a total of 56 pages in signed opinions detailing her reasoning.
>
> The Rev. Barry Lynn, executive director of Americans United for Separation of Church and State, says he's been frustrated in trying to find clear-cut examples of Sotomayor's opinions on the church and state issues he cares about. And he thinks Sotomayor's elusiveness is deliberate. "You have to think about your public record and the public trail if you're going to move up in the judiciary," he said. "And I think she's savvy enough to have done so. It is a self-preservation pattern." He also said: "In this contentious era of every nomination becoming a political campaign I can understand why someone would choose to do that."
>
> It may have been exactly Sotomayor's elusiveness that appealed to President Barack Obama — a man who has himself been described as ideologically elusive throughout his career. Obama knows that opponents can't stop his nominee if they can't pin her down.

Josh Gerstein & Eamon Javers, "Key cases reveal few Sonia Sotomayor clues," *Politico* (19:40 EDT 26 May 2009) http://www.politico.com/news/stories/0509/22982.html .

I think Rev. Lynn may be a bit cynical in believing that Sotomayor was deliberately vague in her judicial opinions on controversial issues. A judicial opinion is *not* a law review article or a provocative essay. The *only* reason for a judicial opinion is to decide the case and explain the reason(s) for the decision. It is considered good form for a judge to decide a case on narrow grounds and avoid constitutional issues whenever possible. On the other hand, I am sure that Obama loves the fact that Sotomayor has a weak paper trail on controversial issues.

On the evening of 27 May, I looked at the website of Americans United for Separation of Church and State and found:

> The Senate Judiciary Committee should thoroughly question Supreme Court nominee Sonia Sotomayor to determine her views on church-state separation, says Americans United for Separation of Church and State. **....** It appears that Sotomayor has not written widely on church-state issues, meaning the committee has an obligation to ascertain her views. **....** Research by Americans United has turned up only a few cases by Sotomayor that touch on the separation of church and state.

Americans United for Separation of Church and State (26 May 2009) http://www.au.org/media/press-releases/archives/2009/05/supreme-court-nominee-should.html .

The politicians on the Judiciary Committee can ask Sotomayor's views on issues that are likely to come before the Court, but — given judicial ethics and the need to preserve impartiality — Sotomayor should *not* answer specific questions about her opinions on controversial issues. This puts us in the strange position that we can not know the nominee's current views on controversial

issues, which is the most important consideration for most people who consider her nomination and confirmation.

The National Abortion and Reproductive Rights Action League (NARAL) released a statement soon after Judge Sotomayor was nominated:

> **....** We look forward to learning more about Judge Sotomayor's views on the right to privacy and the landmark *Roe v. Wade* decision as the Senate's hearing process moves forward.

Statement of Nancy Keenan, President of NARAL Pro-Choice America, on the Nomination of Judge Sonia Sotomayor to the U.S. Supreme Court (26 May 2009) http://www.prochoiceamerica.org/news/press-releases/2009/pr05262009_sotomayor.html .

In the afternoon of 27 May, the day after her nomination was announced, some liberal groups were already expressing their unease — if not actual distress — at the nomination of Sotomayor.

> Some liberal legal groups are raising questions about Supreme Court nominee Sonia Sotomayor, citing her relatively moderate judicial record and her skimpy paper trail on crucial issues like abortion, gay marriage and the death penalty.
>
> "She is a mixed bag. I would not call her a left liberal," Marjorie Cohn, president of the progressive National Lawyers Guild, said in an interview on Air America.
>
> "I'm thrilled that there will be the first Latina on the Supreme Court and that there will be another woman. But I really would have liked to have seen a real progressive counterweight to radical rightists on the court."
>
> **....**
>
> The concern from some liberal groups, however, is that despite her 16 years as a circuit and federal court judge, Sotomayor has not shown her hand on abortion, the death penalty, national security and gay marriage. And she's not viewed as a major thinker in areas like constitutional rights, executive privilege, civil rights or human rights.
>
> "The fact that she hasn't gone off on these sorts of questions I think shows that honestly she's not a dyed in the wool liberal," said Thomas Goldstein, a leading appellate attorney and founder of scotusblog.com. "There are places where Sotomayor will be more conservative than Souter."
>
> By making a more moderate pick, President Barack Obama set himself up for an easier confirmation battle but missed out on an opportunity to more radically restructure the court, argues Cohn.
>
> "I am very supportive of her nomination, and she should be defended, and she should be confirmed, but she is not going to be another Thurgood Marshall," she said. "She will not leave an indelible mark on the court, ultimately, the way Earl Warren did or Oliver Wendell Holmes."

Lisa Lerer, " 'Not a dyed in the wool liberal'," *Politico* (16:20 EDT 27 May 2009) http://www.politico.com/news/stories/0509/23020.html .

On 28 May, Nina Totenberg of National Public Radio wrote about the lack of knowledge about Judge Sotomayor's view of abortion.

> Although the culture wars began and still thrive on the abortion question, President Obama has managed to nominate a judge to the U.S. Supreme Court who has no record on the issue. Sonia Sotomayor has been a federal judge for 17 years, but never in that time has she ruled directly on whether there is a constitutional right to an abortion. The desire for more information on Sotomayor's stance is something abortion-rights groups and abortion opponents have in common.
>
> ....
>
> But if anything, nominees have become more reticent, not less, about answering such questions at their confirmation hearings. For people who want to figure out where Sotomayor is on abortion and privacy rights, there isn't much to work with.
>
> She has made only tangential rulings on abortion — decisions that, if anything, sided with the anti-abortion position, but cast in terms of following precedent. In one case, she upheld the Bush administration's ban on aid to international organizations that either promote or provide abortions.

Nina Totenberg, "Few Clues To Sotomayor's Position On Abortion," NPR (28 May 2009) http://www.npr.org/templates/story/story.php?storyId=104679046 .

It appears that President Obama is caught between two opposites: (1) liberals complaining that Sotomayor has not taken strong liberal positions on controversial issues and (2) conservatives screaming that Sotomayor is a "judicial activist" who will rule on "empathy". Obviously, Obama could *not* please everyone, and by selecting someone moderate, he has angered *both* extremes of the political spectrum. Nonetheless, I say again that I wish Obama had nominated Judge Diane Wood or Prof. Kathleen Sullivan, who we could depend on to argue for freedoms from governmental intrusions in our personal lives.

cases
abortion

On 29 May 2009, I did a few searches of the Westlaw database for judicial opinions written by Judge Sotomayor. On abortion, there are two opinions that are troubling for supporters of legal abortion:

1. *Center for Reproductive Law and Policy v. Bush,* 304 F.3d 183, 198 (2dCir. 2002) ("The Supreme Court has made clear that the government is free to favor the anti-abortion position over the pro-choice position, and can do so with public funds.");

2. *Amnesty America v. Town of West Hartford,* 361 F.3d 113 (2dCir. 2004) (Allegations of excessive force by police in arresting anti-abortion demonstrators at an abortion clinic.).

Neither of these cases directly address the legality of abortion, but Judge Sotomayor seems to have agreed with the party who was anti-abortion, which *might* indicate that she is opposed to abortion. In the case against the Bush Administration, the Judge was constrained by precedent from the Supreme Court.

Ricci v. DeStefano

Judge Sotomayor was involved in one highly controversial affirmative action case that is currently — as I write this in 29-31 May 2009 — being reviewed by the U.S. Supreme Court:

- *Ricci v. DeStefano,* 554 F.Supp.2d 142 (D.Conn. 28 Sep 2006),
  aff'd, 264 Fed.Appx. 106 (2dCir. 15 Feb 2008) (summary order),
  aff'd per curiam, 530 F.3d 87 (2dCir. 9 June 2008) (withdrawing previous summary order),
  530 F.3d 88 (2dCir. 12 June 2008) (denying *en banc* rehearing),
  cert. granted, 129 S.Ct. 894 (9 Jan 2009),
  rev'd, 557 U.S. ___ (29 June 2009).

For readers with inquiring minds, on 30 May I posted at http://www.rbs0.com/ricci.pdf a complete copy of the trial court and appellate court opinions in *Ricci.* On 29 June, I added the slip opinion of the U.S. Supreme Court to my document at my website.

Sotomayor was a member of the three-judge panel that issued the terse, one-paragraph summary order, with citations to no cases and with no reasons. Sotomayor's role in drafting the summary order is *un*known. Biographies of these three judges — Rosemary Pooler, Robert Sack, Sonia Sotomayor — show that each of them was appointed to the Second Circuit in 1998, so no judge was significantly more senior than the other two.

The terseness and lack of reasons in this summary order provoked Judge Cabranes, a colleague on the Second Circuit, to make an unusual motion for an en banc rehearing of the appeal. An en banc rehearing would take the case out of hands of the three-judge panel (including Sotomayor) and have the appeal decided by all 13 judges on the Second Circuit. The motion for an en banc rehearing failed by one vote.

After that vote, the three-judge panel (including Sotomayor) made a few very minor changes in their summary order, which then became a per curiam opinion, published in West's FEDERAL reporter. Sotomayor's role in modifying the summary order to become a per curiam opinion is *un*known. A summary order has no precedential effect, while a per curiam opinion is precedent. This per curiam opinion made the reasons in the District Court's opinion the law of the Second Circuit,[62] without any legal analysis by the Second Circuit.

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[62] 530 F.3d at 96 (Cabranes, J., dissenting from en banc rehearing).

West Publishing has an editorial staff that writes terse headnotes that identify the holdings in each published judicial opinion. But the U.S. Court of Appeals opinion in *Ricci* has zero headnotes, which means that the editors at West could not identify any holdings in that per curiam opinion. This is a criticism of the three-judge panel, *not* the editors at West.

Writing in dissent to the decision not to rehear the case en banc, Judge José Cabranes wrote:

> This *per curiam* opinion adopted *in toto* the reasoning of the District Court, without further elaboration or substantive comment, and thereby converted a lengthy, ... district court opinion, grappling with significant constitutional and statutory claims of first impression, into the law of this Circuit. It did so, moreover, in an opinion that lacks a clear statement of either the claims raised by the plaintiffs or the issues on appeal. Indeed, the opinion contains no reference whatsoever to the constitutional claims at the core of this case, and a casual reader of the opinion could be excused for wondering whether a learning disability [Ricci was dyslexic] played at least as much a role in this case as the alleged racial discrimination. This perfunctory disposition rests uneasily with the weighty issues presented by this appeal.

Ricci, 530 F.3d at 96 (Cabranes, J., dissenting).

It is exceedingly rare that a judge will call his colleagues' work a "perfunctory disposition", but he is correct to criticize their terse, amateurish work. Judge Cabranes concluded:

> It is arguable that when an appeal raising novel questions of constitutional and statutory law is resolved by an opinion that tersely adopts the reasoning of a lower court — and does so without further legal analysis or even a full statement of the questions raised on appeal — those questions are insulated from further judicial review. It is arguable also that the decision of this Court to deny *en banc* review of this appeal supports that view. What is not arguable, however, is the fact that this Court has failed to grapple with the questions of exceptional importance raised in this appeal. If the *Ricci* plaintiffs are to obtain such an opinion from a reviewing court, they must now look to the Supreme Court. Their claims are worthy of that review.

Ricci, 530 F.3d at 101 (Cabranes, J., dissenting).

Seven months later, the U.S. Supreme Court agreed to hear *Ricci.*

The U.S. Supreme Court prefers to have the benefit of a thoughtful analysis of the law by the appellate court below, so that the Court can *review* an appellate decision, instead of being the first appellate court to apply the law to the facts of the case. There are several U.S. Supreme Court opinions during the past twenty years that explain the Court's preference:

> **....** The argument that the allegations of discriminatory discharge and retaliation did not concern conduct within the scope of § 1981 as defined by *Patterson,* however, was not presented to either court below, nor is it supported by arguments in the record. **....**
>
> **....** Applying our analysis in *Patterson* to the facts of a particular case without the benefit of a full record or lower court determinations is not a sensible exercise of this Court's discretion. See *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313, 320, n. 6, 91 S.Ct. 1434, 1438, n. 6, 28 L.Ed.2d 788 (1971); *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883, 896, n. 7, 104 S.Ct. 2803, 2811, n. 7, 81 L.Ed.2d 732 (1984). Cf. *Piccirillo v. New York,* 400 U.S. 548, 91 S.Ct. 520, 27 L.Ed.2d 596 (1971) (dismissing a writ of certiorari as improvidently granted because both parties agreed that an intervening

> state-court judgment rendered any decision by this Court meaningless). On remand, the Fourth Circuit should consider the impact of *Patterson* on Lytle's § 1981 claims.

Lytle v. Household Mfg., Inc., 494 U.S. 545, 552, n.3 (1990).

> Prudence also dictates awaiting a case in which the issue was fully litigated below, so that we will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question. See *Lytle v. Household Mfg., Inc.,* 494 U.S. 545, 552, n. 3, 110 S.Ct. 1331, 1336, n. 3, 108 L.Ed.2d 504 (1990) ("Applying our analysis ... to the facts of a particular case without the benefit of a full record or lower court determinations is not a sensible exercise of this Court's discretion").

Yee v. City of Escondido, California, 503 U.S. 519, 538 (1992).

> If this Court is to reach the merits of this case, it would be better to have the benefit of the views of the full Supreme Court of Appeals of West Virginia on the *Brady* issue. We, therefore, grant the petition for certiorari, vacate the judgment of the State Supreme Court, and remand the case for further proceedings not inconsistent with this opinion.

Youngblood v. West Virginia, 547 U.S. 867, 870 (2006) (per curiam).

In *Ricci,* the U.S. Supreme Court is essentially reviewing the opinion of the U.S. District Court, a trial court, without benefit of any legal analysis by the U.S. Court of Appeals. Normally, the Supreme Court would likely criticize the terse, per curiam opinion of the U.S. Court of Appeals in *Ricci* as inadequate legal analysis. But, as the Supreme Court Justices write their opinion(s) in *Ricci,* they know that Sotomayor has been nominated to replace Justice Souter, who is retiring. On 31 May 2009, I predicted the Justices would be unlikely to criticize the past work of their new colleague. It was an easy prediction and it became true on 29 June 2009, when the Court issued its opinion in *Ricci.*

On 1 June 2009, I searched Westlaw for articles in legal periodicals that critically reviewed the *Ricci* case, but none had been published. I am *not* familiar with affirmative action law, so I decline to express an opinion on the legal issues in *Ricci,* except to say the obvious: the three-judge panel on the U.S. Court of Appeals did an *in*adequate job. A major source of commentary on this case is Daniel Schwartz's CONNECTICUT EMPLOYMENT LAW BLOG at: http://www.ctemploymentlawblog.com/tags/ricci-v-destefano/ (begun 17 June 2008).

For a good analysis of *why* the three-judge panel of the U.S. Court of Appeals for the Second Circuit was wrong, see page 159, below. For the reaction to the U.S. Supreme Court's decision in *Ricci,* see below, beginning at page 161.

On 10 July, a journalist explained how Judge Cabranes rescued from obscurity the summary order that disposed of *Ricci,* and encouraged the U.S. Supreme Court to review Ricci.

> For all the publicity about the Supreme Court's 5-4 reversal of Judge Sonia Sotomayor's decision (with two colleagues) to reject a discrimination suit by a group of firefighters against New Haven, Conn., one curious aspect of the case has been largely overlooked.

That is the likelihood that but for a chance discovery by a fourth member of the 2nd Circuit Court of Appeals, the now-triumphant 18 firefighters (17 white and one Hispanic) might well have seen their case, *Ricci v. DeStefano,* disappear into obscurity, with no triumph, no national publicity and no Supreme Court review.

The reason is that by electing on Feb. 15, 2008, to dispose of the case by a cursory, unsigned summary order, Judges Sotomayor, Rosemary Pooler and Robert Sack avoided circulating the decision in a way likely to bring it to the attention of other 2nd Circuit judges, including the six who later voted to rehear the case.

And if the *Ricci* case — which ended up producing one of the Supreme Court's most important race decisions in many years — had not come to the attention of those six judges, it would have been an unlikely candidate for Supreme Court review. The justices almost never review summary orders, which represent the unanimous judgment of three appellate judges that the case in question presents no important issues.

....

But the case came to the attention of one judge, Jose Cabranes, anyway, through a report in the *New Haven Register.* It quoted a complaint by Karen Lee Torre, the firefighters' lawyer, that she had expected " 'a reasoned legal opinion,' instead of an unpublished summary order, 'on what I saw as the most significant race case to come before the Circuit Court in 20 years.' "

According to 2nd Circuit sources, Cabranes, who lives in New Haven, saw the article and looked up the briefs and the earlier ruling against the firefighters by federal district judge Janet Arterton. He decided that this was a very important case indeed, and made a rare request for the full 2nd Circuit to hold an *en banc* rehearing.

(In response to an e-mail from me, Cabranes declined to comment.)

Cabranes, like Sotomayor a Clinton appointee of Puerto Rican heritage — and once a mentor to her — was outvoted by 7-6, with the more liberal judges (including Sotomayor) in the majority. But by publishing a blistering June 12, 2008, dissent Cabranes brought the case forcefully to the attention of the Supreme Court.

By that time, Torre had filed a petition for certiorari with the court, a fairly unusual move in a case involving impecunious clients because of the long odds against success. Those odds seemed especially long in this case. Not only had the panel branded it as insignificant, but the justices usually review cases to resolve conflicts among precedents set by different appeals courts — and a summary order sets no precedent.

Stuart Taylor, Jr., "How *Ricci* Almost Disappeared," *National Journal* (10 July 2009) http://ninthjustice.nationaljournal.com/2009/07/how-ricci-almost.php .

In short, Judge José Cabranes is a hero, and Judge Sotomayor violated Second Circuit rules on the use of summary orders. But Cabranes, who is male and 69 y old, was ignored by President Obama in the search for a nominee for the U.S. Supreme Court.

religious balance ?

In the 1800s, balancing the Justices of the U.S. Supreme Court considered only geographic location, since all of the Justices were white male Protestants. Since the mid-1960s, race and gender have replaced geographic location as important considerations for a nominee. Because the Catholic church has a strong anti-abortion position — and also strong positions on the death penalty and same-gender marriage — religion may also be an important consideration.

> If Judge Sonia Sotomayor is confirmed to the Supreme Court, she will be only the 12th Roman Catholic justice in history. But what is remarkable is that six of those 12, if you include her, will be on the Court that convenes in October.
>
> "There's an arc of history with seats on the Court that starts with a group that was discriminated against, then it develops and reaches a peak and assimilation, and then it no longer becomes an issue," says political scientist Barbara Perry of Sweet Briar College, a Court scholar who is working on a book on the Catholic justices.
>
> What is interesting now, however, is that Catholics on the Court have become so common — six out of nine — that people are taking notice again, Perry says. "It's interesting that this follows by a couple of weeks the kerfuffle over President Obama speaking at Notre Dame. Maybe there isn't safety in numbers." Perry says she has already heard from Catholics who fear a backlash because of the high numbers.
>
> But Sotomayor, who is said to attend church for family events, may not be easily lumped together with the Court's other five Catholics: John Roberts Jr., Antonin Scalia, Anthony Kennedy, Clarence Thomas and Samuel Alito Jr. All are on the conservative wing on the Court, though Kennedy is often a swing vote.

Tony Mauro, "A Catholic super-majority on the Supreme Court," *The National Law Journal* (15:50 EDT 27 May 2009)
http://www.law.com/jsp/nlj/legaltimes/PubArticleLT.jsp?id=1202431028262&A_Catholic_supermajority_on_the_Supreme_Court
also posted at
http://legaltimes.typepad.com/blt/2009/05/a-catholic-supermajority-on-the-supreme-court-.html .

On 31 May 2009, *The New York Times* reported:

> Four of the Catholics on the court are reported to be committed attenders of Mass, and they make up the court's solid conservative bloc — Chief Justice John G. Roberts Jr. and Justices Antonin Scalia, Clarence Thomas and Samuel A. Alito Jr. The fifth Catholic, Justice Anthony M. Kennedy, often votes with them.
>
> There are indications that Judge Sotomayor is more like the majority of American Catholics: those who were raised in the faith and shaped by its values, but who do not attend Mass regularly and are not particularly active in religious life. Like many Americans, Judge Sotomayor may be what religion scholars call a "cultural Catholic" — a category that could say something about her political and social attitudes.
>
> Interviews with more than a dozen of Judge Sotomayor's friends from high school, college, law school and professional life said they had never heard her talk about her faith, and had no recollection of her ever going to Mass or belonging to a parish. Her family did not return phone calls for comment.
>
> A White House spokesman, speaking on background, put it this way: "She currently does not belong to a particular parish or church, but she attends church with family and friends for important occasions."

> Many of Judge Sotomayor's friends and colleagues also said they believed that her expressed commitment to social justice and community service is a reflection of her Catholic upbringing.

Laurie Goodstein, "Sotomayor Would Be Sixth Catholic Justice, but the Pigeonholing Ends There," *The New York Times* (31 May 2009)
http://www.nytimes.com/2009/05/31/us/politics/31catholics.html .

racist remark in 2001

At page 53, above, I quoted and criticized Sotomayor's 2001 lecture (which lecture *The New York Times* had reported on the night of 14 May) that was published in a legal journal. On 27 May, Newt Gingrich, the speaker of the U.S. House of Representatives during 1995-99, reacted to part of one sentence in Sotomayor's lecture. The following is Gingrich's entire remark on this topic:

> Imagine a judicial nominee said "my experience as a white man makes me better than a latina woman" Wouldn't they have to withdraw? New racism is no better than old racism.
>
> A white man racist nominee would be forced to withdraw. Latina woman racist should also withdraw.

Newt Gingrich, On Supreme Court nominee Sonia Sotomayor (27 May 2009)
http://newt.org/tabid/193/articleType/ArticleView/articleId/4253/On-Supreme-Court-nominee-Sonia-Sotomayor.aspx .
(See Mr. Gingrich's clarification at page 117, below).

What is surprising to me is that Judge Sotomayor has — on 31 May 2009 — still *not* repudiated her words almost eight years ago. But, if she repudiates her words now, her apology will appear *in*sincere and intended only to end a controversy over her nomination to the Court.

On Friday afternoon, 29 May, the President's Press Secretary said "her word choice in 2001 was poor". That's putting it mildly. Her words were *not* some casual, spontaneous remark. Her words were *not* the angry remark of a 24 y old law student. She carefully prepared that lecture when she was 47 y old.

I was amused at an online poll at the *San Francisco Chronicle* website from the afternoon of 29 May through 31 May:

> Sotomayor's "wise Latina woman" remark?
>
> (A) Innocent in context 28 %
> (B) Racist 33 %
> (C) True, if the white males being referred to are Limbaugh and Gingrich. 38 %

The percentage of 2734 responses at 01:03 EDT on 1 June are given above. I chose (B), although I dislike Limbaugh. <*grin*> I am pleased to see that someone at the *Chronicle* had a sense of humor in offering choice (C). I will *not* quote what Limbaugh said earlier on 29 May about the quotation from Sotomayor's lecture, as I choose to ignore his outrageously inflammatory rhetoric.

29 May Press Briefing: defense of her racist remark

At the end of the White House Press Briefing on Friday, 29 May, there were some questions and answers about Sotomayor's remark in her 2001 lecture:

Q. Can I ask you, on the Sotomayor nomination, has the White House or anyone here had a chance to talk to her about that 2001 Berkeley speech to see if she might have wished she chose different words or meant to say something other than what she said?

And on a related note, do you know if she has any personal reaction to people throwing words around like "racist" or apparently today Rush Limbaugh compared her to David Duke? Is it difficult for her, given her background, to hear those type of things or does she just sort of slough it off?

MR. GIBBS: Well, I don't know if anybody has talked to her specifically about that comment. I don't think you have to be the nominee to — [omit cell phone interruption] I don't think you have to be the nominee to find what was said today offensive. And I think maybe the best example of that, Josh, is to look at any number of conservative and Republican leaders who over the past 24 hours have specifically addressed the comments of people like Newt Gingrich and Rush Limbaugh. It's sort of hard to completely quantify the outrage I think almost anybody would feel at the notion that you're being compared to somebody who used to be a member of the Ku Klux Klan. It's amazing.

On the other question, obviously folks have — she's been here, she's made calls. Look, I think that — I've not talked specifically with her about this, but **I think she'd say that her word choice in 2001 was poor**;[63] that she was simply making the point that personal experiences are relevant to the process of judging; that your personal experiences make you — have a tendency to make you more aware of certain facts in certain cases; that your experiences impact your understanding — I think we all agree with that; and that on a court that's collegial, that it can help others that are trying to wrestle with the facts of those cases.

And, I mean, look, there have been allusions to this in the media over the past few days. I mean, if you look at — let me read some quotes from current and recent justices, or in this case, both. Justice Alito, during his confirmation hearing, referenced his heritage. He said that, "When a case comes before me involving someone" — and there's some ellipses in here, but — "someone who is an immigrant, I can't help but think of my own ancestors because it wasn't long ago when they were in that position."

Or he later says — this is not paraphrased — "You know this could be your grandfather, this could be your grandmother. They were not citizens at one time and they were people who came to this country." More recently —

Q Obama voted against Alito.

MR. GIBBS: I understand. I hope that doesn't preclude me from being able to quote him.

Q Well, I mean, it adds a little context.

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63 Boldface added by Standler.

MR. GIBBS: Well, he wasn't here for Justice Ginsburg — wasn't here to vote on Justice Ginsburg, but Justice Ginsburg just recently said, I think quite clearly, in a case involving the strip search of a 13-year-old girl, that — that she said that some justices seem to ignore the humiliation that might be involved because "they've never been a 13-year-old girl. It's a very sensitive age for a girl. I don't think that my colleagues, some of them, quite understood."

So I think that's what Justice Sotomayor was talking about.

Q But Robert, those both seem to talk about identity with a certain circumstance, where the 2001 speech said because of her experience she would come to a better conclusion, which to some people —

MR. GIBBS: Well, that's why, Major, I started this by saying I think if she had the speech to do all over again, I think she'd change that word.

Q How do you know that?

MR. GIBBS: In discussions with people. [ending press briefing] Thanks, guys.

Q Discussions with who?

Q What's your people?

MR. GIBBS: People who have talked to her. [END of Briefing]

Robert Gibbs, White House Press Briefing, (beginning 14:22 EDT 29 May 2009)
http://www.whitehouse.gov/the_press_office/Briefing-by-White-House-Press-Secretary-Robert-Gibbs-5-29-09/ .

Walking out of the room during the discussion was a rather unsatisfactory ending to the press briefing. Nonetheless, Mr. Gibbs is in a difficult position: Sotomayor's 2001 remark is causing problems, yet Sotomayor herself has neither repudiated her choice of words nor apologized.

President's defense

In an interview by NBC News on Friday, 29 May, President Obama spoke about Judge Sotomayor's 2001 remark that a wise Latina would "reach a better conclusion than a white male":

In an interview with NBC's Brian Williams, President Obama strongly defended his Supreme Court nominee, Sonia Sotomayor. But he also said that she could have "restated" her controversial sentence from 2001, in which she suggested that a Latina woman could reach a better conclusion than a white male.

BRIAN WILLIAMS: This is the quote, "I would hope that a wise Latino woman, with the richens of her experiences would, more often than not, reach a better conclusion than a white male who hasn't lived that life." It — it's your judgment — perhaps, having talked to the judge, that — as we say, that's one of those she'd rather have back if she had it to redo?

PRESIDENT OBAMA: I'm sure she would have restated it. But if you look in the entire sweep of the essay that she wrote, what's

> clear is that she was simply saying that her life experiences will give her information about the struggles and hardships that people are going through — that will make her a good judge.
>
> ....

Mark Murray, "Obama Weighs In on Sotomayor Remark," MSNBC (18:33 EDT 29 May 2009) http://firstread.msnbc.msn.com/archive/2009/05/29/1947904.aspx .
Reply by President Obama quoted at:
Dan Eggen and Paul Kane, "Obama Says Judge Regrets Wording," *The Washington Post* (30 May 2009) http://www.washingtonpost.com/wp-dyn/content/article/2009/05/29/AR2009052901538.html ;
Kent Klein, "Obama: Sotomayor 'Right Choice' for Supreme Court," *Voice of America* (30 May 2009) http://www.voanews.com/english/2009-05-30-voa12.cfm .

I have two comments on President Obama's defense:

1. Sotomayor did *not* say that her life experiences would make her a good judge, she said she was a "better" judge than a white male. Obama is defending something that Sotomayor did *not* say. When Obama ignores the racist/sexist implication of her "better" remark, then her remark is easier to defend. And by saying the remark should be taken in context of the entire lecture, Obama knows that few people will read the entire lecture, and Obama hopes that most people will accept his characterization of the entire lecture.
2. Why are President Obama and his Press Secretary talking about her word choice in 2001? Why doesn't Sotomayor herself either defend or apologize for her word choice? Sotomayor is an educated and articulate person, she can defend herself. I suggest an answer at page 107, below.

commentary

The Washington Post published an interesting commentary on the 2001 lecture by Sotomayor:

> Nice try, Mr. President, but I'm not buying the poor-choice-of-words defense for Sonia Sotomayor. "I'm sure she would have restated it," President Obama told NBC News about his Supreme Court nominee's now-famous 32 words: "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." Said White House Press Secretary Robert Gibbs, "I think she'd say that her word choice in 2001 was poor."
>
> .... This was no throwaway line or off-the-cuff linguistic stumble along the lines of the judge's other controversial comment about appeals courts making policy. Rather, Sotomayor was deliberately and directly disputing remarks by then-Justice Sandra Day O'Connor that a wise old woman and a wise old man would eventually reach the same conclusion in a case. "I am…not so sure that I agree with the statement," Sotomayor said. Moreover, if Sotomayor regretted that YouTube moment, she had the chance to revise and extend: Her remarks were reprinted in the Berkeley La Raza Law Journal. Knowing the multi-layered editing process of law journals, I'd be shocked if Sotomayor did not at least have the chance to review the transcript of her speech and make any tweaks.

> My rejection of the spin, by the way, doesn't mean I think this is anywhere near sufficient grounds to reject the nominee. The totality of the speech shows Sotomayor wrestling intelligently with the influences of race and gender on judging. But I believe she knew exactly what she was saying back then — even if it now takes some fancy spinning to undo now.

Ruth Marcus, "Sotomayor's Deliberate Choice of Words," *The Washington Post* (11:47 EDT 30 May 2009) http://voices.washingtonpost.com/postpartisan/2009/05/sotomayors_deliberate_choice_o.html .

I think Ruth Marcus is exactly correct. The following day, a columnist for the *Chicago Tribune* recognized that the problem was much more than a one-sentence remark in her 2001 lecture, indeed the entire lecture was an embarrassment.

> The chief blot on Sonia Sotomayor's otherwise stellar professional record is a comment she made deprecating the capabilities of any judge lacking a Y chromosome and Iberian ancestry.
>
> "I would hope," she said in a 2001 lecture on law and multicultural diversity, "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."
>
> The question for her supporters is: How do we spin that? It's not sufficient grounds to reject her nomination, given her excellent credentials. But it's still an embarrassment.
>
> One possible way to handle it is a mea culpa by the nominee. She could say, "Let me explain what I meant to say," or "I used to believe that, but I now realize I was mistaken," or "Oh, man — what was I thinking?" Any of those tactics would defuse the controversy and allow the debate to proceed to a topic more advantageous to her.
>
> Maybe when she gets to her confirmation hearing, Sotomayor will disavow the remark. The White House says she made a poor choice of words. But President Obama, in his Saturday radio address, accused her critics of "pulling a few comments out of context to paint a distorted picture of Judge Sotomayor's record."
>
> ....
>
> [Sotomayor's supporters who complain about out-of-context quotations] have a point. **Anyone who reads the whole speech will indeed find that her comment wasn't as bad as it sounds. It was worse.**[64]
>
> What is clear from the full text is that her claim to superior insight was not a casual aside or an exercise in devil's advocacy. On the contrary, it fit neatly into her overall argument, which was that the law can only benefit from the experiences and biases that female and minority judges bring with them.
>
> She clearly thinks impartiality is overrated. "The aspiration to impartiality is just that — it's an aspiration because it denies the fact that we are by our experiences making different choices than others," she declared, a bit dismissively. She doesn't seem to think it's terribly important to try to meet the aspiration.

Steve Chapman, "Sotomayor's aversion to impartiality," *Chicago Tribune* (31 May 2009) http://www.chicagotribune.com/news/columnists/chi-oped0531chapmanmay31,0,6455044.column .

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[64] Boldface added by Standler.

As I pointed out on page 5, above, the obligation of impartiality is the *principal* requirement for a federal judge, and the requirement is stated in the judicial oath, federal statute, the U.S. Constitution (i.e., due process), and the judicial code of conduct.

On 31 May 2009, Senator Schumer appeared on a Sunday morning television program that interviews politicians, and he predicted that Judge Sotomayor will *not* repudiate her 2001 lecture that includes a racist remark:

> Sen. Chuck Schumer (D-N.Y.), a defender of president Obama's Supreme Court nominee Sonia Sotomayor, said Sunday that she will stand by a controversial speech when she pays courtesy visits to senators this week.
>
> The GOP has been inflamed by a 2001 speech in which she said that a "wise Latina" would make a better decision than a white male. White House spokesman Robert Gibbs last week conveyed her regrets over the speech by saying that she made a poor choice of words.
>
> But Schumer, a member of the Senate Judiciary Committee who is going to shepherd Sotomayor on her Senate visits this week, stressed that she should be judged on the entire speech in which "she makes it clear that rule of law comes first."
>
> "I think she will stand by the entire speech. I think that she will show that the speech when you read it says rule of law comes above experience," Schumer said on ABC's "This Week."

Roxana Tiron, "Schumer: Sotomayor to stand by her words," *The Hill* (11:30 EDT 31 May 2009) http://thehill.com/leading-the-news/schumer-sotomayor-to-stand-by-her-words-2009-05-31.html .

Politico reported the same interview of Senator Schumer:

> Sen. Charles Schumer (D-N.Y.) declined Sunday to concur with President Barack Obama's claim that Supreme Court Judge Sonia Sotomayor believes she chose her words poorly in a 2001 speech where she said a "wise Latina" judge would reach better results than a white male.
>
> "I don't think anybody wants nine justices on the Supreme Court who have ice water in their veins," Schumer said on ABC's "This Week."
>
> However, when pressed by host George Stephanopoulos on whether Sotomayor planned to distance herself from the "wise Latina" comment during her confirmation hearings, Schumer, who is a member of the Senate Judiciary Committee, did not answer directly.
>
> "I think she'll stand by the entire speech," Schumer said. "The specific sentence there is simply saying that people's experiences matter and we ought to have some diversity of experience in the court."

Josh Gernstein, "Schumer won't concede Sotomayor misspoke," *Politico* (10:31 EDT 31 May 2009) http://www.politico.com/blogs/politicolive/0509/Schumer_wont_concede_Sotomayor_misspoke.html .

Senator Schumer appears to be saying that Sotomayor will *not* admit her 2001 lecture contains a racist/sexist remark. And that may be why President Obama and his Press Secretary — but *not* Sotomayor herself — are saying she would now "restate" or "change that word".

Given the large majority of Democratic party senators, Sotomayor's confirmation is a fait accompli. But her refusal to acknowledge she made a mistake in her 2001 lecture diminishes her personal reputation.

marketing of Sotomayor

There are two sides to Judge Sotomayor. President Obama introduced her on 26 May touting both (1) her suffering[65] during childhood, and (2) her professional success as an adult, which Obama called "the American Dream".

On 27 May, Dr. Thomas Sowell, an economist and senior fellow at the Hoover Institute, wrote a vigorous defense of meritocracy, specifically that we need to ignore Sonia Sotomayor's suffering during childhood:

> It is one of the signs of our times that so many in the media are focusing on the life story of Judge Sonia Sotomayor, President Obama's nominee for the Supreme Court of the United States.
>
> You might think that this was some kind of popularity contest, instead of a weighty decision about someone whose impact on the fundamental law of the nation will extend for decades after Barack Obama has come and gone.
>
> Much is being made of the fact that Sonia Sotomayor had to struggle to rise in the world. But stop and think.
>
> If you were going to have open heart surgery, would you want to be operated on by a surgeon who was chosen because he had to struggle to get where he is or by the best surgeon you could find — even if he was born with a silver spoon in his mouth and had every advantage that money and social position could offer?
>
> If it were you who was going to be lying on that operating table with his heart cut open, you wouldn't give a tinker's damn about somebody's struggle or somebody else's privileges.
>
> The Supreme Court of the United States is in effect operating on the heart of our nation — the Constitution and the statutes and government policies that all of us must live under.
>
> Barack Obama's repeated claim that a Supreme Court justice should have "empathy" with various groups has raised red flags that we ignore at our peril — and at the peril of our children and grandchildren.
>
> "Empathy" for particular groups can be reconciled with "equal justice under law" — the motto over the entrance to the Supreme Court — only with smooth words. But not in reality. President Obama used those smooth words in introducing Judge Sotomayor but words do not change realities.
>
> Nothing demonstrates the fatal dangers from judicial "empathy" more than Judge Sotomayor's decision in a 2008 case involving firemen who took an exam for promotion. After the racial mix of those who passed that test turned out to be predominantly white, with only a few blacks and Hispanics, the results were thrown out.
>
> When this action by the local civil service authorities was taken to court and eventually reached the 2nd Circuit Court of Appeals, Judge Sotomayor did not give the case even the courtesy of a spelling out of the issues. She backed those who threw out the test results. Apparently she didn't have "empathy" with those predominantly white males who had been cheated out of promotions they had earned.

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[65] For example: her parents were immigrants from Puerto Rico, they lived in public housing, her father had a third-grade education and he did not speak English, her father died when Sonia was 9 y old, and her mother worked 6 days/week.

> Fellow 2nd Circuit Court judge Jose Cabranes commented on the short shrift given to the serious issues in this case. It so happens that he too is Hispanic, but apparently he does not decide legal issues on the basis of "empathy" or lack thereof.
>
> This was not an isolated matter for Judge Sotomayor. Speaking at the University of California at Berkeley in 2001, she said that the ethnicity and sex of a judge "may and will make a difference in our judging."
>
> Moreover, this was not something she lamented. On the contrary, she added, "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."
>
> No doubt the political spinmasters will try to spin this to mean something innocent. But the cold fact is that this is a poisonous doctrine for any judge, much less a justice of the Supreme Court.

Thomas Sowell, "Sotomayor: 'Empathy' in Action" (27 May 2009) http://townhall.com/columnists/ThomasSowell/2009/05/27/sotomayor__empathy_in_action .

On 27 May, a journalist for the Associated Press wrote:

> The scrutiny is just beginning of Sotomayor's thick record as a federal appeals judge, trial judge, prosecutor and corporate attorney. But it's not enough for a high court hopeful to be a creature of the law.
>
> She must also be a recognizable member of the human race. She must be one of us even as she prepares to leave us for the rarefied pinnacle of judicial power. "I am an ordinary person," she said [on 26 May 2009], "who has been blessed."
>
> ....
>
> To be sure, she's known a taste of the high life. In her corporate career, Sotomayor represented luxury brands Fendi and Ferrari North America, helping the former rein in counterfeit knockoffs of its products. Divorced with no children, she lives in a condo in New York's trendy Greenwich Village on earnings of more than $200,000 last year. She was not among the most affluent people considered by Obama for the court.

Calvin Woodward, "Sotomayor and the struggle to be ordinary," Associated Press (03:10 EDT 27 May 2009), published in *The Washington Post,* http://www.washingtonpost.com/wp-dyn/content/article/2009/05/27/AR2009052700222.html .

Two days later, another Associated Press story said:

> There are two sides to Supreme Court nominee Sonia Sotomayor: a Latina from a blue-collar family and a wealthy member of America's power elite.
>
> The White House portrays Sotomayor as a living image of the American dream, though its telling of the rags-to-riches story emphasizes the rags, a more politically appealing narrative, and plays down the riches.
>
> ....
>
> On ethnicity, Sotomayor herself has recognized — and contributed to — the dichotomy. She proudly highlights her Puerto Rican roots but hasn't always liked it when others have. She once took issue with a prospective employer who singled her out as a Latina with questions she viewed as offensive yet has shown a keen ethnic consciousness herself.

....

Yet Sotomayor did not live her entire childhood in a housing project in the South Bronx — she spent most of her teenage years in a middle-class neighborhood, attending private school and winning scholarships to Princeton and then Yale.

And Sotomayor's life and lifestyle after law school largely resemble the background of many lawyers who rise to powerful positions in Washington.

She climbed her way up through New York's Democratic power structure boosted by its ultimate brokers over those years — Gov. Mario Cuomo, Mayor Ed Koch, Sen. Daniel Patrick Moynihan and District Attorney Robert Morgenthau. That's the access of a partner in a corporate law firm, not a kid from the South Bronx.

She now earns more than $200,000 a year and owns a condominium in Greenwich Village, a neighborhood of million-dollar-plus homes. Her brother, Dr. Juan Sotomayor, is a physician in North Syracuse, N.Y., whose practice doesn't accept Medicaid or Medicare — programs for the poor and elderly — according to its Web site.

Sharon Theimer, "SPIN METER: Sotomayor's contradictory images," Associated Press (19:22 EDT 29 May 2009). Published in the *Washington Post,* http://www.washingtonpost.com/wp-dyn/content/article/2009/05/29/AR2009052900291.html .

finances

We come now to a difficult topic. As an advocate for privacy rights, I am uncomfortable reading and repeating details of a person's personal finances. On the other hand, finances of public officials, including judges, are a matter of public record in the USA, in an attempt to prevent corruption and to disclose conflicts of interest. Because the Obama administration is selling Sotomayor as a product of poverty, it's important to understand that she has been affluent since 1984 (when she was 30 y old), when she entered the private practice of law and subsequently became a judge. Most people who begin law school or medical school at age 22 y do not begin to earn appreciable amounts of money until sometime after age 30 y, because after graduation they work for three to five years as an apprentice. So Judge Sotomayor's education and career are typical of a successful professional.

On 7 May, about three weeks before she was nominated, *The Washington Post* reported on her personal finances:

Although Sotomayor earns $179,500 a year as a judge on the 2nd Circuit Court of Appeals in New York and worked for eight years as a private attorney in New York before joining the bench, in recent years she has reported having virtually no assets.

For 2007, Sotomayor, who is divorced, reported that she had no financial holdings that needed to be reported on her personal financial disclosure report, save for a checking account and a saving account with Citibank. Combined, the accounts were worth $50,000 to $115,000. That was more than she reported as assets during the previous four years, during which the value of the accounts at some points was listed as low as $30,000.

Since at least 2003, she has reported owning no stocks and having no investments in real estate.

....

> "It's a little sad that someone at the top of the legal profession has so few reportable assets, but that's the reality of living on a federal judicial salary in Manhattan," said Doug Kendall of the nonprofit Constitutional Accountability Center.
>
> Sotomayor brought in some extra income in 2007 by working as an adjunct professor at New York Law School and lecturing at Columbia Law School. Those jobs paid her nearly $25,000 that year. **....**

Joe Stephens, "Sotomayor Rose High, with Few Assets," *The Washington Post* (11:15 EDT 7 May 2009) http://voices.washingtonpost.com/44/2009/05/07/sotomayor_rose_high_with_few_a.html .

While it might superficially appear imprudent for Sotomayor to have few investments and little savings, recognize that she has lifetime tenure as a federal judge, and she can retire anytime after 65 y of age and still receive her full salary. Plus she has health insurance provided by the government. So, unlike an "ordinary" person, Judge Sotomayor may have little need for savings.

After her nomination, there were more reports of Sotomayor's finances. On 28 May, *Politico* reported:

> If U.S. Appellate Court Judge Sonia Sotomayor is confirmed as the Supreme Court's newest justice, she would be among its poorest.
>
> Her personal financial disclosure form filed last year puts her sum total of investments at the end 2007 from $50,001 to $115,000. She reported only two assets: a checking account and a savings account — both at Citibank.
>
> The form does not require disclosure of the value of a judge's personal residence. But New York City records show that Sotomayor owns a Greenwich Village condo that she bought in 1998 for $360,000. It's now worth about $1.4 million, according to Zillow.com. And city records indicate two outstanding mortgages totaling $450,000.
>
> Papers submitted in connection with her nomination to the 2nd Circuit Court of Appeals in 1997 say she was earning $1,100 a month in rent on a co-op apartment that she owned in Brooklyn. As recently as 2004, she reported less than $30,000 in her two bank accounts.
>
> A source told *The Washington Post* earlier this month that Sotomayor once said that filling out her financial reports was a breeze. "When you don't have money, it's easy. There isn't anything there to report," she was quoted as saying.
>
> Sotomayor is divorced and has no children.
>
> She now earns $184,500 a year as a federal appeals court judge. As an associate justice on the Supreme Court, she would make $213,900. Both salaries went up 2.8 percent this year.

Josh Gerstein, "For a justice, Sonia Sotomayor is low on dough," *Politico* (11:29 EDT 28 May 2009) http://www.politico.com/news/stories/0509/23045.html .

29 May: Krauthammer's opinion

In an opinion-editorial, Charles Krauthammer wrote that the confirmation hearings for Justice Sotomayor should emphasize the alleged difference between (1) liberal Democrats (with their empathy for people from *some* disadvantaged backgrounds — but *not* for Ricci, who was white and dyslexic) and (2) conservatives who believe in impartial judges:

> Sonia Sotomayor has a classic American story. So does Frank Ricci.
>
> Ricci is a New Haven firefighter stationed seven blocks from where Sotomayor went to law school (Yale). Raised in blue-collar Wallingford, Conn., Ricci struggled as a C and D student in public schools ill-prepared to address his serious learning disabilities. Nonetheless he persevered, becoming a junior firefighter and Connecticut's youngest certified EMT.
>
> After studying fire science at a community college, he became a New Haven "truckie," the guy who puts up ladders and breaks holes in burning buildings. When his department announced exams for promotions, he spent $1,000 on books, quit his second job so he could study eight to 13 hours a day and, because of his dyslexia, hired someone to read him the material.
>
> He placed sixth on the lieutenant's exam, which qualified him for promotion. Except that the exams were thrown out by the city, and all promotions denied, because no blacks had scored high enough to be promoted.
>
> Ricci (with 19 others) sued.
>
> That's where these two American stories intersect. Sotomayor was a member of the three-member circuit court panel that upheld the dismissal of his case, thus denying Ricci his promotion.
>
> This summary ruling deeply disturbed fellow members of Sotomayor's court, including Judge José Cabranes (a fellow Clinton appointee), who, writing for five others, criticized the unusual, initially unpublished, single-paragraph dismissal for ignoring the serious constitutional issues at stake.
>
> Two things are sure to happen this summer: The Supreme Court will overturn Sotomayor's panel's ruling. And, barring some huge hidden scandal, Sotomayor will be elevated to that same Supreme Court.
>
> What should a principled conservative do? Use the upcoming hearings not to deny her the seat, but to illuminate her views. No magazine gossip from anonymous court clerks. No "temperament" insinuations. Nothing ad hominem. The argument should be elevated, respectful and entirely about judicial philosophy.
>
> On the Ricci case. And on her statements about the inherent differences between groups, and the superior wisdom she believes her Latina physiology, culture and background grant her over a white male judge. They perfectly reflect the Democrats' enthrallment with identity politics, which assigns free citizens to ethnic and racial groups possessing a hierarchy of wisdom and entitled to a hierarchy of claims upon society.
>
> **....**
>
> When the hearings begin, **....** **...** make the case for individual vs. group rights, for justice vs. empathy. Then vote to confirm Sotomayor solely on the grounds — consistently violated by the Democrats, including Sen. Obama — that a president is entitled to deference on his Supreme Court nominees, particularly one who so thoroughly reflects the mainstream views of the winning party. Elections have consequences.

> Vote Democratic and you get mainstream liberalism: a judicially mandated racial spoils system and a jurisprudence of empathy that hinges on which litigant is less "advantaged."
>
> A teaching moment, as liberals like to say. Clarifying and politically potent. Seize it.

Charles Krauthammer, "Sotomayor: Rebut, Then Confirm," *The Washington Post* (29 May 2009) http://www.washingtonpost.com/wp-dyn/content/article/2009/05/28/AR2009052803613.html .

I do not agree with Krauthammer about the absolute, polarizing, partisan differences between liberals and conservatives. Everyone — *both* liberals and conservatives — bring their own political philosophy with them to the bench. Prejudices and biases are part of life, which is why judges are supposed to explain *why* they made a particular decision, in the hope that forcing them to make a public explanation will avoid inappropriate reasons. Over the last few decades, there have been public examples of conservatives (e.g., Newt Gingrich and Bob Barr) who agreed with ultra-liberals on some issues, such as warrantless government surveillance of citizens. Labels, like liberal and conservative, often serve more to divide us than to promote a desirable goal. Many liberals like the idea of impartial judges. Requiring impartiality from judges is the right way — and the American way — to run a judicial system, *not* the conservative way, and *not* the liberal way.

I also do not agree with Krauthammer when he says "a president is entitled to deference on his Supreme Court nominees". The U.S. Constitution does *not* say the president is entitled to deference. The Senate can refuse to confirm a nominee for any reason. Under the system of checks and balances in three independent branches of government, the Senate is the *only* protection that we have from a bad nomination by the President. However, given the large Democratic majority in the Senate this year, it is almost certain that the Senate will confirm Judge Sotomayor.

Fifth Week: 1-7 June 2009

what not to include in this document

On 28 May 2009, I decided, as a matter of policy for this document:

1. *not* to quote:*every* Republican politician who criticizes Sotomayor. However, to chronicle the flavor of the confirmation process, I will quote a few of the major Republican politicians.
2. to ignore *all* of the people in small nonprofit organizations,[66] unless they are quoted by a reputable journalist.
3. not to report discussions of the proposed schedule for hearings and confirmation. What is important is the actual schedule.
4. not to report discussion of whether or not to filibuster the confirmation vote in the full Senate. Unless there is some unforeseen problem, Sotomayor's confirmation is a fait accompli. Furthermore, the Republicans do *not* have the votes to sustain a filibuster.

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[66] Anyone can form a nonprofit organization (e.g., call it "The American Federation of Fish and Frogs" <*grin*>), give themselves a grand title (e.g., "Exalted Wizard of Wisdom" <*grin*>), and then issue press releases. But that does *not* make them a credible spokesman for a point of view shared by intelligent people.

5. not to report newspaper articles that summarize speeches or White House press briefings. Instead, I will quote the original source.
6. not to discuss allegations that Sotomayor is brusque to attorneys in her courtroom, because such a style may be the result of Sotomayor's New York City environment,[67] or may be the result of white males who resent a powerful Hispanic woman asking them *un*comfortable questions.[68] I prefer to discuss substantive issues, *not* personalities, and *not* bruised egos of white male lawyers who were peppered with hard questions about weakness in their argument.

Sonia's meet and greet

On Monday, 1 June 2009, the U.S. Senate reconvened after a one-week recess and President Obama formally sent his nomination of Judge Sotomayor to the Senate. On Tuesday, 2 June 2009, Sotomayor began half-hour visits to various influential Senators. Sotomayor met with Senator Leahy, chairman of the Judiciary Committee, and he asked her about her 2001 lecture with the racist remark. Afterwards, Leahy said he was satisfied with Sotomayor's explanation:

> Some conservatives seized on Sotomayor's past comment, widely circulated in the media, that she would hope 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."
>
> Republican commentators, including Rush Limbaugh and former House Speaker Newt Gingrich, have accused Sotomayor of being a racist because of the remarks in a 2001 lecture.
>
> In a televised news conference, Sen. Patrick J. Leahy (D-Vt.), chairman of the Senate Judiciary Committee, called such criticism against Sotomayor "among the most vicious attacks that have been received by anybody," and said that he was sorry she could not directly answer the comments.
>
> However, Leahy said that Sotomayor, 54, told him during a private meeting Tuesday: "Of course one's life experience shapes who you are, but ultimately and completely as a judge, you follow the law."
>
> Summarizing Sotomayor's comments during the meeting, Leahy added: "There's not one law for one race or another. There's not one law for one color or another. There's not one law for rich, a different one for poor. There's only one law."

Michael Muskal, "Sotomayor and senators make nice — for now," *Los Angeles Times* (3 June 2009) http://www.latimes.com/news/nationworld/nation/la-na-sotomayor-senate3-2009jun03,0,7796649.story .

The details of the private meeting between Leahy and Sotomayor are not publicly known, but what Leahy said at his press conference afterwards is an *in*adequate explanation for her 2001 lecture.

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[67] *Everyone* from the Bronx is rude. <*grin*>

[68] Judges Guido Calabresi, a former Yale Law School dean, and Jon Newman — both of the U.S. Court of Appeals in New York City — both say that Sotomayor's questioning is no different from other judges. Larry Neumeister, "Taking the measure of Sotomayor's courtroom manner," Associated Press (6 June 2009) Published in http://seattletimes.nwsource.com/html/politics/2009308253_apussotomayortemperament.html ; Nina Totenberg, "Is Sonia Sotomayor Mean?," *NPR* (15 June 2009) http://www.npr.org/templates/story/story.php?storyId=105343155 .

Two journalists wrote about the superficiality of the brief visits by Sotomayor on 2 June.

The Associated Press reported:

> She ignored even the most innocuous questions, refusing to issue even a thumbs-up when asked how she was feeling on her big day. At another point, Sotomayor shook her head no: she would not grant a reporter's request to give a sound bite in Spanish. Another scribe tried and failed to provoke her into commenting on the charge by conservative commentators that she was a racist.
>
> She even remained composed when Majority Leader Harry Reid referred to her as "the whole package" and thrice invoked the word "dog" to describe her — twice as an "underdog" who rose through the Ivy League and the judiciary to become "top dog."
>
> ....
>
> Personal chitchat in private is encouraged because it helps humanize the nominee and, the theory goes, makes it harder for political opponents to attack. ....
>
> ....
>
> A demure "thank you" was all she said during the public portion of her meeting with Republican leader Mitch McConnell, an accomplishment in itself given the sole question lobbed at her. "Judge Sotomayor, what do you think of the fact that two prominent conservatives have called you a racist?" she was asked. Sotomayor remained silent as an aide ushered reporters out.

Laurie Kellman, "Sotomayor stays mum during Senate visits," Associated Press (18:55 EDT 2 June 2009). Reported at the *Seattle Post-Intelligencer* website: http://www.seattlepi.com/national/1154ap_us_sotomayor_do_no_harm.html .

Later, Dana Milbank of *The Washington Post* said:

> Leahy (D-Vt.) led the judge to his desk, which was full of items requiring the chairman's attention. ("Senator: a couple more Dark Knight posters for your autograph" said a note on two Batman posters.) The chairman showed the judge photos of his grandchildren, and Sotomayor responded with probing questions: "How many of them?" "Do you get to see them often?" Sotomayor pointed to a photo of the children swimming. "They're in a pool," she judged, accurately.
>
> Leahy and the nominee posed for a few seconds. "Now, have you all got enough footage?" he asked.
>
> CNN's Ted Barrett tried a question for the judge: "Can you tell us how it feels to be labeled a racist?"
>
> "She's going to have plenty of time to talk about that," Leahy answered for her. Leahy sent the silent nominee to her next visit, then went out to the microphones to speak for her. "I know how difficult it is for somebody who is nominated," he said. "They can't speak out while they're a nominee."
>
> Of course, no gag order is forcing Sotomayor to be silent. But Leahy was happy to be her spokesman yesterday, and he defended her controversial remark that a "wise Latina woman" would make better decisions than a white male. "She said ultimately and completely a judge has to follow the law, no matter what their upbringing has been," Leahy explained.

....

> But in the gushing department, Schumer was no match for Reid, who gave a lunchtime news conference of his own where he announced that Sotomayor "is going to be a fantastic, superb Supreme Court justice."
>
> Is there anything in her record that could cause trouble? "I understand that during her career, she's written hundreds and hundreds of opinions," Reid said. "I haven't read a single one of them, and if I'm fortunate before we end this, I won't have to read one of them."

Dana Milbank, "But Enough About Her," *The Washington Post* (3 June 2009) http://www.washingtonpost.com/wp-dyn/content/article/2009/06/02/AR2009060203065.html .
Senator Reid's remark about not reading Sotomayor's opinions was also quoted by Glenn Thrush at *Politico* (16:35 EDT 2 June 2009) http://www.politico.com/blogs/glennthrush/0609/Reids_not_reading.html .
It's interesting that the leader of the majority party in the U.S. Senate, who will vote on the confirmation of a Justice to the U.S. Supreme Court, believes he does *not* need personal knowledge of her work.

Judge Sotomayor's meet and greet visits with senators were essentially completed by 26 June. The Senate was on vacation from 27 June through 5 July.

commentary

The National Law Journal website linked to an opinion published in a Mississippi newspaper that showed the anger of some people over the *Ricci* case and Sotomayor's 2001 lecture:

> Frank Ricci is "just" a firefighter, and not, like Supreme Court Justice nominee Sonia Sotomayor, a federal judge. He is "only" a white male, and not, like Sotomayor, a Latina. And while he works in New Haven, Conn., he certainly didn't attend Yale Law School as Sotomayor did.
>
> ....
>
> That was six years ago. This April, the Supreme Court heard Ricci v. DeStefano, a case that Sotomayor, as part of a three-judge panel, upheld on appeal against Ricci and the 17 other firefighters who joined his complaint.
>
> "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion (as a judge) than a white male who hasn't lived that life," Sotomayor said in her Judge Mario G. Olmos Law and Cultural Diversity Lecture at UC Berkeley's law school in 2001.
>
> The cavalier condescension toward the "white" and the "male" in this statement is breathtaking. And in Ricci v. DeStefano, Sotomayor showed us precisely how she implements it: by upholding discrimination against the expendable, those such as Ricci and his co-plaintiffs who don't have black skin.
>
> But no one on the right is supposed to mention it, or so the conventional wisdom would have it. That's because Sotomayor, in addition to being a Latina — or, rather, as a function of being a Latina — is also a sacred cow. As a woman (check one) with parents from Puerto Rico (check two), she is by accident of birth virtually above criticism, a condition of neo-royalty that is death to a democratic republic.

In other words, it's one thing for Sen. Charles Schumer, D-N.Y., to say, "They (Republicans) oppose her at their peril." It's quite another to hear the very same theme echoed by GOP professionals. "If Republicans make a big deal of opposing Sotomayor, we will be hurling ourselves off a cliff," said former George W. Bush aide Mark McKinnon.

Such shallow politicking reveals the crisis in conservative circles: namely, the lack of understanding of what is required to mount the philosophical arguments against the leftist social engineering, as practiced by Sotomayor and as promulgated by Obama.

Making this moral, conservative case isn't jumping off a cliff. It's leadership based on fundamental, core principles. We'll find out if there is anyone left with any such principles when the Senate confirmation hearings for Sotomayor begin.

Diana West, Opposing Sotomayor is right's thing to do, *Hattiesburg American* (2 June 2009) http://www.hattiesburgamerican.com/article/20090602/OPINION01/906020310 .

On the morning of 3 June, about five days after his comment quoted at page 102 above, Newt Gingrich clarified his comment in a long essay:

Shortly after President Obama nominated her to a lifetime appointment to the Supreme Court, I read Judge Sonia Sotomayor's now famous words:

> "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."

My initial reaction was strong and direct — perhaps too strong and too direct. The sentiment struck me as racist and I said so. Since then, some who want to have an open and honest consideration of Judge Sotomayor's fitness to serve on the nation's highest court have been critical of my word choice.

With these critics who want to have an honest conversation, I agree. The word "racist" should not have been applied to Judge Sotomayor as a person, even if her words themselves are unacceptable (a fact which both President Obama and his Press Secretary, Robert Gibbs, have since admitted).

So it is to her words — the ones quoted above and others — to which we should turn, for they show that the issue here is not racial identity politics. Sotomayor's words reveal a betrayal of a fundamental principle of the American system — that everyone is equal before the law.

The Central Question: Is American Justice No Longer Blindfolded?

The fundamental issue at stake in the Sotomayor discussion or nomination is not her background or her gender but an issue that has implications far beyond this judge and this nomination: Is judicial impartiality no longer a quality we can and should demand from our Supreme Court Justices?

President Obama apparently thinks so. Other presidents, Republican and Democrat, have considered race and gender in making judicial appointments in the past. But none have explicitly advocated the notion that judges should substitute their personal experiences for impartiality in deciding cases. And certainly none have asserted that their ethnicity, race or gender would make them a better judge over a judge from a different background.

....

Newt Gingrich, "Supreme Court Nominee Sotomayor: You Read, You Decide," *Human Events* (3 June 2009) http://www.humanevents.com/article.php?id=32114 .

other speeches by Sotomayor

Supporters of Judge Sotomayor distributed copies of a speech the Judge made in 1994. On the afternoon of Wednesday, 3 June 2009, Greg Sargent was apparently the first to notice that her 1994 speech is not only similar to her 2001 lecture, but also suffers from the same problem of saying that women are better judges than men:

> I've just obtained a speech that Sonia Sotomayor gave in 1994, in which she made a comment virtually identical to the "wise Latina" one from 2001 that has generated so much controversy.
>
> And though the 1994 speech was disclosed to Republican Senators as part of her confirmation for Court of Appeals in 1998, there's no sign that anyone objected to it in any way.
>
> The revelation raises fresh questions as to why the 2001 comments generated the controversy they did, and suggests that the comments are not as controversial as her critics claim.
>
> A copy of the 1994 speech was included with the questionnaire she submitted for the 1998 confirmation. A Sotomayor supporter sent both to me.
>
> Here's what she said in the 1994 speech:
>
> > Justice O'Connor has often been cited as saying that "a wise old man and a wise old woman reach the same conclusion in dueling cases. I am not so sure Justice O'Connor is the author of that line since Professor Resnik attributes the line to Supreme Court Justice Coyle. I am not so sure that I agree with the statement. First, if Prof. Martha Minnow is correct, there can never be a universal definition of 'wise.' Second, I would hope that a wise woman with the richness of her experience would, more often than not, reach a better conclusion.
>
> That's virtually identical to the comments from 2001 that have generated days and days of controversy.
>
> There's no sign that any Republican Senators — seven of whom are still in the Senate — had any objection whatsoever to the comments when they reviewed them in 1998.

Greg Sargent, "Breaking: Sotomayor Made Same 'Wise Woman' Speech In 1990s — And No One Objected," *The Plumb Line Blog* (13:25 EDT 3 June 2009)

http://theplumline.whorunsgov.com/senate-republicans/exclusive-sotomayor-made-same-wise-latina-comment-in-1990s-and-no-one-objected/ .

A brief comment at *Politico* cited Greg Sargent and then observed:

> That undercuts GOP efforts to cast it as the outrage of the century; it also makes it harder for the White House to cast it as a slip of the tongue.
>
> (Berkeley may also be a little peeved that she gave a retread speech, though in fact her 2001 address — though it includes some of the same language — is much longer and broader.)

Ben Smith, "Wise Latina, second time around," *Politico* (14:14 EDT 3 June 2009)
http://www.politico.com/blogs/bensmith/0609/Wise_Latina_second_time_around.html .

A blog by an attorney at the *National Review Online* said:

> I've already discussed the silly efforts of Judge Sotomayor's defenders to claim that she "misspoke" and was "unscripted" when she said in 2001, "I would hope that a wise Latina woman with the richness of her experience would more often than not reach a better conclusion than a white male who hasn't lived that life." As I've pointed out, that comment was from the prepared text of a speech that Sotomayor then published as a law-review article.
>
> Now it turns out that Sotomayor made substantially similar comments in a 1994 speech, a speech that was part of the Senate record on her Second Circuit confirmation in 1998. Somehow the blogger who reports this news thinks it's significant not because it further refutes the White House's defense of Sotomayor's comment but because it supposedly raises the question why Republicans didn't object to this comment in 1998.
>
> Applying Occam's razor, I'd speculate that the answer to that question is that the staffer who reviewed Sotomayor's speeches at the time missed the comment. While unfortunate, that would hardly be surprising, especially in light of the much lower level of resources devoted to an appellate confirmation.
>
> (I'll also note that the sentence at issue in the 1994 speech—"I would hope that a wise woman with the richness of her experiences would, more often than not, reach a better conclusion"—doesn't itself state "better" than whom. The reader has to look four sentences earlier to understand that Sotomayor is comparing a "wise woman" to a "wise man." Someone skimming the speech might easily miss that.)
>
> In any event, the strong reaction that Sotomayor's 2001 comment has elicited renders desperate any suggestion that Republicans are somehow estopped from objecting to it because of their failure in 1998 to object to a similar comment she made in 1994.

Ed Whalen, "More on Sotomayor's 'Unscripted' Law-Review Article," *National Review Online* (14:49 EDT 3 June 2009)

http://bench.nationalreview.com/post/?q=NDAzMmYyMGVkMjc3NWE2ZmFlNDM4YTViYTgxMjhiYTI= .

The Weekly Standard, a conservative news magazine, quoted Greg Sargent's blog and then said:

> When Sotomayor's 2001 remarks first came to light, Robert Gibbs responded to the criticism by speaking on behalf of Sotomayor, saying "I think she'd say that her word choice in 2001 was poor." President Obama weighed in as well, "I'm sure she would have restated it," he said. Well, it turns out that she was restating it in her 2001 speech, except the richness of her experience between 1994 and 2001 apparently led her to the better conclusion that being a wise woman isn't quite as impressive as being a wise Latina woman.
>
> Obviously Obama and Gibbs were being completely dishonest when they said she would have rephrased or restated her remarks if she had it to do over again, and you can hardly fault them for lying — what else were they going to say? But now it's clear that these remarks were not a one-off, that Sotomayor believes this so strongly, and that she believes her formulation is so clever, that she would repeat it in almost precisely the same manner nearly a decade later. The White House will need to help Sotomayor come up with a new defense for her remarks before any hearings begin. The poor choice of words defense is no longer operative.

Michael Goldfarb, "Sotormayor Likes Her 'Poor' Choice of Words," *The Weekly Standard* (15:12 EDT 3 June 2009)

http://www.weeklystandard.com/weblogs/TWSFP/2009/06/sotormayor_likes_her_poor_choi.asp .

I disagree with Mr. Goldfarb's conclusion about "Obama and Gibbs were being completely dishonest" or that they were "lying". I suspect that neither of them were aware of Sotomayor's 1994 lecture. There is a significant difference between ignorance and an intentional false statement.

The Associated Press neatly summarized the controversy:

> But the judge was still under fire for a 2001 speech in which she said she hoped the rulings of a "wise Latina" would be better than those of a white male without similar experiences.
>
> Republican Sen. Lindsey Graham, R-S.C., said in light of the comments, she has to prove to senators and the public "that, if they found themselves in litigation with a Latina woman ... that she would give you a fair shake."
>
> Democrats tried to defuse the criticism by circulating a 1994 speech in which Sotomayor spoke about how personal characteristics could affect judging, which Republicans never criticized during the 1997 debate on her confirmation to a federal appeals court — proof, the Democrats said, that conservatives are trying to politicize Sotomayor's nomination.
>
> In 1994, Sotomayor said, "I would hope that a wise woman with the richness of her experiences would, more often than not, reach a better conclusion" than a wise man. "What is better?" she said. "I ... hope that better will mean a more compassionate, caring conclusion."
>
> "No one made an issue out of Judge Sotomayor's comments the last time the Senate confirmed her for the federal bench, because everyone understood what she meant and knew her respect for the rule of law was unquestionable," Sen. Chuck Schumer, D-N.Y., Sotomayor's home-state senator and her sponsor during the confirmation process, said Wednesday.
>
> Republicans said that the 1994 speech only proves that Sotomayor actually believes the controversial sentiment she restated seven years later and that Obama and the White House were being disingenuous when they suggested she made a poor choice of words in 2001.

Julie Hirschfeld Davis, "White House delivers Sotomayor files to Senate," Associated Press (14:29 EDT 4 June 2009) An earlier version of same text was posted at: http://www.time.com/time/politics/article/0,8599,1902739,00.html .

On the afternoon of Thursday, 4 June 2009, the White House delivered five boxes of documents on Sotomayor to the Senate Judiciary Committee. Judge Sotomayor's answers to the Judiciary Committee's questionnaire were posted on the Internet:
http://judiciary.senate.gov/nominations/SupremeCourt/Sotomayor/upload/Questionnaire-2009.pdf
Documents supplied by Judge Sotomayor:
http://judiciary.senate.gov/nominations/SupremeCourt/Sotomayor/SoniaSotomayor-Questionnaire.cfm

It will take many days before journalists and commentators sort through all of the information in Sotomayor's disclosures, but two conclusions were immediately apparent: (1) Sotomayor has given numerous speeches during 1994-2003 in which she specifically said that women were *better* judges than men, and (2) Sotomayor strongly identifies with her ethnicity and gender, instead of seeing herself as a mainstream American. A news item published by *Congressional Quarterly* observed:

> Supreme Court nominee Sonia Sotomayor delivered multiple speeches between 1994 and 2003 in which she suggested "a wise Latina woman" or "wise woman" judge might "reach a better conclusion" than a male judge.
>
> Those speeches, released Thursday [4 June] as part of Sotomayor's responses to the Senate Judiciary Committee's questionnaire, [citation to responses deleted] suggest her widely quoted 2001 speech in which she indicated a "wise Latina" judge might make a better decision was far from a single isolated instance.
>
> A draft version of a October 2003 speech Sotomayor delivered at Seton Hall University stated, "I would hope that a wise Latina woman with the richness of her experiences would, more often than not, reach a better conclusion." That is identical to her October 2001 remarks at the University of California, Berkeley that have become the subject of intense criticism by Republican senators and prompted conservative talk show host Rush Limbaugh to label her "racist."
>
> In addition, Sotomayor delivered a series of earlier speeches in which she said "a wise woman" would reach a better decision. She delivered the first of those speeches in Puerto Rico in 1994 and then before the Women's Bar Association of the State of New York in April 1999.
>
> The summary descriptions of speeches Sotomayor provided indicated she delivered remarks similar to the 1994 speech on three other occasions in 1999 and 2000 during two addresses at Yale and one at the City University of New York School of Law.
>
> Her repeated use of the phrases "wise Latina woman" and "wise woman" would appear to undermine the Obama administration's assertions that the statement was simply a poor choice of words. After details of the 1994 speech circulated before the questionnaire's release, Sen. John Cornyn, R-Texas, emerged from his private meeting with Sotomayor and expressed new concerns about the nominee's "identity politics."

Seth Stern, Sotomayor Repeatedly Referenced 'Wise Woman' in Speeches, *Congressional Quarterly* (19:32 EDT 4 June 2009)
http://blogs.cqpolitics.com/legal_beat/2009/06/sotomayor-repeatedly-reference.html .

Adding to Stern's analysis, there was an interesting pseudonymous comment by "Sparkey" to Stern's *Congressional Quarterly* blog, at 08:59 on 5 June:

> You'd think that someone as "brilliant" as her could show a little more originality in her speeches from year to year.

I agree with "Sparkey" — I expect a creative intellectual (which Sotomayor is not) to have a broad range of topics and new ideas.

At night on 4 June and in the early morning of 5 June, the Associated Press reported:

> The federal appeals court judge divulged new details about her finances and provided three decades of writings, speeches and rulings that give both supporters and critics fresh fodder for the coming debate on her confirmation. They include more instances in which she said she hopes a "wise Latina" would reach a better decision than a man without that experience.
>
> The comments in 2002 and 2003 echo a much-criticized remark she made in 2001 at the University of California-Berkeley law school that has prompted a furor among conservatives who say they suggest President Barack Obama's first Supreme Court nominee brings a personal bias to her legal decisions.

> Obama has said he is "sure she would have restated it." In fact, she said it almost precisely the same way in speeches to the Princeton Club in 2002 and one at Seton Hall law school in 2003, according to copies she sent the Senate.

Julie Hirschfeld Davis, "Gender and heritage a frequent topic for Sotomayor," Associated Press (06:43 EDT 5 June 2009) Published in:
http://www.washingtonpost.com/wp-dyn/content/article/2009/06/04/AR2009060400876.html .

Late Friday night, 5 June, CNN reported:

> Judge Sonia Sotomayor has spoken for years about how her experiences as a Latina woman have influenced her public and private life. In her speeches, she often discussed her "Latina soul" and explained how even the traditional dishes of her Puerto Rican family shaped her views. And she often said that she hoped those experiences would help her reach better judicial conclusions than someone without such a varied background might reach.
>
> The line was almost identical every time:
>
> > "I would hope that a wise Latina woman with the richness of her experiences would, more often than not, reach a better conclusion."
>
> That sentence, or a similar one, has appeared in speeches Sotomayor delivered in 1994, 1999, 2002, 2004 and 2001. In that speech, she included the phrase "than a white male who hasn't lived that life" at the end, which sparked cries of racism from some Republicans.
>
> ....
>
> Sotomayor has spent the last three days in meetings with senators on Capitol Hill answering their questions about her judicial record — and defending those comments. While the judge has made no public comments herself about the matter, others have.
>
> "She told me she had used the phrase before but that she would not be using it again," said Sen. Susan Collins, R-Maine. "She's clearly a very bright individual who learns from her past mistakes," Collins said.
>
> But Collins said she was "still uncomfortable that she [Sotomayor] made the statement, particularly as a sitting judge." "I can understand her explanation that it was intended to be a statement to inspire the young people to whom she was talking and that it did not reflect how she approaches cases before her," she said. "But that's why I want to read more of her cases to make sure that is the case."
>
> Sen. Dianne Feinstein, D-California, said after meeting with Sotomayor that the judge had told her, " 'It was a poor choice of words. If you read on and read the rest of my speech you wouldn't be concerned with it, but it was a poor choice of words.' "
>
> But Senate Minority Leader Mitch McConnell of Kentucky wasn't mollified. "If it was a bad choice of words, it was a bad choice of words repeatedly ... leading one to believe that it probably wasn't just an isolated statement but a core belief," he said.

anonymous, "Sotomayor's 'wise Latina' comment a staple of her speeches," CNN (23:27 EDT 5 June 2009) http://www.cnn.com/2009/POLITICS/06/05/sotomayor.speeches/ .

There are three conclusions that are *not* helpful to Judge Sotomayor:

1. She has publicly stated since 1994 that women are better judges than men, which means that she did *not* accidently misspeak in her 2001 lecture. Given her repeated pattern of racist/sexist remarks since 1994, the White House's "poor choice of words" defense is *not* plausible.

2. Her 2001 lecture is largely recycled from her 1994 lecture, which violates academic norms against multiple publications of the same material, because multiple publication wastes library shelf space and inflates a person's number of publications. At least, she should have cited her 1994 lecture in her 2001 lecture, to be open about her recycling of old text.
3. Any apology should be personal and in a public forum, *not* in private remarks to Senators who will vote on her confirmation.

Sotomayor's writing style

I was aghast to read an isolated sentence in a long *Washington Post* article about Sotomayor's speeches:

> [Sotomayor] has little patience for long-winded lawyers and bad grammar — "each time I see a split infinitive, an inconsistent tense structure or the unnecessary use of the passive voice, I blister."

Alec MacGillis, Amy Goldstein, & Robert Barnes, "Sotomayor Speeches Woven With Ethnicity High Court Nominee Criticized Stereotypes," *The Washington Post* (5 June 2009) http://www.washingtonpost.com/wp-dyn/content/article/2009/06/04/AR2009060403265.html .

I'm sorry to say this, but Judge Sotomayor's remark about herself makes her appear to be some pinhead who elevates style above substance (i.e., content). I care greatly about style in my writing. I have enough different style manuals from the USA and England on my bookshelf to know that there is no "one right way" universally agreed by authorities on style. For example, the opening lines of Star Trek (i.e., "to boldly go") splits an infinitive, a rule derived from Latin, which has no applicability in modern English. The *only* purpose of style and grammar is to help us effectively communicate substantive information. When Sotomayor elevates style over substance, she puts the cart before the horse. God help some uneducated pro se litigant in Sotomayor's court who writes a Brief with a split infinitive, because Sotomayor has no empathy for those slobs who split infinitives! <*grin*> And maybe Sotomayor should spend less time on style and more time deleting offensive substantive remarks about a "wise Latina" being a *better* judge than a white male.

People, like Sotomayor, who elevate style over substance should beware, for their own style shall be carefully scrutinized and found wanting:

- Adam Liptak, "Nominee's Rulings Are Exhaustive but Often Narrow," *The New York Times* (27 May 2009) http://www.nytimes.com/2009/05/27/us/politics/27judge.html ("Judge Sonia Sotomayor's judicial opinions .... are not always a pleasure to read.");

- Stephanie Mencimer, "Sonia Sotomayor's Prose Problem," *Mother Jones* (11:06 PDT 3 June 2009) http://www.motherjones.com/politics/2009/06/sonia-sotomayors-prose-problem (Sotomayor "unfortunately lacks one of the key qualities of a successful Supreme Court justice: writing skills.");

- David Corn, "Sotomayor's Words," *Congressional Quarterly* (11:13 EDT 5 June 2009) http://blogs.cqpolitics.com/davidcorn/2009/06/sotomayors-words.html .

- Tony Mauro, "Sotomayor, word by word," *The National Law Journal* (22 June 2009) http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202431608804&Sotomayor_word_by_word_ ("... a weak spot in her résumé: those long, plodding opinions that review every moment in the case history and cite, explore and dispose of every point made in the briefs and arguments. Her thoroughness makes for a sometimes leaden writing style that has emerged as a point of criticism **....**").

my opinion: entire process is corrupt

Democrats urge a speedy confirmation with a final vote to confirm *before* 7 August. Republicans urge a thorough review of Sotomayor's voluminous record, with a final vote in September.[69] The opposition party is not being *through* in the sense of conscientious and diligent, but only in the hope of finding some scandalous material that might derail the confirmation of the other party's nominee. This is the adversarial process, the same as in litigation. Those who favor this system in the Senate believe that, at the end of the process, Wisdom will prevail. I am *not* so optimistic: I see delay, enormous expense, insults and embarrassment, and a result that inevitably favors the majority party in the Senate — *not* a decision based on merit.

One needs to understand that this confirmation debate is *not* about the qualifications of Sotomayor to sit on the U.S. Supreme Court. Because Republicans have only 40 votes in the Senate, they can not filibuster her nomination — making her confirmation a fait accompli, regardless of her qualifications or defects. It was only a few weeks ago[70] that Republicans were openly talking about using the confirmation process to energize their supporters and solicit donations, which is *not* a legitimate purpose of judicial confirmation hearings and which corrupts the confirmation process. I conclude that the confirmation process in the Senate is corrupted by partisan politics.

In the specific case of Judge Sotomayor, her public flogging over her alleged racism will *not* result in a better Justice Sotomayor on the Supreme Court. Epithets and ad hominem attacks during confirmation could deepen Sotomayor's alienation from whites, resulting in a more biased Justice on the U.S. Supreme Court. Given the nine-vote majority of Democrats in the U.S. Senate and the likelihood that some Republicans will probably vote to confirm Sotomayor — making her confirmation a fait accompli — the Republicans in the U.S. Senate need to ask themselves *why* they want to embarrass or humiliate Sotomayor, who will soon be a Justice of the U.S. Supreme Court. The answer, of course, is that politics — like litigation — works through an adversarial process, in which ad hominem attacks are routine.

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[69] See, e.g., Manu Raju & John Bresnahan, "No agreement on Sonia Sotomayor timeline," *Politico* (04:43 EDT 4 June 2009) http://www.politico.com/news/stories/0609/23322.html .

[70] See discussion beginning at page 57, above.

Not only is the confirmation process in the Senate corrupt, but also the nomination process by the President[71] was corrupted by his emphasis on gender and ethnicity. All of these problems convinces me that the nation needs a better way to select Justices for the U.S. Supreme Court.[72]

Female Justices

Above, I said many times that the U.S. Supreme Court is *not* a representative body. But, if we consider appointing four or five women Justices — a Court that is representative of gender *might* reach a different result on some cases. So, the question arises: would a woman Justice see cases differently from a male Justice?

Above, at page 26, Justice Scalia was quoted as saying that it is "silly" to have a "female legal answer to a question and a male legal answer to the same question". Remarks attributed to Justice O'Connor, the first woman on the U.S. Supreme Court, say that a woman and a man will reach the same result in deciding cases.[73] If that is true, then gender is *not* relevant in selecting a Justice of the Court.

Redding case

There is an awful case currently before the U.S. Supreme Court, in which a nurse and a school employee in an Arizona town strip searched a 13 y old girl who was suspected of having concealed an ibuprofen tablet in her underwear. *Redding v. Safford Unified School Dist. No. 1,* 504 F.3d 828 (9th Cir. 2007) (affirming trial court judgment in favor of school officials), *rev'd in part,* 531 F.3d 1071 (9thCir. 2008) (en banc), *cert. granted,* 129 S.Ct. 987 (2009). Frustrated with her colleagues on the U.S. Supreme Court, Justice Ginsburg gave an interview to a journalist from *USA Today:*

> Three years after Justice Sandra Day O'Connor left the Supreme Court, the impact of having only one woman on the nation's highest bench has become particularly clear to that woman — Ruth Bader Ginsburg.
>
> Her status as the court's lone woman was especially poignant during a recent case involving a 13-year-old girl who had been strip-searched by Arizona school officials looking for drugs. During oral arguments, some other justices minimized the girl's lasting humiliation, but Ginsburg stood out in her concern for the teenager.
>
> "They have never been a 13-year-old girl," she told USA TODAY later when asked about her colleagues' comments during the arguments. "It's a very sensitive age for a girl. I didn't think that my colleagues, some of them, quite understood."

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[71] See discussion beginning at page 73.

[72] Standler, How to Select a Justice for the U.S. Supreme Court, http://www.rbs0.com/sctjustices.pdf (Oct 2005).

[73] See Judge Sotomayor's 2001 lecture, quoted on page 54, above.

....

Ginsburg, 76, a former women's rights advocate whom President Bill Clinton named to the high court in 1993, recalled that as a young, female lawyer her voice often was ignored by male peers. "I don't know how many meetings I attended in the '60s and the '70s, where I would say something, and I thought it was a pretty good idea. …. Then somebody else would say exactly what I said. Then people would become alert to it, respond to it."

Even after 16 years as a justice, she said, that still sometimes occurs. "It can happen even in the conferences in the court. When I will say something — and I don't think I'm a confused speaker — and it isn't until somebody else says it that everyone will focus on the point."

It was a revealing observation from a justice who generally praises her male colleagues, some of whom are close friends.

Ginsburg said the court's gender imbalance has real, although not entirely obvious, consequences.

"You know the line that Sandra and I keep repeating … that 'at the end of the day, a wise old man and a wise old woman reach the same judgment'? But there are perceptions that we have because we are women. It's a subtle influence. We can be sensitive to things that are said in draft opinions that (male justices) are not aware can be offensive."

The differences between male and female justices, she said, are "seldom in the outcome." But then, she added, "it is sometimes in the outcome."

....

Often Ginsburg's view as the court's only woman emerges in an understated way. The strip-search case that began in 2003 was different: Of all the justices, Ginsburg was the most focused on the plight of Arizona student Savana Redding.

After a classmate told the vice principal at the Safford Middle School that Savana had unauthorized prescription-strength ibuprofen, the vice principal directed a nurse and administrative aide to strip-search the girl. Savana's mother, April Redding, sued the school district for violating her daughter's right to be free from unreasonable searches. Authorities found no drugs on Savana.

"After Redding was searched and nothing was found, she was put in a chair outside the vice principal's office for over two hours, and her mother wasn't called," Ginsburg noted during oral arguments. "What was the reason for … putting her in that humiliating situation?"

One of Ginsburg's liberal colleagues, fellow Clinton appointee Stephen Breyer, saw it a little differently. He said he had a hard time understanding the girl's claim that her rights had been violated.

"I'm trying to work out why is this a major thing to, say, strip down to your underclothes, which children do when they change for gym," Breyer said. "How bad is this?"

Ginsburg retorted that school officials had directed Redding "to shake (her) bra out, to shake, shake, stretch the top of (her) pants."

She later told USA TODAY, "Maybe a 13-year-old boy in a locker room doesn't have that same feeling about his body. But a girl who's just at the age where she is developing, whether she has developed a lot … or … has not developed at all (might be) embarrassed about that."

Joan Biskupic, "Ginsburg: Court needs another woman," *USA Today* (23:05 5 May 2009) http://www.usatoday.com/news/washington/judicial/2009-05-05-ruthginsburg_N.htm .

More on this topic was published by *The New York Times.*[74]

While I understand Justice Ginsburg's frustration with her colleagues who fail to see the trauma that government agents can inflict on girls, I think the real problem is *not* men v. women, but rather Justices who are overly deferential to the government. Furthermore, when Justice Ginsburg went public with a private dispute amongst Justices on the *Redding* case that is still under discussion, she certainly antagonized the other Justices. That kind of antagonism is perhaps the real reason why Justice Ginsburg is *in*effective in persuading her male colleagues, and why they ignore her. People who are antagonistic get marginalized, regardless of their gender or ethnicity.

Justice Ginsburg's frustration her male colleagues was premature, because the final decision of the U.S. Supreme Court — which was issued on 25 June 2009 — held that a search of underwear was *un*reasonable and violated plaintiff's Fourth Amendment rights. Moreover, only one Justice disagreed with the holding that the search was unreasonable.

My opinion of the issues in the *Redding* case is simple: there should be no doubt that schools can search pupils who are suspected of carrying either weapons or illicit drugs (e.g., marijuana, methamphetamine, heroin, cocaine, etc.). The school in the *Redding* case makes a big deal about the object of the search being "prescription-strength ibuprofen", as if it were dangerous or illegal. This is ridiculous. First, there is no significant difference between (1) a single 400 mg tablet of "prescription-strength ibuprofen" and (2) two tablets of 200 mg ibuprofen that anyone can purchase without a prescription in any drugstore or grocery store. Second, girls in school have a legitimate need for ibuprofen or similar drugs to treat menstrual cramps, which is a common condition. Third, anyone who suffers from occasional headaches has a right to possess and consume ibuprofen to treat this common condition. In view of these facts, I conclude that the object of the search was ridiculous. Furthermore, the methods and scope of the search was an outrageous invasion of her privacy. School officials *ought* to spend more effort on teaching students how to solve quadratic equations and abandon their ridiculous quest to exterminate the possession of ibuprofen in schools. Taxpayers ought to be outraged that schools wasted taxpayers' money on legal fees to defend such ridiculous and outrageous acts by school officials. Not only did school officials violate Redding's Fourth Amendment rights, but also the school officials repeatedly refused to recognize that they had made a mistake.

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[74] Neil A. Lewis, "Debate on Whether Female Judges Decide Differently Arises Anew," *The New York Times* (4 June 2009) http://www.nytimes.com/2009/06/04/us/politics/04women.html .

general remarks

Feminists, like Justice Ginsburg, assert that only a woman can understand the problems of women. I've never been a 13 y old girl, but I easily find the strip search of 13 y old girl in a quest to find ibuprofen to be an outrageous violation of her privacy. I've never been pregnant, but I — like many other men — have always supported a woman's right to an abortion for any reason. I'm offended that Justice Ginsburg — and many other feminists — are stereotyping my gender as Neanderthals who are *un*sympathetic to the plight of women.

Pregnancy is amongst the issues in law where gender of the judge might matter. The U.S. Supreme Court has a long history of rejecting pregnant women as a "suspect class" for purposes of heightened scrutiny under equal protection of laws. It appears that male judges consider pregnancy as something that apparently affects both genders equally and therefore is *not* an "equal protection of the law" issue, when the obvious fact is that men *never* become pregnant.

Recent research done on U.S. Court of Appeals cases show no difference between male and female judges in 13 subject areas of law, with one exception. In sex discrimination cases, the plaintiff was 10% to 15% more likely to win if a female judge was a member of the three-judge panel, and the defendant was 10% more likely to win if the three-judge panel was all-male.[75]

conclusion

In conclusion of this section, I am still not convinced that women necessarily approach issues differently from men. I know men who are sensitive to so-called women's issues, indeed many physicians who perform abortions are male. And there are many women amongst the vocal opponents of abortion. Men do *not* speak with one voice, and neither do women. There is a wide range of opinions on political or social issues in each gender.

I would welcome nominations of women like Prof. Kathleen Sullivan or Judge Diane Wood to the U.S. Supreme Court, *not* because they are women, but because they are articulate and courageous in support of civil liberties, and because — based on their record — I trust them to do the right thing.

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[75] Christina L. Boyd and Lee Epstein, "When Women Rule, It Makes a Difference," *The Washington Post* (3 May 2009) http://www.washingtonpost.com/wp-dyn/content/article/2009/05/01/AR2009050103406.html . Christina L. Boyd, Lee Epstein, & Andrew D. Martin, "Untangling the Causal Effects of Sex on Judging," draft article posted at: http://epstein.law.northwestern.edu/research/genderjudging.pdf and http://boyd.wustl.edu/Untangling.pdf .

We need *less* tribal behavior in the USA — fewer people who see themselves as defined by either their racial, ethnic, gender, or religious membership. And that's why I am very concerned about the nomination of Judge Sotomayor, with her repeated statements that a "wise Latina" is a *better* judge than a white male.

I suggest that focusing on gender (or ethnicity) is a distraction from finding a truly outstanding nominee who:

1. has a reputation as an independent thinker with integrity to depart from orthodoxy, popular sentiment, and political correctness, so we can trust her to be impartial.
2. is very knowledgeable about constitutional law (including objective measures of excellence, such as frequency of citations to the candidate's work in judicial opinions, scholarly articles, and books)
3. has a record of *not* being deferential to the government in civil liberties and privacy rights.

Sixth Week: 8-14 June 2009

There was relatively little coverage of the Sotomayor nomination by journalists during 8-14 June. In the morning of Monday, 8 June, Sotomayor tripped in LaGuardia airport and fractured her ankle. She continued her visits with senators later Monday while walking on crutches. The cast up to her knee will remain for at least three weeks.

Leahy's remarks about the schedule

At noon on Tuesday, 9 June, Senator Leahy announced that hearings would begin on Monday, 13 July. Leahy anticipates a final vote on the Senate floor on or before Thursday, 6 August. Senator Leahy's statement[76] said:

> Today, I am announcing that the Senate Judiciary Committee will hold the confirmation hearing on the nomination of Judge Sonia Sotomayor to be an Associate Justice on the United States Supreme Court on July 13.
>
> ....
>
> This is a reasonable schedule that is in line with past experience and that will allow several more weeks for Committee members to prepare for the hearing. There is no reason to unduly delay consideration of this well-qualified nominee.[77] Indeed, given the attacks on her character, there are compelling reasons to proceed even ahead of this schedule. She deserves the earliest opportunity to respond to those attacks.

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[76] I added my comments as footnotes.

[77] "Well-qualified" is a conclusion. Leahy presents no facts to support his conclusion.

This is a responsible schedule that serves the many interests involved: the American people's stake in a process that is fair and thorough but not needlessly prolonged; the Senate, which needs sufficient time to prepare for confirmation hearings, and which has a full legislative plate of additional pressing business in the weeks and months ahead that is of great importance to our constituents and to the Nation; the Third Branch of government, which depends on the other branches of government to fill Court vacancies in our independent judiciary; the President, who has nominated Judge Sotomayor; and the nominee herself, who, as a judge, will not be able to defend herself from these attacks until hearings are convened.[78] The Justice who takes Justice Souter's place for the Court session that convenes Oct. 5 also will need as much time as possible before then to hire clerks, set up an office and take part with the rest of the Court in the preparatory work that precedes the formal start of the session.

....

My initial proposal to Senator Sessions was that we begin the hearing on July 7, following the Senate's return from the July 4 recess. I have deferred the start date to July 13 in an effort to accommodate our Republican members. With bipartisan cooperation, we should still be able to complete Judiciary Committee consideration of the nomination during the last week in July, and allow the Senate to consider the nomination during the first week in August, before the Senate recesses on August 7.

In selecting this date I am trying to be fair to all concerned. I want to be fair to the nominee and allow her the earliest possible opportunity to respond to the attacks made about her character. It is not fair for her critics to be calling her racist without allowing her the opportunity to respond.[79]

I also want to conclude the process without unnecessary delay so that she might participate fully in the deliberations of the Supreme Court selecting cases and preparing for its new term.[80] In his May 1 letter to President Obama, Justice Souter announced his resignation effective "when the Supreme Court rises for the summer recess this year," which will happen later this month. Thereafter, the Supreme Court prepares for the next term. To participate fully in the upcoming deliberations, it would be helpful for his successor to be confirmed and able to take part in the selection of cases as well in preparing for their argument.

....

Of course, in the case of the current nomination, Judge Sotomayor had been reported to be a leading candidate for the vacancy as soon as it arose on May 1, and her record was being studied from at least that time forward. The right wing groups attacking her were doing so

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[78] Leahy does *not* say *why* Sotomayor is unable to defend herself before the hearings. In fact, Sotomayor can hold a press conference anytime she wants.

[79] Her critics are *not* denying her an opportunity to respond. She can respond anytime.

[80] This sentence *assumes* that Sotomayor will be confirmed by the entire Senate. If that conclusion is now a fact, why hold hearings on her qualifications?

long before she was named by the President on May 26, and those attacks have intensified since her designation.[81]

I do not want to see this historic nomination of Sonia Sotomayor treated unfairly or less fairly than the Senate treated the nomination of John Roberts. In 2005, when President Bush made his first nomination to the Supreme Court, Senator McConnell, then the Majority Whip, asserted that the Senate should consider and confirm the nominations within 60 to 70 days. We worked hard to achieve that.

The nomination of Judge Sotomayor should more easily be considered within that timeframe. Judge Sotomayor has been nominated to succeed Justice Souter, a like-minded, independent and fair Justice, not bound by ideology, but one who decided each case on its merits and in accordance with the rule of law. We have the added benefit of her career being one that includes her service on the judiciary for the past 17 years. Her judicial decisions are matters of the public record. Indeed, when my staff assembled her written opinions and offered them to the Republican staff, they declined, because they already had them and were reviewing them. We have the benefit of her judicial record being public and well known to us. We have the benefit of her record having been a subject of review for the last month, since at least May 1, when she was mentioned as a leading candidate to succeed Justice Souter. We have the benefit of having considered and confirmed her twice before, first when nominated to be a judge by a Republican President and then when elevated to the circuit court by a Democratic President.[82] **....**

....

Her historic nomination should be treated as fairly as the nomination of John Roberts was treated by the Senate. Given the outrageous attacks[83] on Judge Sotomayor's character, I do not think it fair to delay her hearing. I cringed when I was that during the courtesy visit Judge Sotomayor paid to Senator McConnell, reporters shouted questions about conservatives calling her a racist. She had to sit there silently and could not respond.[84] She deserves that opportunity as soon as possible.

....

I hope that the Republican Senators who are members of the Judiciary Committee will cooperate. This is a schedule that I think is both fair and adequate — fair to the nominee and adequate for us to prepare for the hearing and Senate consideration. There is no reason to indulge in needless and unreasonable delay. This is an historic nomination. It should unite the American people and the Senate. Hers is a distinctly American story. Whether you are

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[81] What "right-wing groups" have done should *not* be relevant to the Senate Judiciary Committee's schedule.

[82] Confirmation of a nominee to the U.S. District Court or to a U.S. Court of Appeals is less important than confirmation of a nominee to the U.S. Supreme Court, because a majority of Justices on the Supreme Court can make new common law that all judges of the lower courts must follow.

[83] "Outrageous attacks" is a conclusion. Leahy presents no evidence to justify his conclusion.

[84] She can respond anytime she wants. She still has her First Amendment right of freedom of speech.

from the South Bronx, the South Side of Chicago or South Burlington, the American Dream inspires all of us, and her life story IS the American Dream. And so is the journey of the President who nominated her.

Some are simply spoiling for a fight. There have been too many unfair attacks,[85] people unfairly calling her racist and bigoted. I know[86] Sonia Sotomayor, and nothing could be further from the truth. These are some of the same people who vilify Justice Souter and Justice O'Connor. Americans deserve better. There are others who have questioned her character and temperament. She deserves a fair hearing, not trial by partisan attack and assaults upon her character. Let us proceed to give her that fair hearing without unnecessary delay.

....

The purpose of the hearing is to allow Senators to ask questions and raise their concerns. It is also the time the American people can see the nominee, consider her temperament and evaluate her character, too. I am disappointed that some Republican Senators have declared that they will vote no on this historic nomination and have made that announcement before giving the nominee a fair chance to be heard at her hearing.[87] It is incumbent on us to allow the nominee an opportunity to be considered fairly and allow her to respond to false criticism[88] of her record and her character. Those who are critical and have doubts should support the promptest possible hearing. That is where questions can be asked and answered. That is why we hold hearings.

Judge Sotomayor is extraordinarily well equipped to serve on the Nation's highest court.[89] To borrow the phrase that the First Lady used last week, not only do I believe that Judge Sotomayor is prepared to serve all Americans on the Supreme Court, I believe that the country is "more than ready" to see this accomplished Hispanic woman do just that.[90] ....

....

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85 "Unfair attacks" is a conclusion. Leahy presents no evidence to justify his conclusion.

86 How well does a Senator from Vermont know a judge in New York City? Leahy asserts personal knowledge and testifies in her favor, when he probably has read few of her speeches.

87 But, earlier in this statement, Leahy expresses his opinion that she is "well qualified" to be a Justice and that criticism of her is "unfair". So Leahy is also announcing his conclusions before the hearings begin.

88 "False criticism" is a conclusion. Leahy presents no evidence to justify his conclusion.

89 Again, this is a conclusion that should be reached only after the hearings have concluded.

90 Now Leahy arrogantly speaks for the entire country, apparently including Republicans and "right-wing" critics of affirmative action.

Statement Of Senator Patrick Leahy (D-Vt.), Chairman, Senate Judiciary Committee, Regarding The Nomination Of Judge Sonia Sotomayor To Be An Associate Justice On The U.S. Supreme Court (9 June 2009) http://leahy.senate.gov/press/200906/060909b.html .
Also in the CONGRESSIONAL RECORD, S6329 - S6332 (9 June 2009).

Notice that Senator Leahy is *not* being a neutral chairman of the Judiciary Committee, he is an active advocate for the confirmation of Sotomayor. Senator Leahy has already concluded that Sotomayor deserves to be confirmed as a Justice, before the hearings have begun. Senator Leahy repeatedly characterizes criticism of Sotomayor as "unfair", which is a conclusion that can only be reached after a careful examination of her record. Aside from those criticisms, Leahy's speech was rambling, repetitive, included irrelevant matieral, and was much longer than it needed to be. Leahy should have announced the schedule, compared the Sotomayor schedule with the schedule for the confirmation of Chief Justice Roberts in the year 2005, and then ended his speech.

On 10 June, the seven Republicans on the Senate Judiciary Committee sent a four-page letter to the White House asking for correction of "apparent omissions" and "incomplete responses" in Sotomayor's 173-page response to the Judiciary Committee's questionnaire.[91] The Republicans asked Sotomayor for copies of materials she *edited* while working for the YALE LAW JOURNAL in 1978-79, which I think is a ridiculous and irrelevant demand. The author of those articles, *not* Sotomayor as an editor, is responsible for their content. And whatever she did at age 25 y is hardly relevant — the Republicans should focus on her past 16 years as a federal judge.

White House Press Briefings 8-12 June

On Monday, 8 June, the White House Press Secretary held a routine briefing:

> **Q. ...** the Senate questionnaire revealed that at least four times, possibly five times, Judge Sotomayor used a variation of the idea that a Latina could come to a better or more informed conclusion than a white male about some various aspect. The White House has said that was a poor choice of words in one instance. I'm wondering if it's willing to say it's a poor choice of words in multiple incidents. And if so, does that poor choice of words denote a pattern of her thinking that is somehow troubling to the White House, as it is to the critics?
>
> MR. GIBBS: I think if you — as we have said here many times, the overall theme of her comments were that her experiences matter, just as they did for and just as they have for, in the quotes of Judge Sandra Day O'Connor — Justice Sandra Day O'Connor, Justice Ginsburg, Justice Alito. I think Judge Sotomayor has said in her visits that the speech that you're referring to was a poor choice of words. But that —
>
> Q He's actually referring to five or six different speeches.

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[91] J. Taylor Rushing, "GOP letter asks Sotomayor to fill in the blanks," *The Hill* (14:45 EDT 10 June 2009)
http://thehill.com/leading-the-news/republicans-say-sototmayor-questionnaire-incomplete-2009-06-10.html .

Q Four or five.

MR. GIBBS: Right, but I —

Q And I'm wondering, if it was poor choice of words, it would suggest, if it was said once, it might have been an error. If it was said multiple times, it was part of a — an approach or a pattern.

MR. GIBBS: I think if you go back and look at each of the instances, I think the overall theme is that experiences and background matter, and that what we've talked about in 2001 was a poor choice of words.

Q The confirmation is not about the overall but it's about the specific meaning of specific words and specific utterances. And since we have a pattern here now, I'm just wondering why critics would not be valid in saying there appears to be a pattern here that may be inconsistent with application —

MR. GIBBS: Except, Major, what people — what your unnamed critics don't seem to subscribe to is any pattern that is in the hundreds of opinions that she's written.

Q So the pattern there trumps the pattern of the words, is that —

MR. GIBBS: I think if you want to know what a — how a judge is going to rule, I'm under the impression that how they've ruled is a good indication of how they're going to do, and what they're going to — the notion that she's talked about, the impartiality of how she looks at these issues, and I think that's been borne out by much news reporting over the past many days of the way in which she —

Q So study the opinions, not the speeches.

MR. GIBBS: I think we would expect friend and foe alike to judge here on her full body of work.

Q Robert, can I follow on that?

Q How much of this back-and-forth about Sotomayor's words do you think is really a question about the value of diversity and sort of the debate about affirmative action sort of cloaked in something else?

MR. GIBBS: You know, look, I think it would be not a good thing for me to infer what or why certain people who are seemingly opposed to her nomination characterize it different ways. I've said I think it's important that we watch the use of what we say, but other than that, I can't — and I wouldn't begin to peer into the motivations.

....

Q Robert, when you and the President said that Sotomayor used a poor choice of words, were you aware of the other times she had similar utterances, or only that one, the Berkeley speech?

MR. GIBBS: Mara, I got to tell you, a lot of life in here blurs together, so I don't entirely recall what — all that I have been briefed on.

Q At the time, people were focusing on one speech, but I'm just wondering if you were aware that she'd said it more than once.

MR. GIBBS: In all honesty, I honestly don't remember.

Q Just to follow up on that, now that you're aware that she said it more than once, do you think they all were poor choices of words?

MR. GIBBS: Well, I think I answered that question just a few minutes ago.

Q Well, no, you said that we should look at the whole context. I'm wondering, just in terms of these statements, do you think they were all — she regrets saying them in that way?

MR. GIBBS: Again, I think I've — I think I've said, I think the President said, and I think she said this was a poor choice of words.

PRESS BRIEFING BY PRESS SECRETARY ROBERT GIBBS (begin 14:28 EDT 8 June 2009) http://www.whitehouse.gov/the_press_office/Briefing-by-Press-Secretary-Robert-Gibbs-with-Jared-Bernstein-the-Vice-Presidents-Chief-Economist-6-8-09/ .

As I explained above, beginning at page 102 and 118, the "poor choice of words" defense is *not* plausible.

On Tuesday, 9 June, the White House Press Briefing commented briefly on the setting of a date to begin hearings in the Senate Judiciary Committee:

Q. [by Ms. Loven] Thank you. Can you talk about the President's personal reaction to the setting of the hearing date for Judge Sotomayor? And is this — does this track with his timing of where he wants this to be and her getting confirmed by October?

MR. GIBBS: Well, obviously the President is pleased that the Senate has set a hearing date of July 13th. We have talked in this room before about the time period that normally happens as you go from nomination to hearing and then ultimately what we hope to be confirmation. From nomination to hearing will be about 48 days, which is consistent with the range of 51 days that I had mentioned in here a few days ago, that the past nine nominees — the average for the past nine nominees.

We sent the questionnaire to the Senate in record time and believe that this continues on a track that would have Judge Sotomayor confirmed and in place for the very important work that happens in the month before the term opens in September where the Court decides the cases that it's going to take, which, as you know, is a very important period of time. So the President is pleased with the developments today in the Senate.

PRESS BRIEFING BY PRESS SECRETARY ROBERT GIBBS (begin 14:33 EDT 9 June 2009) http://www.whitehouse.gov/the_press_office/Briefing-by-Press-Secretary-Robert-Gibbs-6-9-09/ .

I searched each of the daily transcripts of the Press Briefings for 10-12 June for Sotomayor's name, but did not see anything significant about Sotomayor in these three briefings.

law enforcement endorsement

On Tuesday, 9 June, the White House held a propaganda event with law enforcement personnel to endorse the nomination of Judge Sotomayor. The White House press release proclaimed:

> Washington, DC – Vice President Joe Biden was joined today by representatives from eight national law enforcement organizations, who together announced their support for and endorsement of Judge Sonia Sotomayor's nomination to the United States Supreme Court.
>
> With these endorsements, law enforcement organizations from around the country stand firmly behind Judge Sotomayor's nomination. These groups know her record on crime: as a prosecutor and then on the federal bench, Judge Sotomayor has always been both fair and tough, and has followed the rule of law at every turn.
>
> ....
>
> Below is the full list of national law enforcement organizations that sent letters of support for Judge Sotomayor's nomination:
>
> Major Cities Chiefs Association
> - Police Executive Research Forum
> - National Sheriff's Association
> - National Association of Police Organizations
> - National Latino Peace Officers Association
> - Fraternal Order of Police
> - National Organization of Black Law Enforcement Executives
> - National Association of District Attorneys

Press Release, NATIONAL LAW ENFORCEMENT ORGANIZATIONS ENDORSE JUDGE SONIA SOTOMAYOR FOR THE UNITED STATES SUPREME COURT (9 June 2009)

http://www.whitehouse.gov/the_press_office/National-law-enforcement-organizations-endorse-Judge-Sonia-Sotomayor-for-the-United-States-Supreme-Court/ .

Politico offered the following commentary:

> Vice President Joe Biden offered an exuberant endorsement of Supreme Court nominee Sonia Sotomayor at a White House event Tuesday – but some legal analysts believe he went too far by suggesting she would rule in favor of police if confirmed. Flanked by a dozen District of Columbia police officers, Biden said Sotomayor, a former prosecutor, could be counted on to support law enforcement while on the high court. "As you do your job, know that Judge Sotomayor has your back as well. And throughout this nominating process, I know you'll have her back," Biden said.
>
> "I think what Biden said was foolish," said Stephen Gillers, a law professor at New York University who is a prominent legal ethicist. "She's not there to 'have their back.' She's there to interpret the law as she sees fit. "It'll be embarrassing to her when she learns of it," Gillers said. "Biden crosses the line when he starts representing to interest groups that she would be voting in their favor."
>
> Sotomayor was not present at the event, which took place at the Eisenhower Executive Office Building in the White House complex.

> The president of the National Association of Criminal Defense Lawyers, John Wesley Hall, complained that Biden's comment made it sound like she would overlook police misconduct.

Josh Gerstein & Carol E. Lee, "Joe Biden pushes envelope with Sonia Sotomayor praise," *Politico* (9 June 2009) http://www.politico.com/news/stories/0609/23540.html .

The following day, Fox News reported:

> Vice President Joe Biden may have crossed the line when he assured national law enforcement groups Monday that Supreme Court nominee Sonia Sotomayor "has your back." The remark quickly stirred criticism in the legal world, since Biden was making a pledge that a fair and objective justice would not necessarily be able to keep. Biden made the remark at an assembly of eight law enforcement groups after he detailed Sotomayor's tough-on-crime record in the courtroom.
>
> "There's a part of her record that seems to be, up to now, been flying under the radar a bit. And that's her tough stance on criminals and her unyielding commitment to finding justice for the victims of crime," Biden said. He then repeatedly said, "She gets it," and sought to assure the law enforcement groups that she would be on their side. "So you all are on the front lines. But as you do your job, know that Judge Sotomayor has your back as well," Biden said. "And throughout this nomination process, I know you'll have her back."
>
> ....
>
> John Wesley Hall, president of the National Association of Criminal Defense Lawyers, said Biden didn't do himself any favors with that remark, since it's likely to generate more critical questions for Sotomayor during confirmation hearings.
>
> "That (comment) means that she could probably care less about civil liberties and just do whatever law enforcement wants," Hall said. Hall said Sotomayor probably doesn't sign on to Biden's remark, though. "My take on it is that he's probably just trying to get law enforcement to support him by saying something just completely off the wall," he said.

anonymous, "Biden Tells Law Enforcement Groups Sotomayor 'Has Your Back'," *Fox News* (10 June 2009)
http://www.foxnews.com/politics/2009/06/10/biden-tells-law-enforcement-groups-sotomayor/ .

Mr. Biden is a former member of the Senate Judiciary Committee. That he would spout such nonsense shows that politicians are not suitable for the judiciary.

beneficiary of affirmative action

On Sunday, 7 June, *The New York Times* reported:

> If Judge Sonia Sotomayor joins Justice Clarence Thomas on the Supreme Court, they may find that they have far more than a job title in common.
>
> Both come from the humblest of beginnings. Both were members of the first sizable generation of minority students at elite colleges and then Yale Law School. Both benefited from affirmative action policies.

> But that is where their similarities end, and their disagreements begin. For the first time, the Supreme Court would include two minority judges, but ones who stand at opposite poles of thinking about race, identity and opportunity. Judge Sotomayor and Justice Thomas have walked parallel paths and yet arrived at contrary conclusions, not only on legal questions, but on personal ones, too.
>
> Judge Sotomayor celebrates being Latina, calling it a reason for her success; Justice Thomas bristles at attempts to define him by race and says he has succeeded despite the obstacles it posed. Being a woman of Puerto Rican descent is rich and fulfilling, Judge Sotomayor says, while Justice Thomas calls being a black man in America a largely searing experience. Off the bench, Judge Sotomayor has helped build affirmative action programs. On the bench, Justice Thomas has argued against them with thunderous force.

Jodi Kantor & David Gonzalez, "For Sotomayor and Thomas, Paths Diverge at Race," *The New York Times* (7 June 2009) http://www.nytimes.com/2009/06/07/us/politics/07affirm.html .

On Thursday, 11 June, *The New York Times* reported:

> Judge Sonia Sotomayor once described herself as "a product of affirmative action" who was admitted to two Ivy League schools despite scoring lower on standardized tests than many classmates, which she attributed to "cultural biases" that are "built into testing."
>
> ....
>
> Those comments were among a trove of videos dating back nearly 25 years that shed new light on Judge Sotomayor's views. She provided the videos to the Senate Judiciary Committee last week as it prepares for her Supreme Court confirmation hearing next month.
>
> The clips include lengthy remarks about her experiences as an "affirmative action baby" whose lower test scores were overlooked by admissions committees at Princeton University and Yale Law School because, she said, she is Hispanic and had grown up in poor circumstances.
>
> "If we had gone through the traditional numbers route of those institutions, it would have been highly questionable if I would have been accepted," she said on a panel of three female judges from New York who were discussing women in the judiciary. The video is dated "early 1990s" in Senate records.
>
> Her comments came in the context of explaining why she thought it was "critical that we promote diversity" by appointing more women and members of minorities as judges, and they provoked objections among other panelists who pointed out that she had graduated summa cum laude from Princeton and been an editor on Yale's law journal.
>
> But Judge Sotomayor insisted that her test scores were sub-par — "though not so far off the mark that I wasn't able to succeed at those institutions." Her scores have not been made public.
>
> "With my academic achievement in high school, I was accepted rather readily at Princeton and equally as fast at Yale, but my test scores were not comparable to that of my classmates," she said. "And that's been shown by statistics, there are reasons for that. There are cultural biases built into testing, and that was one of the motivations for the concept of affirmative action to try to balance out those effects."
>
> ....

> In the [video] program, Judge Sotomayor also rejected the proposition that minorities must become advocates of "selection by merit alone." She said diversity improved the legal system — like having a Hispanic judge in a case where a litigant and his family is Hispanic, and who can translate what is happening into Spanish.
>
> "Since I have difficulty defining merit and what merit alone means, and in any context, whether it's judicial or otherwise, I accept that different experiences in and of itself, bring merit to the system," she said, adding, "I think it brings to the system more of a sense of fairness when these litigants see people like myself on the bench."

Charlie Savage, "Videos Shed New Light on Sotomayor's Positions," *The New York Times* (11 June 2009) http://www.nytimes.com/2009/06/11/us/politics/11judge.html .

Commenting on the last two paragraphs quoted above, a Hispanic litigant probably appreciates seeing a Hispanic judge who translates into Spanish for the benefit of that litigant. But what about the *other* litigant, who may see such efforts as bias? People who are in a courtroom in the USA should expect proceedings in the English language. People who choose to come to the USA should learn to speak English.

Similarly, CNN reported:

> Supreme Court nominee Judge Sonia Sotomayor years ago said she was a "product of affirmative action" when she was admitted to prestigious universities, but defended the contributions she offered as a Hispanic woman to classroom and workplace diversity.
>
> The statements were part of newly released videos of speeches and panel discussions dating from the mid-1980s that the 54-year-old federal judge provided to the Senate Judiciary Committee, which will begin confirmation hearings July 13.
>
> The remarks offer often-candid insights into the New York native's views on the law, growing up poor in a Bronx housing project, juggling a career and a social life, and her 1980s divorce.
>
> In an early 1990s panel with two other female judges, Sotomayor talked about her educational background and how it helped her in her job as a federal trial judge in Manhattan.
>
> "I am a product of affirmative action," she said. "I am the perfect affirmative action baby. I am Puerto Rican, born and raised in the south Bronx. My test scores were not comparable to my colleagues at Princeton and Yale. Not so far off so that I wasn't able to succeed at those institutions."
>
> She said that using "traditional numbers" from test scores, "it would have been highly questionable if I would have been accepted."
>
> The female panel members politely objected to her characterizations of how she overcame such obstacles, pointing out she graduated from law school with honors and was on the prestigious law review. Sotomayor countered that those were signs test scores alone do not offer the full measure of a person's capability. Test scores, she said, often can be the result of "cultural biases."
>
> ....
>
> Sotomayor has been criticized by some conservatives for her remarks on diversity, and her 2001 comment that she "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 the legal panel, she rejected suggestions that minorities should accept "selection by merit alone." She noted, "It is critical that we promote diversity" by giving women and minorities more opportunities in the law and the judiciary.
>
> "Since I have difficulty defining merit and what merit alone means — and in any context, whether it's judicial or otherwise — I accept that different experiences in and of itself, bring merit to the system," she said. "I think it brings to the system more of a sense of fairness when these litigants see people like myself on the bench."

Bill Mears, "Sotomayor says she was 'perfect affirmative action baby'," *CNN* (11 June 2009) http://edition.cnn.com/2009/POLITICS/06/11/sotomayor.affirmative.action/ .

On Monday, 15 June, the *Los Angeles Times* reported:

> When Sonia Sotomayor goes before the Senate next month for her Supreme Court confirmation hearing, the questioning is likely to focus on her work as a civil rights advocate in the 1980s as much as on her nearly two decades on the federal bench. That is because she was a board member of a Puerto Rican advocacy group that sued to overturn New York City's civil service exams and to win more police and firefighter jobs for Latinos. Sotomayor embraced affirmative action and later described herself as leading an "attack" on testing and promotional exams that favored whites and limited the opportunities for minorities.
>
> ....
>
> As a result, her hearings promise to revive a decades-old debate about the role of race and ethnicity in hiring decisions, and the use of quotas to achieve diversity. It is a thread that has run through much of Sotomayor's life — beginning with her admission to Princeton University and Yale Law School, where she excelled. "I am a product of affirmative action," Sotomayor said in a 1994 interview. "I am the perfect affirmative action baby."
>
> ....
>
> Sotomayor has said she too had benefited from having her test results ignored. In an interview in the 1990s, she said her "test scores were not comparable to that of my colleagues at Princeton or Yale — [but] not so far off the mark that I wasn't able to succeed at those institutions." "But," she added, "if we had gone through the traditional numbers route of those institutions, it would have been highly questionable whether I would have been accepted."

James Oliphant and David G. Savage & Andrew Zajac, "Sotomayor embracing affirmative action, then and now," *Los Angeles Times* (15 June 2009) http://www.latimes.com/news/nationworld/nation/la-na-sotomayor15-2009jun15,0,6208899.story .

Sotomayor mentions "cultural biases" in standard, multiple-choice exams. Such "biases" are commonly alleged by minorities, but rarely proven in a convincing way. But Sotomayor is right to say that multiple-choice exams do not portray the entire picture of a candidate for admission. That's why universities have long considered a candidate's creative ability, such as science fair projects, published writings, and other indicators of talent.

On the issue of affirmative action, Sotomayor has conceded that she would not have been admitted to Princeton University on the basis of her SAT scores. Above, beginning at page 73, I concluded that Obama nominated Judge Sotomayor *not* because she was the best qualified candidate, but because she was the best qualified Hispanic woman. One might wonder if her career is based more on affirmative action than on merit: both the beginning of her adult life (i.e., admission to Princeton Univ.) and her final promotion (i.e., Justice of the U.S. Supreme Court) were based on her ethnicity and gender. And in view of the role of affirmative action in her life, it is particularly audacious that she would repeatedly give speeches saying that a woman, or a Latina woman, would be a *better* judge than a white male.

discussion of affirmative action

Affirmative action cases at the U.S. Supreme Court often result in small majorities — and sometimes no majority opinion, but only a plurality opinion — which indicates the highly controversial nature of affirmative action and the lack of consensus. The following are a few quotations from the opinions of individual Justices on the U.S. Supreme Court:

In 1987, Justice Scalia (joined by Chief Justice Rehnquist) wrote:

> The Court today completes the process of converting this [42 U.S.C. § 2000e-2(a) enacted in 1964] from a guarantee that race or sex will not be the basis for employment determinations, to a guarantee that it often will. Ever so subtly, without even alluding to the last obstacles preserved by earlier opinions that we now push out of our path, we effectively replace the goal of a discrimination-free society with the quite incompatible goal of proportionate representation by race and by sex in the workplace.

Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 658 (1987) (Scalia, J., dissenting).

In 1989, Justice Scalia wrote:

> The difficulty of overcoming the effects of past discrimination is as nothing compared with the difficulty of eradicating from our society the source of those effects, which is the tendency — fatal to a Nation such as ours — to classify and judge men and women on the basis of their country of origin or the color of their skin.
>
> A solution to the first problem that aggravates the second is no solution at all. I share the view expressed by Alexander Bickel that "[t]he lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society." A. Bickel, THE MORALITY OF CONSENT 133 (1975).
> At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb — for example, a prison race riot, requiring temporary segregation of inmates, cf. *Lee v. Washington, supra* — can justify an exception to the principle embodied in the Fourteenth Amendment that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens," *Plessy v. Ferguson,* 163 U.S. 537, 559, 16 S.Ct. 1138, 1146, 41 L.Ed. 256 (1896) (Harlan, J., dissenting); accord, *Ex parte Virginia,* 100 U.S. 339, 345, 25 L.Ed. 676 (1880); 2 J. Story, COMMENTARIES ON THE CONSTITUTION

§ 1961, p. 677 (T. Cooley ed. 1873); T. Cooley, CONSTITUTIONAL LIMITATIONS 439 (2d ed. 1871).

City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520-521 (1989) (Scalia, J. concurring in judgment). Justice Scalia wrote later in the same opinion:

> It is plainly true that in our society blacks have suffered discrimination immeasurably greater than any directed at other racial groups. But those who believe that racial preferences can help to "even the score" display, and reinforce, a manner of thinking by race that was the source of the injustice and that will, if it endures within our society, be the source of more injustice still. The relevant proposition is not that it was blacks, or Jews, or Irish who were discriminated against, but that it was individual men and women, "created equal," who were discriminated against. And the relevant resolve is that that should never happen again. Racial preferences appear to "even the score" (in some small degree) only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right that an injustice rendered in the past to a black man should be compensated for by discriminating against a white. Nothing is worth that embrace. Since blacks have been disproportionately disadvantaged by racial discrimination, any race-neutral remedial program aimed at the disadvantaged as such will have a disproportionately beneficial impact on blacks. Only such a program, and not one that operates on the basis of race, is in accord with the letter and the spirit of our Constitution.

City of Richmond v. J.A. Croson Co., 488 U.S. 469, 527-528 (1989) (Scalia, J. concurring in judgment).

In 1995, Justice Scalia wrote:

> In my view, government can never have a "compelling interest" in discriminating on the basis of race in order to "make up" for past racial discrimination in the opposite direction. See *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 520, 109 S.Ct. 706, 735-736, 102 L.Ed.2d 854 (1989) (SCALIA, J., concurring in judgment). Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus upon the individual, **....** To pursue the concept of racial entitlement — even for the most admirable and benign of purposes — is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.

Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part).

In 1995, Justice Thomas wrote:

> That these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged. There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution. **....**
>
> These programs not only raise grave constitutional questions, they also undermine the moral basis of the equal protection principle. Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society. Unquestionably, "[i]nvidious [racial] discrimination is an engine of oppression," [515 U.S.

> 200, 242] (STEVENS, J., dissenting). It is also true that "[r]emedial" racial preferences may reflect "a desire to foster equality in society," *ibid.* But there can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called "benign" discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences. **....**
>
> In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. [footnote: "It should be obvious that every racial classification helps, in a narrow sense, some races and hurts others. **....**"] In each instance, it is racial discrimination, plain and simple.

Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240-241 (1995) (Thomas, J., concurring in part).

In June 2003, Justice O'Connor wrote for a five-member majority in a case that approved a law school reserving some admission slots for African-American, Hispanic, and Native-American students, and denying admission to better-qualified white students:

> It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. [*Regents of University of California v. Bakke,* 438 U.S. 265 (1978)] Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.

Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (majority opinion).

This remark appears to be a nonbinding promise that white people will have equal opportunity sometime after the year 2028. Justice Thomas, joined by Justice Scalia, dissented in part:

> I agree with the Court's holding that racial discrimination in higher education admissions will be illegal in 25 years. I respectfully dissent from the remainder of the Court's opinion and the judgment, however, because I believe that the Law School's current use of race violates the Equal Protection Clause and that the Constitution means the same thing today as it will in 300 months.

Grutter v. Bollinger, 539 U.S. 306, 351 (2003) (Thomas, J., dissenting in part).

Justice Thomas continued:

> The Court also holds that racial discrimination in admissions should be given another 25 years before it is deemed no longer narrowly tailored to the Law School's fabricated compelling state interest. While I agree that in 25 years the practices of the Law School will be illegal, they are, for the reasons I have given, illegal now. The majority does not and cannot rest its time limitation on any evidence that the gap in credentials between black and white students is shrinking or will be gone in that timeframe. In recent years there has been virtually no change, for example, in the proportion of law school applicants with LSAT scores of 165 and higher who are black. In 1993 blacks constituted 1.1% of law school applicants in that score range, though they represented 11.1% of all applicants. Law School Admission Council, National Statistical Report (1994) (hereinafter LSAC Statistical Report). In 2000 the comparable numbers were 1.0% and 11.3%. LSAC Statistical Report (2001). No one can seriously contend, and the Court does not, that the racial gap in academic credentials will disappear in 25 years. Nor is the Court's holding that racial discrimination will be

> unconstitutional in 25 years made contingent on the gap closing in that time.
> [three footnotes omitted]

Grutter v. Bollinger, 539 U.S. 306, 375-376 (2003) (Thomas, J., dissenting in part).

Affirmative action was initially created in the early 1960s.[92] If affirmative action were an effective means to end discrimination, why is affirmative action still necessary almost fifty years later? It is obvious from current cases like *Ricci* that affirmative action has failed to end discrimination in employment and promotion. Perhaps it is time to abandon affirmative action and instead use tort litigation, with punitive damages, to punish discriminatory employers.

Affirmative action is an extremely controversial subject. While I believe that affirmative action should be ended, I also believe that some good — the integration of minorities into both government and the professional communities — has come from affirmative action. My criticism of affirmative action is based on two observations: (1) it is a departure from meritocracy, in which the majority is discriminated against on the basis of their race and gender (i.e., being a white male is a handicap), and (2) it's a recipe for disaster when important professional or managerial positions are filled with someone who is not the best available candidate on merit alone. I also agree with Justices Scalia and Thomas in their opinions quoted above.

Affirmative action has also created collateral damage: a backlash of bigotry amongst innocent white males who believe they were denied either a promotion or a job, so that the position could be given to a less qualified minority candidate. Furthermore, when many white males see a minority person in an esteemed position (e.g., judge, professor), there is often an *assumption* that the minority person was not the best qualified, but obtained the position *only* because of his/her minority status — an assumption which unjustly harms the reputation of minority people who are genuinely well qualified for the job.

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[92] *U.S. v. United Brotherhood of Carpenters and Joiners of America,* 457 F.2d 210, 217-218 (7thCir. 1972) ("... Executive Order 11246 [President Johnson, Sep 1965] requires contractors to take affirmative action in regard to equal opportunity employment, upgrading, recruitment and selection for training, including apprenticeship...."); *Pettway v. American Cast Iron Pipe Co.,* 411 F.2d 998, 1000 (5thCir. 1969) ("The [Defendant] Company has been a contractor with the United States since the effective date of Executive Order No. 10925 signed by President Kennedy, and therefore has been under an obligation since 1961 to undertake an affirmative action program to eliminate discriminatory employment based on race or to institute affirmative action programs to assure equal employment opportunities to minority groups.").

I believe it is wrong to discriminate against white males, in exactly the same way that it is wrong to discriminate against any other race, ethnic group, or gender.[93] Making some groups "more equal" than others is *not* a recipe for a just and fair society. Affirmative action is especially unfair to white males, when those white males are personally innocent of bigotry, because they are being punished for discrimination by society many years ago.

An extreme example of the unfairness of affirmative action is the *Ricci* case, discussed above, beginning at page 97. Ricci, who is white, made a higher test score than any of the minority candidates, but Ricci's promotion was denied for at least six years, because of the failure of minority candidates to pass the examination. Why have exams if we are going to ignore the results?

Seventh Week: 15-21 June 2009

An article posted at the *Politico* website on Monday morning, 15 June, summarized how a nominee should answer questions from the Senate Judiciary Committee. Because of legal restrictions on how much copyrighted text can be quoted under the doctrine of fair use, I am only quoting their list of do's and don't's, without their explanations and quotations from previous nominees.

> Through it all, Sotomayor should keep in mind the central lesson taught by her predecessors: Nothing they said in their hearings mattered once they were confirmed for a life term. They can, and do, vote exactly as they please.

Below are some do's and don'ts gleaned from recent confirmations — and rejections:

(1) Don't: Say the Constitution is a "living" document.
Do: Say the Constitution may be applied to "changed conditions."

(2) Don't: Suggest you would never even consider overturning decisions hated by Republicans.
Do: Leave them some hope.

(3) Don't: Say you have empathy.
Do: Suggest that you have empathy.

(4) Don't: Confuse Earl Warren and Warren Burger when you're asked to name your favorite justice.
Do: Avoid controversy by spreading the love around.

(5) Don't: Compare being a justice to being a baseball player, an NFL star, LeBron James or anyone else famous.

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[93] Above, at page 114, I refused to quote discussion of Judge Sotomayor's alleged problems with her temperament. There, I characterized such criticism as bruised egos of white males who were uncomfortable with criticism by a powerful Hispanic woman.

Do: Compare the job of a justice with that of an umpire, as Roberts did.
Fred Barbash & Andie Coller, "Dos and don'ts of Senate confirmations," *Politico* (04:12 EDT 15 June 2009) http://www.politico.com/news/stories/0609/23732.html .

Barbash & Coller are *not* being cynical when they said "Nothing they said in their hearings mattered once they were confirmed". Although one might *imagine* impeaching a Justice for perjury during confirmation hearings, fundamental concerns about separation of powers should prevent such impeachments. The Supreme Court is intended to be an independent branch of government, which means the Court will occasionally overrule or irritate the other two branches of government.

Belizean Grove

On her initial Questionnaire submitted to the Senate Judiciary Committee on 4 June 2009, Sotomayor admitted that the Belizean Grove was an woman's organization in response to the query "describe briefly the nature and objectives of each such organization":

> The Belizean Grove is a private organization of female professionals from the profit, non-profit and social sectors.

Sonia Sotomayor, Questionnaire, Nr. 11(a) on page 11.
http://judiciary.senate.gov/nominations/SupremeCourt/Sotomayor/upload/Questionnaire-2009.pdf

The Questionnaire then asks, and Sotomayor responded:

> [Q.] The American Bar Association's Commentary to its Code of Judicial Conduct[94] states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, religion, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminates or formerly discriminated on the basis of race, sex, religion, or national origin either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.
>
> [A.] None of the above organizations, other than the Belizean Grove, discriminates on the basis of race, sex, religion, or national origin. The Belizean Grove is a private organization of female professionals from the profit, non-profit and social sectors, but I do not consider the Belizean Grove to invidiously discriminate on the basis of sex in violation of the Code of Judicial Conduct.

Ibid., Questionnaire, Nr. 11(b) on pages 14-15.

In a letter to the Senate Judiciary Committee, Sotomayor defended her membership in an all-women's group, The Belizean Grove:

> The June 10 letter [from Senator Sessions] also asks about my membership in the Belizean Grove. As I explained in response to question 11(a), I am a member of the Belizean Grove, a private organization of female professionals from the profit, non-profit, and social

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[94] Why are the Senators citing the ABA model code? The citation *should* be to the official Code of Conduct for United States Judges.

> sectors. The organization does not invidiously discriminate on the basis of sex. Men are involved in its activities — they participate in trips, host events, and speak at functions — but to the best of my knowledge, a man has never asked to be considered for membership. It is also my understanding that all interested individuals are duly considered by the membership committee. For these reasons, I do not believe that my membership in the Belizean Grove violates the Code of Judicial Conduct.

Sonia Sotomayor, Questionnaire Supplement, pp. 1-2 (15 June 2009)
http://judiciary.senate.gov/nominations/SupremeCourt/Sotomayor/upload/061509QuestionnaireSupplement.pdf .

The website of the Belizean Grove explains its purpose:

> Having observed the power of the Bohemian Grove, a 130-year-old, elite old boys' network of former Presidents, businessmen, military, musicians, academics, and non-profit leaders, and realizing that women didn't have a similar organization, Susan Stautberg and 26 other founding members created the Belizean Grove, a constellation of influential women who are key decision makers in the profit, non-profit and social sectors; who build long term mutually beneficial relationships in order to both take charge of their own destinies and help others to do the same.
>
> Members are highly accomplished leaders in a wide venue of fields, are dedicated to giving back to their communities, have a sense of humor and excitement about life and are willing to mentor and share connections. With this vision in mind, members are invited not only for their professional accomplishments but also for their generosity and compatibility.
>
> The Grove is an international nurturing network that helps women pursue more significant dreams, ambitions, purposes, transcendence, and spiritual fulfillment, while also opening up more leadership opportunities to these women of diverse backgrounds, talents, ages, and skills. The Grovers are leaders from 5 continents, from profit, non-profit and social sectors. They are heads of major government agencies, businesswomen, military officers, academics, non-profit leaders, musicians, authors, diplomats, design gurus...
> [ellipses in original]

Belizean Grove homepage (20 June 2009) http://www.belizeangrove.com/ .

It would seem that the group only admits women to membership, because it's purpose is to be an "elite old [girls'] network" that "helps women pursue more significant dreams ... while also opening up more leadership opportunities to these women". Doesn't say anything about helping *people* — only says *women.* Doesn't say anything about welcoming men who might help women.

Journalists explained about the Belizean Grove:

> Sotomayor joined the New York-based Belizean Grove last year and listed it on the questionnaire she submitted this month to the Senate Judiciary Committee as among her many memberships. Though she called attention to the fact that the Grove's members are all women, she asserted on the original questionnaire, "I do not consider the Belizean Grove to invidiously discriminate on the basis of sex in violation of the Code of Judicial Conduct."
>
> That didn't satisfy Senate Republicans, who in a letter last week demanding more information from Sotomayor, asked her to "explain the basis for your belief that membership in an organization that discriminates on the basis of sex nonetheless conforms to the Code of Judicial Conduct."
>
> Founded nearly 10 years ago as the female answer to the Bohemian Grove — a secretive all-male club whose members have included former U.S. presidents and top business leaders

— the Belizean Grove has about 125 members, including Army generals, Wall Street executives and former ambassadors.

The group on its website describes itself as "a constellation of influential women who are key decision makers in the profit, nonprofit and social sectors; who build long-term, mutually beneficial relationships in order to both take charge of their own destinies and help others to do the same." It hosts an annual off-the-record three-day retreat in Central or South America at which its members attend cocktail parties with U.S. diplomats and host-country officials and participate in panel discussions on public policy and business affairs.

Sotomayor attended last year's retreat in Lima, Peru, and gave a presentation on the challenges the judiciary faces in maintaining its independence from the legislative and executive branches. In a quote on the group's website, Sotomayor called the Grove "an extraordinary grouping of talented, compassionate and passionate women. I am deeply honored to have been included. The joy of participating in your fun in Peru was wonderful."

The group's founder, Susan Stautberg, told POLITICO that male spouses, partners and adult children are permitted to go on the optional post-retreat expeditions (last year's was to Machu Picchu and the Sacred Valley) and said that even though "no man has ever applied to be a member. ... If they did, we would certainly vote on it."

Kenneth P. Vogel and Josh Gerstein, "Sotomayor defends all-women's group," *Politico* (19:50 EDT 15 June 2009) http://www.politico.com/news/stories/0609/23779.html .

The New York Times added:

According to the Belizean Grove's Web site, the group is a "constellation of influential women" who are building "long-term, mutually beneficial relationships." It was founded as a counterpart to the all-male Bohemian Grove, a legendary club of elite politicians, businessmen and other leaders.

The group's roughly 115 "grovers," as members call themselves, include ambassadors and top executives of Goldman Sachs, Victoria's Secret and Harley-Davidson. They meet each year for an annual retreat in Belize or another Central American destination, as well as occasionally in New York and other cities for outings described as "a balance of fun, substantive programs and bonding." The group's Web site does not appear to mention any roles for men.

Charlie Savage & David D. Kirkpatrick, "Sotomayor Defends Ties to Association," *The New York Times* (16 June 2009) http://www.nytimes.com/2009/06/16/us/politics/16judge.html .

There is an ethics problem when a judge belongs to any organization that discriminates on the basis of race, gender, religion, or ethnicity. Canon 2 of the Code of Conduct for United States Judges states:

C. A judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.

Code of Conduct for United States Judges, Canon 2(C), (effective 1973) http://www.uscourts.gov/guide/vol2/ch1.cfm#2 .

The new Code of Conduct that is effective 1 July 2009 contains the exact same rule.

The terse rule contains no guidance on what "invidious discrimination". The commentary to the Code of Conduct before July 2009 explains:

> Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Canon 2C refers to the current practices of the organization. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. See *New York State Club Ass'n. Inc. v. City of New York,* 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988); *Board of Directors of Rotary International v. Rotary Club of Duarte,* 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987); *Roberts v. United States Jaycees,* 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984). Other relevant factors include the size and nature of the organization and the diversity of persons in the locale who might reasonably be considered potential members. Thus the mere absence of diverse membership does not by itself demonstrate a violation unless reasonable persons with knowledge of all the relevant circumstances would expect that the membership would be diverse in the absence of invidious discrimination. Absent such factors, **an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex, or national origin persons who would otherwise be admitted to membership.**[95]
>
> Although Canon 2C relates only to membership in organizations that invidiously discriminate on the basis of race, sex, religion or national origin, a judge's membership in an organization that engages in any invidiously discriminatory membership practices prohibited by applicable law violates Canons 2 and 2A and gives the appearance of impropriety. In addition, it would be a violation of Canons 2 and 2A for a judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of race, sex, religion, or national origin in its membership or other policies, or for the judge to use such a club regularly. Moreover, public manifestation by a judge of the judge's knowing approval of invidious discrimination on any basis gives the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity and impartiality of the judiciary, in violation of Canon 2A.
>
> When a judge determines that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Canon 2C or under Canons 2 and 2A, the judge is permitted, in lieu of resigning, to make immediate and continuous efforts to have the organization discontinue its invidiously discriminatory practices. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within two years of the judge's first learning of the practices), the judge should resign immediately from the organization.

Ibid.

Because the Belizean Grove apparently excludes men from membership, even if the men want to help women with their careers, I conclude that the Grove does invidiously discriminate against men.

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[95] Boldface added by Standler. This is the critical part of the commentary for evaluating the Belizean Grove.

After I wrote this section on the Belizean Grove, I stumbled across three trenchant editorials during a search of Google News. On 5 June, Mr. Whelan, a conservative attorney, commented on Sotomayor's membership in the Belizean Grove:

> Judge Sotomayor's response to the Senate questionnaire (question 11.a) reveals that she belongs to the Belizean Grove, "a private organization of female professionals." From this Politico article, it's clear that the Belizean Grove is an exclusive and elite group that provides networking opportunities that many men would be eager to avail themselves of. Sotomayor concedes, in her response to question 11.b, that the Belizean Grove discriminates on the basis of sex, but she maintains that its discrimination isn't invidious.
>
> Perhaps Sotomayor can try explaining that to the men who can't take part in the Belizean Grove and who don't have comparable opportunities—and who would be accused of invidious discrimination if they were able to join an all-male group that provided comparable opportunities.
>
> Of course, Sotomayor first ought to explain to the New Haven firefighters who were denied promotions on the basis of their race why that denial wasn't invidious discrimination.

Mr. Edward Whelan, "Sotomayor on Good Discrimination vs. Invidious Discrimination," Bench Memos, *The National Review Online* (10:17 5 June 2009) http://bench.nationalreview.com/post/?q=MjVlNjljOTE0NmNiZDBlN2IzYTE1NGVmN2Q1M2YzNGU= .

On 16 June, Jennifer Rubin wrote about Sotomayor's initial position on her membership in the Grove:

> A few things are noteworthy. First, the condescension toward men — we let the guys come to party — is reminiscent of the "we let women be social members" excuses that exclusive men's clubs routinely gave for decades – and which were scorned by women's groups. Second-class citizenship for thee, but not for me. Got it?
>
> Second, the line about "no one ever asking to join" is rich. Certainly if one declares the organization to be "all men" or "all white" or "all anything" those not in the "all" group are going to be dissuaded from seeking membership. Isn't the mere statement of exclusivity enough to raise concerns?
>
> Finally, by repeating the catch phrase "invidious" she suggests, but does not come right out and say, that even if these gals discriminate it's not "invidious" because it's women keeping out men and not the other way around. This is the noxious double standard that many minority clubs and organizations operate under. Here, it falls particularly flat. Certainly many men would love to have the opportunity to network with rich and famous women in positions of power. Their careers undoubtedly would be furthered if they could belong to a club priding itself on its sophisticated membership. **....**
>
> Let's put it this way: imagine how Senator Kennedy would react if a male nominee were a member of the Bohemian Grove, explained that the ladies can come to the picnics and that, gosh, no girl ever asked to be let in. Enough said.

Jennifer Rubin, "The Fellas Can Come to the Picnics," *Commentary Magazine* (19:10, 16 June 2009 http://www.commentarymagazine.com/blogs/index.php/rubin/69952 .

The following day, Ed Whelan quoted both Jennifer Rubin and the requirements of the Code of Conduct for U.S. Judges and concluded:

> I won't claim that Sotomayor's membership in the Belizean Grove is itself a matter of any concern to me. But her apparent violation of Canon 2C and her readiness to rationalize her own participation in reverse discrimination tie into broader concerns about her impartiality.
>
> Further, what's sauce for the goose ought to be sauce for the gander. In that regard, I'll highlight Jeffrey Lord's essay on Judge Brooks Smith's confirmation travails ("Pat Leahy's Fish Story"), which discusses how Senate Democrats in 2002 went into conniptions over Smith's former membership in an all-male fishing club.

M. Edward Whelan, "Judge Sotomayor and the Belizean Grove," Bench Memos, *The National Review Online* (10:48, 17 June 2009)
http://bench.nationalreview.com/post/?q=OWU2NjJkZWZmYTliZjY2MzhjZmQxMmUxYTliMjg5MDk= .

On 18 June, an op-ed column written by a liberal commentator and published in *The Washington Post* addressed the issue of discrimination in favor of women or in favor of a racial/ethnic minority:

> If Obama had nominated a man who was a member of the Bohemian Grove, that would be a big issue and probably a fatal one. So how is it different if Sotomayor is a member of a club set up specifically to be the female equivalent? Rather than try to answer this question honestly, Sotomayor chose to make the preposterous argument that the Belizean Grove isn't a women's club. It's just that no men have ever applied for membership, you see. White clubs used to explain the absence of black members the same way. It's a laughable argument — a brazen whopper — and an insult to the citizenry and the Senate that must confirm her.
>
> The true answer is that we tolerate discrimination in favor of traditionally oppressed groups more than we tolerate discrimination against them. It's not symmetrical. And, if you believe in affirmative action — as Sotomayor proudly does, as I do — it can't be.
> An all-women's club is okay even though an all-men's club is not. A corporation's minority recruitment program or a university's minority scholarships are considered admirable, while similar programs reserved for white people would be regarded as horrific.
>
> Sotomayor will feel right at home on the Supreme Court, where justices have made heroic efforts to pretend that affirmative action is one thing and that reverse discrimination is another. **....**
>
> But this familiar debate misses the point about Sotomayor. The obnoxious form of discrimination practiced by institutions like the Belizean Grove isn't discrimination against men. It's discrimination against ordinary women who aren't successful, or powerful or connected, who haven't risen through the meritocracy. It's not that many of them want to join; most have never even heard of the Belizean Grove. (I'd never heard of it until this week.) It's that the openly expressed purpose of this organization is to create a female elite just like the male elite represented by the Bohemian Grove in all respects except one.
>
> Feminists, like all liberation movements, face the question: Do we want to change society to make it more egalitarian? Or do we just want in on current arrangements? **....**
>
> On the other hand, this Belizean Grove thing sounds like an especially self-conscious and farcical attempt to create a unnecessary meritocratic hurdle. You don't have to be a radical leveler to think that allowing the Bohemian Grove to fade into inconsequence would be better for equality than setting up a female imitation. It would have been nice if Sotomayor, with all her accomplishments, had been secure enough to laugh at the invitation to join this parody of

> elitism. But not many people who have risen so far so fast are so secure. Republicans ought to find that reassuring.

Michael Kinsley, "Shake That Grove Thing," *The Washington Post* (18 June 2009) http://www.washingtonpost.com/wp-dyn/content/article/2009/06/17/AR2009061702801.html .

Mr. Kinsley makes two points: (1) that it is socially acceptable to discriminate in favor of women or in favor of racial/ethnic minorities, and he explicitly recognizes that conventional political dogma is *not* symmetrical, and (2) creation of elitist organizations is "obnoxious".

On the first point, I think we do real harm when we pretend that discrimination in favor of women — or in favor of racial/ethnic minorities — is somehow better than discrimination in favor of white males. Anytime we construct social policies that are illogical or nonsymmetrical, we make a new mistake, even if that mistake is *intended* to reverse past mistakes (i.e., to reverse past discrimination).

On the second point, I do *not* see a problem with so-called elitist organizations. Indeed, such organizations are the natural consequence of meritocracy. It is *not* objectionable that the American Medical Association limits its membership to physicians, or the American Bar Association limits its membership to attorneys, although such members — who typically have 7 to 8 years of full-time university education — are *not* representative of the general population. In a different context, we do *not* allow anyone to play on professional sports teams — instead we take the elitist approach of finding the most talented athletes and then train them rigorously to make them even better. Frankly, I regard egalitarianism as a scourge and a recipe for mediocrity.

her resignation from the Grove

After defending her membership in the Belizean Grove just four days earlier, Judge Sotomayor unexpectedly resigned from the Grove on Friday, 19 June 2009. Her entire letter to the Senate Judiciary Committee says:

> I am writing to inform you that I have resigned from the Belizean Grove, effective today. I believe that the Belizean Grove does not practice invidious discrimination and my membership did not violate the Judicial Code of Ethics, but I do not want questions about this to distract anyone from my qualifications and record.

Sonia Sotomayor, letter to Senators Leahy and Sessions (19 June 2009) http://judiciary.senate.gov/nominations/SupremeCourt/Sotomayor/upload/061909SotomayorToLeahy-Sessions.pdf .

Her resignation was announced by Senator Leahy on Friday evening, and apparently first reported by *The Hill* at 19:45 EDT on Friday.[96] I have three comments.

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[96] Ian Swanson, Sotomayor resigns from all-women's club, *The Hill* (19:45 EDT 19 June 2009) http://thehill.com/leading-the-news/sotomayor-resigns-from-all-womens-club-2009-06-19.html .

First, if Judge Sotomayor truly believed that the Belizean Grove did *not* discriminate against men, then she should have remained a member and defended her choice. Abandoning memberships in groups to placate a few Senators during her confirmation hearing basically abandons her personal autonomy and permits others to dictate her personal friendships and associations. While such loss of autonomy is a cowardly approach to life, it may be a good recipe for success amongst politicians.

Second, resigning on 19 June 2009 does *not* cure the entire problem. She has been a member of the Belizean Grove while she was a federal judge who is bound by Canon 2(C). To make an analogy: suppose Sotomayor runs over a pedestrian with her car, then sells the car after the accident — does her subsequent sale of the car make her immune to criminal and tort liability for the accident? Of course not. There are *two* issues here: (1) her current membership in discriminatory organizations, and (2) her bad judgment in joining discriminatory organizations in the past. Resigning only cures the first problem, not the second problem.

Third, the timing of the announcement of her resignation in the Grove is suspicious. By waiting until Friday evening to make the announcement, she avoids publicity on the topic. She can hope that when business resumes on Monday morning, there will be new events that occurred over the weekend that will displace her resignation from public attention. Only major news stories — and her resignation from the Grove is a minor detail — have a life of more than two days. Again, if Judge Sotomayor truly believed that the Belizean Grove did *not* discriminate against men, she should have remained a member, instead of quietly resigning.

Apparently, the Belizean Grove *invidiously* discriminates against men. The staff of the Senate Judiciary Committee ought to investigate this issue and the Committee ought to make a determination, instead of ignoring the issue.

Sotomayor's past membership in the Belizean Grove raises some interesting issues for discussion. Membership in professional societies (e.g., The American Bar Association, The American Medical Association, etc.) are acceptable, because such societies do not discriminate on race, gender, religion, or ethnicity and because their agenda affects all races, both genders, and all ethnic groups. But a group that has an agenda that seeks preferences[97] — or offers advantages — to only one race, or only one gender, or only one ethnic group, seems objectionable to me, especially for a judge who has sworn an oath to be impartial. If a man were to join a hypothetical American Association for the Advancement of White Males (which sounds like a neo-Nazi or white supremacist group, even though it is a nonexistent, fictional organization), he would surely

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[97] I think an organization that seeks *equal* treatment of some minority is an acceptable goal. However, such a group might still be objectionable for a judge, since membership might indicate a lack of impartiality by the judge.

be condemned as a bigot. The exact same standard ought also to apply to women, racial minorities, ethnic groups, etc.

It is in the context of the preceding paragraph that I find troubling Sotomayor's membership in two ethnic organizations.

> [Q.] List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, **...** to which you belong, or to which you have belonged, or in which you have participated, since graduation from law school. **....** Describe briefly the nature and objectives of each such organization, the nature of your participation in each such organization, **....**
>
> [A.] **....**
>
> National Council of La Raza 1998–2004 *Member.* The Council works to improve opportunities for Hispanic Americans in five key areas: assets and investments, civil rights and immigration, education, employment and economic status, and health.
>
> **....**
>
> Puerto Rican Legal Defense & Education Fund 1980–1992 I served at various points during this time frame in the following capacities: *Member and Vice President, Board of Directors Chairperson, Litigation and Education Committees.* PRLDEF provides legal resources for Latinos.
>
> **....**

Sonia Sotomayor, Questionnaire for Senate Judiciary Committee, Question 11, pp. 11-13 (4 June 2009).

White House Press Briefings 15-19 June

I searched the text of the White House Press Briefings for 15-19 June for the word "Sotomayor" and found the only substantive mention was once on Wednesday, 17 June:

> Q Let me ask you one other thing. Going back all the way to the then-state senator's [Obama's] 2004 convention speech when he talked about the importance of one America not being divided up into ethnic groups, et cetera, Judge Sotomayor has actually spoken about the superior perspective that she brought, based on her Latina — being a Latina woman. How does he square that, the nomination —
>
> MR. GIBBS: I think we covered this a couple weeks ago. You may have missed that one. I think, as I've talked about up here and as she's said, she talked about the richness of her experience and how that affects the way she sees things, just as Justice Ginsburg, Justice Sandra Day O'Connor and Justice Alito have described.

Robert Gibbs (17 June 2009)
http://www.whitehouse.gov/the_press_office/Briefing-by-White-House-Press-Secretary-Robert-Gibbs-6/17/09/ .

Mr. Gibbs is now experienced at being evasive in answering questions about Sotomayor's awful speech.

Congressional Research Service

On 19 June, the Congressional Research Service (part of the Library of Congress) issued a 59-page report on the judicial opinions of Judge Sotomayor. Anna C. Henning & Kenneth R. Thomas, "Judge Sonia Sotomayor: Analysis of Selected Opinions," (19 June 2009) http://www.fas.org/sgp/crs/misc/R40649.pdf .

commentary

An excellent, but little-noticed, article in *Newsday* — a Long Island, NY newspaper — discussed the central role of ethnicity and gender in Judge Sotomayor's thinking:

> [Sotomayor's 17 April 2009 speech to the Black, Latino, Asian Pacific American Law Alumni Association on at New York University] reflects the kind of views she has expressed over the years that have set off clashes between her critics and her backers on her strong public identification as a Puerto Rican and a woman — and how that might affect her decision-making as a Supreme Court justice.
>
> The controversy stems partly from Sotomayor's decision to be a very public person while on the bench, speaking her mind at scores of conferences and dinners on what it means to be a Latina judge. In nearly half of her 183 appearances since 1993, her Senate questionnaire shows, she either spoke about ethnicity and gender or addressed a minority or women's group.
>
> Those appearances include a speech to a Latino group in 2001 in which she delivered her most controversial comment: "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion that a white male who hasn't lived that life." **....** ... Obama and his aides have tried to deflect flak over the "wise Latina" line by calling it a poor choice of words she'd like to do over. They've ducked questions since it turned out she used the line seven times.
>
> Sotomayor first spoke it in 1994, saying a "wise woman" would reach a better decision, and defined "better" as "more compassionate and caring." She used that speech four more times, in 1999 and 2000, her Senate filing says. In 2001, she tweaked it to make it a Latina. She last used the line in 2003.

Tom Brune, "Sotomayor's views in speeches scrutinized," *Newsday* (22:03 EDT 20 June 2009) http://www.newsday.com/news/printedition/nation/ny-ussoto2112903197jun20,0,5157937.story .

I fear that anyone who strongly identifies with a particular racial or ethnic group is likely to be biased in favor of that group, which makes them unsuitable for a judge, who *must* be impartial.

Eighth Week: 22-28 June 2009

Sotomayor almost disappeared from the news this week. I searched the text of the White House Press Briefings for 22-26 June for the word "Sotomayor", but found nothing. The big news this week was a commuter train crash in Washington, DC on Monday evening (22 June) that killed nine people, and the death of Michael Jackson, a popular singer and dancer, on Thursday afternoon (25 June).

speeches in U.S. Senate on 23 June

On 23 June, the Republican minority leader spoke on the Senate floor about the nomination of Judge Sotomayor and her concept of empathy:

> Judge Sotomayor's writings offer a window into what she believes having empathy for certain groups means when it comes to judging, and I believe once Americans come to appreciate the real-world consequences of this view, they will find the empathy standard extremely troubling as a criterion for selecting men and women for the Federal bench.
>
> A review of Judge Sotomayor's writings and rulings illustrates the point. Judge Sotomayor's 2002 article in the Berkeley La Raza Law Journal has received a good deal of attention already for her troubling assertion that her gender and ethnicity would enable her to reach a better result than a man of different ethnicity. Her advocates say her assertion was inartful, that it was taken out of context. We have since learned, however, that she has repeatedly made this or similar assertions.
>
> Other comments Judge Sotomayor made in the same Law Review article underscore rather than alleviate concerns with this particular approach to judging. She questioned the principle that judges should be neutral, and she said the principle of impartiality is a mere aspiration that she is skeptical judges can achieve in all or even in most cases — or even in most cases. I find it extremely troubling that Judge Sotomayor would question whether judges have the capacity to be neutral ''even in most cases.''
>
> ....
>
> I would like to talk today about one of Judge Sotomayor's cases that the Supreme Court is currently reviewing. In looking at how she handled it, I am concerned that some of her own personal preferences and beliefs about policy may have influenced her decision. For more than a decade, Judge Sotomayor was a leader in the Puerto Rican Legal Defense and Education Fund. In this capacity, she was an advocate for many causes, such as eliminating the death penalty. She was responsible for monitoring all litigation the group filed and was described as an ardent supporter of its legal efforts. It has been reported that her involvement in these projects stood out and that she frequently met with the legal staff to review the status of cases. One of the group's most important projects was filing lawsuits against the city of New York based on its use of civil service exams. Judge Sotomayor, in fact, has been credited with helping develop the group's policy of challenging those exams.
>
> ....
>
> [*Ricci v. DeStefano*] was, and is, a major case. As I mentioned, the Supreme Court has taken that case, and its decision is expected soon. The Second Circuit recognized it was a major case too. Amicus briefs were submitted. The court allotted extra time for oral argument. But unlike the trial judge who rendered a 48-page opinion, Judge Sotomayor's panel dismissed the firefighters' appeal in just a few sentences. So not only did Judge Sotomayor's panel dismiss the firefighters' claims, thereby depriving them of a trial on the merits, it didn't even explain why they shouldn't have their day in court on their very significant claims.
>
> I don't believe a judge should rule based on empathy, personal preferences, or political beliefs, but if any case cried out for empathy — if any case cried out for empathy — it would be this one. The plaintiff in that case, Frank Ricci, has dyslexia. As a result, he had to study

> extra hard for the test—up to 13 hours each day. To do so, he had to give up his second job, while at the same time spending $1,000 to buy textbooks and to pay someone to record those textbooks on tape so he could overcome his disability. His hard work paid off. Of 77 applicants for 8 slots, he had the sixth best score. But despite his hard work and high performance, the city deprived him of a promotion he had clearly earned.
>
> Is this what the President means by "empathy" — where he says he wants judges to empathize with certain groups but, implicitly, not with others? If so, what if you are not in one of those groups? What if you are Frank Ricci? This is not a partisan issue. It is not just conservatives or Republicans who have criticized Judge Sotomayor's handling of the Ricci case. Self-described Democrats and political independents have done so as well. President Clinton's appointee to the Second Circuit and Judge Sotomayor's colleague, Jose Cabranes, has criticized the handling of the case. He wrote a stinging dissent, terming the handling of the case ''perfunctory'' and saying that the way her panel handled the case did a disservice to the weighty issues involved.

McConnell, CONGRESSIONAL RECORD, S6907-S6908 (23 June 2009).

I find it strange that Senator McConnell — who graduated from law school — would discuss judicial impartiality at length, but fail to mention the requirements of the judicial oath, federal statute, due process, and the Code of Conduct for U.S. Judges. Without such citations, it sounds like McConnell has a personal opinion that impartiality is desirable, instead of recognizing it as a legal requirement. Also, I disagree with Senator McConnell that the *Ricci* case "cried out for empathy" — everyone is entitled to an impartial judge, no one is entitled to an empathic judge.

Following Senator McConnell, Senator Sessions spoke on the Senate floor about Sotomayor's work with the Puerto Rican Legal Defense and Education Fund before she became a federal judge. In 1954, four "radical Puerto Rican nationalists" (*not* PRLDEF members) shot five members of the U.S. House of Representatives.[98] In 1990, New York City Mayor Dinkins called these four criminals "assassins", although none of the victims died. The PRLDEF responded by calling Mayor Dinkins "insensitive". The president of the PRLDEF lauded the four criminals: "to many people in Puerto Rico, these are fighters for freedom and justice, for liberation, just as is Nelson Mandela, ..."[99] It is *un*known what Sotomayor thought about these four criminals. Senator Sessions then went on a tangent about terrorists in Puerto Rico who had no apparent relationship to either PRLDEF or Judge Sotomayor. See the CONGRESSIONAL RECORD S6909-S6910 (23 June 2009). I am troubled at this kind of guilt by association. Senator Sessions' real point seems to be that he did not have adequate documentation of Sotomayor's work for PRLDEF.

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[98] The attack occurred on 1 March 1954. Sonia Sotomayor was born on 25 June 1954, about four months *after* the attack.

[99] Todd Purdum, "Praising Mandela, Dinkins Shakes Fragile Coalition," *The New York Times* (16 June 1990) http://www.nytimes.com/1990/06/16/nyregion/praising-mandela-dinkins-shakes-fragile-coalition.html .

Frankly, Senators McConnell and Sessions make weak arguments against Judge Sotomayor. I think there are stronger arguments that could be made, especially:

1. her below-average performance as a judge, as described on page 49, above. By definition, half of the judges on the U.S. Court of Appeals are below average.[100] Being below average does *not* mean they are incompetent. But being below average *should* be a bar to promotion to the U.S. Supreme Court.
2. her lack of scholarly publications, as described on page 74, above. A Justice of the U.S. Supreme Court is expected to not only survey past and current law, but also to evaluate proposed new common law. Scholarly publications are where new ideas in law are most commonly expressed and discussed. If she wants to be taken seriously as an intellectual, then she needs to write significant articles.
3. her repeated speeches in which she identifies herself as a Hispanic and as a woman, instead of as an American. (This reason includes her awful lecture in 2001, see page 53 above, with the "wise Latina" remark.)
4. her incorrectly stating that judicial impartiality is an "aspiration", instead of recognizing it as a legal requirement in the judicial oath, federal statutes, due process, and the Code of Conduct for U.S. Judges. Her error indicates either a lack of knowledge about professional responsibility or a lack of respect for impartiality. The following commentary from *The Washington Times* indicates more ethical lapses.

Even if one insists that the next Justice be a woman, I believe that there are better candidates than Judge Sotomayor. However, my personal preference for Prof. Kathleen Sullivan or Judge Diane Wood would surely horrify Senators McConnell and Sessions, because Sullivan and Wood are liberals. As I have said before, the nomination and confirmation process for judges in federal courts is *not* based on merit, it is a purely political process.

commentary

The Washington Times, a conservative newspaper in the nation's capital, published an editorial on 24 June that identified some ethical lapses by Sotomayor. *The Washington Times* began by mentioning her responses to the Senate Judiciary Committee Questionnaire said she had a law firm titled "Sotomayor & Associates" during 1983-86, while she was also working either as a prosecutor or as an employee of a larger law firm. It is considered improper to include "Associates" in a firm name when there are no associates, because it is misleading.[101]

> Supreme Court nominee Judge Sonia Sotomayor seems to think different rules apply to her than to everyone else.

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[100] Technically in statistics, I should say *median* instead of *average.* However, in rating people it is conventional to speak of *average* instead of *median* (e.g., C is an average grade).

[101] *The Washington Times* credits Eric Turkewitz, a personal injury attorney in New York State, with first publicly recognizing the problem with "Sotomayor & Associates". See Turkewitz's blog for 4 June 2009 at http://www.newyorkpersonalinjuryattorneyblog.com/2009/06/did-sotomayor-violate-ny-ethics-rules.html .

....

By itself, the infraction [Sotomayor & Associates] should not derail her nomination to the Supreme Court. In the context of a series of worrisome statements and actions by Judge Sotomayor, the transgression ought to give pause to senators considering her confirmation. Just as context can sometimes excuse minor ethical infringements, context also can make minor violations a significant concern.

This violation could be considered irrelevant if it were not part of a pattern. However, this is a judge who has questioned whether she can even be impartial — in violation of the judicial oath of office. In addition, she has said that physiological factors of a judge's ethnic identity can and probably ought to sway her opinions. She has argued that not only is the ideal that law should be predictable and understandable to the public a "myth," but it is not even a worthy ideal.

Judge Sotomayor has tried to make — in the words of liberal columnist Michael Kinsley — "the preposterous argument that the Belizean Grove [to which she belongs] isn't a women's club," even though membership in that ritzy club is open to women only. We don't care that she belongs to such a club, or if gentlemen belong to clubs for men only, for that matter. But what Mr. Kinsley called her "brazen whopper" and "insult to the citizenry" is pertinent. That's her practice of twisting rules and standards to fit her circumstances. This calls her veracity into question.

In that light, Judge Sotomayor's misleading advertising back in the 1980s looks less like an oversight and more like a mark of questionable character.

Anonymous, "EDITORIAL: Sotomayor's ethical oversight," *The Washington Times* (24 June 2009) http://washingtontimes.com/news/2009/jun/24/sotomayors-ethical-oversight/ .

Prof. Bonventre on *Ricci*

A professor at Albany Law School wrote an excellent critique of the decision by a three-judge (including Sotomayor) panel of the Second Circuit in *Ricci:*

The decision reached by Sotomayor and her 2 colleagues is not really the problem. Not the worse one anyway. [I may think their decision is wrong; right-wing blowhards are sure it is. Others may think it's right; some knee-jerk liberals, with whom I more frequently agree, are sure it is.]. But come on, this is a toughie. Race blindness versus diversity. Both compelling interests. In conflict.

So the real problem is not the decision itself. But how that decision was rendered. Cavalier, covert, and — I'll be blunt — cowardly. Let me explain.

Sotomayor and her 2 colleagues on the panel decided this important, controversial, difficult constitutional case with a summary order. Yes, summarily. In a one paragraph opinion--six sentences--"explaining" the decision. In fact, the opinion was simply a few conclusory lines, with precious little that could be mistaken for legal analysis. Surely the case deserved more than that. Even if Sotomayor and her 2 colleagues, for whatever reason, really thought that the claim of the firefighters who were denied promotion was devoid of any legal merit justifying a more serious treatment.

Worse than that, the summary order was unpublished. Yes, that pitiful one paragraph opinion of Sotomayor and her 2 colleagues for this extremely important case was not to appear in the published reports of the court's decisions. It was to be buried among other summary orders. Decisions of the court typically involving matters having absolutely no

consequence or implication beyond the particular dispute between particular parties. Of course, the Ricci case does not fit into that category at all.

The summary order remained unpublished until other judges on the 2d Circuit complained. They made clear that they believed such cursory treatment was inappropriate. Sotomayor and her 2 colleagues then withdrew the unpublished summary order, changed a few words, and reissued it for publication. As a per curiam opinion.

And what's the significance of a per curiam ? Well, these opinions — literally "for the court" — are usually (but not always) reserved for decisions that break no new ground, decisions where the law is well settled, decisions not requiring extensive legal analysis, decisions not meriting full-blown legal analysis and explanation for the court's judgment. Sooooo, Sotomayor and her 2 colleagues issued a per curiam opinion comprised of the 1 substantive paragraph — 6 sentences. Entirely inappropriate for a case of this significance, this difficulty, and the competing compelling interests at stake.

But beyond that, what a per curiam opinion means is that no one signs. No one claims authorship. None of the judges takes responsibility — the credit or the blame — for writing the opinion and for choosing what to include or not. (Or they all take responsibility. Meaning, again, that none of them takes individual responsibility for the opinion. Judges usually want to take credit for important opinions. So when they avoid it — especially for the important cases — you know something is up.)

....

Neither Sotomayor nor either of her 2 colleagues on the panel took personal credit (or blame) for the Ricci opinion. We do not know exactly the reasons. What we do know is that Sotomayor either (1) wrote the opinion and didn't sign her name, or (2) she didn't write that opinion and somehow didn't think it necessary to author a more adequate separate one of her own. Either way, she was part of this rather shameful exercise. Cavalier, covert (until pressed into the open), and cowardly.

Vincent Bonventre, "Sotomayor — Let's Put the Cards on the Table (The Good, The Bad, & The Ugly [Opinions])," New York Court Watcher (blog), (22:00 EDT, 23 June 2009) http://www.newyorkcourtwatcher.com/2009/06/sotomayor-lets-put-cards-on-table-good.html .

I think Prof. Bonventre is precisely correct in his analysis. Unfortunately, by 19 July, only one journalist had reported Prof. Bonventre's analysis.[102] There are many good blogs, but I do not regularly read any blogs, because of limits on my time. On 8 July, I found Prof. Bonventre's blog, after my search of Google News found the Albany, NY newspaper article that mentioned that blog. All of the following material for the ninth week was written *before* I read Prof. Bonventre's blog, so my commentary is independent of his, although we agree.

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[102] Carol DeMare, "Law professor critiques Sotomayor's rulings," *Albany Times-Union* (8 July 2009) http://www.timesunion.com/AspStories/story.asp?storyID=817602 .

Ninth Week: 29 June - 5 July 2009

reporting of U.S. Supreme Court opinion in *Ricci*

On 29 June at about 10:00 EDT, the U.S. Supreme Court issued its opinion in *Ricci v. DeStefano,* a case in which Judge Sotomayor was a member of a three-judge panel that wrote an *in*adequate appellate opinion. (See my discussion at page 97, above.) Journalists and commentators in the mass media made two general errors in their reporting of this Supreme Court opinion:

1. They commonly said that Judge Sotomayor wrote the appellate opinion, when she was actually a member of a three-judge panel that produced an anonymous opinion.

2. They implied that Judge Sotomayor was wrong, because the Supreme Court had overruled the decision of the U.S. Court of Appeals. However, the three-judge panel *may*[103] have followed the precedents in 2008, and the U.S. Supreme Court definitely made new law in 2009 in its decision in *Ricci.*

Some people who had already decided to oppose Sotomayor's confirmation were said to be "emboldened"[104] by the U.S. Supreme Court opinion in *Ricci,* when the truth of the matter is that the Supreme Court changed the law on 29 June 2009.

The real problem with the U.S. Court of Appeals opinion in *Ricci* is that it treated a serious legal case in a casual, perfunctory way. We don't know if the three-judge panel was (1) lazy, (2) concerned about political criticism in a high-profile, controversial case, or (3) eager to continue affirmative action because of their personal political beliefs, regardless of legal problems and unfairness. In the third reason, Sotomayor has publicly recognized that she has personally benefitted from affirmative action — as explained above, beginning at page 137 — so it is possible that she allowed her personal experience to influence her judgment in *Ricci.* Whichever reason explains the absence of a detailed opinion with citation to cases, it is clear that Sotomayor and her two colleagues failed to do the job for which they were paid. Judges are *supposed* to explain their reasoning and cite statutes and cases, to show that they did not decide the case for inappropriate reasons (e.g., racial bias, politics, prejudice, etc.).

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[103] I say *may* because we do not know how or why the three judges on the U.S. Court of Appeals decided the case, because they gave no reasons and cited no precedent in their terse decisions.

[104] Julie Hirschfeld Davis, Associated Press, "Foes of Sotomayor emboldened by discrimination case," *The Washington Post* (18:16 EDT 30 June 2009) http://www.washingtonpost.com/wp-dyn/content/article/2009/06/30/AR2009063000310.html .

Supporters of Judge Sotomayor are claiming that she followed precedent. For example, Senator Leahy, chairman of the Senate Judiciary Committee, said:

> In Ricci [sic — no italics in original], five justices of the Supreme Court narrowly reversed the ruling of the Second Circuit, which had been supported by the Equal Employment Opportunity Commission, the Department of Justice, many states, the National League of Cities and the National Association of Counties. The lower court's ruling in Ricci [sic] was also supported by the majority of the Second Circuit, including judges appointed by Democratic and Republican presidents.
>
> It would be wrong to use today's decision to criticize Judge Sonia Sotomayor, who sat on the panel of the Second Circuit that heard this case but did not write its unanimous opinion. Judge Sotomayor and the lower court panel did what judges are supposed to do, they followed precedent. It is notable that four justices would have upheld the Second Circuit's ruling, including the retiring Justice Souter, who Judge Sotomayor is nominated to replace.
>
> ....
>
> Judge Sotomayor's nomination is supported by law enforcement organizations, public officials on both sides of the aisle — and just today, the American Hunters & Shooters Association, all of which have endorsed her long record of judicial restraint. The decision of Judge Sotomayor's panel in *Ricci* was an example of that judicial restraint, and it followed both the facts and the law. Although the judges on her panel were sympathetic to the plaintiffs' claim, the Supreme Court had not spoken on this issue. The judges were bound by the precedent of the Second Circuit. Had Judge Sotomayor's panel ruled in favor of the firefighters claim, their decision would have been judicial activism contrary to clearly settled and longstanding Second Circuit precedent. The Second Circuit was bound by this precedent and not free to adopt a new interpretation of the law, as the Supreme Court has done today.

Patrick Leahy, "Comment On The Supreme Court's Decision In *Ricci v. DeStefano*" (29 June 2009) http://leahy.senate.gov/press/200906/062909a.html .

I have three comments on Leahy's propaganda:

1. court cases — and judicial nominees — are not commodities like laundry detergent that are properly marketed by endorsement by organizations. Endorsement by an organization is part of the bandwagon propaganda tactic, which pretends that every member of an organization has studied the issue, formed an educated opinion, and agrees with the endorsement.

2. Judge Sotomayor and the other two judges on the panel did *not* follow precedent. Instead, they issued a terse opinion that cited no precedent. Before Sotomayor can be excused for having followed precedent, she *must* cite the precedent on which she allegedly relied in making her decision.

3. Senator Leahy is wrong to say "The lower court's ruling in Ricci was also supported by the majority of the Second Circuit, ..." Judge Calabresi voted against an en banc rehearing because plaintiffs failed to make an argument to the trial court, *not* because he agreed with three-judge panel. 530 F.3d at 88-89. Judge Katzmann voted against an en banc hearing because of the Second Circuit's tradition in *not* having en banc rehearings. 530 F.3d at 89-90. Adding those two judges (who denied rehearing purely on procedural grounds) to the

> six judges who voted for rehearing gives a majority *not* agreeing with the per curiam opinion of the Court of Appeals. Furthermore, almost half of the judges on the U.S. Court of Appeals for the Second Circuit voted to rehear the case en banc and then issue a legitimate opinion that discussed the legal issues of the *Ricci* case. The motion for an en banc rehearing shows that some of Sotomayor's colleagues on the Second Circuit were embarrassed by the *in*adequate appellate opinion of the three-judge panel, including Sotomayor.

Leahy's propaganda is ridiculous. But he was not alone. *Politico* reported the reaction of Senator Schumer, a Democrat from New York and a member of the Senate Judiciary Committee:

> "While the Supreme Court disagreed with the Second Circuit, they in no way undercut Justice Sotomayor's contention that she was following legal precedent and was bound to do so," Senator Chuck Schumer (D-N.Y.) told reporters in a conference call Monday afternoon.
>
> Schumer, who said he had not yet had time to read the opinion, said he did not expect the case to impact Sotomayor's confirmation hearings, set to begin in two weeks. "I think the result of this case won't change things a whit," Schumer said.

Josh Gerstein, Supreme Court gives victory to white firefighters, *Politico* (16:37 EDT 29 June 2009) http://www.politico.com/news/stories/0609/24322.html .

Again, Sotomayor can *not* follow precedent when she has cited no precedent that she allegedly followed. Maybe Senator Schumer should actually read opinions before he publicly comments on them.

Some of the published criticism[105] of Sotomayor compared "her" summary order that fit on one page (a single substantive paragraph of only 126 words) to the 93-page length of the U.S. Supreme Court opinion in *Ricci,* with the obvious conclusion that Sotomayor capriciously, perfunctorily, and tersely disposed of *Ricci.* While the conclusion is correct, the facts are *not* correct. The 93 pages from the U.S. Supreme Court include the Syllabus (4 pp.), a majority opinion (34 pp.), two concurring opinions (totalling 16 pp.), and one dissenting opinion (39 pp.). The Syllabus is *not* part of the majority opinion, and the concurring and dissenting opinions are *not* law. A fairer comparison would be to compare the terse summary order to the 34-page majority opinion. But that omits an important fact: the U.S. Supreme Court issues its text in a 4×7 inch format, so when the Court's opinion is printed on standard $8\frac{1}{2} \times 11$ inch paper, the text consumes only 30% of the page, and the generous margins consume 70% of the page. When I formatted the Court's opinion on standard $8\frac{1}{2} \times 11$ inch paper with conventional 1 inch margins on all four sides, 12 point type, and with 1.2 line spacing, the majority opinion required only 19 pages. So the published criticism of Sotomayor exaggerates the length of the Supreme Court's opinion by about a factor of five (i.e., 93/19).

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[105] To avoid embarrassing some commentators and journalists, I am omitting citations to sources here. I have seen four different articles that make this faulty comparison, and I suspect there are many more articles that I have not seen. But see Senator McConnell's speech, quoted at page 170, below.

The preceding paragraph shows that the opponents of Sotomayor have difficulty with facts, just like the supporters of Sotomayor. In any discussion, it is a distraction when people have their facts wrong. Getting facts wrong suggests to me that either the speaker is a demagogue or the speaker is ignorant of facts, and — either way — the speaker has no credibility in my opinion.

White House Press Briefings 29 June - 1 July

I searched the text of White House Press Briefings on 29 and 30 June and 1 July for either "Sotomayor" or "Ricci". There was no mention of either word on 30 June or 1 July. There were no Press Briefings on 2-3 July 2009. The only mention of the Sotomayor nomination this week was in a Press Briefing on Monday afternoon, 29 June:

> Q Did the President have any comment on the Supreme Court decision this morning on the firefighter's [i.e., *Ricci v. DeStefano*] decision?
>
> MR. GIBBS: I haven't talked to him specifically about it. I think — though I think one thing is clear, that the ruling by Judge Sotomayor was based on the precedent of the 2nd circuit and the precedence that they had considered. The Supreme Court clearly had a new interpretation for Title VII of the Civil Rights Act. So I think some of the very concerns that members of the Senate have expressed about judicial activism seem to be at the very least upside-down in this case. I think her ruling on the 2nd circuit denotes that she's a follower of precedent.
>
> Q Is there any concern that there will be some consequences out of this at the confirmation hearings at all?
>
> MR. GIBBS: No. I don't foresee that this would represent anything that would prevent her from a seat on the Supreme Court. I would note that one of the rulings that came down today in an important First Amendment case is that the court — the new court will hear a case on September the 9th. I think that underscores the importance of ensuring that we get a new Supreme Court nominee there in order to become — in order to be an active participant in that case, rather than potentially have something that's a four-to-four decision.
>
> ....
>
> Q Do you want to see her sworn in on September 9?

[On 9 Sep, the U.S. Supreme Court will hear a second round of oral arguments in an unresolved case, *Citizens United v. Federal Elections Commission,* involving federal campaign finance law, specifically a movie critical of Hillary Clinton when she was campaigning for the presidential nomination.]

> MR. GIBBS: We want her to be an active participant when the Supreme Court hears what I think everyone believes will be an important case in the new term.
>
> Q Robert, on that point, do you think that the reversal — when you count noses of what the Senate votes, what your projections are, do you think that will change any of what you think your roll call will be?

MR. GIBBS: No, because I think if you look at the last two Supreme Court nominees, I don't think the vote changed because they had cases either reversed — let me separate that a little bit. Judge Alito had three cases reversed by the Supreme Court and is now a member of the Supreme Court. Judge Roberts actually had a case reversed by the Supreme Court as the sitting Chief Justice of the Supreme Court.

Q It was —

MR. GIBBS: Right. So I think that denotes that there's little political significance to whatever the Court decided today in terms of Judge Sotomayor, except to render I think a fairly definitive opinion that she follows judicial precedent and that she doesn't legislate from the bench. It is a little interesting to watch today the people that criticize her — in essence, I think you've seen a new interpretation of a piece of legislation by a court, and her critics are criticizing her ruling based on judicial precedent and in support of something where a court has interpreted in a new way the law. It's interesting to watch the gymnastics.

Q (Cross talk.) — judicial activist. You're saying today was an example of —

MR. GIBBS: I think it is — it's an interesting, new interpretation of a law that has been reviewed by many judges in many courts — judges supported by Democrats and Republicans. I just — I find it somewhat interesting.

PRESS BRIEFING BY PRESS SECRETARY ROBERT GIBBS (begun 14:48 EDT 29 June 2009) http://www.whitehouse.gov/the_press_office/Briefing-by-White-House-Press-Secretary-Robert-Gibbs-6-29-09/ .

Mr. Gibbs was wrong to say that "the ruling by Judge Sotomayor was based on the precedent of the 2nd circuit". That ruling cited no precedent at all. Before Sotomayor and her colleagues on the three-judge panel can be excused for having followed precedent, they *must* cite the precedent on which they allegedly relied in making their decision. Furthermore, the ruling was the product of a three-judge panel, not Sotomayor alone. If supporters of Judge Sotomayor want to defend her, they should at least read the judicial opinions and get their facts correct.

The lack of coverage of Sotomayor in recent White House Press Briefings mirrors the absence of articles about her at political news websites. For example, *The Hill* — an excellent website in Washington, DC devoted to political news, especially in the federal government — had only six news articles on her during 25 days beginning 11 June and ending 5 July:

1. 14 June (McConnell mentions fillibuster)
2. 24 June (Specter urges Sotomayor allow television cameras in S.Ct.)
3. 24 June (meet & greet with senators)
4. 25 June (Democrats defend schedule for health care legislation and Sotomayor)
5. 25 June (conservatives urge Republicans to delay hearings on Sotomayor's confirmation)
6. 29 June (the S.Ct.'s decision in *Ricci*).

During these 25 days, *The Hill* published a total of 373 news articles, so Sotomayor was mentioned in 1.6% of their articles. In my opinion, that is too little coverage for the nomination and confirmation of a Justice for the most important court in the nation. A Justice potentially has more power than any senator, when that Justice votes to declare a federal statute unconstitutional. My citing *The Hill* was just one, typical example of the absence of coverage of Sotomayor.

Journalists at other newspapers, news magazines, and news websites had a comparable lack of coverage of Sotomayor.

opinion polls

Public opinion polls on matters of constitutional law are largely meaningless, because constitutional law is what the U.S. Supreme Court says — regardless of public opinion. Furthermore, few citizens either understand constitutional law or actually read opinions of the U.S. Supreme Court. Despite those comments, I was interested in an *un*scientific online poll conducted by the *Hartford Courant* newspaper for two days after the Supreme Court's decision in *Ricci.* In a total of 3342 responses by 19:30 EDT on 1 July, 92% agreed with the Court's decision. That is a very strong showing of support for the white firefighters who were denied a promotion because no minority candidates passed the test.

A scientific opinion poll on the first two nights *after* the U.S. Supreme Court decision in *Ricci* showed a significant decline in people's opinion of Sotomayor, compared with two weeks earlier.

> This national telephone survey of 1,000 Likely Voters was conducted by Rasmussen Reports June 29-30, 2009. The margin of sampling error for the survey is ±3 percentage points with a 95% level of confidence
>
> ....
>
> The latest Rasmussen Reports national telephone survey, conducted on the two nights following the Supreme Court decision, finds that 37% now believe Sotomayor should be confirmed while 39% disagree. Two weeks ago, the numbers were much brighter for the nominee. At that time, 42% favored confirmation, and 34% were opposed.
>
> Rasmussen Reports has been tracking this question every other week, and it is not possible to know at this time if the decline in support is anything more than a temporary aberration caused by the publicity surrounding the Supreme Court reversal. Sotomayor was one of a panel of federal Appeals Court judges who signed off on the Ricci decision, rejecting the claims of New Haven firefighters who said they were being discriminated against for promotions because they are white.
>
> ....
>
> Overall, 38% of voters have a favorable opinion of Sotomayor, down 12 points from [two weeks] before the Supreme Court reversal.

"Public Support for Sotomayor Falls After Supreme Court Reversal" (1 July 2009)

http://www.rasmussenreports.com/public_content/politics/obama_administration/june_2009/public_support_for_sotomayor_falls_after_supreme_court_reversal .

I wonder about the significance of such an opinion poll, because it is likely that *none* of those polled had read any of the opinions in *Ricci.* Furthermore, it is almost certain that Sotomayor will be confirmed by the Senate, regardless of the opinion of citizens.

Politicians, journalists, and the American public have a very short attention span. Two days after the U.S. Supreme Court announced its decision in *Ricci,* discussion of this case had essentially vanished from major newspapers and television networks.

commentary

On 1 July, the PRLDEF delivered more than 350 pages of documents to the Senate Judiciary Committee, reflecting advice that Sotomayor gave to that organization. *If* one is opposed to affirmative action, then Sotomayor's work for the PRLDEF is troubling, because the PRLDEF supported litigation challenging merit examinations for hiring or promotion.[106] Furthermore, the PRLDEF supported litigation challenging English-only restrictions on language, which moves us away from a unified, integrated nation with *one* language.

On Sunday morning, 5 July, the Associated Press noticed the difficulty faced by opponents of Sotomayor:

> A week before her Senate hearings, Republicans are floundering in their efforts to trip up Supreme Court nominee Sonia Sotomayor, unable to find an effective message about why she's not fit to serve.
>
> Blame the tricky politics of opposing the woman who would be the first Hispanic justice, especially for a party struggling to broaden its base and whose chief spokesman on Sotomayor [Jeff Sessions of Alabama] has a troubled history of racism allegations.
>
> Add to that the mathematical impossibility of Republicans' rejecting President Barack Obama's first high court nominee, and it's a recipe for a weak-kneed response.

Julie Hirschfeld Davis, Associated Press, "Analysis: GOP struggles for anti-Sotomayor message," *The Washington Post* (08:21 EST 5 July 2009) http://www.washingtonpost.com/wp-dyn/content/article/2009/07/05/AR2009070500880.html and http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2009/07/05/national/w052139D18.DTL .

For the political system to function, the opposition party has an obligation to scrutinize the president's nominees and attempt to reject unqualified nominees. Above in this document, I have made the case that, in my opinion, Sotomayor is not the best qualified candidate for the U.S. Supreme Court. However, depending on one's personal political opinion, she may be good enough.

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[106] Julie Hirschfeld Davis, Associated Press, "Group Sotomayor advised fought job tests," *The Washington Post* (07:57 EDT 4 July 2009) http://www.washingtonpost.com/wp-dyn/content/article/2009/07/04/AR2009070400393.html .

rules for attending hearings

On 1 July, the Senate Judiciary Committee promulgated rules for the ~~rabble~~ public <*grin*> who wish to attend the confirmation hearings.

> At all times, those standing in line shall abide by the rules established by the Senate Judiciary Committee.
>
> ....
>
> No picketing or demonstrating will be allowed by individuals standing in line. At any time authorized staff can request the removal of any person from the line for failure to adhere to established rules or other security/safety related reasons.
>
> ....
>
> The following items are prohibited for those attending the hearing:
>
> > Firearms; weapons of any kind; ammunition (either real or simulated); explosives of any kind (including fireworks); knives; blades; razors; box cutters; or other sharp objects (of any length); any pointed object (i.e. knitting needles, letter openers, etc.); aerosol sprays; cans and bottles; coolers; thermal or glass containers; mace; pepper spray; sticks, poles; pocket or hand tools (such as a Leatherman); packages; backpacks; large bags; duffel bags; camera bags; suitcases; laser pointers; strollers; chairs; umbrellas; food or beverages of any kind; posters, signs or placards larger than 8.5 inches by 11 inches (must be held directly in front of the body and no higher than the shoulders); signage or clothing with profanity or images deemed inappropriate by security screeners; and any other items at the discretion of the security screeners that may pose a potential safety hazard.
>
> Photography, of any kind, is strictly prohibited in the hearing room, except for authorized staff.

Guidelines For Public Attendance At The Nomination Hearing Of Sonia Sotomayor To Be An Associate Justice Of The Supreme Court Of The United States (1 July 2009).

Prohibiting firearms is good, in view of the terrorists from Puerto Rico who shot five members of the House of Representatives in 1954, and a paranoid schizophrenic who shot and killed two policemen inside the Capitol Building in July 1998. But the Senate's prohibition on signs "or clothing with profanity" seems to contradict the holding in *Cohen v. California,* 403 U.S. 15 (1971) (reversing criminal conviction for wearing jacket with words "Fuck the Draft" inside a state courthouse in Los Angeles, as a protest against the draft and the Vietnam war). I am troubled by delegating authority to "security screeners" either (1) to have discretion to determine "profanity or images deemed inappropriate" or (2) to prohibit unspecified items that they believe "may pose a potential safety hazard." Determination of First Amendment rights of citizens should *not* be delegated to low-level government employees.

From watching previous confirmation hearings on the C-SPAN cable television channel, I think the real danger to lack of decorum, and the most frequent wastes of time, comes *not* from the audience, but from the senators themselves. <*grin*> Note that there is no prohibition against senators asking argumentative or repetitive questions. Note there is no prohibition against senators making a speech and pretending that it is a question, with Sotomayor given only a few seconds to respond.

[Added 26 July 2009] The only disruptions of the confirmation hearings were four anti-abortion protesters who shouted slogans on Monday, 13 July,[107] and one anti-abortion protester who shouted slogans on Tuesday, 14 July. All five were removed from the hearing room, arrested, and charged with disruption of Congress.

Tenth Week: 6-12 July 2009

On Tuesday morning, 7 July, *The New York Times* reported on an issue raised earlier by *The Washington Times* (see page 158, above).

> The judge's choice of the name Sotomayor & Associates is regarded by some legal ethicists as a confusing departure for someone generally regarded as meticulous about preparation and following the rules.
>
> Stephen Gillers, professor of legal ethics at New York University Law School, said Judge Sotomayor's use of the larger-sounding title was "inadvisable because it is inaccurate." He noted that bar associations frown on the use of the term "and associates" by single practitioners. "She could have just said, 'Law Offices of Sonia Sotomayor,' " he said.
>
> Bar associations have held that the use of such a name can be misleading. But Mr. Gillers said that since Ms. Sotomayor never appears to have advertised or to have put the name on letterhead, it is a technical issue and not one likely to ever have been cited by a disciplinary committee in the New York State court system. But he said that if the panel had received a complaint about the name, it would have required her to change it.

Serge F. Kovaleski, "Little Information Given About Solo Law Practice Run by Sotomayor in '80s," *The New York Times* (7 July 2009)
http://www.nytimes.com/2009/07/07/us/politics/07firm.html .

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[107] Larry Margasak, Associated Press, "Abortion case plaintiff arrested at Senate hearing," *The Washington Post* (19:10 EDT, 13 July 2009)
http://www.washingtonpost.com/wp-dyn/content/article/2009/07/13/AR2009071301378.html ;
Paul Kane, " 'Jane Roe' Arrested at Supreme Court Hearing," *The Washington Post* (20:17 EDT, 13 July 2009)
http://www.washingtonpost.com/wp-dyn/content/article/2009/07/13/AR2009071302345.html .

Senator McConnell on 7 July

On Tuesday, 7 July, Senator Mitch McConnell, the leader of the Republicans in the Senate, made a speech on the Senate floor about Judge Sotomayor's disposition of the *Ricci* case:

> Yet regardless of where one comes out on this question [a race-neutral, standardized test in which some races did not perform as well as others], there are at least two aspects of how all nine Justices handled this very important case that stand in stark contrast to how Judge Sotomayor and her panel on the Second Circuit handled it—and which call into question Judge Sotomayor's judgment.
>
> First, this case involves complex questions of Federal employment law; namely, the tension between the law's protection from intentional discrimination— known as ''disparate treatment'' discrimination—and the law's protection from less overt forms of discrimination, known as ''disparate impact'' discrimination.
>
> It also involves important constitutional questions—such as whether the government, consistent with the 14th amendment's guarantee of equal protection under the law, may intentionally discriminate against some of its citizens in the name of avoiding possible discriminatory results against other of its citizens.
>
> Every court involved in this case realized that it involved complex questions that warranted thorough treatment— every court, that is, except for Judge Sotomayor's panel. The district court, which first took up the case, spent 48 pages wrestling with these issues. The Supreme Court devoted 93 pages to analyzing them. By contrast, Judge Sotomayor's panel dismissed the firefighters' claims in just 6 sentences — a treatment that her colleague and fellow Clinton appointee, Jose Cabranes, called ''remarkable,'' ''perfunctory,'' and not worthy ''of the weighty issues presented by'' the firefighters' appeal.
>
> It would be one thing if the Ricci case presented simple issues that were answered simply by applying clear precedent. But the Supreme Court doesn't take simple cases. And at any rate, no one buys that this case was squarely governed by precedent, not even Judge Sotomayor. We know this because in perfunctorily dismissing the firefighters' claims, Judge Sotomayor did not even cite a precedent.
>
> Moreover, she herself joined an en banc opinion of the Second Circuit that said the issues in the case were ''difficult.'' So, to quote the National Journal's Stuart Taylor, the way Judge Sotomayor handled the important legal issues involved in this case was ''peculiar'' to say the least. And it makes one wonder why her treatment of these weighty issues differed so markedly from the way every other court has treated them and whether her legal judgment was unduly affected by her personal or political beliefs.
>
> Second, all nine Justices on the Supreme Court said that Judge Sotomayor got the law wrong. She ruled that the government can intentionally discriminate against one group on the basis of race if it dislikes the outcome of a race-neutral exam and claims that another group may sue it. Or, as Judge Cabranes put it, under her approach, employers can ''reject the results of an employment examination whenever those results failed to yield a desired racial outcome, i.e., failed to satisfy a racial quota.''
>
> No one on the Supreme Court, not even the dissenters, thought that was a correct reading of the law.
>
> ....

> It is one thing to get the law wrong, but Judge Sotomayor got the law really wrong in the Ricci case, and the New Haven firefighters suffered for it. To add insult to injury, the perfunctory way in which she treated their case indicates either that she did not really care about their claims, or that she let her own experiences planning and overseeing these types of lawsuits with the Puerto Rican Legal Defense and Education Fund affect her judgment in this case.
>
> As has been reported, before she was on the bench, Judge Sotomayor was in leadership positions with PRLDEF for over a decade. While there, she monitored the group's lawsuits and was described as an ''ardent supporter'' of its litigation projects, one of the most important of which was a plan to sue cities based on their use of civil service exams. In fact, she has been credited with helping develop the group's policy of challenging these types of standardized tests.
>
> Is the way Judge Sotomayor treated the firefighters' claims in the Ricci case what President Obama means when he says he wants judges who can ''empathize'' with certain groups? Is this why Judge Sotomayor herself said she doubted that judges can be impartial, ''even in most cases''? It is a troubling philosophy for any judge, let alone one nominated to our highest court, to convert ''empathy'' into favoritism for particular groups.

Mitch McConnell, "Sotomayor Nomination," CONGRESSIONAL RECORD S7154 - S7155 (7 July 2009).

In my opinion, there are several criticisms of Judge Sotomayor — her personal experiences as a beneficiary of affirmative action, her personal involvement in affirmative action as an officer of PRLDEF, her empathy for minority racial/ethnic groups, her public disdain for impartiality — all of which merge in the *Ricci* case, and any of which may have influenced her decision in the *Ricci* case. Or maybe Sotomayor was either lazy or concerned about political criticism in a high-profile, controversial case.

witnesses next week

On Thursday, 9 July, the Republicans announced they would call 14 witnesses at the Sotomayor hearings next week. The most famous witness is Frank Ricci, the lead plaintiff in the *Ricci* case. The Republicans will also call Ben Vargas, a Hispanic firefighters who was another of the plaintiffs in the *Ricci* case. I am sorry to say that the Republicans are engaging in a pure propaganda stunt at the hearings. I do believe that Ricci, Vargas, and the other white firefighters-plaintiffs were treated shabbily by the three-judge panel (including Sotomayor). But none of these plaintiffs have any personal knowledge that is relevant to Sotomayor's nomination. None of these plaintiffs have met Sotomayor,[108] so they can not testify about her character. None of these plaintiffs are attorneys who have undertaken a legal analysis of Sotomayor's work, so they can not testify about the quality of her legal work or her performance as a judge. Having disappointed

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[108] In a trial court, the plaintiffs and defendants are present in the courtroom during the trial, and they often testify as part of the trial. But in an appellate court, the proceedings in a courtroom is limited to the judges asking questions of the attorneys, for approximately an hour. Most of appellate work is done with *written* briefs to the judges.

litigants testify about their personal anguish is not relevant to confirmation hearings for a judge — no matter how a judge rules, there will always be disappointed litigants. Fortunately, the U.S. Supreme Court finally delivered justice to Ricci, Vargas, and the other firefighters, so their anguish should now be ended. Calling Ricci and Vargas as witnesses make the Republicans appear to endorse empathy for white people, which is no better than Sotomayor's empathy for Hispanics.

The Democrats are no better than the Republicans. The Democrats announced they would call David Cone, a former pitcher for the New York Yankees baseball team, who will testify that Sotomayor's ruling in a 1995 case saved baseball from a strike. The Democrats will also call the president of the Hispanic National Bar Association, who will presumedly testify that Sotomayor was correct to say that Hispanic women make *better* judges than white men. <*grin*> And the Democrats will also call the chairwoman of the Congressional Hispanic Caucus, for more ethnic support, perhaps to threaten Republicans who vote against Sotomayor. <*grin*>

On Friday, 10 July, Dahlia Lithwick, a senior editor at *Slate* online magazine, wrote an attack on Frank Ricci, in which she identified him as a frequent litigant over alleged discriminatory employment or wrongful termination:

> The other way to look at Frank Ricci is as a serial plaintiff — one who reacts to professional slights and setbacks by filing suit, threatening to file suit, and more or less complaining his way up the chain of command. That's not the typical GOP heartthrob, but I look forward to hearing Sen. Cornyn's version of that speech next week as well.

Dahlia Lithwick, "Fire Proof The New Haven firefighter is no stranger to employment disputes," *Slate* (18:50 EDT, 10 July 2009) http://www.slate.com/id/2222087/ .

I think it is repulsive for Ms. Lithwick to make this personal attack on Ricci for asserting his legal rights, although Republicans *may*[109] have invited such an attack by calling Ricci as a witness. At least one liberal organization urged reporters to investigate Ricci.[110] Even *if* Ms. Lithwick's irrelevant characterization of Ricci is correct, the conclusions remain that (1) the three-judge panel including Sotomayor did an *in*adequate job in disposing of complex legal issues in *Ricci* in a terse, one-paragraph summary order and (2) Ricci was a victim of racial discrimination by the city of New Haven, according to the U.S. Supreme Court. However, I continue to believe, for reasons stated two paragraphs above, that Ricci and Vargas are *not* appropriate witnesses for the Sotomayor confirmation hearings.

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[109] A polite person would say that one *never* invites an ad hominem attack. But in law, which can be brutal, calling a witness puts that witness' personal character in issue.

[110] ... citing in an e-mail "Frank Ricci's troubled and litigious work history," the liberal advocacy group People for the American Way drew reporters' attention to Ricci's past.
Michael Doyle and David Lightman, "Sotomayor backers urge reporters to probe New Haven firefighter." *McClatchey Newspapers* (20:26 EDT, 10 July 2009)
http://www.mcclatchydc.com/227/story/71660.html and
http://www.centredaily.com/mcclatchydc/story/1392194.html .

Jumping ahead in time, but inserted here in the interest of coherence, at the confirmation hearings in the Senate Judiciary Committee on 14 July, Senator Hatch and Judge Sotomayor had the following exchange about this personal attack on Ricci:

> HATCH: These are cases where people are discriminated against. And let me just make one last point here. You have nothing to do with this, I know. But there's a rumor that People for the American Way has — that this organization has been smearing Frank Ricci, who is only one of 20 plaintiffs in this case, because he may be willing to be a witness in this — in these proceedings.
>
> I hope that's not true. And I know you have nothing to do with it, so don't — don't think I'm trying to make a point against you. I'm not. I'm making a point that that's the type of stuff that doesn't belong in Supreme Court nomination hearings. And I know you would agree with me on that.
>
> SOTOMAYOR: Absolutely, Senator. I would never, ever endorse, approve, or tolerate, if I had no one control over individuals, that kind of conduct.
>
> HATCH: I believe that.
>
> SOTOMAYOR: Reprehensible.

Confirmation Hearings in U.S. Senate Judiciary Committee (14 July 2009).

An attorney wrote a thoughtful comment on why People for the American Way were wrong to attack Ricci:

> Ricci is on the list of witnesses Republican Senators will call at Sotomayor's confirmation hearing. But does this make his "litigious work history" an issue that deserves scrutiny? It does so only if that history has some relevance to Judge Sotomayor's fitness to serve on the Supreme Court. And plainly, it has no such relevance. No matter how many actions Ricci may have filed in the past, the only one that pertains to Sotomayor is the one she decided. That suit, in which a substantial number of other plaintiffs joined, was found to be meritorious.
>
> ....
>
> But what of Ricci's "troubled" history of litigating employment claims. It consists of a suit claiming disability discrimination when one fire department decided not to hire him (Ricci is dyslexic); an administrative complaint claiming that his discharge by that same fire department was in retaliation for accusing the department of safety violations; and the reverse discrimination suit against the New Haven fire department that Sotomayor mishandled.
>
> Isn't it odd that an outfit calling itself People for the American Way would call this history "troubling"? One might have thought that such an organization would applaud challenges to disability discrimination, race discrimination, retaliation, and safety violations.

Paul Mirengoff, "Is This the American Way?," *Powerline Blog* (22:28, 12 July 2009) http://powerlineblog.com/archives/2009/07/024034.php .

absence of feminists

Why are the feminists (e.g., National Organization for Women) and abortion groups (e.g., NARAL and Planned Parenthood) absent from the Democrats' witness list at Sotomayor's confirmation? A reporter for the Associated Press noticed that feminist groups and abortion groups had been silent about Sotomayor:

> Women's groups, euphoric when President Barack Obama chose Sonia Sotomayor for the Supreme Court, have been remarkably quiet in the weeks since on the judge who would be the court's third woman ever. Sotomayor's few rulings on the abortion issue have made abortion rights activists unwilling to crusade on her behalf, and other liberal women's organizations say they're waiting to voice full-throated support until they know more about her record. Their relative silence may be helping Sotomayor — who's been accused of letting her personal experiences interfere with her judging — more than it hurts her.
>
> ....
>
> Hispanic groups have led the charge in promoting and defending Sotomayor, who would be the first Latina to serve on the Supreme Court.
>
> ....
>
> Don't expect to hear from NARAL Pro-Choice America, the abortion rights group. Its leaders clammed up about Sotomayor once she was nominated, and the group is spending its time and resources pressing senators to ask her questions about the right to privacy during the hearings.

Julie Hirschfeld Davis, Associated Press, "Women's groups quiet on Sotomayor," (21:31 EDT 10 July 2009)
http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2009/07/10/national/w133650D57.DTL and
http://www.washingtonpost.com/wp-dyn/content/article/2009/07/10/AR2009071003196.html .

As mentioned above, beginning at page 93, Judge Sotomayor has issued few rulings that mention abortion. Federal courts do not consider other so-called women's issues, such as domestic violence, divorce, alimony, child custody, ...[111] Because Sotomayor has served as a judge only in federal courts, she has no judicial record on these other so-called women's issues. In my opinion, the lack of vocal support by feminists for Sotomayor — who would be the third female Justice in the history of the U.S. Supreme Court — suggests that the feminists do not see Sotomayor as one of them. I do not know *why* the feminists are silent on what should be the historic nomination of the third woman to the U.S. Supreme Court. Perhaps this is one of those times when silence speaks louder than words.

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[111] Standler, Federal Court Jurisdiction in the USA in Family Law Cases, http://www.rbs2.com/dfederal.pdf (2004).

On 13 July 2009, the National Organization for Women (NOW) endorsed the confirmation of Judge Sotomayor:

> Today millions of women and girls will watch and listen as the historic confirmation hearings begin for Judge Sonia Sotomayor, nominated by President Barack Obama for a seat on the U.S. Supreme Court. If confirmed, Judge Sotomayor will be the first Hispanic justice and only the third woman ever to serve on the high court.
>
> We fully expect the Senate Judiciary Committee to ask probing questions, meticulously interview witnesses, and examine Judge Sotomayor's past decisions. Then we are confident the full Senate will confirm Judge Sotomayor enthusiastically, judiciously, and swiftly.
>
> There is no denying that Judge Sotomayor is highly qualified to replace retiring Justice David Souter. Walking in the door, she has more judicial experience than any seated Supreme Court justice had prior to confirmation. She brings a lifelong commitment to equality, justice and opportunity, as well as the respect of her peers, unassailable integrity, and a keen intellect informed by experience. Judge Sotomayor will serve this nation with distinction.
>
> It is also past time for the court to more closely reflect the population of this diverse country. The National Organization for Women echoes the words of Justice Ruth Bader Ginsburg, who has said having only one woman on the court sends the wrong message about women's roles in U.S. society. Canada's Supreme Court, for example, has four women justices, including a female chief justice. We look forward to seeing Judge Sotomayor join Justice Ginsburg on the court by the first Monday in October, when the court's term begins.

Kim Gandy, NOW Calls for Swift Confirmation of Judge Sotomayor to Supreme Court (13 July 2009) http://www.now.org/press/07-09/07-13.html .

This endorsement seems to say that *any* woman would be a better Justice than a man. While it is true that Sotomayor "has more judicial experience" than any current Justice prior to their confirmation, objective ratings place Sotomayor in the bottom half of the judges on the U.S. Courts of Appeals.[112] The other qualifications mentioned by NOW are all conclusory statements without any supporting evidence. NOW fails to mention — let alone refute — any of the significant defects mentioned by opponents of Sotomayor's nomination. Notice that NOW did not wait to evaluate the testimony of Judge Sotomayor in the confirmation hearings before endorsing her.

On 21 July 2009 — five days *after* the end of Sotomayor's testimony at the U.S. Senate Judiciary Committee — NARAL Pro-Choice America finally endorsed Sotomayor:

> President Obama made a sound choice in nominating Judge Sotomayor to the U.S. Supreme Court. **....**
>
> Within the context of this change in the court's makeup [Roberts and Alito], we have examined Judge Sotomayor's responses to privacy-related questions. We are pleased that Judge Sotomayor expressed stronger support for the established constitutional right to privacy than either Chief Justice Roberts or Justice Alito, both of whom had anti-choice records before being nominated to their current positions. She also articulated several times throughout the hearing that the constitutional right to privacy includes the right to choose.

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[112] See above, beginning at page 49.

> In addition, we took into consideration the significant and strong support her nomination has garnered from some of our most committed pro-choice allies in the Senate as well as President Obama's consistent record of support for Roe v. Wade and his established record of nominating to key posts individuals who share his principles.
>
> After engaging in this especially deliberate and thoughtful process, we are pleased to have arrived at a position in support of President Obama's first nominee to the U.S. Supreme Court.

Nancy Keenan & Kelli Conlin, NARAL Pro-Choice America and NARAL Pro-Choice New York Announce Support for Sotomayor Nomination (21 July 2009) http://www.prochoiceamerica.org/news/press-releases/2009/pr07212009_sotomayorsupport.html .

commentary

On 9 July, *The Washington Post* published a long article that reviewed some of Sotomayor's appellate judicial opinions.

> To examine the record of Sotomayor, whose Senate confirmation hearings begin Monday, The Post reviewed all 46 of her cases in which the 2nd Circuit issued a divided ruling, nearly 900 pages of opinions. Although Sotomayor has heard about 3,000 cases, judicial scholars say split decisions provide the most revealing window into ideology because in such cases the law and precedent are often unclear, making them similar to cases heard by the Supreme Court. **....**
>
> **....**
>
> Her writings have often offered a granular analysis of every piece of evidence in criminal trials, and sometimes read as if she were retrying cases from her chambers.
>
> Legal experts said Sotomayor's rulings fall within the mainstream of those by Democratic-appointed judges. But some were critical of her style, saying it comes close to overstepping the traditional role of appellate judges, who give considerable deference to the judges and juries that observe testimony and are considered the primary finders of fact.
>
> "It seems an odd use of judicial time, given the very heavy caseload in the 2nd Circuit, to spend endless hours delving into the minutiae of the record," said Arthur Hellman, a University of Pittsburgh law professor and an authority on federal courts.
>
> Adrienne Urrutia Wisenberg, a Washington criminal appellate lawyer, said appellate judges "are not in the role of reweighing the credibility of a witness. Someone's demeanor is not reflected on a transcript."

Jerry Markon, "Uncommon Detail Marks Rulings by Sotomayor, She Almost Oversteps Her Role, Experts Say," *The Washington Post* (9 July 2009) http://www.washingtonpost.com/wp-dyn/content/article/2009/07/08/AR2009070804211.html .

"Uncommon detail"? Sotomayor was a member of the three-judge panel who disposed of the *Ricci* case in a single paragraph, with citations to neither cases nor statutes. But then the summary order in *Ricci* was **not** a divided opinion.

On 11 July, *The Salt Lake City Tribune* reported the reaction of Prof. Paul G. Cassell at the University of Utah College of Law:

> Cassell, the most prominent conservative law professor at the U., reviewed Sotomayor's record at the request of PBS' NewsHour.
>
> "My concern is that I don't see her opinions as being particularly distinguished. They are fairly mechanical," he said, agreeing with a recent Washington Post review that found Sotomayor's decisions include an unusual level of detail about the evidence in cases.
>
> He wonders how easily she will make the transition to the Supreme Court, which focuses on legal precedent, not deciding factual disputes.
>
> "There's nothing in there to suggest she would be a horrible Supreme Court justice, but there is also nothing in there to suggest that she would be an exceptional Supreme Court justice," he said. Cassell expects Sotomayor to be "a fairly conventional liberal."

Matt Canham, "Legal experts from left and right weigh in on Sotomayor," *The Salt Lake City Tribune* (17:57 MDT 11 July 2009) http://www.sltrib.com/news/ci_12814992 .

problems with the current Court

The Provost of Princeton University, who has a law degree, wrote an article for *The Washington Post* about the dullness of the current U.S. Supreme Court.

> And the truth is, federal appeals court judges are not the most charismatic folks in the world. When they give public speeches, for instance, they are partial to discussing stuff like courtroom civility and docket congestion. (Snooze.) And despite Clarence Thomas's rags-to-robes story, Antonin Scalia's legendary wit and Ruth Bader Ginsburg's trail-brazing victories as a feminist litigator, the current high court is remarkably monochromatic — a bunch of career jurists, professional, polished and pedigreed.
>
> The bench didn't used to be this dull.
>
> The justices who decided Brown v. Board of Education in 1954 were a formidable lot. Chief Justice Earl Warren was once California's governor and the Republican Party's nominee for vice president. Felix Frankfurter, a Jewish immigrant, had been the single most eminent law professor in the United States. Hugo Black was a former senator from Alabama with a bit of history in the Ku Klux Klan. Robert Jackson served as U.S. attorney general and was chief prosecutor at the Nuremberg trials.
>
> To get an equally dynamic court today, you would need to include the likes of Jennifer Granholm, Cass Sunstein, Joe Lieberman and Ken Starr. And that's even before you try to find a modern-day counterpart for William O. Douglas, the brilliant former chairman of the Securities and Exchange Commission who irked conservatives with his libertarian bent and multiple marriages — he had four wives in about a dozen years, each younger than the last.

Christopher L. Eisgruber, "The Highest, Dullest Court In the Land," *The Washington Post* (12 July 2009)
http://www.washingtonpost.com/wp-dyn/content/article/2009/07/10/AR2009071002361.html .

Actually, Prof. Eisgruber could be more critical of the current Court. Five of the current Justices (Roberts, Scalia, Kennedy, Souter, Breyer) are graduates of Harvard Law School, two (Thomas, Alito) are graduates of Yale Law School, one (Ginsburg) attended Harvard Law School but graduated from Columbia Law School, and one (Stevens) is a graduate of Northwestern Law

School. Sotomayor is a graduate of Yale Law School. It's a kind of academic incest when most of the Justices attended either Harvard or Yale law schools. There are approximately 200 law schools in the USA and many of them (e.g., University of Chicago, Cornell, Stanford, Georgetown, ...) have excellent reputations. It is possible for a student to get a good education at almost any school — they key is diligence and thousands of hours of reading by the student, not the reputation of the school. Only a snob would insist that a lawyer be a graduate of either Harvard or Yale Law School.

Prof. Eisgruber advocates appointing politicians to the Court, while I believe — for reasons stated above, beginning at page 9 — that politicians are unsuited for the Court.

But I agree with Prof. Eisgruber that the current Court lacks Justices like William Douglas who took a passionate, personal interest in delivering justice. Instead, we have cautious, conventional, professional technocrats on the Court who avoid controversy and who are *un*creative.

In the current political climate surrounding the nomination and confirmation of Justices, anyone who has taken a stand on any controversial topic (e.g., abortion, affirmative action, ownership of firearms, rights of homosexuals, ...) is automatically disqualified. Such a political climate excludes Judges Richard Posner and Diane Wood, as well as Prof. Kathleen Sullivan. Such exclusions are a tragedy for jurisprudence and for our nation.

On 20 July 2009 — four days after the end of the confirmation hearings in the U.S. Senate Judiciary Committee — a columnist for *The Washington Post* wrote:

> A political ad that lucky New Yorkers get to see on television begins with "A million lawyers in America" and goes on to wonder about certain no-bid contracts in nearby New Jersey that will not concern us today. But every time the ad runs, I cannot help thinking about Sonia Sotomayor: A million lawyers in America, and Barack Obama chooses her for the Supreme Court.
>
> Don't get me wrong. She is fully qualified. She is smart and learned and experienced and, in case you have not heard, a Hispanic, female nominee, of whom there have not been any since the dawn of our fair republic. But she has no cause, unless it is not to make a mistake, and has no passion, unless it is not to show any, and lacks intellectual brilliance, unless it is disguised under a veil of soporific competence until she takes her seat on the court. We shall see.
>
> ....
>
> My admiration for Scalia is constrained by the fact that I frequently believe him to be wrong. But his thinking is often fresh, his writing is often bracing; and, more to my point, he has no counterpart on the left. His liberal and moderate brethren wallow in bromides; they can sometimes outvote him, but they cannot outthink him.
>
> This is the sad state of both liberalism and American politics. First-class legal brains are not even nominated lest some senator break into hives at the prospect of encountering a genuinely new idea. The ceiling is further lowered by the need to season the court with

> diversity, a wonderful idea as long as brilliance is not compromised. The result has been the rout of sexism: The women are as mediocre as the men.
>
> From all we know, Sotomayor is no Scalia. She is no Thurgood Marshall, either, or even a John Roberts, who is leading the court in his own direction. She will be confirmed. But if she is not, liberalism will not have lost much of a champion or a thinker. A million lawyers in America and something Jimmy Carter used to say comes to mind: Why not the best?

Richard Cohen, "The So So Sotomayor," editorial, *The Washington Post,* p. A17 (20:44 EDT 20 July 2009)
http://www.washingtonpost.com/wp-dyn/content/article/2009/07/20/AR2009072002179.html .

questions to ask Sotomayor next week

On 12 July, Claudia Zhao, an articulate reader of *The New York Times,* wrote a wonderful list of questions for senators to ask Sotomayor at her confirmation hearings:

1. Much as Chief Justice John Roberts asked during oral arguments over Ricci… Can you assure us, Judge Sotomayor, that your decision in Ricci for the City of New Haven would have been the same if minority firefighters scored highest on this test in disproportionate numbers, and the City said, "We don't like that result, we think there should be more whites on the fire department, and so we're going to throw the test out?"

2. On the South Wall of the Supreme Court Building's courtroom are carvings of the "great lawgivers of history." The second earliest lawgiver depicted is Hammurabi, king of Babylon, who is honored for carving the laws in stone and putting them up in public—which meant that even the king couldn't change the laws after the fact to suit his convenience. Why should Mayor DeStefano enjoy the privilege that King Hammurabi denied himself: to see what the final score turned out to be, then change the rules of the game?

3. In the Obama Administration's friend of the court brief to the Supreme Court on the Ricci case, the Obama Administration called for your decision for summary judgment in favor of Mayor DeStefano to be overturned and the Ricci case to be remanded to local district court for retrial on the facts. Why did you vote for a more extremist outcome than the Obama Administration later called for?

4. Chief Justice Robert s recently wrote, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." Do you agree?

5. Here's a guest question from Emily Bazelon of Slate and the Yale Law School about your terse judgment in Ricci: "The problem for Sotomayor, instead, is why she didn't grapple with the difficult constitutional issues, the ones Cabranes pointed to. Did she really have nothing to add to the district court opinion? In a case of this magnitude and intricacy, why would that be?"

6. Is the primary point of our civil rights laws to protect minorities or to protect individuals of all races?

7. You have described yourself on video as "a product of affirmative action" and an "affirmative action baby" and that it is "critical that we promote diversity." Considering your often-expressed passionate views on the topic and personal self-interest in promoting ethnic preferences, how could Frank Ricci have expected even-handed, colorblind justice from you?

8. Yes, but, according to the Supreme Court, Frank Ricci didn't get justice from you, now did he?

9. I realize you resent these questions, but aren't doubts about racial bias inevitably created by the act of treating people of different races differently, acts which you endorse?

10. Considering the personal benefits that ethnic preferences have provided you over the years, shouldn't you have recused yourself from the Ricci case?

11. Will you promise to recuse yourself in all future cases involving quotas, affirmative action, discrimination, or disparate impact?

12. Six years ago, in the previous major affirmative action case, Justice Sandra Day O'Connor wrote in her majority decision in Gratz,[113] "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." (That's now only 19 years from 2009.) Do you agree?

13. Justice Ruth Bader Ginsburg wrote in her dissenting opinion on Ricci: "The Court's order and opinion, I anticipate, will not have staying power." Do you agree?

14. Should immigrants be eligible for racial and ethnic preferences? Why?

15. Judge Sotomayor, you were a member of the National Council of La Raza from 1998 to 2004. What do the words "La Raza" mean in English?

Claudia Zhao, *The New York Times* (10:13 EDT 12 July 2009)
http://thecaucus.blogs.nytimes.com/2009/07/12/caucus-readers-what-would-you-ask-judge-sotomayor/?hp#comment-1490155

http://thecaucus.blogs.nytimes.com/2009/07/12/caucus-readers-what-would-you-ask-judge-sotomayor/?hp#comment-1490161 .

The correct answer to Nr. 15 is "The Race". The motto of the La Raza organization is, in English translation, "For the Race, Everything; Outside the Race, Nothing."

The opinion-editorial editors at *The New York Times* invited seven prominent law professors or former judges to each submit two or three questions for Judge Sotomayor. I am quoting two of them, first Prof. Kathleen Sullivan, then Prof. Ann Althouse:

1. Advocacy of "states' rights" has long been considered a hallmark of conservative judicial philosophy. Recently, however, we have seen the advent of what might be called "blue states' rights," as progressive states seek to provide greater consumer, environmental and

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[113] Quoted at page 143, above. Ms. Zhao confused *Gratz v. Bollinger,* 539 U.S. 244 (2003) with the correct case.

antidiscrimination protection than the federal government, while business seeks to strike down such measures as pre-empted by federal law.

What is your view of the role of federalism in our constitutional system? And how has that view affected your rulings in the cases that have come before you concerning whether federal laws pre-empt state laws or causes of action?

2. The Supreme Court has issued four major decisions since 9/11 invalidating the president's and Congress's efforts to detain and try "enemy combatants" according to procedures that depart from traditions of military justice and the rule of law. And yet since 9/11, not a single enemy combatant has been tried to judgment by military tribunal or released over executive branch objection. How will history view the Supreme Court's decisions in this area — as a success for the principles they announced or a failure for the results they achieved? What is your view of the role of the court in ensuring the separation of powers? Has that view varied in times of national emergency?

KATHLEEN M. SULLIVAN, a professor of law at Stanford

1. When you said you hoped that "a wise Latina" would make better judicial decisions, did you mean it as a pleasantry aimed at people who had invited you to speak about diversity or will you now defend the idea that decision-making on the Supreme Court is enhanced by an array of justices representing different backgrounds?

2. If a diverse array of justices is desirable, should we not be concerned that if you are confirmed, six out of the nine justices will be Roman Catholics, or is it somehow wrong to start paying attention to the extreme overrepresentation of Catholicism on the court at the moment when we have our first Hispanic nominee?

ANN ALTHOUSE, a professor of law at the University of Wisconsin

Seven legal experts, "Questions for Judge Sotomayor," op-ed, *The New York Times* (13 July 2009) http://www.nytimes.com/2009/07/13/opinion/13sotomayor.html .

Prof. Sullivan's questions are rather technical, but I would expect that from her, since she is a genuine expert on constitutional law.

With respect to Prof. Althouse's first question, no matter how the "wise Latina" remark is interpreted (i.e., twisted), it is still *un*acceptable to me, because it plainly indicates that Sotomayor sees Hispanic females as superior to white males. And it is not an isolated mistake, because Sotomayor repeated it in other speeches during many years. In my opinion, this "wise Latina" statement disqualifies Sotomayor, although I think there are better reasons to reject her, such as her below average performance as a judge on the U.S. Court of Appeals and her lack of scholarly publications. It is also bad form to suggest answers inside of a question, as Prof. Althouse did.

my questions

My questions, if I were on the Senate Judiciary Committee? I would start by picking twenty of the major U.S. Supreme Court decisions that established the current rules of law that we use in issues of the First Amendment. For ten cases, I would tell her the name of the case and expect her to tell me tersely the major holdings. For the other ten cases, I would tell her the holding and expect her to tell me the name of the case. No notes allowed. Closed book.

Then I would repeat the process with ten major U.S. Supreme Court cases in search and seizure law, including the reasonable expectation of privacy, that is protected — but poorly — by the Fourth Amendment.

After those thirty questions, I suspect that it would be rather obvious that Sotomayor is no expert on constitutional law. I'd call a professor from a respected law school who is a recognized expert on constitutional law and have her/him testify that my questions were reasonable and appropriate for someone who is going to sit on the U.S. Supreme Court. (Of course, the professor would give such testimony, because she/he helped me draft the questions. That's how the game is played.)

I would remind Sotomayor that the Bible condemns sodomy, and then ask her if homosexuals — or anyone — should have the legal right to engage in sodomy. She *should* say that consenting adults have a legal right to engage in sodomy.[114] But will she have the courage to say that right answer?

I would ask her how the Court could have decided *Roe v. Wade,* so that the holdings in that 1973 case could better withstand the criticism that religious leaders have heaped on the legal right to an abortion. (She will probably reply "I have never thought about that issue, and it is too complicated for me to give you a quick response now." And that's a good answer, unless you really care about a woman's legal right to an abortion.)

I would *not* waste time with questions about her "wise Latina" remark in her awful speech, or her work with the PRLDEF, because I am already convinced that she is biased in favor of Hispanics. Besides, everyone knows she will deny that she is a racist.

I would *not* ask her views on issues that will likely come before the Court after she is confirmed, because the concept of impartiality requires her not to answer such questions.

There is zero chance that my questions will be used by senators. Confirmation hearings are largely a publicity stunt done for the benefit of the senators, *not* a sincere and genuine inquiry into

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[114] *Lawrence v. Texas,* 539 U.S. 558 (2003).

the competence of a nominee. The american public — which is woefully ignorant of constitutional law[115] — would see such questions as *un*reasonably difficult and *un*fair to the nominee, so such questions will not be asked. Nonetheless, I believe that candidates for the U.S. Supreme Court should understand constitutional law *before* they are nominated.

Eleventh Week: Hearings

See my separate document at http://www.rbs0.com/sotomayor2.pdf .

Conclusion

One theme that clearly emerged in first five days after Justice Souter announced his resignation is that politicians are clamoring for a nominee who is a woman, and who is preferably also from a minority ethnic group (e.g., Hispanic or Black). This diversity point of view reduces a candidate's lifetime of work in law to a mere label about the candidate's gender, ethnicity, sexual orientation, religion, or physical disability. Such labels fit prejudices that "all ___ think alike", robbing a person of individuality and denying that they might not conform to stereotypes and dogma of their group. Worse, it ignores the largest pool of people in the USA who are knowledgeable about constitutional law: white males.

We need to remind ourselves that the U.S. Supreme Court is *neither* a representative institution *nor* a political institution. We should be seeking a Justice who is:

1. who has a reputation as an independent thinker with integrity to depart from orthodoxy, popular sentiment, and political correctness, so we can trust her to be impartial,
2. very knowledgeable about constitutional law (including objective measures of excellence, such as frequency of citations to the candidate's work in other opinions, articles, and books), and
3. has a record of *not* being deferential to the government in civil liberties and privacy rights.

Unless, one wants to politicize the Court and turn it into an instrument of social change, race and gender of the Justices should be irrelevant. Indeed, it is insulting to say that white males are somehow incapable of understanding minorities — history shows that white males on the U.S. Supreme Court during the 1950s enthusiastically supported desegregation.

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[115] See, e.g., the results of an opinion poll released by C-SPAN on 9 July 2009: http://www.cspan.org/pdf/C-SPAN%20Supreme%20Court%20Online%20Survey_070909_6pm.pdf Fewer than half of people in the USA could name at least once Justice on the Court, fewer than half knew the name of President Obama's current nominee to the Court, and fewer than half knew the name of the first female Justice on the Court.

By the third week of the nomination process, it was clear that opposition politicians[116] would mount an intense public relations campaign against any nominee who had expressed an opinion on any controversial topic. In a vibrant democracy, I would *expect* that intelligent, articulate people (except judges, who must remain impartial) would take public positions on the major issues of the day, including controversial topics like abortion, same-gender marriage, death penalty, etc. However, if future employment opportunities are forbidden to outspoken people, then ambitious people will learn to avoid taking public positions on controversial issues. Such silence on the important issues of the day will harm democracy by reducing the number of voices. Appointing judges who have a history of never taking a position on an important issue elevates those who don't use their First Amendment rights, and who (I fear) don't really respect the First Amendment.

At the beginning of the fourth week of the nomination process, President Obama selected Judge Sotomayor. The only reasons that I can see to nominate Judge Sotomayor — when there are *many* better qualified[117] candidates (e.g., Judge Richard Posner, Judge Diane Wood, Prof. Kathleen Sullivan, ...) — is that (1) Sotomayor is a Hispanic woman, which elevates ethnicity and gender over merit, and (2) Sotomayor has "empathy" for disadvantaged people, which is a lack of impartiality.

During the fifth week of the nomination process, I concluded that the entire nomination and confirmation processes are corrupted by partisan politics.[118]

During the sixth week (8-12 June 2009) of the nomination process, there was less news about Sotomayor. The sixth week's big story about the Supreme Court nomination was Senator Leahy's unilateral choice of 13 July as the date to begin hearings on Sotomayor. Although Leahy made a reasonable choice, the Republicans criticized him for his choice.

During the seventh week (15-19 June 2009) there was little news about Sotomayor, except for her membership in the Belizean Grove, and even that story received little coverage in major newspapers. I think we do real harm when we pretend that discrimination in favor of women — or in favor of racial/ethnic minorities — is somehow better than discrimination in favor of white males. Anytime we construct social policies that are illogical or nonsymmetrical, we make a new

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116 In this specific case in 2009, the opposition is composed of right-wing Republicans. But the Democrats are no better, having viciously smeared Robert Bork in 1987 and attacked Samuel Alito in Jan 2006. (I personally opposed both Bork and Alito, but I don't like seeing ad hominem attacks on anyone.)

117 See my reasons at page 73, above.

118 See page 124, above.

mistake, even if that mistake is *intended* to reverse past mistakes (i.e., to reverse past discrimination).

During the eighth week (22-26 June 2009) there was even less news about Sotomayor. The opposition to Sotomayor's nomination appears weak.

At the beginning of the ninth week (29 June 2009), the U.S. Supreme Court issued its opinion in *Ricci.* Politicians and journalists misinterpreted the significance of the Court's decision for the confirmation of Sotomayor. In particular, supporters claimed that Sotomayor followed precedent, when the opinion of the three-judge panel actually cited no precedent at all. Before Sotomayor and her colleagues on the three-judge panel can be excused for having followed precedent, they *must* cite the precedent on which they allegedly relied in making their decision. Except for three days of coverage of *Ricci,* journalists mostly ignored Sotomayor in this week.

During the tenth week (6-12 July), the Republicans in the U.S. Senate still had not found precise, articulate reasons to oppose Sotomayor. Probably for purely political reasons (i.e., not alienating Hispanics and black people), they are unwilling to make a frontal assault on affirmative action programs. The Republicans seem unwilling to recognize that Sotomayor is below average as a judge on the U.S. Court of Appeals,[119] perhaps because many nominations by Republican presidents have also been seriously lacking in merit.

The hearings in the Senate Judiciary Committee and the votes in the Senate are discussed in my separate document at: http://www.rbs0.com/sotomayor2.pdf .

This document is at **www.rbs0.com/sotomayor.pdf**
first posted 4 May 2009, revised 3 Aug 2009

return to my homepage at http://www.rbs0.com/

[119] See page 49, above.