InFocus

ASSESSING JUDGE SONIA SOTOMAYOR BEFORE HER CONFIRMATION HEARINGS

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Based on information now publicly available about Barack Obama's Supreme Court nominee, Judge Sonia Sotomayor, the Family Research Council must stand in opposition to her confirmation. The existing evidence shows that Judge Sotomayor lacks a proper understanding of the role of judges and the judiciary in our constitutional system. Unless her Senate confirmation hearings provide evidence to the contrary, we must conclude that Judge Sotomayor stands outside the historic mainstream of American legal thought.

Sotomayor is a judicial activist who has no qualms about imposing her policy preferences from the bench, rather than interpreting the law as written. Judicial activism is anathema to our system of government. It undermines the very basis of our representative democracy and deprives the American people of their right to govern themselves on the most important issues of the day. For Americans concerned chiefly about life, family, and faith issues, the prospect of confirming a justice who believes she "makes policy" from the bench is absolutely unacceptable.

That we now have a more accurate understanding of Judge Sotomayor's judicial philosophy is not due to the President's forthrightness about his nominee and her record. Rather, the President has seen fit to trumpet Judge Sotomayor's supposed "empathy," which is a quality the President famously admires in a judge. Yet what has come to light in recent months about her record shows this supposed empathy to be a mask for deciding winners and losers based upon political ideology rather than the principle of equal justice for all. It does *not* include empathy for unborn children, for white and Latino firefighters from New Haven, for property owners who have their land taken from them by greedy towns, or for Americans who believe in their right to established Second Amendment freedoms. In Judge Sotomayor's world, "empathy" is only owed to groups or classes favored by the political Left. In Judge Sotomayor's world, "empathy" is an excuse for bias.

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There are many troubling aspects of Judge Sotomayor's record, and her confirmation hearings should shed some light on them. If she is asked probing questions and answers forthrightly and honestly, we believe the American people will perceive that the judge has an expansive philosophy of judicial power in which judges act as legislators not mere adjudicators of the law. That is the foremost quality that makes her an unsuitable candidate to hold a life-term appointment on the United States Supreme Court.

With these points in mind, we offer members of the Senate some questions that should be asked of Judge Sotomayor.

Abortion: Puerto Rican Legal Defense Fund Briefs

From 1980 to 1992 Judge Sotomayor was an active governing board member of the Puerto Rican Legal Defense and Education Fund (PRLDEF), helping to shape the group's legal policy. During that period, the group's abortion position was revealed in numerous *amicus* briefs to be aggressively pro-abortion: attacking commonsense regulations such as waiting periods, pushing for a mandate that the state and federal government fund abortions with taxpayer money, and arguing that abortion clinics should be able to perform secret abortions on minor girls without their parents' consent.

Does Judge Sotomayor still embrace her former group's legal reasoning and extreme rhetoric in its briefs in *Ohio v. Akron Center for Reproductive Health* (1990), *Rust v. Sullivan* (1991), or *Planned Parenthood v. Casey* (1992), cases in which the Supreme Court ruled against the arguments made by her group? How, moreover, can she justify having spent some of the PRLDEF's limited legal resources - resources accumulated, in PRLDEF's own words, "to overcome the obstacles that frustrated [Puerto Ricans'] dreams and limited their lives"- to promote radical abortion ideology?

In *Akron Center for Reproductive Health*, for example, the PRLDEF filed a brief opposing a law requiring abortion clinics to obtain the consent of a parent before performing an abortion on a minor girl under the age of 15. The group derided what it called the "ostensible secular purposes" of the law, suggesting they were a "sham," and claiming that "parents who are religiously opposed to abortion" were the law's "primary beneficiaries." Does Judge Sotomayor still believe that laws requiring abortion clinics to involve parents in their minor daughter's abortion – laws which enjoy the support of an overwhelming majority of Americans -- are really a "sham" that ought to be wiped off the books?

In *Planned Parenthood v. Casey*, the PRLDEF's brief asserted that the right to abortion is equal to the right to free speech. It claimed that *any* burden on the abortion right – even

a requirement that women be given relevant information 24 hours before the abortion is to be performed -- is unconstitutional. The Court rejected that argument. Does Judge Sotomayor still believe that abortion in America must be completely unregulated, even to the extent of abolishing commonsense regulations like informed consent 24 hours before an abortion?

Abortion: Partial-Birth Abortion Medical Records

In 2004, Judge Sotomayor made troubling comments at oral argument during one of the federal Partial-Birth Abortion trials.

In the case, *National Abortion Federation v. Ashcroft,* the National Abortion Federation claimed that partial-birth abortion was the safest abortion method in some cases and therefore the Act was unconstitutional. The Department of Justice requested that they produce their medical records to back up this claim *with all identifying information regarding their patients removed*. The partial-birth abortion doctors refused to provide any records with evidence to support their claim. This was tantamount to arguing that they should win the case on their word alone. The District Judge ruled that the abortion providers should produce the medical records and that decision was appealed to the Second Circuit Court of Appeals. Judge Sotomayor sat on the appellate panel. During oral argument, according to the Associated Press (April 22, 2004), Judge Sotomayor stated: "I just don't understand what the records will prove in this case."

This is a troubling statement. It suggests both a disregard for the need for hard evidence at trial and a willingness to coddle the abortion industry. What the records would prove is whether or not the partial-birth abortion doctors were telling the truth. It is irresponsible for a judge to insist that one side in a case merely be taken at its word, especially when evidence is readily available to corroborate or impeach its statements. Appellate courts are particularly unsuited to second-guessing the decisions of the trial court regarding evidence of this nature.

Does Judge Sotomayor believe the abortion industry should be excused from having to prove its case in court when it sues to strike down a duly-enacted abortion regulation? Does she believe medical records are relevant and admissible as a general matter but not if they involve abortion? Does Sotomayor have such great faith in abortion providers that she is willing to accept their verbal claims as fact and impose them as a matter of law?

Judge Sotomayor's Treatment of Litigants

Judge Sotomayor often appears to give short shrift to some parties who are appealing lower court rulings. She does this by joining summary dismissals that do not provide anything approaching an adequate opinion explaining the court's ruling. In the two *Ricci* decisions which Judge Sotomayor signed, there was no recognition of the complex legal issues that the Supreme Court examined for dozens of pages in its decision released this summer. How did she reach the conclusion that a summary, unpublished order was warranted in an historic case of that magnitude? What are Judge Sotomayor's criteria for dismissing cases with summary orders, as she did in *Ricci* and *Didden v. The Village of Port Chester*, a property rights case?

No judicial quality is more important than impartiality. The Senate must investigate thoroughly the appearance of partiality exhibited by Judge Sotomayor's manner of disposing of certain cases.

International Law

An increasing trend in Supreme Court jurisprudence is the Court's reliance on foreign or international sources of law as being authoritative in its decisions. In this regard, most notable is the majority opinion in *Lawrence v. Texas* (striking down laws outlawing sodomy). Justices Stephen Breyer and Ruth Bader Ginsburg have given influential public speeches defending the practice, as has Judge Sotomayor.

As Judge Sotomayor stated in an April 2009 speech to the American Civil Liberties Union (ACLU) of Puerto Rico, "We don't *use* foreign or international law, we *consider* the *ideas* that are *suggested* by international and foreign law. That's a very different concept." Sotomayor went on to say, "It is my hope that judges everywhere will continue to [consider foreign and international law] because I personally believe that it is part of our obligation to think about things, not outside of the American legal system, but that within the American legal system we're commanded to interpret our law in the best way we can."

Can Judge Sotomayor defend her distinction between "considering" foreign and international law, and "using" it, or is it, in fact, a distinction without a difference and a dangerous way for judicial activists to impose their own policy preferences? In particular, does Sotomayor believe that the mere silence of the U.S. Constitution on a general legal point permits a judge to rely on foreign or international law as authority for promulgating a constitution-level principle in law? Does she believe foreign or international law can ever supersede clear principles delineated in the U.S. Constitution? Does she recognize that the consideration of foreign law she recommends is an intellectual and legislative function, prone to both subjective and selective abuse, and illegitimate as a mode of interpretation of U.S law?

Re-Defining Marriage

The question of whether there is a constitutional right to enter into same-sex marriage will likely come before the Supreme Court in the future. From a judicial activist's perspective, the question is whether there ought to be such a right as a matter of policy – not whether the drafters and ratifiers of the Constitution's provisions included that right within the text. If Judge Sotomayor is confirmed, she will be positioned to "make policy" on this important issue. Will she create a right to homosexual marriage?

Does Judge Sotomayor believe it is irrational – in a legal sense – for a state to legally recognize as marriage *only* those sexual relationships that mirror the biological reality of the male-female physiological complementarity that has the capacity to produce children?

If monogamous, male-female marriage would not satisfy a rational basis review, has Western civilization been irrational on this point for two thousand years? If two-sex marriage is not rational, how is a ban on polygamous or polyamorous marriage rational? Why, in other words, is *number* a higher constitutional value than *gender* in defining what states and the federal may do as they define marriage?

Conclusion

Barring significant revelations at her Senate confirmation hearing that change our assessment of her judicial philosophy, the Family Research Council must stand in opposition to Judge Sotomayor's confirmation. The available evidence reveals Judge Sotomayor to be a judicial activist who does not have a proper understanding of the limited role of judges and the judiciary in our constitutional system.

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