

'A Wise Latina Woman'

The context shows that Judge Sotomayor meant what she said.

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Not since Rose Mary Woods made "18" famous has a number so absorbed the attention of the media and political establishment. But with President Barack Obama's nomination of Second Circuit judge Sonia Sotomayor to the Supreme Court to replace retiring Justice David Souter, Washington has become transfixed by "32"--the number of words in a startling passage from the Judge Mario G. Olmos Memorial Lecture that Sotomayor delivered at the University of California, Berkeley, School of Law in 2001 and published the following spring in the *Berkeley La Raza Law Journal*.

The sentence that set off a furious round of spin by supporters and of criticism by opponents of Sotomayor's nomination reads as follows: "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."

This sort of ethnic condescension is routinely bandied about among academics and those who style themselves "civil rights" advocates. But in general public parlance it is problematic in the extreme. As a political analyst confided privately, the sentence in question "is utterly absurd, and I say that as someone who believes that diversity is a good thing in Court appointments and just about everything else. . . . No one's gender or ethnicity bestows an edge in wisdom. What a fatuous concept."

The hapless White House press secretary Robert Gibbs at first refused to address Sotomayor's words. By the end of the week though he declared, "I think she'd say that her word choice in 2001 was poor." Sotomayor herself, according to Senator Dianne Feinstein, said that "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."

The following week the excuse of inadvertence unraveled. Sotomayor had used similar or identical words in speeches between 1994 and 2003, the most recent at Seton Hall, in which the same "wise Latina" formulation was used. And Sotomayor is a meticulous draftsman, as she explained in a separate 1994 speech on the importance of clear writing, in which she boasted that she repeatedly edits her work.

However, the president had already weighed in, pronouncing, "I'm sure she would have restated it. But if you look in the entire sweep of the [speech] 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."

But that is precisely not what the entire sweep of the speech conveys. Indeed, Sotomayor took nearly 4,000 words to say the opposite. The president's characterization of the speech is as false as Sotomayor's reassurances to Feinstein are misleading. The White House is no doubt banking

on the media and public's unwillingness to seek out the *Berkeley La Raza Law Journal* and read Sotomayor's musings in their entirety. In contrast to Judge Richard Paez of the Ninth Circuit, a liberal Hispanic appellate judge who addressed the same Berkeley audience, Sotomayor propounded not warm and fuzzy feelings of ethnic pride but radical views of multiculturalism and of judging itself.

Sotomayor's speech is in many ways a distillation of the most extreme views of the liberal civil rights establishment. They have dispensed with Martin Luther King Jr.'s vision of a "colorblind" society, in which people "will not be judged by the color of their skin but by the content of their character." The notion of a shared American tradition is considered a dodge for maintaining white, male domination of society. Instead, they aim to secure the levers of power, to empower disadvantaged groups to pursue their distinct ideology, culture, and language. It is not enough to eliminate barriers to entry in business, universities, government, or the bench; numerical quotas are essential to securing each group's "fair share." And most critically, group identity and goals supplant individual identity and professional obligations. Each of these elements, the core of the most extreme variety of contemporary multiculturalism, is prominently featured in Sotomayor's speech and law review article.

Sotomayor begins with a homage to her ethnic background and personal experiences--and indeed pronounces the topic of her speech to be "my Latina identity, where it came from, and the influence I perceive it has on my presence on the bench." She goes on to describe in some depth her favorite ethnic foods and her memories of extended family celebrations. She never explains what "Latina" identity means much beyond "I became a Latina by the way I love and the way I live my life." How that might translate into a set of values, intellectual precepts, or methodologies for judging remains unexplained. The description of her ethnic identity is notable in its lack of intellectual content.

But she then gets to the heart of the matter: Whatever it means to be a Latina, the critical issue is that there aren't enough Latinas (or Latinos) on the bench. The bean-counting then begins, a long parade of statistics meant to illustrate her central point: "Those numbers [of Latino judges] are grossly below our proportion of the population." No consideration is given to whether Latinos have obtained the requisite educational or professional achievements or qualifications to qualify for federal judgeships; the key point is the percentage of the pie that they have secured. And the implication is clear: There is something very wrong, nefarious in fact, when a minority group's percentage in the population and its share of seats on the bench don't match up.

The reason for that fixation on numbers becomes apparent in the next section of her speech, which is devoted to debunking the views of a former colleague Judge Miriam Cedarbaum:

Now Judge Cedarbaum expresses concern with any -analysis of women and presumably again people of color on the bench, which begins and presumably ends with the conclusion that women or minorities are different from men generally. She sees danger in presuming that judging should be gender or anything else based. She rightly points out that the perception of the differences between men and women is what led to many paternalistic laws and to the denial to women of the right to vote because we were described then "as not capable of reasoning or thinking logically" but instead of "acting intuitively." I am quoting adjectives that were bandied around

famously during the suffragettes' movement.

Cedarbaum's view--an affirmation of the innate intellectual equality of her fellow citizens--is what Sotomayor proceeds to dispute at great length. Sotomayor derides the idea that we should be wary of stereotyping individuals' intellectual abilities by their ethnic or racial background or gender. She argues the precise opposite, that intellectual equality is a myth and impartiality a canard:

While recognizing the potential effect of individual experiences on perception, Judge Cedarbaum nevertheless believes that judges must transcend their personal sympathies and prejudices and aspire to achieve a greater degree of fairness and integrity based on the reason of law. Although I agree with and attempt to work toward Judge Cedarbaum's aspiration, I wonder whether achieving that goal is possible in all or even in most cases. And I wonder whether by ignoring our differences as women or men of color we do a disservice both to the law and society. Whatever the reasons why we may have different perspectives, either as some theorists suggest because of our cultural experiences or as others postulate because we have basic differences in logic and reasoning, are in many respects a small part of a larger practical question we as women and minority judges in society in general must address. I accept the thesis of a law school classmate, Professor Stephen Carter of Yale Law School, in his affirmative action book that in any group of human beings there is a diversity of opinion because there is both a diversity of experiences and of thought. □□□□. Professor Judith Resnik says that there is not a single voice of feminism, not a feminist approach but many who are exploring the possible ways of being that are distinct from those structured in a world dominated by the power and words of men. Thus, feminist theories of judging are in the midst of creation and are not and perhaps will never aspire to be as solidified as the established legal doctrines of judging can sometimes appear to be.

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 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 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.

Sotomayor plainly rejects the premise that judges from different backgrounds could or even should put their biases aside. The notion that there is a "Latino" brand of jurisprudence or way of judging seems inherent in her analysis. Minority judges *are* different, she contends, and will judge differently *because* they are Latino or African American or female. Such judges, she is arguing, are products of their ethnic and racial backgrounds and destined to express this on the bench.

In her view minority judges are practicing their own brand of law, which explains why she wants lots of those judges. It is, as she argues in invoking Resnik, about power and about asserting judges' distinct Latina (or female or African-American or whatever) visions.

She also denigrates the notion of a neutral, objective judiciary which treats all citizens alike and removes personal bias from the judicial branch. The goal here is not to remove racial or ethnic bias from judging, but to make sure the right bias is given voice--secured by increased numbers of minority judges. And her qualms about intellectual rigor and impartiality extend to virtually all that judges do ("I wonder whether achieving that goal is possible in *all or even in most cases*"). This is legal relativism, if not nihilism. No objective truth, no objective judging, only power politics.

And then she goes on to dispute the obvious rejoinder to her argument: "Judge Cedarbaum has pointed out to me that seminal decisions in race and sex discrimination cases have come from Supreme Courts composed exclusively of white males." Well, *if that* is the case then the assertion that we must have judges of a certain ethnic or racial background to achieve "good" results is undermined. Really, could it be that any white, liberal male judge might reach the same results as Sotomayor?

It is in this context that her 32 words (and several dozen more) are deployed--to defend the view that ethnicity and gender matter in judging:

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 [Sandra Day] 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.

Her "wise Latina" declaration is therefore central to her argument that more Latinas are needed, that their brand of judging is distinct, and that they should wield their Latina wisdom to derive results which are superior to those of white males. It is hardly a throwaway line; it is the essence of her address.

She grudgingly acknowledges that yes, well, there were some noteworthy white jurists whose rulings dismantled legal discrimination. But that required "great moments of enlightenment" on their part, and hence does not diminish the need for the distinctive jurisprudence of nonwhite males:

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. Others 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.

I also hope that by raising the question today of what difference having more Latinos and Latinas on the bench will make will start your own evaluation. For people of color and women lawyers, what does and should being an ethnic minority mean in your lawyering? For men lawyers, what areas in your experiences and attitudes do you need to work on to make you capable of reaching those great moments of enlightenment which other men in different circumstances have been able to reach. For all of us, how do [we] change the facts that in every task force study of gender and race bias in the courts, women and people of color, lawyers and judges alike, report in significantly higher percentages than white men that their gender and race has shaped their careers, from hiring, retention to promotion and that a statistically significant number of women and minority lawyers and judges, both alike, have experienced bias in the courtroom?

She concedes that there is a "danger in relative morality" (perhaps she means subjective or bias-laden judging), but quickly returns to her theme: We need to boost minority numbers to change the law from white, male-dominated law into something better:

All of us in this room must continue individually and in voices united in organizations that have supported this conference, to think about these questions and to figure out how we go about creating the opportunity for there to be more women and people of color on the bench so we can finally have statistically significant numbers to measure the differences we will and are making.

Sotomayor's speech/law review article is a repudiation of the notion that the rule of law provides a single standard of justice, impartially applied by judges (of whatever background) who put aside bias and favoritism. She isn't advocating some new intellectual approach to interpreting the Constitution. She is, much in the way bilingual advocates defend distinct language traditions, defending a separatist school of judging. The law will be altered not by argument or persuasion, but by sheer force of numbers, by more judges who bring ethnic and gender and racial baggage to the bench.

The president's innocuous spin on Sotomayor's speech is in fact a description of what another Latino jurist offered in *contrast* to Sotomayor. While not styling his comments as a rebuttal to Sotomayor, Judge Richard Paez of the Ninth Circuit spoke in the same venue the following day and did in effect rebut Sotomayor's views. (His remarks, like hers, were published the following

year in the *Berkeley La Raza Law Journal*.)

Pacz also declared that he would like more Latinos on the bench. Plainly this is a man who is proud of his heritage and would like more Latinos to rise to prominent positions. But his is the commonplace sort of ethnic pride that has permeated much American history. His purpose, as he explains, is *not* to insure some Latino brand of justice:

[T]here is something about our own personal life experience that makes each of us different. I used to tell jurors when they entered the courtroom and took their oaths as jurors, "You walk into the courtroom with a lifetime of experiences, and we don't ask you to suddenly forget all that experience, to ignore that experience." I asked them if they could judge fairly the case that they were about to hear. I explained, "As jurors, recognize that you might have some bias, or prejudice. Recognize that it exists, and determine whether you can control it so that you can judge the case fairly. Because if you cannot--if you cannot set aside those prejudices, biases and passions--then you should not sit on the case."

The same principle applies to judges. We take an oath of office. At the federal level, it is a very interesting oath. It says, in part, that you promise or swear to do justice to both the poor and the rich. The first time I heard this oath, I was startled by its significance. I have my oath hanging on the wall in my office to remind me of my obligations. And so, although I am a Latino judge and there is no question about that--I am viewed as a Latino judge--as I judge cases, I try to judge them fairly. I try to remain faithful to my oath.

He then goes on to speak of his professional experiences. Paez explains that the experience of providing legal services to poor clients gave him firsthand experience in dealing with the indigent. But then he hastens to add:

You don't shed that experience--you don't leave it behind. But, when called upon to decide a case, judges have a distinct and clear obligation to apply the law fairly and justly to the parties in the case. Judges have an obligation to read cases honestly and find facts fairly. I strive to do that at all times.

So it is Paez, not Sotomayor, who is the judge Obama describes: one whose "life experiences will give [him] information about the struggles and hardships that people are going through that will make [him] a good judge." Paez offers, in contrast to Sotomayor's celebration of ethnicity, an affirmation of the principle of equal justice. Though his experiences are distinct, his role on the bench is to judge fairly and impartially for all his fellow citizens. This is *not* Sotomayor's vision.

Sotomayor's 32 words were not an off-the-cuff indiscretion, but an accurate summary of 4,000 words of disdain for judicial impartiality. It is also remarkable in its apparent rejection of an assimilative society in which Americans of all backgrounds can receive an unbiased brand of justice that does not vary from court to court because of the race or ethnicity of the judge. It is a vision that subsumes individual identity and professional obligations to the ties that bind one to race and ethnicity.

In Sotomayor's 2001 speech, we have a candid and comprehensive description of her views on multiculturalism and on judging. We must as a matter of intellectual fairness assume that she was sincere. And we can therefore expect to see her put these views into practice should she be confirmed as a Supreme Court justice.

Unlike an appellate court judge who is bound by Supreme Court precedent and who frankly may be drafting opinions with an eye toward ascending to the High Court, a Supreme Court justice is relatively free from constraint. Her lifetime appointment gives her the mandate to write what she pleases, to endeavor to steer the Court and the body of constitutional law in whatever direction she thinks best, and to set a tone and standard of jurisprudence for the lower courts. One can expect that just as Justice Antonin Scalia has demonstrated the majesty of originalist interpretation (in *District of Columbia v. Heller*, for example) and extolled the correctness of text-based judging, so too can Sotomayor be expected to use her position if confirmed to implement and popularize her views.

We have never had a Supreme Court justice who subscribed to views like those described in Sotomayor's Berkeley speech and law review article. It will be up to the Senate to decide whether they are compatible with our constitutional tradition and the judicial role.

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