Written by **Jack Kenny** on June 23, 2009

Sonia Sotomayor's Selection

The *Times* issued its critique shortly after President Barack Obama announced the New York judge is his choice to fill the vacancy on the U.S. Supreme Court created by the pending retirement of Associate Justice David Souter of New Hampshire. Conservatives and constitutionalists might be expected to find "unflashy competence" desirable after decades of spectacular discoveries in constitutional law by liberal jurists.

But experience suggests that a judge packaged in "diligence, depth and unflashy competence" may be concealing beneath his or her black robes a rather flashy and left-leaning agenda. Indeed, court watchers may recall one such judge who came to the U.S. Supreme Court 19 years ago, of whom it was expected that if he made any waves at all, they would be waves in the "right" direction, socially, politically and ideologically. That judge was David H. Souter of New Hampshire.

Another Souter?

Indeed, Sotomayor seems to fit the Souter profile, at least in lack of flash. Those who have waded through many of Souter's opinions find them dense with precedent and technical facts and sparse in quotable lines or original thinking. Souter and now-retired Justice Sandra Day O'Connor did join Justice Anthony Kennedy in an opinion issued 17 years ago this month in *Planned Parenthood v. Casey* that affirmed as a basic constitutional right the liberty of a woman to terminate her pregnancy, and that contained a rhetorical flight to the cosmos about "the meaning of the universe" and "the mystery of life," but that passage was written by Kennedy and has been quoted with obvious pride of authorship by him in subsequent decisions. It has also been scorned by Associate Justice Antonin Scalia as the "sweet mystery of life" passage.

If the "mystery of life" seems inscrutable and the passage of a pre-born infant to personhood remains above President Barack Obama's "pay grade," few nevertheless doubt that Judge Sotomayor will express agreement with the high court's *Roe v. Wade* ruling of January 22, 1973. The ruling elevated abortion, at the time permitted as a matter of "choice" in only a few states, to the status of a right guaranteed by the U.S. Constitution, which nowhere mentions or alludes to it. The ruling has also made nominations to the Supreme Court controversial because it became a litmus test demonstrating a nominee's level of judicial activism — for what is believed or at least suspected about a nominee's view

of that ruling. Ironically, Judge Souter, during his confirmation hearings in 1990, was opposed by abortion "rights" leaders and supported by most abortion foes. His refusal to discuss the issue deepened the distrust of him by those who feared his confirmation would result in the overturning of *Roe*. Few on the "pro-life" side thought the silent judge from the Granite State would disappoint them. With the *Casey* decision, the mask came off, and in numerous decisions since then, Souter has been as reliably left-handed as Whitey Ford.

Like Souter in 1990, Sotomayor has, as the good gray *Times* put it, "issued no major decisions concerning abortion, the death penalty, gay rights or national security." On the other hand, the *Times* found: "In cases involving criminal defendants, employment discrimination and free speech, her rulings are more often liberal than not." One interesting ruling was her finding that under the Freedom of Information Act, the government had to release the suicide note of White House attorney Vince Foster, found shot to death in an apparent suicide in 1993.

But what about the rights of prisoners on Guantanamo or citizens like Jose Padilla, who was held prisoner for five years without any charges against him? At this point one may only guess, hope, and, while it remains constitutionally permissible, pray about Sotomayor's leanings. A jurist who is liberal "more often than not" on criminal law may be expected to oppose the government on matters like extra-legal detentions and warrantless wiretaps. But in this post-9/11 era, claims of national security have been known to trump all other considerations.

How Sotomayor balances those considerations might become clearer if she has a chance to rule on the case of Maher Arar, a Syrian-born citizen of Canada who was apprehended by U.S. officials at New York's Kennedy Airport in 2002 and was shipped to Syria for interrogation. Arar, who claims he was tortured and imprisoned for 10 months in his native land before his eventual release, has sued the United States over his arrest and deportation. A divided panel of the Second Circuit Court of Appeals dismissed the suit. The full court recently heard the case, and a ruling might give some indication of where the prospective U.S. Supreme Court justice comes down when an imperious demand for security runs afoul of personal rights.

Ironically, a decision by Sotomayor in favor of Arar, should it come, may increase, rather than allay, suspicion and opposition from much of the Republican right, which has been on a security *uber alles* trip since 9/11, if not before. Many espoused conservative and neoconservative Republicans claim the president has authority to detain prisoners, even U.S. citizens, without charges and eavesdrop on citizens' international phone calls without warrants, even though no such authority is granted in the U.S. Constitution. Some on the right have argued that such authority is inherent or implicit in the power of the president as commander in chief. But conservatives have previously reacted in horror to such a broad interpretation of constitutional grants. Indeed, the finding of such powers in the commander-in-chief clause sounds suspiciously like the finding of new rights of privacy in mysterious "penumbras formed by emanations," which is, interestingly enough, where the court in Roe found the right to abortion.

Affirmative Action

Since she has not yet ruled on any abortion cases, chances are Sotomayor will be asked little and will say less on that issue when she is questioned by the Senate Judiciary Committee. But she will almost certainly be asked about affirmative action, particularly in light of her ruling as part of a three-judge panel in the case of *Ricci v. DeStefano*, the suit brought by 15 New Haven, Connecticut, firefighters, one of them Hispanic, whose promotions were cancelled after none of the African-American candidates

passed the exam. The panel unanimously and perfunctorily dismissed the case. When the full court refused to hear it, dissenting Judge Jose A. Cabranes, writing for himself and five other judges, noted that the panel's ruling "contains no reference whatsoever to the constitutional claims at the core of this case," and added that "this perfunctory disposition rests uneasily with the weighty issues presented by this appeal." Those issues and the firefighters' appeal are now before the U.S. Supreme Court.

Affirmative action has long been an explosive issue, both on and off the court, since the concept began to be promoted in the political arena in the 1960s and '70s. It has been a thorny issue for the courts, especially since the high court's *Bakke* case in 1978. In that ruling, the Burger Court issued a fractured decision that did not rule against the University of California's goal of increasing minority enrollment at its medical school, but held that Allan Bakke, a qualified white applicant, had been denied his rights by a policy that set aside 16 percent of the admissions each year for minority applicants. Bakke, who had outscored in his entrance exam many of the minority applicants accepted in two consecutive years and was otherwise well qualified, claimed the policy violated both the 14th Amendment requirement that each state provide its citizens with the "equal protection of the law," and the 1964 Civil Rights Act that forbids discrimination against any race or ethnic group. Presumably that includes non-Hispanic Caucasians.

Sotomayor herself has been called an affirmative-action choice by some on the right, including columnist, commentator, and political activist Pat Buchanan. Bu-chanan cites statements by the judge herself, in which she has described herself as "an affirmative action product." A summa cum laude graduate of Princeton and former editor of the *Yale Law Review*, Sotomayor has questioned whether she could have gone that route on merit alone. "If we had gone through the traditional merit route of those institutions," she has said, "it would have been highly questionable if I would have been accepted…. My test scores were not comparable to that of my classmates." Indeed, Sotomayor, who says she has difficulty in defining "merit," seems to think "diversity" an acceptable substitute. "I accept that different experiences, in and of itself, bring merit to the system," she said, adding there is a "greater sense of fairness when these litigants see people like myself on the bench."

Dreams and Reality

Born of Puerto Rican parents, Sotomayor grew up in a poor section of the Bronx and, with her mother's encouragement, became an avid reader and dreamer, consuming in her youth Nancy Drew novels and watching Perry Mason on TV. It was when watching one of Mason's trials, she has said, that she noticed the judge was the most important person in the room and decided she wanted to be one. One might try to imagine a young boy watching Mickey Mantle play ball and deciding early in life that he wanted to be an umpire.

The 54-year-old Sotomayor is, in fact, an ardent baseball fan and, as might be expected of one who grew up in the shadow of Yankee Stadium, a die-hard devotee of the pin-striped "Bombers." One of her interesting rulings as a judge was her March 31, 1995 injunction, issued on the eve of the scheduled opening of a major-league baseball season, that ended a 7½-month-old strike that had wiped out the previous year's World Series, something the Great Depression and two World Wars never accomplished.

Upon graduation from Yale Law School, she joined the Manhattan district attorney's office and the board of the Puerto Rican Legal Defense and Education Fund. She spent five years as an assistant DA, then entered private practice for eight years with the Pavia and Harcourt firm, representing primarily European clients in intellectual property, commodities trading, and other business cases. She was a U.S. District Court judge in Manhattan for six years and has been on the appeals court where she now

serves for six years. She has been active in working on appellate court policy, serving as a member of the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts.

It is precisely her strong ethnic and gender identifications that might present a stumbling block for those who favor a traditional, color-blind, gender-blind administration of justice. Her oft-repeated remark that a wise Latina would likely come to a better conclusion in a given case than a white male who lacked that experience suggests a way of thinking and adjudicating that is troublesome to many. And her statement as a panel member at Duke University Law School in 2005 that "the court of appeals is where policy is made" raises questions as well. That statement has been viewed repeatedly on YouTube, along with her explanation that while "the facts control" at the district court level, the appeals court judge must rule with an eye toward history and how a ruling in a particular case might affect "a broad class of cases" and "the next step in the development of the law."

Indeed, Sotomayor provoked much laughter and was herself grinning broadly when she assured the audience that "We [judges] don't make law. I know. I know." That laughter, as well as the judge's ideas about "the development of the law" may require some explanation before the Senate Judiciary Committee.

So might her involvement with a Hispanic-American organization called "*La Raza*," which means literally "The Race." Sotomayor was for six years a member of the National Council of La Raza, according to the questionnaire she answered for the Senate. The organization aggressively advocates an open border between the United States and Mexico and demands amnesty for aliens now here illegally. Even more troubling, as John Birch Society president (and The New American publisher) John F. McManus points out, "The organization backs the return to Mexico of what it labels Aztlan. The vast area targeted includes the four states of California, Arizona, Nevada, and New Mexico, as well as portions of Colorado and Texas." Writing in the July JBS *Bulletin*, McManus continues

> La Raza's president, Janet Murguia,… heaped high praise on President Obama for his selection [of Sotomayor]. It now remains to be seen whether California senators Boxer and Feinstein will approve the nomination. Will Arizona's John McCain approve the choice? How about the senators from the other states claimed by Aztlan? Won't a positive vote for Sotomayor indicate their approval of the demand that the people in six states, and in four cases the entire states themselves, become part of Mexico?

Sotomayor's clearly disqualifying association with La Raza should have already doomed her chances for approval. It should also confirm for all Americans President Obama's incredibly leftist and revolutionary leanings. But neither the president nor the nominee has been confronted by the major media about Sotomayor's clearly disqualifying tie to La Raza. Imagine how an association of pro-British New Englanders agitating for a return of several states to Mother England would be treated.

Moreover, since the nation's immigration laws are among those the Supreme Court and inferior tribunals are required to uphold, the judge's affiliation with La Raza should be a sticking point, as it might be if she were part of an organization advocating amnesty for illegal drug users. In fact, considering the amount of drug traffic that comes across the U.S.-Mexican border, those two issues may be embarrassingly intertwined.

One issue that is almost certain to inflame opposition to the nomination is the judge's view on the Second Amendment right to "keep and bear arms." In *Maloney v. Cuomo*, a case involving a New York ban on possession of a chuka stick used in martial arts, Sotomayor opined that the Second Amendment

restricts the national, but not the state governments, in regulating weapons possession. That case also appears headed to the Supreme Court.

The New York judge has been hailed for her achievements and for her "pragmatism" as a judge. Obama is credited with making an historic choice in choosing Sotomayor to be the first Latina on the Supreme Court. But she also will come before a Senate that now has a history of pitched battles over Supreme Court nominations. One such was the nomination by President Nixon in 1970 of G. Harrold Carswell, who was rejected by the Senate, allegedly because he was overturned so often by the Supreme Court that his record was considered "mediocre." Carswell's decisions were overturned on 58 percent of the appeals. Sotomayor's have been overturned on 60 percent, with some highly questionable rulings still pending before the high court.

Obama wants a judge with "empathy" for common Americans in their everyday lives. In the Ivy League-educated Puerto Rican daughter of the Bronx, he might have found one. "She's an ordinary American," said Carlos Ortiz, chairman of the Supreme Court Committee of the Hispanic National Bar Association. When the nominee was Carswell, the frequently overturned judge wasn't called "ordinary."

He was called "mediocre."