Testimony of

Linda Chavez

July 16, 2009

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LINDA CHAVEZ

CHAIRMAN, CENTER FOR EQUAL OPPORTUNITY

BEFORE THE

SENATE JUDICIARY COMMITTEE

REGARDING THE

NOMINATION OF JUDGE SONIA SOTOMAYOR

TO THE UNITED STATES SUPREME COURT

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Introduction

Thank you, Mr. Chairman, for the opportunity to testify before you today regarding the nomination of Judge Sonia Sotomayor to be an Associate Justice on the United States Supreme Court.

I testify today not as a wise Latina woman, but as an American who believes that skin color and national origin should not determine who gets a job, promotion, or public contract, or who gets into college or receives a scholarship.

My name is Linda Chavez, and I am chairman and founder of the Center for Equal Opportunity, a nonprofit research and educational organization that focuses on public policy issues that involve race and ethnicity, including civil rights, bilingual education, and immigration and assimilation policies.

I have served as Staff Director of the U.S. Commission on Civil Rights (1983-1985), and Chairman of the National Commission on Migrant Education (1988-1992). In 1992, I was elected by the United Nations' Human Rights Commission to serve a four-year term as U.S. Expert to the U.N. Sub-commission on the Prevention of Discrimination and Protection of Minorities, and I was Co-Chair of the Council on Foreign Relations' Committee on Diversity from 1998-2000. Finally, I am the author of, among other books, Out of the Barrio: Towards a New Politics of Hispanic Assimilation (Basic Books 1991).

Why You Should Not Vote To Confirm This Nominee

My message today is straightforward, Mr. Chairman: Do not vote to confirm this nominee. I say this with some regret, because I believe Judge Sotomayor's personal story is an inspiring one,

which proves that this is truly a land of opportunity where accidents of birth and class do not determine whether you can succeed. Unfortunately, based on her statements both on and off the bench, I do not believe Judge Sotomayor necessarily shares that view. It is clear from Judge Sotomayor's record that she has drunk deep from the well of identity politics. I know a lot about that well, and I can tell you that it is dark and poisonous. It is, in my view, impossible to be a fair judge and also believe that one's race, ethnicity, and sex should determine how someone will rule as a judge. Yet, Judge Sotomayor has repeatedly said that race, ethnicity and gender are determinants of one's point of view. She has said, for example, that "[w]hether born from experience or inherent physiological or cultural differences, a possibility" that, she said, she "abhor[ed] less or discount[ed] less" than some of her colleagues, she believed that "gender and national origins may and will make a difference in our judging." She added, "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." If there were any doubt that Judge Sotomayor's embracing of identity politics has fatally compromised her ability to be a good judge, those doubts should be laid to rest by the way she handled the New Haven firefighters case, Ricci v. DeStefano, which has already been extensively discussed at these hearings and which I discuss below.

Judge Sotomayor and Identity Politics

The nominee was bitten by the identity politics bug at an early age. She was an affirmative action activist as an undergraduate, pushing for race-based hiring goals and timetables for faculty hiring. She proudly insists that she was admitted to Princeton because of affirmative action. In her senior thesis, she took a Puerto Rican nationalist position and refused to call the U.S. Congress by its proper name; instead, referring to this body as either the "North American Congress" or the "mainland Congress." As one history professor noted, "This kind of rhetoric was very trendy, and not uncommon, among the Latin Americanist fringe of the academy." And she continued her activism as a student at Yale Law School, protesting when a law-firm interviewer asked a politically incorrect question about affirmative action.

Her commitment to identity politics is perhaps best exemplified by her long association with the Puerto Rican Legal Defense and Education Fund and its many controversial causes. She urged quota-seeking lawsuits challenging civil-service exams, seeking race-conscious decision-making similar to that used by the city of New Haven in the now infamous firefighters case. She opposed the death penalty as racist. She made dubious legal arguments in support of bilingual education and, more broadly, in trying to equate language requirements with national origin discrimination. Elsewhere she supported race-based government contracting. She also said, "America has a deeply confused image of itself" --apparently because most Americans think that the celebration of diversity should not include politically correct discrimination. The list is endless.

Nor can she distance herself from this mindset by claiming that the Puerto Rican Legal Defense and Education Fund's positions were not her own, because her own extensive extrajudicial writings and speeches make clear that she shared these views. The example that has received the most attention is her "Wise Latina" speech at Berkeley, the revelation of which would have resulted in the immediate and embarrassed withdrawal of the nomination had she been a white male expressing the view that "differences in logic and reasoning" are hardwired according to ethnicity and sex.

The "Wise Latina" speech was no anomaly. Rather, its themes had been declared before and would be declared again later. Consider, for example, the following statement from Judge Sotomayor: "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. . . . I think it brings to the system more of a sense of fairness when these litigants see people like myself on the bench."

Implicit in Judge Sotomayor's criticism of the "underrepresentation" of Latinos, blacks, and women in various jobs is the notion that these groups are somehow entitled to proportional representation. She complained in 2001, for example, that Latino judges made up "only 10 out of 147 active Circuit Court judges and 30 out of 587 active district court judges. Those numbers are grossly below our proportion of the population." The first problem with this line of reasoning is that so few Latinos have completed college, much less law school, which is generally a prerequisite for becoming a judge. In 2000, the American Bar Association estimated that only 3.4 percent of attorneys were Latino, suggesting, that if anything, Latinos were somewhat overrepresented on the federal bench compared to their availability in the pool from which judges are selected.

But this whole way of looking at the world is deeply troubling. If some groups are "underrepresented" in certain fields, then logically, others are "overrepresented." But who decides how many is too many? According to a study by the National Science Foundation, Asian Americans earn almost 7 percent of advanced degrees in science and engineering and more than 8 percent of the undergraduate degrees in those areas, despite being only about 4 percent of the population. Should we limit the number of Asian Americans who may go into these fields in order to ensure that more Latinos and blacks be represented? And if we adopt proportional representation as our goal, how do we achieve it short of setting racial, ethnicity, and gender quotas? And in this era when increasing numbers of Americans are multi-racial, who determines when a person "counts" as black or Latino or Asian or white?

But even if Judge Sotomayor rejects strict racial and ethnic quotas, as she certainly must if she is to adhere to the plain meaning of civil rights laws and the Constitution, she appears to be solidly in favor of preferential treatment based on national origin. For instance, the New York Times reports that she "rejected the proposition that minorities must become advocates of 'selection by merit alone.'" She seems deeply suspicious of standardized testing, and sees nothing wrong with ignoring test results in order to give preference to underrepresented groups, as the city of New Haven did in the Ricci case, despite having invested considerable time and money ensuring that the test was not racially or culturally biased. Judge Sotomayor's views may be based on her own history; she proudly insists that she benefited from such preferential treatment, noting that her own test scores were not equal to her peers' at Princeton and Yale. She also has admitted that, while serving on the board of the Puerto Rican Legal Defense and Education Fund, she encouraged "cases attacking civil service testing."

From Identity Politics to Identity Judging

A straight line can be drawn from identity politics to identity judging--that is, to a particularly noxious kind of judicial activism.

Judicial activism occurs when a judge ignores the text of the Constitution or other law and instead follows his or her own policymaking preferences. It can involve making up something that isn't in the law, or ignoring something that is there. We would not accept a President who refused to follow the law, and it baffles me that some people seem happy to confirm judges who share the same inclination.

If Judge Sotomayor believes that her ethnic and gender identity make her better qualified than others to be a federal judge, then she ought to explain how this identity helps her in interpreting legal texts. She has never done that, and of course the reason why is obvious: She doesn't believe

that her ethnic and gender identities help her in reading a constitutional or statutory provision. But she does seem to believe that those identities should be injected into her judicial decision-making, instead of or in addition to her reading of the law.

Will Judge Sotomayor engage in judicial policymaking as an Associate Justice? Of course she will: She was caught on tape admitting that she already does so as a court of appeals judge, when she said that the "appeals court is where policy is made." She followed her statement with a wink and a nod, adding: "I know this is on tape and I should never say that because we don't make law, I know. OK, I know. I'm not promoting it, and I'm not advocating it, I'm -- you know. OK. Having said that, the court of appeals is where, before the Supreme Court makes the final decision, the law is percolating -- its interpretation, its application."

And in her "Wise Latina" speech, she suggested that she cannot really be "objective," that "impartiality" is at best an "aspiration," that even morality is "relative," that "there can never be a universal definition of wise," and that "[p]ersonal experiences affect the facts that judges choose to see." All of this is perfectly consistent with judicial activism, and none of it is consistent with the rule of law. And indeed she has written that it is a "public myth that law can be certain and stable."

Exhibit A: Ricci v. DeStefano

For evidence that Judge Sotomayor's identity politics has infected her judging, we need look no further than the New Haven firefighters case, Ricci v. DeStefano. The Committee is, I'm sure, quite familiar by now with the case, so I'll just describe it briefly. The plaintiffs were applicants for promotion in the fire department of New Haven, Connecticut. The city administered a test, but then decided to throw out the results because too many whites, and not enough African Americans, did well on it. The white and Latino firefighters who had earned promotions then sued, arguing that they had been discriminated against on the basis of race, in violation of Title VII of the 1964 Civil Rights Act and the U.S. Constitution.

Now, as I noted earlier, judicial activism can involve ignoring a guarantee that is in the Constitution or a statute as well as making up one that is not in it. That's what Judge Sotomayor did in Ricci.

The text of Title VII is a litany of prohibitions directed at employers to ensure that they not make decisions in their treatment of employees based on race and ethnicity (as well as sex and religion). The statute also says that testing is permissible and that nothing in the law requires racial or ethnic balancing in the workplace.

Yet Judge Sotomayor ruled that it violated no law for New Haven to throw out the results of a promotion test because the city didn't like the racial and ethnic composition of the group of firefighters who passed the test. In order to do so, she ignored the main thrust of Title VII and seized on one small subsection, which makes it possible for employers to be sued if they use a selection device that has a significant "disparate impact" on the basis of race or ethnicity, unless that device is "job related for the position in question and consistent with business necessity." But it is very odd to seize upon a relatively small part of Title VII and read it in a way that swallows the antidiscrimination focus of the overwhelming bulk of the statutory scheme. Such a reading not only undermines Title VII, but also the Constitution, which forbids government employers from denying "the equal protection of the laws." There is nothing in the Constitution's text that suggests an exception when the discrimination is of a politically correct variety.

As you know, the Supreme Court reversed Judge Sotomayor and ruled 5-4 in favor of the firefighters. Even the dissenting justices did not endorse the approach taken by the lower courts, which dismissed the plaintiffs' claims without a full hearing. What's more, President Obama's

own legal experts thought that the Second Circuit's decision was wrong, in light of the evidence that the city's actions were motivated, not by any real legal concerns, but by nothing but racial politics. So the Justice Department's brief also urged that Judge Sotomayor's decision be reversed and sent back for more work.

Furthermore, the attempt by Judge Sotomayor's panel to sweep the case under the rug--first with a summary order, and then withdrawing that and issuing a terse per curiam opinion which did not even mention the plaintiffs' equal-protection claims--was unconscionable. Such dispositions are typically limited to cases that raise unimportant or well-settled matters; the New Haven case was neither. After all, it prompted, sua sponte, an impassioned protest from other Second Circuit judges (led by another Democratic appointee, Jose Cabranes), and was granted review by the Supreme Court,which happens in only a tiny percentage of cases the Court sees.

And is there some reason to suppose that this distortion of the legal texts involved--and the procedurally dubious disposition of the case--was driven by Judge Sotomayor's personal policy preferences, the definition of judicial activism? Alas, yes.

Although she has attempted this week to back away from some of her own intemperate words--and has accused her critics of taking them out of context--the record is clear: Identity politics is at the core of Judge Sotomayor's self-definition. It has guided her involvement in advocacy groups, been the topic of much of her public writing and speeches, and influenced her interpretation of law. There is no reason to believe that her elevation to the Supreme Court will temper this inclination, and much reason to fear that it will play an important role in how she approaches the cases that will come before her if she is confirmed.

Conclusion

Let me conclude by noting that Ricci is not the only civil-rights related case in which Judge Sotomayor reached a dubious conclusion. She has opined in en banc dissents, for example, that the Voting Rights Act may require states to allow prison inmates to vote, and that a witness's identification of an assailant may be unconstitutional racial profiling in violation of the Equal Protection Clause if race is an element of that identification.

Moreover, if a judge is an activist in one area, it is likely that she will be an activist in other areas, too. And, sure enough, the Committee has heard and will hear abundant testimony that the problems with Judge Sotomayor's jurisprudence are not limited to the civil rights area, but extend to property rights, campaign finance, and the Second Amendment, to give just a few examples.

Finally, let me add a few words about the confirmation process. One often hears that the Senate should defer to the President's choices about who should be "on his team." There may be some truth to that for Executive Branch appointments, but not for the judiciary, for the simple reason that those nominees are not part of the President's team--rather, they are members of a separate branch of government.

Second, this is not a situation where the individual being scrutinized is innocent until proved guilty beyond a reasonable doubt. Something closer to the contrary is the truth: If you have reasonable doubts about the job the nominee will do, then you should not confirm her. This is a lifetime appointment to an extraordinarily powerful position, and it makes no sense to roll the dice in that situation.

Thank you again for the opportunity to testify today, Mr. Chairman, and I look forward to answering any questions you may have.

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