

Obama's Empathy Test

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In discharging their constitutional duty to provide advice and, if they deem appropriate, give consent to President Barack Obama's nomination of Judge Sonia Sotomayor to the Supreme Court, Senators should examine the critical importance the president attaches to empathy as a judicial virtue and to Judge Sotomayor's claim to be well-endowed with it. They will find that the president and the judge have exaggerated empathy's significance, understated its ambiguities, and obscured fundamental judicial virtues.

On May 26, in his White House remarks introducing Judge Sotomayor, President Obama praised her "rigorous intellect" and lauded her conception of the "judicial role," which involved "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 are estimable qualities essential to the task assigned judges in our constitutional system. But Obama hastened to correct the traditional understanding by adding that these qualities "alone are insufficient" for appointment to the Supreme Court. Also needed, and what Sotomayor brings to the bench, is "experience being tested by obstacles and barriers, by hardship and misfortune" and a distillation of that 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." Sotomayor's now famous conviction is 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. She adds that excellence at empathy is a function of race, ethnicity, and sex.

The ability to feel and understand what others feel and understand, especially what ordinary people feel and understand, is just what then Senator Obama charged that then Judge John Roberts lacked when, in 2005, Obama took to the Senate floor to explain why he opposed Robert's nomination to become the nation's seventeenth Chief Justice.

"There is absolutely no doubt in my mind," Obama declared, "that Judge Roberts is qualified to sit on the highest court in the land." But contrary to these conciliatory words, Obama proceeded to spell out Roberts's disqualifying deficiency.

True, Obama acknowledged, Roberts was exceptionally intelligent, exhibited a judicial temperament, loved the law, respected precedent and procedure, exercised restraint interpreting statutes and cases, and displayed impartiality. These qualities, Obama maintained, would provide Roberts guidance in 95 percent of Supreme Court cases.

But resolution of "the five percent of the cases that are truly difficult," declared Obama, inevitably turns upon "one's deepest values, one's core concerns, one's broader perspectives on how the world works, and the depth and breadth of one's empathy." Indeed, "the critical ingredient is supplied by what is in the judge's heart."

Obama concluded that Robert's heart was deficient because in his work in the White House and Solicitor General's office in the 1980s, Roberts advocated a limited role for government in fighting racial discrimination and empowering women. In fact, it is Obama's claim to have looked into Robert's heart and found it wanting that is deficient. After all, Roberts was a lawyer developing arguments for his client. And the limited government views that he elaborated reflected principles concerning the proper exercise of government power in a free society, empirical judgments about the kinds and degree of discrimination to which racial and ethnic minorities and women were then subject, and opinions about the passions and interests inscribed in human nature.

In 2006 in opposing Judge Samuel Alito's nomination to the Supreme Court, Obama, as he had for Roberts, affirmed that the nominee "has the training and qualifications to serve." And then, as he had for Roberts, Obama promptly contradicted himself by proclaiming that the nominee was bereft of a crucial qualification. Obama said Alito had consistently ruled "on behalf of the powerful against the powerless; on behalf of a strong government or corporation against upholding American's individual rights." Since, however, Obama refrained from discussing the merits of any of the cases in question or identifying specific rights that Alito failed to uphold, it was as if the first-term senator's real complaint was that the distinguished federal appeals court judge had failed to pursue a progressive agenda from the bench. And that provides a key to understanding Obama's understanding of empathy.

Obama seems to believe that empathy has substantive policy content, that it favors ordinary people, or rather the powerless and downtrodden, or rather progressive convictions about the powerless and downtrodden. This belief is mistaken. Particularly in the hardest and most divisive constitutional cases, empathy yields no determinate result.

Whether, for example, the Constitution protects a woman's right to abortion cannot be determined by canvassing the feelings and understandings of women who cherish their freedom to choose and to control their own bodies and those of men and women devoted to safeguarding unborn life. The question turns on the powers the Constitution assigns to the federal government and those it leaves to the democratic process, to what extent the unborn are endowed with rights, and how to balance the rights of the unborn against those of pregnant women.

Whether the Constitution permits race conscious measures to secure equality for blacks is not settled by seeing the world as it is seen by an aggrieved African-American or, for that matter, an aggrieved white American. It depends on constitutional text and structure, history,

and the actual impact of race-conscious measures on the individuals that receive them and the society that provides them.

And whether the Constitution provides a right to same-sex marriage cannot be resolved by judicial divination of the emotions and perceptions of gay couples seeking to wed or of defenders, straight and gay, of the traditional definition of marriage. That question is properly answered by considering the constitutionally correct relationship of the federal government toward marriage, the changing social meaning of marriage, and the social and political consequences of a change in marriage's legal meaning.

Like the highly partisan domestic program that he is seeking, under a pragmatic and post-partisan guise, to ram through Congress, Obama's opposition to Roberts and Alito for lacking empathy and support of Sotomayor for possessing it, advances by obscuring an aggressively progressive agenda.

In the context of Supreme Court appointments, Obama has abused empathy by politicizing it. In practice, his exaltation of empathy is indistinguishable from the endorsement of progressive policy outcomes. This promotes arrogance and activism, encouraging judges to think that they can and should probe the inner workings of the souls of the parties that come before them. And ironically it leads to the constriction of empathy, because it persuades progressives to dismiss as cold-hearted those who disagree with them about policy and so inhibits progressives from feeling and understanding the world as do conservatives, not a few of whom are ordinary people.

The ability to imaginatively enter into the shoes of another is a desirable judicial trait. But how judges handle the knowledge empathy yields and apply it to the facts before them is the work of the fundamental judicial virtues--impartiality, integrity, and moderation. These are the judicial virtues that senators, in performing their constitutionally mandated advice and consent responsibilities, should look for in Judge Sotomayor.

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