



Penetrating Sotomayor's Judicial Philosophy



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Penetrating Sotomayor's judicial philosophy is proving no easy task. Will we get the information we need to properly evaluate the merits of the US President's ambiguous choice for the high court – before it's too late? The media is in a frenzied state over this nominee – Judge Sonia Sotomayor. One would expect this, given the stakes that her nomination holds for the fate of abortion rights – which are currently hanging in the balance.

What is Sotomayor's view about a woman's right to make childbearing decisions? Oddly, there is nothing concrete that we know about her actual judicial philosophy. No one seems to know exactly – because there is no clear answer being laid bare.

This is creating much unease on both sides of the political spectrum. There is a fundamental lack of information flowing. This is unacceptable. I decided to seek out Gloria Feldt, former president of US Planned Parenthood, to get her take on the Sotomayor nomination. She's the quintessential trailblazer of the pro-choice lobby.

Gloria initiated the Prevention First Act and reintroduction of a new, improved, Freedom of Choice Act. Her "fight forward" mission is further exemplified on her blogs and through her speeches and writings, all accessible through her website: www.gloriafeldt.com, including 30 years on the frontline. So, needless to say, she's in a position to evaluate the 'threats' that Sotomayor presents, if any, should Sotomayor be confirmed as a Supreme Court Justice.

Diane Walsh: Have you managed to find out whether Judge Sotomayor believes that Roe vs. Wade is "settled law" (under the precept of stare decisis)?

Gloria Feldt: Based on her previous rulings and past approach to judging, it is reasonable to assume that she will say Roe is settled law, but then so did John Roberts and Samuel Alito and we have already seen how meaningless that was in the *Gonzales v. Carhart* ruling. The Court has and can continue to make abortion less and less accessible while maintaining Roe as "settled law". So even if Sotomayor issued a notarized statement that she believes Roe is settled law, it would be cold comfort to women. The question I want answered is: what is her judicial perspective on who has the right to make childbearing decisions? Roe is almost useless now as a basis for reproductive rights, though privacy remains an important principle and I wouldn't want to see Roe overturned--as I wrote here, though, we must get beyond Roe and on to human rights for women:

<http://www.gloriafeldt.com/heartfeldt-politics-blog/2008/12/9/beyond-roe-toward-human-rights-for-women.html>

DW: What have you found out that could make us confident that she could be counted on as someone that would 'definitively and always' rule essentially pro-choice?

GF: I am not confident at all for two reasons. First, Obama's spokespersons say he didn't ask her the questions. That raises a big red flag. Why didn't he ask, since he said during the campaign that he wouldn't appoint a judge who would not support a woman's right to choose? Second, both of her rulings related to reproductive rights have come down on the side of those who will stop at nothing to strip women of the human and civil right to make their own childbearing decisions. Doesn't [the] murder of Dr. George Tiller [on May 31st, 2009] chillingly remind us of why we must not appease them?

DW: Ditto. Here's a snapshot of Sotomayor's climb up the ladder: As an assistant District Attorney (in NYC), early on in her career, she happily threw the book at, as it were, thieves and prostitutes and other so-called 'undesirables' of the times; but, later, she is seen to get involved with social housing issues dealing with the poor. Then, later again, she becomes involved with corporatist-leaning projects suggesting that overall she doesn't necessarily sit on the left side of the political spectrum. You can say if you agree with the characterization, of course. But keeping her 'history' in mind, and, also, tracking back to the time of Robert Bork's nomination, and the grandstanding that he, at that time, was allowed to do - when it was 'right' for Republicans to hear about 'their' Justices beliefs - I ask you this [following] question, in the context of today's political climate: Do you not think it is reasonable to hear the political philosophies of Supreme Court nominees?

GF: If we could only get straight answers about judicial philosophies - that would be a giant step forward!

DW: Have we seen a pattern of 'deciding Justices in secret', culminating in the present state of affairs? Let me frame this question in more detail: As a public, we don't even truly know where Sotomayor stands on abortion, strictly speaking. For instance, the last info release NARAL put out to its list members is to encourage us to push to get a fair hearing to be able to ask Sotomayor questions! That is to say we are practically begging to even be able to ask questions of her. How does this work? Is there not something wrong with this picture, that we feel we are in a state of not-knowing?

GF: It's been said that the role of advocacy is to make it impossible for those in power not to do the right thing. I am more deeply concerned that most of the pro-choice groups aren't asking their questions pointedly enough and vigorously enough to get meaningful answers. This does not augur well for how much our concerns will be addressed in future appointments, for we all know the squeaky wheel get the attention.

DW: Apparently, President Obama personally knew four other possible nominees - but not the vetted Sotomayor - and she is the one chosen. Does this strike you as a little odd? Janet Napolitano, of the Department of Homeland Security, when questioned, showed extreme ignorance about US-Canada border issues. Yet she was put forth. What does this say about President Obama's judgement?

GF: I asked myself this question too as a former CEO. Often I've seen a tough decision get made like this: there are many competing recommendations each with good supporting arguments, but none is perfect. The leader is stuck. Then late in the game, someone comes in with a completely new idea, and it is chosen with minimal vetting but great relief. I am not saying this is what happened—I wasn't in the room. But from the scenario described in the press, I wouldn't be surprised.

DW: Who would you, Gloria, have liked to see nominated?

GF: I am thrilled at the idea of the first Latina justice. And I think it was essential that he nominate a woman. Fortunately, we now have a deep bench of highly qualified women on the progressive side. I would have preferred to see one of the women whose deep scholarly roots in liberal judicial philosophy might have served to pull the court back toward the center. Someone like Kathleen Sullivan or Pamela Karlan. Both, I believe are Stanford professors. We seriously need someone on the left who can balance Scalia on the right both intellectually and with the same strength of conviction. I am enthusiastic about a Latina and another woman on the court. We're all best served when our legislatures and courts look like America. But I have expressed concerns about Sotomayor's judicial philosophy on reproductive rights.

DW: There is a brewing conversation about Sotomayor's 2002 decision, a case involving the Centre for Reproductive Law v. Bush whereby she upheld the then Bush Administration's implementation of the Mexico City Policy, that says that "the United States will no longer contribute to separate nongovernmental organizations which perform or actively promote abortion as a method of family planning in other nations." - and thought by many, on the left, to be quite ghastly. In brief; apparently Sotomayor contended that the policy did not constitute a violation because, she argued, "the government is free to favor the anti-abortion position over the pro-choice position, and can do so with public funds. Clearly this is fraught with difficulties. What is your view about this? What are your feelings about this decision? Does it take away from Sotomayor's credibility as far as her being someone the Pro-choice lobby can rely upon to defend the rights of women when it comes to reproductive choice?

GF: To refer back to your first question, she will claim this was stare decisis, that she stood on precedent, and that is likely to be viewed positively by both Senate Republicans and many Democrats. But several aspects of this decision concern me:

First, she wrote it. So it must illustrate how she approaches such cases. Given that most of the significant cases interpreting Roe since 1973 have been steps backward for women, stare decisis these days means trouble for reproductive rights—not just abortion but also contraception and pregnancy rights.

Second, the ruling rejects CRR's claim for standing, which would have perhaps allowed them to raise new questions about the gag rule that had not been considered in previous cases, and thus might have allowed even a stare decisis court to relook at some of the issues involved.

Third, often if a judge feels compelled by precedent to uphold a law she feels is unjust, she will write the ruling in a way that suggests to the appellant how to ask the question differently in the future to have a better chance for the court to reconsider the issue. Sotomayor not only didn't do that; the ruling's language is clear and simple, offering no wiggle room or invitation to further challenge the gag rule which violates both medical ethics and the first amendment.

DW: What can we do to make things more certain?

GF: We can't. You never really know what a justice will do until he or she has been on the bench for 5, 10, 20 years. Who would have thought the rather conservative Republican Harry Blackmun would have become the architect of Roe v Wade? But please see my answers to questions 5 and 13 for additional comment on this question.

DW: The Judiciary Committee will of course screen her. Wouldn't it be ironic if Democrats rejected her and Republicans were seen to support her? Shouldn't that make progressive Democrats suspicious? Wouldn't that speak volumes but by then be too late? What would the consequence of this slap to President Obama?

GF: Oh the irony of politics. But this is too speculative to answer right now. In any case, I predict she will sail through, for good or ill, barring the release of some damaging personal information.

DW: Should Obama's remarks about the need to look for "common ground" not make us all into skeptics given what is frankly, an all-out warring terrain governing pro-life versus pro-choice? Especially since he has said outright that he personally doesn't like abortion but of course understands that it needs to be available - as if he's doing us all (on the pro-choice side) - a favor! Because he personally opposes abortion - theoretically, that is - as far as he, himself, is concerned; he cleverly manages to remove any kind of ownership over the issue when advocating the need to make some abortion service available - qualified by programs and abstinence and what ever else he can say to deflect the spotlight. More over, what's even more shocking is he apparently never asked Sotomayor what her position was on abortion before choosing her. So what he's asking of us is to trust him. It's not good enough.

GF: It is infuriating that Obama demonstrates so much leadership and courage on other issues, but when it comes to these most fundamental of women's rights he demurs, deflects, looks for "common ground", when on reproductive rights, health, and justice issues, the prochoice position clearly is the common ground. He should just declare it so and move on with a positive agenda such as the Freedom of Choice Act.

DW: What do you know about Sotomayor that could make the rest of us more comfortable with her?

GF: We should not be comfortable. We must continue to ask the questions and persist until we get the answers. And even if we get the answers we want, we must continue to demonstrate grassroots political strength at the ballot box and in legislative policy if we want our views on equality and justice for women to prevail in the courtroom.