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IT'S TIME TO DUST OFF THE LANGUAGE OF JUDICIAL PHILOSOPHY

BY

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Many have been spending time in the last few days polishing up on their means of expressing support or disdain for the recent nomination by President Obama of Sonia Sotomayor to the nation's highest court. At the outset I offer the disclaimer that I am not an attorney nor have I ever been trained to be one. My interest in the current selection of Judge Sotomayor, like many who will read this, is political in nature.

The reader should be prepared over the next two months to be bombarded with a continuous flow of legal jargon from news network talking heads pertaining to the relative merits of judicial activism or judicial restraint as a philosophy of interpreting the United States Constitution by a Supreme Court Justice and of how the current nominee fits the preferred definition. Embedded in these discussions will surely be the current heated debate over the desirability of a "living constitution" versus a philosophy which dictates holding fast to the original meaning as intended by the founding fathers in 1787. This makes for a profoundly interesting discussion, but neither side seems able to define these positions in a way that gets beyond their own respective political philosophies which each in turn claims should be off limits when considering such weighty matters as the makeup of the Supreme Court.

Then there is the immediate discussion of whether or not it is appropriate to consider the socio-cultural, ethnic and gender background of a potential nominee as adding to or detracting from their fitness to be on the court. Nominee Sotomayor's candidness on this matter in recent years has certainly served to light this fire. There have been several appointments over the years that demonstrate that such consideration has never been far from a President's thinking when making a Supreme Court nomination.

The failed nomination of Robert Bork has supplied us with a number of talking points when Supreme Court nominating time rolls around. We will likely hear the term "Borked" a number of times over the next few weeks. It is derived from the infinitive "to Bork." A strong case can be made that the wall of opposition put in place by the Senate Democrats to

Robert Bork's nomination was the opening salvo in the modern era of partisan warfare. Bork will be remembered as the Solicitor General under the embattled President Richard Nixon who ascended to the role of acting Attorney General after the resignations of Elliot Richardson and William French Smith. Bork, rather than resigning as his predecessors had done, did Nixon's bidding and fired Watergate Special Prosecutor Archibald Cox. Thus, despite Robert Bork's brilliant legal mind he ran afoul of the Democratic majority as a casualty of his support for Nixon's desperate end game. President Reagan nominated Bork, and in a sense set the stage for the modern day restraint versus activism debate that has been smoldering since.

Thurgood Marshall was the first African-American appointed to the court. Marshall was certainly a known quantity in the legal world when President Lyndon Johnson appointed him to the court in 1967. Justice Marshall had been a prominent civil rights lawyer and one of the lead attorneys, on the winning side in the 1954 landmark *Brown vs. Board of Education* case. This case was tantamount to a declaration of war for the civil rights movement. Were there political considerations in play here?

President Reagan fulfilled a campaign promise by appointing the first female justice of the Supreme Court. Justice Sandra Day O'Connor was thoroughly qualified as she proved throughout her distinguished career, but it has also been noted that the Senators who reviewed her nomination were on their best behavior in addressing the first of her gender to ascend to the court.

The appointment of Justice Clarence Thomas was quite unique. Justice Thomas was appointed by President George H.W. Bush. Thomas is an African-American who is arguably the most conservative justice on the Supreme Court today. The dilemma that the Thomas nomination placed on the Democratic Party opposition was profoundly interesting. This was made only more so by the Anita Hill sexual harassment accusations. The Democrats were forced to struggle with their opposition to a nominee far more conservative than was acceptable to them, yet who was an African-American, a demographic which to this day remains loyal to their party. The Democrats blinked and relented in their opposition after Thomas labeled the spectacle that had played out over television "a high tech lynching."

Now comes the nomination of Sonia Sotomayor. Judge Sotomayor's resume' is more than adequate to support her fitness for ascending to the Supreme Court. Beyond that, Sotomayor would be not only the third woman, but the first Hispanic to serve on the Court. This comes at a time when the number of Hispanics has passed the African-American population as a percentage of total U.S. population. Political strategists are keenly aware of the impact that the rapidly growing Latina population may have on future elections. Much as was the case with the Bush appointment of an African-American Clarence Thomas with a contrary political philosophy to the Democrats, President Obama has returned the favor to the Republicans by appointing one from an ethnic group craved by political operatives who has a judicial philosophy to the left of many in the GOP.

Don't let anyone tell you that politics has no role to play in Supreme Court nominations.

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