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“In the Judge’s Heart:” Rethinking the Role of Empathy in the Supreme Court Nomination and Confirmation Process

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“In the Judge’s Heart:”
Rethinking the Role of Empathy in the Supreme Court Nomination and
Confirmation Process

Submitted by: Louis H. Guard¹

¹ J.D., Cornell Law School, expected May, 2012. This paper was originally completed while a visiting student at University of Pennsylvania Law School for a seminar taught by former U.S. Senator Arlen Specter and Senator Specter’s former General Counsel, Matthew Wiener, entitled “Congress, the Constitution, and the Supreme Court.” The views expressed herein are the author’s only unless noted otherwise.

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Introduction

In September, 2005, then-Senator Barack Obama articulated his views on qualities he deemed essential for a Justice serving on the Supreme Court. While acknowledging that “95 percent” of cases that come before most any court would be decided similarly by “a Scalia” or “a Ginsburg” based on settled precedent and rules of constitutional construction, President Obama asserted that what matters most “is those 5 percent of cases that are truly difficult.”² In such cases, he continued, established precedent “will only get you through the 25th mile of the marathon...[t]hat last mile can only be determined on the basis of 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.”³ The “critical ingredient” in deciding such cases is “supplied by what is in the judge’s heart.”⁴ President Obama refined and reasserted his position in favor of an empathetic Justice upon the appointment of Sonia Sotomayor in 2009, saying that he would “seek someone who understands that justice isn't about some abstract legal theory or footnote in a casebook”⁵ and that he views empathy as “an essential ingredient for arriving at just decisions and outcomes.”⁶

Perhaps unsurprisingly the idea that “empathy” should be either a characteristic of nominees to the Court or a tool used by members of the Court has sparked its fair share of

² 151 Cong. Rec. 21,032 (2005)(floor Statement of Senator Barack Obama on Nomination of John Roberts to be Chief Justice)[hereinafter Floor Statement].

³ *Id.*

⁴ *Id.*

⁵ President Barack Obama, *Remarks on the Retirement of Justice David Souter* (May 1, 2009), available at <http://www.gpoaccess.gov/presdocs/2009/DCPD-200900317.pdf> cited in Major Garrett, *Obama Pushes for Empathetic Supreme Court Justices*, Fox News, May 1, 2009 available at <http://www.foxnews.com/politics/2009/05/01/obama-pushes-empathetic-supreme-court-justices/>.

⁶ *Id.*

controversy from across the political spectrum.⁷ Although a lynchpin of then-Senator Obama’s thinking and rhetoric during the confirmation process of John Roberts and also through Obama’s own nomination of Sonia Sotomayor, empathy was scarcely mentioned by the President when nominating Elena Kagan.⁸ During the Sotomayor hearings then-nominee Sotomayor herself in fact evaded in-depth discussion of the specific subject of empathy.⁹ By the time of Kagan’s nomination to the Court the Obama administration had stopped mentioning empathy in public statements regarding nominees altogether.¹⁰ But why? Overwhelmingly, the answer has been taken to be a result of the political complications around elaborating on the notion of empathy. Legal philosophical and jurisprudential arguments are either too esoteric for meaningful public consumption or can easily become political “hot button” issues. As such, during the confirmation of Justice Sotomayor Democratic Senators “charged with shepherding Sotomayor through the mountain pass of the Senate confirmation process,”¹¹ were extremely careful of letting Sotomayor’s nomination “slip into some philosophical crevasse.”¹²

⁷ See , e.g., *id*; Erwin Chemerinsky, *The Need for Empathy on the Court*, National Law Journal, Oct. 31, 2011; Editorial, *The Supreme Court: Empathy v. Law – Which Sonia Sotomayor is the Senate About to Confirm?*, The Economist, Jul. 16, 2009, available at <http://www.economist.com/node/14031304>; Jonah Goldberg, *Empathy and the Supreme Court*, L.A. Times, Apr. 13, 2010, available at <http://articles.latimes.com/2010/apr/13/opinion/la-oe-goldberg13-2010apr13>; John Paul Rollert, *Obama’s Empathy for the Supreme Court*, Mar. 22, 2011, Huffington Post available at http://www.huffingtonpost.com/john-paul-rollert/obamas-empathy-for-the-supreme-court-pick_838638.html; Janet Hook & Christi Parsons, *Obama Calls Empathy Key to Supreme Court Pick*, May 2, 2009, L.A. Times available at <http://articles.latimes.com/2009/may/02/nation/na-court-souter2>.

⁸ See John Paul Rollert, *Reversed on Appeal: The Uncertain Future of President Obama’s Empathy Standard*, 120 Yale L.J. 89, 90 (2010). This article, cited frequently herein, stands out as a leading piece of scholarship on President Obama’s empathy standard.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

Interestingly, despite the political sensitivities surrounding the use of the term “empathy,” empathy has often been cited as a desirable quality for those serving in other public functions. Perhaps most obvious is the “empathizer-in-chief” title laudably bestowed upon Bill Clinton by members of the press.¹³ Moreover, that empathy is an admirable characteristic of members of a democratic society generally is hardly subject to dispute.¹⁴ Further, the idea that empathy or similar characteristics and traits are desirable ones for members of the Supreme Court is not entirely new. In the empathy “vein” Woodrow Wilson famously remarked that only those who understand “that law is subservient to life and not life to law”¹⁵ are suitable nominees to the Court. Benjamin Cardozo in a series of influential writings on judicial decision-making has been understood as articulating that “judges should be true to their sense of justice, shaped as it is by their own life experiences”¹⁶ when the letter of the law is less than clear in its application to the particular facts at hand. Justice William Rehnquist himself in a rarely cited article published early in his legal career inadvertently highlighted the gap to be filled by empathy when he wrote:

It is high time that those critical of the present Court recognize ... [that] the constitution has been what the judges say it is...[i]f greater judicial self-restraint is desired, or a different interpretation of the phrases “due

¹³ See Howard Fineman, *The Next Florida*, Newsweek, Oct. 31, 2004, available at <http://www.thedailybeast.com/newsweek/2004/10/31/the-next-florida.html>.

¹⁴ See John Paul Rollert, *supra* note 7 at 106 (“...no one can deny that [empathy] is a powerful virtue in a large and diverse democracy.”).

¹⁵ Woodrow Wilson, “An After-Dinner Talk” (Dec. 9, 1916), in 40 *The Papers of Woodrow Wilson* 193, 196 (Arthur S. Link ed., 1982) as cited in Catherine Crowe, *Videri Quam Esse: The Role of Empathy in Judicial Discourse*, 34 *Law & Psychol. Rev.* 121 (2010).

¹⁶ See Kim McClane Wardlaw, *Umpires, Empathy, and Activism: Lessons from Judge Cardozo*, 85 *Notre Dame L. Rev.* 1629, 1633 (2010).

process of law” or “equal protection of the laws,” then men sympathetic to such desires must sit upon the high court.¹⁷

Although not speaking directly to the value of empathy in his article Justice Rehnquist appears at least to recognize the place of characteristics such as empathy on the Court. Even if Justice Rehnquist is not personally a proponent of empathy as a consideration in the nomination and confirmation process his remarks reveal, perhaps more articulately and significantly than others, the critical role that empathy could play in the decision-making process at the Supreme Court level.

The possibilities for empathy as a judicial tool, as opposed to a personal characteristic of nominees to the Court, are likewise not new or novel concepts. Empathy has previously been advanced outside of the context of the Court’s confirmation process as an explicit tool for judges looking at cases involving a wide range of legal issues as diverse as Section 1983,¹⁸ immigration,¹⁹ discrimination and Title VII,²⁰ pleading standards,²¹ economic equality and predatory lending,²² and gender issues²³ among others. The most recent scholarship on empathy as a characteristic of Justices and in the confirmation process however has addressed empathy’s historical significance and

¹⁷ William H. Rehnquist, *The Making of a Supreme Court Justice*, Harv. L. Rec. (Oct. 8, 1959) 10.

¹⁸ See Sheldon Nahmod, *The Restructuring of Narrative and Empathy in 1983 Cases*, 72 Chi.-Kent L. Rev. 819 (1997).

¹⁹ See Lauren Gilbert, *The 26th Mile: Empathy and the Immigration Decisions of Justice Sotomayor*, 31 Harv. Latino L. Rev. 1 (2010).

²⁰ See Michael J. Zimmer, *Systemic Empathy*, 34 Colum. Human Rights L. Rev. 575 (2003).

²¹ See Darrell A.H. Miller, *Iqbal and Empathy*, 78 UMKC L. Rev. 999 (2010).

²² See Mitchell F. Crusto, *Obama’s Moral Capitalism: Resuscitating the American Dream*, 63 U. Miami L. Rev. 1011 (2009).

²³ See Hon. Diane S. Sykes, *Speech: Gender and Judging*, 94 Marq. L. Rev. 1381 (2011).

roots,²⁴ the political nature of empathy and theoretical political strategies for overcoming weaknesses in the empathy argument,²⁵ and the tenuous political future of empathy as a quality overtly sought in nominees to the Court.²⁶ The thrust of this recent scholarship focuses on empathy's benefits.²⁷ The various authors examining empathy as a characteristic of Supreme Court nominees include scholars, federal and state judges, and practitioners alike with the majority view tending to hold that despite the political thorniness of invoking empathy the Obama administration should continue to consider the empathetic capabilities of potential nominees in selecting future Justices.

With these considerations in mind this paper will seek to germinate answers to the overarching question: what is the current meaning and purpose of empathy as a quality for Supreme Court Justices and how can, and should, this purpose be effectively promoted moving forward? Working within the recent line of scholarship on empathy just mentioned this paper supports the position that empathy is both a desirable and necessary quality for nominees to the Court but also suggests that it should not be the only defining quality considered by the president. The paper will argue first that the Obama administration's conception of empathy is clear, reasonable, and workable and review the political considerations that seem to have stymied overtly embracing empathy as a consideration. Further, this paper will show that the role empathy might play for a particular justice once on the Court is uncertain, suggesting that perhaps empathy should

²⁴ See Wardlaw, *supra* note 12 (discussing the role of empathy for Judge Cardozo and the way in which he discredited the notion that the legal system was a group of "preordained" rules "logically to be discovered and mechanically to be applied").

²⁵ See Tobin A. Sparling, *Resurrecting the Argument for Judicial Empathy: Can a Dead Duck Be Successfully Repackaged for Sale to a Skeptical Public?* 20 Temp. Pol. & Civ. Rts. L. Rev. 1 (2010)

²⁶ See Rollert, *supra* note 7.

²⁷ See *supra* notes 23-25.

not be the leading consideration advanced by the president in choosing a nominee. This paper will reveal the arguments for why empathy is a very meaningful and admirable quality and should remain a consideration, however, the paper will also show that for policy and practical political reasons empathy should probably not occupy the central public role initially suggested by President Obama in the nomination of Sonia Sotomayor, or be the only factor considered in choosing future nominees.

In order to structure the argument this paper culls the confirmation records and testimonies of four current Justices purportedly nominated and confirmed to the Court because of the unique perspective they would bring as Justices:²⁸ Clarence Thomas, appointed by George H. W. Bush; Ruth Bader Ginsburg, appointed by Bill Clinton; and Sonia Sotomayor and Elena Kagan, both nominees of Barack Obama and by default arguably symbolic of his empathy standard. By examining the confirmation testimony and select subsequent decisions of these Justices the paper will examine the role considerations of empathy actually played throughout the nomination and confirmation processes, and more critically, the potential for empathy as a characteristic of future nominees by briefly discussing some work of these Justices in the remaining pages.²⁹

Part I will examine what has become the “Obama standard” and the understanding of empathy advanced by President Obama arguing that the concept of empathy as a consideration is clear and reasonable as well as important and meaningful. Part II will consider the four nominations and confirmations of the previously mentioned Justices with a focus on notions of empathy throughout their nomination and confirmation

²⁸ See *infra* notes 48-51.

²⁹ Due to space constraints neither the historical accounts of the confirmation hearings nor the concluding analysis are meant to be completely exhaustive. Either could be expanded in further work or expanded accounts.

processes and the political implications of empathy as a consideration. Part III will briefly discuss the work of the four selected Justices while on the Court to consider the extent to which empathy can if at all be discerned from their work on the Court as well as draw some other summary conclusions from merging the work in Parts I and II. The result is that empathy's impact in constitutional jurisprudence is hardly predictable or reliable, and that though beneficial and meaningful, empathy should probably not be relied upon as the primary factor in selecting a Justice but should be considered alongside other factors.

I. The Obama Standard of Empathy

President Obama's understanding of empathy as a qualification for members of the Supreme Court is clear, reasonable, and workable. The president's views, however, have not been unanimously embraced by lawmakers and jurists and represent one side of a significant legal and jurisprudential rift. The depth and ideological complexity of this two-sided debate makes touting empathy as a primary quality sought in nominees to the Court politically difficult and potentially dangerous to the nominee.³⁰

a. *Obama's Empathy: Reasonable and Workable*

What precisely President Obama means when he has expressed a desire to appoint Justices with "empathy" is not exactly certain but can be gleaned from his his 2006 book *The Audacity of Hope*.³¹ Distinguishing empathy from "sympathy or charity,"³² Obama refers to empathy as a "call to stand in somebody else's shoes, and see through their eyes." A leading scholar on Obama's call for empathy on the Court, John Paul Rollert,

³⁰ See generally Rollert, *supra* note 7.

³¹ See also, *id.* at 100 ("Obama's only sustained discussion of empathy comes not in his speeches or in remarks he made during his presidential campaign, but in...*The Audacity of Hope*.").

³² Barack Obama, *The Audacity of Hope: Thoughts on Reclaiming the American Dream* 66 (2006).

calls Obama’s distinction between “sympathy and charity” on the one hand and empathy on the other “critically important.”³³ Despite possibly leading to feelings of sympathy in cases where there is serious suffering, the exercise of empathy, Rollert writes, is distinguishable from sympathy in that empathy “is characterized not by the pity we feel for others but by our attempt to understand their reality.”³⁴ Empathy in the Obama view is not feeling sorrow on behalf of a litigant, but seeking to understand the “setbacks and triumphs”³⁵ and the “blessings as well as [the] burdens”³⁶ of the litigant. It is this clear distinction between sympathy and empathy that helps make empathy both a virtuous aspiration for nominees to the Supreme Court as well as a reasonable and fairly workable policy consideration. This is especially so given the legal ambiguity in those extremely unique cases that make it before the Court.

In speeches on the notion of appointing a Justice with empathy Barack Obama has been fairly explicit and illustrative in articulating his understanding of the term and the distinct meaning of empathy. In a 2007 speech at a conference for Planned Parenthood then-Senator Obama remarked that “we need somebody who’s got the...empathy, to recognize what it’s like to be a young teenage mom...[t]he empathy to understand what it’s like to be poor, or African-American, or gay, or disabled, or old.”³⁷ Again these remarks show that the Obama concept of empathy is distinct from the notion of pure sympathy. President Obama does not advance empathy as a means for jurists to fall prey

³³ Rollert, *supra* note 7 at 100.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Senator Barack Obama, Address Before the Planned Parenthood Action Fund, (July 17, 2007) available at <http://sites.google.com/site/lauraetch/barackobamabeforeplannedparenthoodaction> cited by Crowe, *supra* note 14.

to whimsical emotions, but as means for them to understand the broader context and experience of each of the litigants before them in an effort to “arriv[e] at just decisions and outcomes”³⁸ when “the law strays into uncertainty.”³⁹

b. *Umpire v. Empathizer*

The Obama concept of empathy can be understood in the context of what have emerged as the principle divergent views on the role and duty of Supreme Court Justices:⁴⁰ the Justice with “empathy”⁴¹ as articulated by President Barack Obama and the Justice as “umpire”⁴² as espoused by Chief Justice John Roberts. These views are characterized by the argument either that a Justice be like an “umpire” in that they do not make the rules but simply apply them,⁴³ or instead, have “empathy” in their role on the bench when filling the obvious gaps in the law exposed by cases and controversies that are “those 5 percent of cases that are truly difficult.”⁴⁴ A Justice with empathy is not a perfect opposite of a Justice merely applying the rules like an “umpire,” but the two notions nonetheless represent political and theoretical loggerheads in the current debate on the role of empathy as advanced by President Obama.⁴⁵

³⁸ President Barack Obama, *Remarks on the Retirement of Justice David Souter*, *supra* note 4.

³⁹ Rollert, *supra* note 7 at 102.

⁴⁰ See Sparling, *supra* note 24 at 3-7.

⁴¹ See Floor Statement, *supra* note 1.

⁴² *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005)(Statement of John G. Roberts)[hereinafter Roberts Hearing].

⁴³ *Id.* See also Aaron S. J. Zelinsky, *Benching the Judge-Umpire Analogy*, 119 Yale L.J. Online 113 (2010) available at <http://yalelawjournal.org/the-yale-law-journal-pocket-part/supreme-court/the-justice-as-commissioner:-benching-the-judge%11umpire-analogy/>.

⁴⁴ Floor Statement, *supra* note 1.

⁴⁵ See generally Sen. Orrin G. Hatch, *The Constitution as the Playbook for Judicial Selection*, 32 Harv. J.L. & Pub. Pol’y 1035 (2009). It is also worth noting that Chief Justice Roberts’ view that “Judges and Justices are servants of the law” seems to conflict directly with President Wilson’s view on Supreme

The dangers for the nominee of an in-depth public debate over empathy in a confirmation hearing—or on virtually any other topic for that matter—are too obvious to warrant much extended discussion in this paper. The leading example of the ramifications of a nominee’s willingness to engage in controversial detailed scholarly discourse in the public eye during a confirmation hearing is undoubtedly Robert Bork.⁴⁶ Since the Bork hearings it has been said that “[t]he incentive in these [senate confirmation] hearings is for the senators to say as much, and the nominees to say as little, as possible.”⁴⁷ The negative implications of a nominee discussing empathy in too great of detail during a confirmation hearing are too great to warrant such extended discussion. As has been noted, “the real debate underlying the empathy controversy is not whether judges can simply make up the rules (or the laws) as they go along...The debate is over the relative clarity of the law...and where a judge should look whenever the law is unclear.”⁴⁸ This debate appears to be too risky for nominees to embark upon in the confirmation hearing setting. These implications and the meaning of discussions surrounding empathy in select confirmation hearings and nominations is the subject to which the next section turns.

II. Empathy and The Confirmation Process

Court Justices and the law. Compare Statement of John G. Roberts, *supra* note 30 with Woodrow Wilson, “An After-Dinner Talk,” *supra* note 14. It is also worth noting that Chief Justice Roberts’ view has been challenged head-on by another leading jurist, Richard Posner, who leveled the claim that no person honestly believes the rules in our judicial system are given to judges “...the way the rules of baseball are given to umpires.” Richard A. Posner, *How Judges Think* 78 (2008).

⁴⁶ See Kenji Yoshino, *On Empathy in Judgment (Measure for Measure)*, 57 *Clev. St. L. Rev.* 683, 683 (2009).

⁴⁷ *Id.*

⁴⁸ John Paul Rollert, *The Suprising Star at Elena Kagan’s Hearing: Thurgood Marshall*, *The Christian Science Monitor* (Jul. 8, 2010).

By examining the nomination and confirmation processes of four current Justices we can glean both the significance of empathy as a quality for members of the Court as well as the political sensitivity of the term given the umpire versus empathizer ideological debate just discussed. This section considers the nomination and confirmation of four Justices arguably nominated for what were understood to be the unique perspectives they would bring to the Court vis-a-vis their personal backgrounds: Clarence Thomas;⁴⁹ Ruth Bader Ginsburg;⁵⁰ Sonia Sotomayor;⁵¹ and, Elena Kagan.⁵² Though empathy is a quality that one can attempt to espouse and exercise regardless of background or upbringing, notions of empathy in the current discourse seem indelibly tied to the background experiences of nominees.⁵³

a. *Clarence Thomas*

The clear disconnect between what Clarence Thomas was expected to bring to the Court once confirmed based on his confirmation testimony and what he seems instead to

⁴⁹ See Eric L. Muller, *Where, But For the Grace of God Goes He? The Search for Empathy in The Criminal Jurisprudence of Clarence Thomas*, 15 Const. Commentary 225 (1998)(describing the nomination and confirmation of Clarence Thomas as consisting of a “strategy of emphasizing [Thomas’] impoverished, racism-tinged upbringing in the tiny town of Pin-Point, Georgia, rather than his professional accomplishments and commitments”).

⁵⁰ See Byron York, *Advice and Consent? How Clinton Chose Ginsburg*, National Review Online (Jul. 5, 2005)(quoting Clinton White House senior staffer George Stephanopoulos from his book *All too Human* as saying Ginsburg “would be the first Jewish Justice since Abe Fortas, and the first woman to be appointed by a Democrat. More important, she was a pioneer in the legal fight for women’s rights—a female Thurgood Marshall”) available at <http://www.nationalreview.com/articles/214854/advice-and-consent-how-clinton-chose-ginsburg/byron-york>.

⁵¹ See, e.g., *Remarks on the Retirement of Justice David Souter*, supra note 4 (describing the Obama administration’s viewpoint on empathy as a criteria for nominees). As Sotomayor and Kagan were both nominated by President Obama it can be inferred that their life experiences and the effect these would have on their empathy were considerations of the president.

⁵² *Id.*

⁵³ See supra notes 48-51. See also Riddhi Dasgupta, *Rising Above Themselves: Why Today’s Lawyers of Color Must Look Beyond Color*, 16 Tex. Wesleyan L. Rev. 495 (2010); Gilbert, supra note 18.

have brought to the Court has been extensively noted.⁵⁴ Interestingly, much of the discussion in this respect pertains to empathy,⁵⁵ or as Thomas himself puts it in his confirmation hearing the ability to “walk in the shoes”⁵⁶ of those before the Court. Thomas described his ability to level with litigants as “something different”⁵⁷ he would bring to the Court, using empathy to bear in mind “the people who are affected by what the Court does.”⁵⁸ In a manner almost identical to the vision of empathy advanced by President Obama, Clarence Thomas said of criminal defendants specifically that as a judge “you feel that you have the same fate, or could have, as those individuals.”⁵⁹ Taken at face value then, it seems clear that Clarence Thomas as a nominee at least purported to espouse an empathy or empathetic tendencies nearly identical to those advanced by President Obama.⁶⁰

Despite the similarities between the Thomas and Obama notions of empathy the ideological divide that tinges today’s debate over empathy did not seem to exist when Thomas was nominated. In fact, empathy was seen as an admirable quality in Thomas and his empathy was praised openly by President George H.W. Bush at the time of his

⁵⁴ Muller, *ibid.*

⁵⁵ *See, e.g., id.* at 229 (discussing how a justice supposedly “walk[ing] in the shoes” of criminal defendants could possibly rule against them so frequently).

⁵⁶ *Confirmation Hearing on the Nomination of Hon. Clarence Thomas to be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 102d Cong., 1st Sess., pt. 1, at 260 (1991)(Statement of Clarence Thomas) [hereinafter Thomas Hearing].

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id. Accord.* Obama, *supra* note 31 at 67 (“We wouldn’t tolerate schools that don’t teach, that are chronically underfunded and understaffed and underinspired, if we thought the children in them were somehow like our children. It’s hard to imagine a CEO of a company giving himself a multimillion-dollar bonus while cutting health-care coverage for his workers if he thought they were in some sense his equals.”).

nomination.⁶¹ What's more Thomas was purposefully chosen to take the seat of Thurgood Marshall,⁶² a Justice widely and perhaps controversially regarded by many for his views on empathy as a jurist.⁶³ Albeit with significant reservations by many in the civil rights community⁶⁴ Thomas was embraced by the right as an acceptable replacement to Marshall on the Court.⁶⁵ When nominating Thomas, President Bush said that Thomas was "delightful and warm"⁶⁶ and stated plainly that Thomas was a "person who had great empathy."⁶⁷ In the nomination and Senate confirmation of Clarence Thomas any empathetic qualities Thomas espoused were laudable and fairly uncontroversial. To be sure his actual use of empathy on the Court is another matter, the implications of which are taken up in Part III.

b. *Ruth Bader Ginsburg*

Similarly to the nomination and confirmation of Clarence Thomas, empathy as informed by unique background experiences was not a trait to be shied away from in the nomination and confirmation of Ruth Bader Ginsburg.⁶⁸ Indeed, the benefits of empathy

⁶¹ See Brian Beutler, *Flashback: George H.W. Bush on Clarence Thomas' Empathy*, Talking Points Memo (May 27, 2009) available at <http://tpmdc.talkingpointsmemo.com/2009/05/flashback-george-hw-bush-on-clarence-thomas-great-empathy.php>.

⁶² See "Clarence Thomas," The Oyez Project, available at http://www.oyez.org/justices/clarence_thomas.

⁶³ See Rollert, *supra* note 47.

⁶⁴ See Evan Thomas, *Where Does He Stand?*, Newsweek (Jul. 14, 1991) available at <http://www.thedailybeast.com/newsweek/1991/07/14/where-does-he-stand.html>.

⁶⁵ See *id.*

⁶⁶ Beutler, *supra* note 60.

⁶⁷ *Id.*

⁶⁸ It is clear from the testimony that Justice Ginsburg's background is unique and meaningful for a host of reasons including her Judaism, her upbringing in a first-generation family, and socio-economic difficulties as a child. See *infra* note 68 at 186. However, due to space constraints and the significant work of Ginsburg in the area of women's rights this paper focuses primarily on Justice Ginsburg's background as it pertains to gender and serving as the second woman on the Court. See also Emily Bazelon, *The Place of*

were explicitly invoked when Ginsburg was asked by Senator Metzenbaum whether she could “understand what it is to have your boss threaten your livelihood and your family’s economic well-being...[in response to] trying to organize”⁶⁹ for better working conditions. Ginsburg’s response was unwavering: “I think that if you take a full and fair look at the body of decisions I have written...you will be well satisfied that I possess the empathy you have just expressed.”⁷⁰

It also seems clear that Ginsburg’s experiences as a leading woman in the law and what she would bring to the Court as a result of these experiences were seen as net positives for the Court by many. Senator Moynihan upon introducing and recommending Ginsburg to the Senate Judiciary Committee highlighted Ginsburg’s role as one of the early woman law clerks to the Supreme Court, her experience as “one of the first tenured women professors in the country”⁷¹ and as a “moving force behind the women’s rights project of the American Civil Liberties Union, the prime architect of the fight to invalidate discriminatory laws against individuals on the basis of gender.”⁷² Senator D’Amato similarly praised Ginsburg’s enrollment at Harvard Law School “at a time when it was not popular for young women to enter law school”⁷³ and cited with apparent admiration her “difficult time breaking the ‘old boy’ network that excluded so many

Women on the Court, N.Y. Times (Jul. 7, 2009)(discussing the significance of Ginsburg’s womanhood as impacting her work on the Court) available at <http://www.nytimes.com/2009/07/12/magazine/12ginsburg-t.html?pagewanted=all>.

⁶⁹ *Confirmation Hearing on the Nomination of Ruth Bader Ginsburg to be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 103d Cong., 1st Sess., at 152-3 (1993)(Senator Metzenbaum) [hereinafter *Ginsburg Hearing*].

⁷⁰ *Id.* (Statement of Ruth Bader Ginsburg).

⁷¹ *Id.* at 10-11 (Statement of Senator Moynihan).

⁷² *Id.*

⁷³ *Id.* at 11-12 (Prepared Statement of Senator D’Amato).

other fine law graduates.”⁷⁴ Eleanor Holmes Norton of the District of Columbia praised Ginsburg for spending her life “making things how they ought to be,”⁷⁵ and for “us[ing] the law, always carefully, always defensibly, for all those left at the margins”⁷⁶ only after calling her “the chief navigator in the journey that took women...into the safe harbor of the U.S. Constitution.”⁷⁷

The Judiciary Committee was made aware at the time of Ginsburg’s confirmation hearing of the possible affect Ginsburg’s background experiences could have in her role as a Justice on the Court. “Constitutional interpretation,”⁷⁸ Senator DeConcini reminded the group, “requires an exercise of discretionary judgment[] [t]hus, we must carefully choose the Constitution’s most important interpreters.”⁷⁹ Such remarks show that the Judiciary Committee was conscious of the ways in which Ginsburg’s background could impact her work on the Court, especially where the law is uncertain. Interestingly however it does not seem as though empathy specifically arose as a proxy for judicial activism or for biased decision-making as it would in later nominations and confirmations, beginning with that of Justice Sonia Sotomayor.

c. *Sonia Sotomayor*

The nomination and confirmation of Sonia Sotomayor appears to be the beginning of real controversy in the debate over empathy in the nomination and confirmation process. Republicans were quick to call President Obama’s empathy standard “a code

⁷⁴ *Id.*

⁷⁵ *Id.* at 12 (Statement of Hon. Eleanor Holmes Norton).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 23 (Opening Statement of Senator DeConcini).

⁷⁹ *Id.*

word for an activist judge.”⁸⁰ Moreover, it became clear in the Sotomayor hearings that the empathy debate was more accurately “over the relative clarity of the law...and where a judge should look whenever the law is unclear.”⁸¹ Senator Orrin Hatch’s remarks to the Federalist Society in 2009 are an apt summary of the opposition to President Obama’s empathy standard in the context of the Sotomayor nomination: “In [the] activist view of judicial power, the desired ends defined by a judge’s empathy justify whatever means he uses to decide cases...[t]his activist view of judicial power is at odds with our written constitution....”⁸² While President Obama explicitly advanced his version of empathy as a key trait in nominees to the Court with the nomination of Sonia Sotomayor,⁸³ detractors were quick to reveal their underlying fears of the empathy standard as a broad license for judges in decision-making and discretion.

Given the strong reaction to empathy⁸⁴ as a quality sought in Supreme Court nominees and the political implications of an extended debate over empathy⁸⁵ it was unsurprisingly a subject that then-nominee Sotomayor attempted to skirt and deny during her confirmation hearings.⁸⁶ This is so despite the widespread discussion of empathy in the opening statements of both Republican and Democratic senators at the hearings.⁸⁷

⁸⁰ *This Week*, (ABC Television Broadcast, May 3, 2009)(Remarks by Senator Orrin Hatch).

⁸¹ Rollert, *supra* note 47.

⁸² Sen. Orrin Hatch, *supra* note 44 at 1042-43.

⁸³ *See* President Barack Obama, *Remarks on the Retirement of Justice David Souter*, *supra* note 4.

⁸⁴ *See* Sen. Orrin Hatch, *ibid*.

⁸⁵ *See infra* pp. 10-12.

⁸⁶ *See also* Rollert, *supra* note 7 at 90.

⁸⁷ *See, e.g., Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor to be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Cong., 1st Sess., at 1-28 (2009) [hereinafter Sotomayor Hearing](discussing empathy extensively in the statements of Senators Leahy, Feingold, Hatch, Sessions, and Grassley among others).

Speaking second at the outset of the hearing Senator Jeff Sessions set the tone for the opposition to the empathy standard saying “this ‘empathy standard’ is another step down the road to a liberal activist, results-oriented, and relativistic world where...unelected judges set policy, [and] Americans are seen as members of separate groups....”⁸⁸ He continued on to imply that through an empathy standard fairness and impartiality were suspect, saying curtly “I will not vote for...an individual...who is not fully committed to fairness and impartiality toward every person who appears before them.”⁸⁹ This was a subject area that clearly posed a philosophical, and in turn political, bramble patch for Sotomayor.⁹⁰ When given the opportunity to address the Judiciary Committee Sotomayor stated that her judicial philosophy was simply “fidelity to the law”⁹¹ and that in each case she has heard she has simply “applied the law to the facts at hand.”⁹² The task of the judge, Sotomayor repeated with conviction, “is not to make the law, it is to apply the law.”⁹³

Much of the remaining discussions of empathy in the Sotomayor hearings revolved around Sotomayor’s Latina background and alleged bias in favor of Latinos given her infamous remarks on “wise Latina”⁹⁴ women. Responding to various charges

⁸⁸ *Id.* at 6 (Opening Statement of Senator Sessions).

⁸⁹ *Id.*

⁹⁰ *See also* Rollert, *supra* note 7 at 90 (“Seeing Sotomayor safely to the Court was far more important than arguing over how she...should make her decisions on the bench.”).

⁹¹ Sotomayor Hearing, *ibid.* at 59 (Statement of Hon. Sonia Sotomayor).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ For a summary of Sotomayor’s “wise Latina” comments *see* “Sotomayor’s ‘Wise Latina’ Comment a Staple of Her Speeches,” June 5, 2009, CNN Politics, *available at* http://articles.cnn.com/2009-06-05/politics/sotomayor.speeches_1_sotomayor-s-confirmation-sotomayor-supporters-judge-sonia-sotomayor?_s=PM:POLITICS.

that her comments that “a wise Latina woman...would...reach a better conclusion”⁹⁵ in certain decisions show bias on her part and thus the potential dangers of empathy as a consideration Sotomayor stated that “I do not believe that any ethnic, racial, or gender group has an advantage in sound judging...I do believe that every person has an equal opportunity to be a good and wise judge regardless of their background....”⁹⁶ Despite successful attempts by many to—in the words of one eminent senator—make a “mountain out of a molehill”⁹⁷ of Sotomayor’s remarks and her empathy, Sotomayor managed to successfully evade in-depth engagement in a Bork-like debate on empathy and her background. As a result she was successfully confirmed.⁹⁸

d. *Elena Kagan*

In 2010 Elena Kagan was nominated by President Obama to the United States Supreme Court and was confirmed by the United States Senate in a 63-37 vote.⁹⁹ No mention of empathy was made by the Obama administration when appointing Kagan or upon the retirement of Justice John Paul Stevens.¹⁰⁰ Kagan’s controversy over remarks on the role of confirmation hearings are perhaps most instructive for purposes of understanding empathy and its elusive role in the Supreme Court confirmation process and on the Court.

⁹⁵ *Id.*

⁹⁶ Sotomayor Hearing, *supra* note 86 at 66 (Statement of Hon. Sonia Sotomayor).

⁹⁷ *Id.* at 373 (Senator Specter).

⁹⁸ See Amy Goldstein & Paul Kane, *Senate Votes 68-31 to Confirm Sonia Sotomayor to Supreme Court*, Wash. Post, Aug. 7, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/06/AR2009080601706.html>.

⁹⁹ See Carl Hulse, *Senate Confirms Kagan in Partisan Vote*, N.Y. Times, August 5, 2010, available at: <http://www.nytimes.com/2010/08/06/us/politics/06kagan.html>.

¹⁰⁰ See Rollert, *supra* note 7 at 90 and 105.

Having served as both Dean of Harvard Law School and Solicitor General of the United States Kagan's professional qualifications were hardly a serious point of contention.¹⁰¹ Instead the Senate Judiciary Committee, as with nearly all recent nominees, focused begrudgingly on seeking to uncover just what kind of Justice Kagan might be if confirmed and with reconciling apparent inconsistencies.¹⁰² In written responses Kagan answered questions from Senator Orrin Hatch regarding her 1995 Chicago Law Review article "Confirmation Messes, Old and New."¹⁰³ In the article Kagan argued that when Senators fail to delve deep into legal issues with Court nominees the Senate and public lose their ability to meaningfully evaluate the nominee.¹⁰⁴ Responding to Senator Hatch's request for her to reconcile her 1995 position with her pending nomination Kagan responded with an about face on her prior position: "I am...less convinced than I was in 1995 that public discussions of substantive legal issues and views, in the context of nomination hearings, provide the great public benefits I suggested..."¹⁰⁵ Kagan subsequently confessed that her "views on this question have evolved in some ways, but [she] continue[s] to think the question well worth

¹⁰¹ *Id.* Although it is correct to point out that some Senators did vote against Justice Kagan based on her lack of specific experience as a judge or based on other arguable facets of her "qualifications" this did not appear to have been a major sticking point during the hearings. The focus of real contention during the hearings, whether couched in terms of qualifications, experience or otherwise, appears to have been nominee-Kagan's judicial philosophy and an attempt on both sides of the aisle to determine what sort of a Justice she would become.

¹⁰² See generally, *Confirmation Hearing on the Nomination of Elena Kagan to be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Cong., 2d Sess. (2010) [hereinafter Kagan Hearing].

¹⁰³ *Questions from Senator Orrin Hatch for Elena Kagan*, 2010, in "Class 4 and 5 Readings" for *Congress, the Constitution, and the Supreme Court*, University of Pennsylvania Law School.

¹⁰⁴ See Elena Kagan, *Confirmation Messes, Old and New*, 62 Chi. L. Rev. 919 (1995).

¹⁰⁵ *Questions from Senator Orrin Hatch for Elena Kagan*, *ibid.*

exploring.”¹⁰⁶ Given Justice Kagan’s scholarship on the confirmation process and her subsequent reversal in confirmation testimony, her remarks perhaps most significantly leave open serious questions as to the proper role of Senate confirmation hearings. But her responses to these inquiries are also revealing when one considers the way in which considerations of empathy were disowned by nominee-Kagan at the time of her confirmation.

At Kagan’s hearing Senator John Kyl noted the arguable point that Justice Sotomayor, in her confirmation hearings, “explicitly rejected the empathy standard”¹⁰⁷ that had been advanced by President Obama. Kyl further claimed that in nominating Kagan the president “repackaged”¹⁰⁸ empathy. Kagan however, like Sotomayor, proved adept at avoiding significant discussions of empathy and rather unarguably rejected President Obama’s view explicitly. When asked by Senator Kyl whether she agreed that the law “only takes you the first 25 miles of the marathon and that the last mile has to be decided by what is in the judge’s heart”¹⁰⁹ Kagan stated: “Senator Kyl, I think it’s the law all the way down...the question is what the law requires.”¹¹⁰ When probed further on the president’s empathy standard Kagan simply remarked “I don’t know what the President was speaking about specifically.”¹¹¹ Kagan’s remarks on the confirmation process and empathy in her testimony are revealing of the ways in which old ideas can be disowned

¹⁰⁶ *Id.* See also Vikram David Amar, *How Senate Confirmation Hearings Should Better Educate Senators and the American Public: The Instructional Necessity of Case-Specific Questioning*, Symposium Article Postscript, 61 *Hastings L.J.* 1407, 1434 (2010)

¹⁰⁷ Kagan Hearing, *supra* note 101 at 18 (Statement of Sen. John Kyl).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 103 (Senator Kyl).

¹¹⁰ *Id.* (Elena Kagan).

¹¹¹ *Id.*

and the fabric of history and intellectual thought re-spun. Obviously opinions, attitudes, and viewpoints shift and can change over time.

III. Rethinking Empathy

A good argument exists that despite the seemingly obvious benefits that seem to result from empathy its impact in specific decisions of the Court is hard to predict, decipher, or even distinguish. Whether or not a particular Justice will employ empathy in a particular case—like adherence to any principle promised or conveyed in a confirmation hearing—is highly uncertain. As such, the strength of empathy as the sole criterion in appointing Justices to the Supreme Court remains elusive and reasonably open to question. This is so for a number of reasons but chiefly because of the utter unpredictability of the decisions of Justices once confirmed to the Court.¹¹²

Justice Clarence Thomas serves as an apt example. For all of President Bush’s talk of his jovial comportment and resounding “empathy,”¹¹³ and Thomas’ own talk of his ability to “walk in the shoes”¹¹⁴ of litigants, Thomas is now uncontroversially viewed as one of the Court’s most un-empathetic Justices.¹¹⁵ This has notably been seen in his dissent in *Hudson v. McMillian*, in which Thomas took the unpopular position that the abuse of a prisoner by prison guards in that particular case did not rise to the level of

¹¹² Indeed it was Justice Ginsburg who promised at her confirmation hearing only that there would be “no hints, no forecasts, [and] no previews” to her judicial decision-making. Ginsburg Hearing, *supra* note 68 at 323. Unpredictability in judicial decision-making also rears its head in other forms, such as *stare decisis*. Compare Roberts Hearing, *supra* note 39 with *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010).

¹¹³ See Beutler, *supra* note 60.

¹¹⁴ Thomas Hearing, *supra* note 55.

¹¹⁵ See Muller, *supra* note 48.

being cruel and unusual punishment.¹¹⁶ Despite a 7-2 decision by the Court in favor of the brutally abused prisoner¹¹⁷ Thomas' apparent view that the Eighth Amendment "should not be turned into...a National Code of Prison Regulation"¹¹⁸ seemed to trump any considerations of empathy for the prisoner.

Justice Ginsburg on the other hand has been said to actively employ her experiences as a pioneering woman in the law to empathize with litigants,¹¹⁹ and this is arguably seen in her dissent in *Ledbetter v. Goodyear Tire & Rubber Co.*¹²⁰ Justice Sotomayor, despite being touted as President Obama's model of empathy, has had her empathy described by at least one Democratic senator as "not all that it was cracked up to be."¹²¹ In-depth academic work focusing on Justice Sotomayor and her decisions on immigration and criminal convictions show that "far from allowing empathy to color her decision-making, she has tended to decide these cases based on neutral principles"¹²² and often with "harsh consequences."¹²³ Justice Kagan, who has spent little time on the Supreme Court or any bench for that matter has managed to evade much formal evaluation of her use of empathy, though we do know from her confirmation hearing that she is, at least publicly, somewhat perplexed as to empathy's "specific[]"¹²⁴ application.

¹¹⁶ 503 U.S. 1 (1992)(Thomas, J.)(dissenting).

¹¹⁷ *Id.* (O'Connor, J.).

¹¹⁸ *See* Muller, *ibid.* at 228.

¹¹⁹ *See* Dasgupta, *supra* note 52 at 503.

¹²⁰ 550 U.S. 618 (2007)(Ginsburg, J.)(dissenting).

¹²¹ *See* Rollert, *supra* note 7 at 92 (citing Senator Schumer).

¹²² *See* Gilbert, *supra* note 18 at 7-8.

¹²³ *Id.*

¹²⁴ Kagan Hearing, *supra* note 101 at 103.

How can we tell with any certainty whether a Justice is employing empathy in a particular case, regardless of whether or not they rule for or against the litigant with whom one might reasonably expect them to empathize or be empathetic? The short answer, revealed in the confirmation testimonies and subsequent tenures of the four Justices discussed herein is that it is hardly at all possible to tell. Like *stare decisis*,¹²⁵ principles of comity, abstention doctrines, or myriad cannons of statutory interpretation, empathy on the bench appears not only necessary and purposeful on its face, but also clouded in its actual application by a mystery akin only to doctrines of judicial discretion. Elena Kagan’s reversals and denials in her confirmation hearing show how opinions and ideas change over time. Perhaps Justice Kagan will evolve as a champion of empathy while Justice Sotomayor will prove the opposite. The only real certainty is that predictions with purporting any degree of certainty on this matter seem difficult to make.

It comes as no surprise then that in recent nominations and confirmations empathy as a code word for activist judges has really become a “strawman.”¹²⁶ The more accurate debate at its heart pertains to what judges should do in the face of a dearth of legal clarity¹²⁷ in “the last mile”¹²⁸ of a constitutional decision where the law provides no concrete answers. One side says that decisions at this point are only made “on the basis of 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.”¹²⁹ The other side of this debate seems to settle for calling such a position activist. Interestingly, in offering no

¹²⁵ See *supra* note 111.

¹²⁶ Rollert, *supra* note 47.

¹²⁷ *Id.*

¹²⁸ Floor Statement, *supra* note 1.

¹²⁹ *Id.*

solution this same side also fails to acknowledge that ambiguity in certain constitutional decisions exists at all, preferring to think that every constitutional pitch is either clearly the proverbial ball or strike. Either way, the proper place of empathy in judicial decision-making—that is, to contribute where the law fails to serve-up concrete answers—again portends the potential for uncertainty in its actual application.

Conclusion

It has been said that the debate over judicial empathy is one that is not recent but has really been going on for centuries.¹³⁰ The revelation that the debate over empathy is really a debate over what a Justice should do where the law is silent indeed supports this point¹³¹ and indicates that the debate over empathy, at least beyond its being a political buzzword, will not cease in the near future though it may shift in form. The Obama administration's conception of empathy appears to be clear, reasonable, and workable but obvious political considerations in the confirmation process seem to have stymied overtly embracing empathy as a consideration or publicly debating its merits. Despite this phenomenon it also seems clear from Court opinions, the scholarly literature, and the way in which the minds of Justices change once on the Court that the role empathy plays for a particular Justice on the Court is really quite unpredictable in any given case.

All of this suggests that perhaps empathy should not be the *leading* consideration advanced by the president in choosing a nominee but rather should play more of a supporting role along with other considerations. Despite the convincing and I believe

¹³⁰ See Yoshino, *supra* note 45 at 683-4.

¹³¹ *Id.*

correct arguments—shown in the testimonies of various nominees nominated by various presidents over two decades—for why empathy is a meaningful and admirable quality this remains the case. However, that empathy should be considered alongside other qualities does not mean that these other qualities that should be considered are any less nebulous and complicated than the empathy standard itself. This paper will leave exploration of these qualities for further academic work in this area. It will leave to the president and senate the unenviable task of attempting to find out exactly “what is in the...heart”¹³² of a given nominee on any given day.

¹³² Floor Statement, *supra* note 1.