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## What they should have asked Sotomayor

Now that the Senate Judiciary Committee hearings regarding Judge Sonia Sotomayor's nomination to the U.S. Supreme Court have ended, it is clear that this was pure political theater.

The Senators asked questions prepared by their staff. Sotomayor answered according to a script that she and the White House staff prepared. It was made-for-TV entertainment. At the end, we knew little about the senators' true thoughts, and even less about the future justice's.

She will be confirmed after lengthy "made for TV" speeches on the floor of the Senate. The champagne is already on ice at her apartment.

What *should* the senators have asked her? Certainly not about the issues that could come before her, which they did, even though they knew that if she answered those questions she would violate the judicial ethics rules. Certainly not about her "judicial philosophy," which they also did, even though they knew she would answer in the vaguest of terms: she likes "precedent," but has "empathy."

They *should* have asked her about judicial independence, transparency, and accountability. They and we, the American people, should have learned what she thinks about the role of the judiciary as an independent yet accountable branch of government. She could and should have answered these questions:

*First, don't you think that your swearing-in should take place in the Supreme Court courtroom, rather than the White House?*

Recently Justice John Paul Stevens lamented that many recent swearing-ins of Supreme Court justices have taken place in the White House with the President looking on. He said that he refuses to attend these ceremonies because they suggest to the American people that "this is the President's appointee." I agree with him.

The announcement of the nomination properly takes place at the White House when the President introduces the nominee to the press and he or she makes a short speech. The Senate hearings properly take place in the United States Capitol. However, upon confirmation, that person is now a member of the judicial branch and should take the oath in the Supreme Court building.

Who can forget the sight of a tall George H. Bush towering over David H. Souter, a man of average height, while the new justice took the oath at the White House? It sent the message, "this is my guy." Of course, Souter turned out to be anything *but* "Bush's guy."



### Law and Public Issues

By Ann Lousin

Ann M. Lousin has been on the faculty of The John Marshall Law School since 1975. She has also had a career in state government, including being a research assistant at the 1969-1970 constitutional convention and parliamentarian of the Illinois House of Representatives, 1973-1975.

Moreover, shouldn't the Chief Justice strike a blow for judicial independence by telling the president, "thank you for your invitation, but we'll hold the ceremony over here in our building"?

*Second, don't you think that the members of the Supreme Court should stay away from the State of the Union and other presidential speeches in the Capitol?*

Whenever the president speaks to the assembled houses of Congress, all the TV stations carry the event. Justice Antonin Scalia has said that he will no longer attend these speeches because he refuses to be a "political prop" for the president. I agree with him.

Presidential speeches to Congress are political theater; the president is really speaking to the American people and the world, not just to Congress. He presents his programs and ideas, and, at appropriate points, the members of Congress applaud and cheer. *I love it!* (Confession: I helped orchestrate gubernatorial appearances before the Illinois General Assembly when I was parliamentarian of the House in the 1970s and can recite the skeletal program by heart.)

There's a role for politics, but it's in the two "political branches," the executive and legislative branches. If the federal judges and especially the Supreme Court truly value judicial independence and an "unpolitical" judiciary, they should stay away from these purely political events. It's unnerving to watch justices in their robes applauding a president's speech.

I do not include the presidential inauguration in this ban. That happy occasion every four years is, as President John F. Kennedy said, "not a victory of party, but a celebration of freedom." Besides, the Chief Justice and one other

justice have to be there to swear in the new president and vice-president. There the justices are not "political props."

*Third, don't you think that the Supreme Court could be more transparent and accountable, specifically televise its oral arguments and communicate with the public better?*

Justice David H. Souter famously said that the day television cameras rolled into the Supreme Court, they would "roll in over [his] dead body." I understood his objection. The broadcasts of several criminal trials, notably O.J. Simpson's, were pure entertainment and did not enhance judicial transparency. However, those were trials, not appellate arguments, which we lawyers know are rarely "theatrical" and certainly not "entertaining."

When Souter was a New Hampshire Supreme Court justice, he had a bad experience with TV stations, which taped part of the oral arguments and then played snippets on the evening news. He said he was always aware of the cameras and that their presence affected his questioning of counsel.

That's understandable. However, the United States Supreme Court already audiotapes all oral arguments. Surely the Court could install a small camera in the wall opposite the bench and have the camera videotape the entire oral argument unobtrusively. Thanks to modern technology, the court could then post the videotape on the Supreme Court's Web site by that evening. Both the TV stations and those of us who want to watch oral arguments could access the Web site.

Speaking of the Web site, it strikes me as not user-friendly. Of course, I am not much more of a technophile than Souter; but people who visit the site regularly tell me it is not up to par technologically. Why not? Computers are the best way to communicate with the American public and thus to show transparency and accountability.

However, the senators didn't ask these three questions, which Sotomayor could have answered. If she had refused to answer, she would have looked coy. If she had said, "I haven't thought about that," she would have signaled that she hadn't thought much about issues of judicial independence, transparency, and accountability.

I think she would have answered those questions. And both the senators and the American people would have learned so much more about our forthcoming "Justice Sotomayor."