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May 28, 2009

Obama, Sotomayor, Ricci and White Male Privilege

By **David Paul Kuhn**

It is now asked whether Sonia Sotomayor has empathy for Frank Ricci.

It's a question larger than the first Latina nominated to the Supreme Court, larger than the first black president who selected her and larger than the case before the high court of a firefighter who did not get a promotion because he was white and male.

Three personal narratives interlocked as Obama nominated Judge Sotomayor on Tuesday. Sotomayor, if confirmed, would be the first Latina and only the third woman of the 111 justices to serve on the high court.

Sotomayor is a legal heavyweight. But she was also chosen, in part, because of her color and gender.

In an odd twist of fate, the first Latina nominee now finds herself cast not as the discriminated but the discriminator.

Sotomayor sits on the appellate court that decided against Frank Ricci, one of the more significant affirmative action cases before the Supreme Court in decades. The case evokes issues of discrimination. It highlights whether we can see white men as victims, a half-century after affirmative action was first implemented.

It was Obama who emphasized empathy as he discussed the makeup of his ideal Supreme Court nominee. And it was also Obama, in his acclaimed race speech during the presidential campaign, who noted that when whites hear "that an African-American is getting an advantage in landing a good job or a spot in a good college because of an injustice that they themselves never committed ... resentment builds over time."

That resentment is captured by the Ricci case. Ricci has brought affirmative action back into the political debate at a time of towering firsts. It's these same firsts that bring culturally uncomfortable questions forward of affirmative action's role in the era of Obama.

In the near term, however, Sotomayor is compelled to reckon with the issue. Obama once said, in explaining his opposition to Chief Justice John Roberts, that he had no issue with Roberts' rulings on 95 percent of cases but "what matters on the Supreme Court is those 5 percent of cases that are truly difficult."

A few cases can consume the public debate over high court nominees. So it is with Sotomayor in the case of Frank Ricci, a story that has provoked deeper questions of race and how far we have come.

The Ricci Case

In 2003, the New Haven fire department had several vacancies for new lieutenants and captains. Candidates for promotion had to take a written and oral test. Candidates had three months to prepare. Ricci gave up a second job to study. Because he is dyslexic, Ricci paid an acquaintance more than \$1,000 to read textbooks onto audiotapes. He studied 8 to 13 hours a day. And he succeeded. Ricci's exam ranked sixth among the 77 candidates who took the test.

But New Haven's civil service board ruled that not enough minorities earned a qualifying score. The city is more than a third black. None of the 19 African-American firefighters who took the exam earned a sufficient score. Only two of 29 Hispanics earned a qualifying score. The city tossed out the exam. No promotions were given. Ricci and 17 other white firefighters, including one Hispanic, sued New Haven for discrimination.

In 2006, a Federal District Court ruled that the city had not discriminated against the white

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firefighters. Judge Janet Bond Arterton argued that since "the result was the same for all because the test results were discarded and nobody was promoted," no harm was done.

But in reality, the decision meant that Ricci and other qualified candidates were denied promotions because of the color of their skin. This is the essence of discrimination. The exclusion of a person from earned advancement because of his or her race. The Ricci case exemplifies decades of faulty policy that mistook equal opportunity for equal outcome.

When the case came before the three-judge panel of the New York federal appeals court, Arterton's ruling was upheld in an unsigned and, as the New York Times described it, "unusually terse decision." One of the judges who upheld the ruling was Sotomayor.

Judge Jose Cabranes' dissenting opinion noted that the ruling "lacks a clear statement of either the claims raised by the plaintiffs or the issues on appeal" and "contains no reference whatsoever to the constitutional claims at the core of this case," concluding that the "perfunctory" actions of the majority in their decision "rests uneasily with the weighty issues presented by this appeal."

As Slate's Emily Bazelon wrote, "If Sotomayor and her colleagues were trying to shield the case from Supreme Court review, her punt had the opposite effect. It drew Cabranes' ire, and he hung a big red flag on the case, which the Supreme Court grabbed."

In April, the Supreme Court took up the case in oral argument. The ruling is expected in June. Most legal scholars expect Ricci to prevail. But the debate over affirmative action will continue.

Discrimination against white males, termed "positive discrimination," is at the essence of affirmative action law and policy.

Affirmative action made sense at its inception. Rampant discrimination against minorities and women only began to subside in the 1960s. Much, though not all, has changed. Now it comes to us to decide whether affirmative action should change as well.

Ricci and White Male Privilege

The ebb of white male privilege is seen in education where women make up the large majority of college students (even when limited to whites in the middle class) to boys, who are for example twice as likely to be identified as having a learning disability, like Ricci.

The ebb is seen in earnings. Working class women still make less than working class men. But between 1979 and 2003, those women's earnings advanced 12 percent while men's earnings declined 8 percent. White men's earnings have generally stagnated since the early 1970s. Amid this financial crisis, when adjusted for inflation, white men generally make less in 2009 than they did in 1969.

It's seen in the financial crisis. In the past year, according to Bureau of Labor statistics, white men's unemployment rate increased 96 percent. That's only a hair more than black men. But white men's unemployment rate increased about a third more than the rate of white women and about twice the rate of black women.

Black men still have far and away the highest unemployment rate of the four groups. But as of April, white men's unemployment rate was 9 percent. White women's was 6.9.

White men are still overwhelmingly represented in positions of power. In 2007, about three in four members of congress were white males. But that is the same ratio as white men's sacrifice on another end of government. In global warfare since September 11, 2001, about three in four deaths have also been white males.

The Supreme Court, perhaps more than any other institution, is the picture of white male privilege. Less noticed is the pedigree of these white men. They are generally the American ruling class.

About three in four of high court justices have been Protestant, more have been Anglo Saxon and at minimum they are often from economically comfortable backgrounds, according to Supreme Court scholar Henry Abraham. That may understate the point. By the 1970s, another scholar found that about three-fifths of Supreme Court justices "personally knew the president who nominated them."

This is not Ricci's background. As Ricci told one reporter, "When we were kids, we could either be a fireman, or a fireman, or a fireman."

Ricci personalizes a policy that has been easily digested because it often involves statistics and not people. Now Obama and Democrats, as much as the high court, face the people harmed by that policy.

It was Obama who said in November 2007 that the Supreme Court should, "protect people who

may be vulnerable in the political process" and "those who don't have a lot of clout."

Ricci personifies the vast majority of middle and working class white men who lack clout. This is at the heart of the brooding angst over affirmative action. The sense of dissatisfaction among these men is less that they were being blamed for past white men's ills, as Obama noted in his race speech, than the practical impact of opportunity lost.

Affirmative action skewed two generations of white men's sense of fairness. They came to believe that their gender and race worked against them. To many of these men affirmative action meant a domino effect of events hindering their ability to get into the right school, get the right job, earn more money and even, in their view, win a spouse. This is precisely how minorities often feel.

But liberals, and to an extent society at large, have long failed to sympathize with the white men who share this sense of struggle with the Sotomayors of the country.

Affirmative Action's Return to Politics

White men, more than white women, moved to Democrats between 2004 and 2008. The reason for the significant white male shift (see this [analysis of the 2008 race](#)) was largely due to the financial crisis. That movement was a start in narrowing the white male gap--a long-strained relationship between most white men and Democrats that was the focus of my 2007 book, "[The Neglected Voter: White Men and the Democratic Dilemma](#)."

Obama will need more white men and women if he is to achieve his greater electoral aim ahead, a game-changing 2012 landslide in the tradition of 1984. Obama's dominance of the minority vote means mostly whites are left over to be won over.

This is the reason the Ricci case not only carries so much weight in law and culture but also potentially in politics.

Polls show support for affirmative action tracks with those who benefit from the policy. For example, white women overwhelmingly support affirmative action when it involves women. But when it involves only minorities, white women generally agree with white men. A majority of whites today oppose strict affirmative action, such as when it involves quotas or dictates preferences. But a majority of whites support a broader policy that includes race as a criterion to correct past discrimination. That support nears 90 percent, when affirmative action regards economic background rather than race or gender.

Discrimination today exists in a milder form than earlier generations were forced to experience. The question is whether affirmative action should evolve with society and focus on class rather than race or gender? That policy would still disproportionately aid minorities.

But there is also the cultural debate, one compounded by not only Sotomayor's law but also her words.

In a now widely reported 2001 speech at the University of California, Berkeley, Sotomayor responded to Sandra Day O'Connor's oft-quoted statement that a wise old man and a wise old woman would reach similar decisions.

"I would hope 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," Sotomayor said.

It's easy to imagine that liberals would have declared political war if Roberts had said a similar line, though alternating the words "white male" and "Latina woman."

We know what Sotomayor likely meant, that a woman justice sometimes better understands a female plaintiff. Yet even in such context, the political left would not have easily forgiven a similar comment by Roberts.

That's the bigger issue afoot. It is still acceptable for society to discriminate against white males and to speak derisively of them. At what point will this change?

As Sotomayor stood beside the president Tuesday, she said, "I strive never to forget the real-world consequences of my decisions on individuals, businesses and government."

But Sotomayor demonstrated no empathy for the "real-world consequences" of affirmative action on Ricci. In the months and years ahead, the Supreme Court, this president and Sotomayor will have to consider whether they should.

David Paul Kuhn is the Chief Political Correspondent for RealClearPolitics and the author of [The Neglected Voter](#). He can be reached at david@realclearpolitics.com and found on [Twitter](#) and [RSS](#)