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Sotomayor And Roger Traynor: The Job Interviews

Law360, New York (September 24, 2009) -- All the focus on the speeches and writings of Supreme Court Justice Sonia Sotomayor before her confirmation got me thinking. What would we see if we carefully scrutinized the speeches and writings of the California Supreme Court's former Chief Justice, Roger Traynor, a great 20th century appellate judge who lived from 1900 to 1983 and served on the California Supreme Court for nearly 30 years?

Traynor was universally revered for the breadth of his interests and his long range impact on the law. I wonder, did he ever say anything unguarded about gun control, or civil rights, or federal government power?

Well, guess what? I found a fully developed answer to my question in "The Two Voices of Roger Traynor," published in 1983 and written by ... me! (Check it out: *The American Journal of Legal History*, July 1983, pp. 269-301, 126 footnotes!)

And it turns out, Roger Traynor was quite chatty and thoughtful off the bench, qualities that other judges admired:

"His evocative ideas, set forth not only in judicial opinions, but in law review articles and oral analysis, are listened to with rapt attention by his fellow judges," wrote a fellow judge, Robert A. Leflar of Arkansas.

My study of Roger Traynor's writings revealed that he had two distinct modes that I called "The Voice of the Justice" and "The Voice of the Man."

As to the Voice of the Justice, Traynor himself eloquently described the process of appellate judging, noting that in a final opinion a judge's "individuality, compressed by accommodation to the views of colleagues and by the very traditions and disciplines of his office, now impresses its life into the inert materials of the law."

There are 892 reported opinions and the body of work has been widely praised, centering on Traynor's contributions to substantive areas of the law: contracts, conflicts, family law and especially torts.

A typical comment from the scholarly perspective shows the level of admiration Traynor's opinions received:

"His opinions are concise, he raises all the issues, his writing is lucid and to the point. His citations are knowledgeable, economical and literate — he has, I think, the best taste in legal citation of any contemporary judge," wrote Professor Harry Kalven.

But for many citizens (and senators, apparently), the themes and styles of a judge's voice when speaking without the special constraints of the appellate judge's job are the most interesting.

What I call "The Voice of the Man," which emerges in Traynor's extrajudicial writings, does not disappoint. I found the essays to be a treasure trove, literally a journey through the 20th century, guided by a thinker who is poetic, analytical and, yes, opinionated.

Roger Traynor was born in 1900 in Park City, Utah and tells us that his childhood included "treks in the shadowed light of mountain trails or across plains running clear to the sky." The first American landscapes he saw had no automobiles and his account of the 1920s betrays a skeptical attitude toward cars:

"We who witnessed the transition soon realized that the invention of the wheel had come full circle. Henceforth, human beings would conform their lives to the locomobiles they had created for better or for worse, to have and to hold, until death did them part. Courts as well as roads would be clogged with endless traffic problems."

Oops. That remark could get him in trouble with the automobile industry.

And there are many indicators about Traynor's jaundiced views on military power and his steadfast position on the futility of violence. At the age of 18, he served in the U.S. Army as a private.

His later comments suggest the effect of the 1918-19 wartime experience on his developing philosophy:

"This much we know, that we have left the daisy fields, the silent plains of the nineteenth century ... The overlapping devastation of World War I and World War II compelled us to realize that each of us has a direct responsibility for the general welfare."

In an essay written many years later, he reports a conversation in the 1940s between his son Stephen and a visiting Italian historian, who advised the boy, "Don't ever give

up, when you have a good cause. But always your weapon must be the pen, not the sword. The sword is not the weapon of a brave man.”

That essay might be OK, but what about these remarks from an essay written in 1958: He seems to be disapproving of soldiers who “drill themselves into stupefaction to achieve agility in crawling under barbed wire or racing to the moon.” Another problem here — does he have a bad attitude toward NASA?

As far as the uses of federal government power, Traynor unabashedly and positively describes what he saw as increasingly necessary national action in the field of tax, when he began teaching in 1929, and then to work in the California and U.S. government agencies:

“The Great Depression was beginning to cast its long shadows over the land. We who had jobs did not take our luck for granted. The decade of the thirties scarred even the lucky ones with memories of economic blight and its victims ... It took the thirties, depressing the human spirit as much as the standard of living, to motivate young lawyers to serve in rudimentary government agencies entrusted to alleviate economic disaster.”

In the 1950s, he spoke out against the loyalty oaths and expressed concern about the postwar narrowing of freedom in the U.S. He said there was an “unhealthy preoccupation with unclear future dangers.”

And then he actually flat out said, in 1958, that the U.S. Supreme Court made a wrong decision regarding the camps for Americans of Japanese ancestry:

“There have been few more grievous examples of military power over civilians than the orders approved in *Korematsu v. U.S.* [323 U.S. 214 (1944)] ... [M]any thoughtful men deplore the precedent this case sets as to what constitutes rational basis.” That bold remark could be a real problem.

In the 1960s, when his alma mater, the University of California at Berkeley, became a center of campus radicalism, he was shaken and discouraged most of all by the violent nature of the debate and the burning of buildings on campus. He began to rebuild his essential optimism as Berkeley calmed down:

“Most of the young who turned on for awhile to the hard sellers of violence are now turning off, aghast at the consequences of violence. The times they are again changing, perhaps enough to insure that people of all ages will make common cause against violence as a way of life.”

As a scholar and a citizen, he constantly worked to clarify what he saw as the universal “civil obligations that attend universal civil rights.” What does this suggest about his views on gay marriage?

There is a recurring concern expressed in his writings — that the government treat the governed fairly and that the law develop to respond to the needs of society. He consistently worked to take account of the past and to look toward the future. Even so, he might not have been able to succeed in the interview process that is faced by federal appellate judge candidates these days.

A passage from one of his late meditative essays, written after retirement, in which he looked out on a varied crowd in New York, could be read as a joyful and hopeful congratulatory wish to Justice Sonia Sotomayor and the country she will serve as she embarks on her new job:

“Young and old shared immortality, for together they glimpsed centuries beyond their own lives, the twenty-first century that some would live to see and the nineteenth century that a few had known. Perhaps the law books would provide needed paragraph transitions for the rough course of events from one unruly generation to the next.”

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