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Maria Echaveste

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Brown to Black: The Politics of Judicial Appointments for Latinos

Maria Echaveste[†]

I am honored that my White House perspective on judicial appointments was deemed interesting enough to be included in the *Berkeley La Raza Law Journal* commemorating the October 2001 Symposium on Latino/a representation in the judiciary. Of course, it is one thing to speak frankly into the ether, and a totally different matter to have those remarks become a permanent record of one's views. Nonetheless, there are still too few Latinos in critical positions of government not to share my observations of the federal judicial appointments process.

My observations are three: First, there are inherent barriers to Latino judicial appointments based on who gets to make the decision about who the nominee will be. Put another way, Latinos may be a growing political force, but it is still a white boys/girls network (for example, in California we had two Democratic female senators, yet they still argued that they had difficulty identifying qualified Latino candidates). Second, sometimes the lack of unity among Hispanics functions to forestall the nomination of a qualified Latino/a. Lastly, but of course not least, is the raw political nature of judicial appointments; having the necessary qualifications is just not enough most of the time.

One story that illustrates at least two of the foregoing three points is the painful story of the ultimately failed effort to appoint the first Latina judge for the District Court of Colorado – Christine Arguello. First, it is important to know that President Clinton had nominated a close friend and early campaign supporter, Colorado attorney, Jim Lyons. That nomination languished for at least two years and was going nowhere fast. Lyons is a good example that getting on the radar screen for a judicial appointment by having the educational and practical experience, having raised money, having been an early supporter and having a close personal relationship with the President sometimes backfires; the two Republican senators from Colorado, as well as then majority leader Trent Lott and chair of the judiciary committee Orrin Hatch, were not inclined to reward one of President Clinton's closest allies.¹

[†] Maria Echaveste, an attorney and consultant, is currently based in Washington, D.C. She was previously Assistant to the President and Deputy Chief of Staff for President Clinton, a position she held from May 1998 through January 2001. As Deputy Chief of Staff, she managed policy initiatives and developed legislative and communications strategies for the White House. She received her J.D. from Boalt Hall, at the University of California, in 1980.

1. Raising money or being supported by someone who has raised a lot of money for a candidate, or having worked on a campaign, are frequently important factors in selecting a nominee. Needless to say, Latinos are not yet significant political players in that arena; so Latinos get a chance to compete in the selection process almost solely because a President or other key political leaders feel it is important to have diversity on the bench for electoral political reasons. Miguel Estrada, nominated by President Bush for the D.C. Court of Appeals, is a perfect example. While Estrada is a member of the

The clock kept ticking as Mr. Lyons sought to build support for his nomination, which ultimately failed. Fast forward to the summer of 1999. Congresswoman Diane DeGette, only in her second term, was from a Denver district that had a significant Latino population and she knew there was the potential for a Latino challenger in the primary. As there were no democratic senators from Colorado,² DeGette decided to form a committee with Mark Udall, another democratic congressman from southern Colorado, also in his second term, to identify possible candidates for this district court vacancy, not necessarily Hispanic. White House Counsel's office advised against this, arguing that such a committee and such a process would be unworkable and uncontrollable. It soon became apparent that DeGette was more concerned about thwarting the plans of state Attorney General Ken Salazar, the highest ranking Latino statewide elected official and a leader in the Colorado Hispanic community. Salazar was very focused on getting a Latino/a on the bench because there had never been one in the history of Colorado. He reasoned that a Latino/a judge would be a good thing politically for democrats and for the Hispanic community in Colorado. Salazar and other key Hispanic leaders agreed upon Christine Arguello. She had the right credentials, with both hands-on lawyering experience and teaching on her resume. DeGette, however, would not support Arguello, arguing that Arguello did not have sufficient trial experience. The truth was that DeGette did not want to support someone that Salazar wanted because she viewed that as a "win" for Salazar. She feared that at some point Salazar or someone he supported would run against DeGette and take credit for a Hispanic appointment to the federal bench.

Enter the Clinton White House. The Clinton White House spent over a year and a half trying to work something out with DeGette, but did not push her until time had almost run out. During that same time period, the Clinton Administration was trying to pass a highly controversial new trade status for China. DeGette was a swing vote on this issue and, when pushed, she referenced the district court vacancy.³ As a result, the Clinton Administration stepped carefully around her wishes and desires, trying to work with her in some way and trying to avoid a nasty public dispute with her. Then ensued months of discussions, phone calls, and negotiations involving DeGette, Udall, White House counsel, chief of staff's office and other key aides. Finally, as we were running out of time, in late summer 2000, the White House decided to support Arguello (and we heard loudly and clearly from DeGette that she was unhappy), but by then it was too late to actually get a confirmation hearing or a vote.

Federalist Society and thus, ideologically in tune with the Republican administration, the decisive factor for the White House was that he is Hispanic. President Bush is bound and determined to have a number of Latinos to choose from should a U.S. Supreme Court vacancy occur, and Miguel Estrada looks good on paper. This might be painful for Estrada since he is against affirmative action, but that is a subject for another article.

2. Normally for district court, the senator or senators from the President's party in each state has the responsibility for naming potential nominees; in the absence of a senator from the President's party, the process is more diffuse and informal.

3. Although it is hard to believe that a federal judicial appointment could have been held hostage for a vote on China, this type of horse trading regularly occurs in politics.

A second story illustrates the situation of Latinos sabotaging their own. A vacancy existed for years in the District Court of Puerto Rico and, as those familiar with Puerto Rican politics know, political control regularly swings from the pro-statehood party to the commonwealth party.⁴ As the two parties could not agree on a candidate, the district court vacancy languished for eight years. The Clinton White House felt torn between both sides since the commonwealthers had historically identified with the Democratic Party until Governor Pedro Rosello, a pro-statehood but strong Democrat was elected in 1992. The Clinton White House had very strong relationships with Rosello, but one of the strongest fundraisers in the Democratic Party was Miguel Lausell, a commonwealther. For both terms, the Clinton Administration tried to mediate a compromise and failed, leaving another district judgeship to be filled by the Bush White House.

Lastly, there is Richard Paez, a new member of the Ninth Circuit after a long and bitter battle, and Enrique Moreno, our failed nominee to the Fifth Circuit Court of Appeals. In Clinton's first term, Judge Paez had been elevated from state court to the Central District Court of California. When the opportunity came to elevate him from the Central District Court of California to the Ninth Circuit Court of Appeals, the Latino leadership was unanimous in its support, even though some on the left believed him to be too "law and order." When the right took aim at Paez, mischaracterizing his judicial philosophy and his judicial record, leaders in the Hispanic community lobbied intensely to protect his nomination. The critics painted Paez with an activist, liberal brush, forced him to wait for four years for a confirmation vote (longer than anyone has ever had to wait in the history of our country), and managed to divert energy from Hispanic leaders by asking them to identify other candidates for other judicial vacancies.

Ultimately, the Paez nomination and all the machinations and incredible effort both in and outside the White House to get Paez a vote on the Senate floor forced everyone to expend tremendous amounts of energy. The pressure that Hispanic organizations put on the White House was intense, as if the President could force Senators Hatch and Lott to schedule a vote. We received constant phone calls from key Hispanic leaders contending that President Clinton was not trying hard enough. Perhaps there was need for some of the calls because President Clinton stepped gingerly around drawing a line in the sand for his judicial nominees for fear that such a move would completely shut down the judicial confirmation process. Latino leaders expended so much energy on just this one nomination that they did not give the necessary attention to efforts to identify other qualified Hispanics for the bench. Enrique Moreno, a noted and well-respected lawyer from El Paso, Texas, did not come to the attention of the White House through any Latino organization. Rather, Moreno came to the attention of the White House Counsel's office through a connection to a former roommate of someone in the Chief of Staff's office.

4. If you don't know the difference between the statehood party and the commonwealth party, consider yourself lucky to have not been ensnared in the sticky, messy politics of Puerto Rico. The politics in Puerto Rico are intense – so intense that on election day over 85% of the electorate turn out to vote; a turnout rate not seen on the mainland.

Both the Paez and Moreno nominations are also good examples of the failure of the Hispanic community to make members of Congress feel the pain for not supporting Hispanic judicial nominees. In the Paez case, by 1999, the Clinton White House understood the importance of Hispanic voters and the need to be seen as fighting for Latinos, so it escalated the fight for Paez. The President spoke out in various settings and worked with Hispanic organizations to highlight the injustice of failing to vote on his nomination. But Hispanics have not yet learned how to play political hardball. In both the Paez and Moreno cases, carefully targeted pressure on Republicans running for the House of Representatives could have resulted in quicker action on Paez and action on Moreno. It is not rocket science to review a political map and to target key Republican members of Congress so that they feel the heat enough to go to their leadership and demand relief. Yet Hispanic organizations and leaders failed to devise and implement such a strategy.

The foregoing reflections on past judicial nomination battles reveal some hard lessons. First, Latinos are not in charge of the decision making apparatus as to who gets selected or indeed even who gets considered. Lack of fundraising, campaign experience, relationship to a candidate and even active participation in mainstream bar associations, all contribute to the dearth of names on a preliminary list for possible selection. Second, sometimes Latinos fail to unify around a candidate, a failure which becomes a convenient excuse for decision makers to not select a Hispanic. Third, even when Latinos have organized themselves to support a candidate, their efforts may fail because of raw political calculations on unrelated political issues. Most importantly, Latinos still do not have sufficient political strength to get attention from the decision makers in order to achieve their desired goal. In those few places where they have political strength, they do not know how to exercise it in the raw, rough and tough manner needed to cause change. Latinos are getting nominated and confirmed because of the commitment of decision makers to diversity, a commitment which is often sacrificed to other political objectives.