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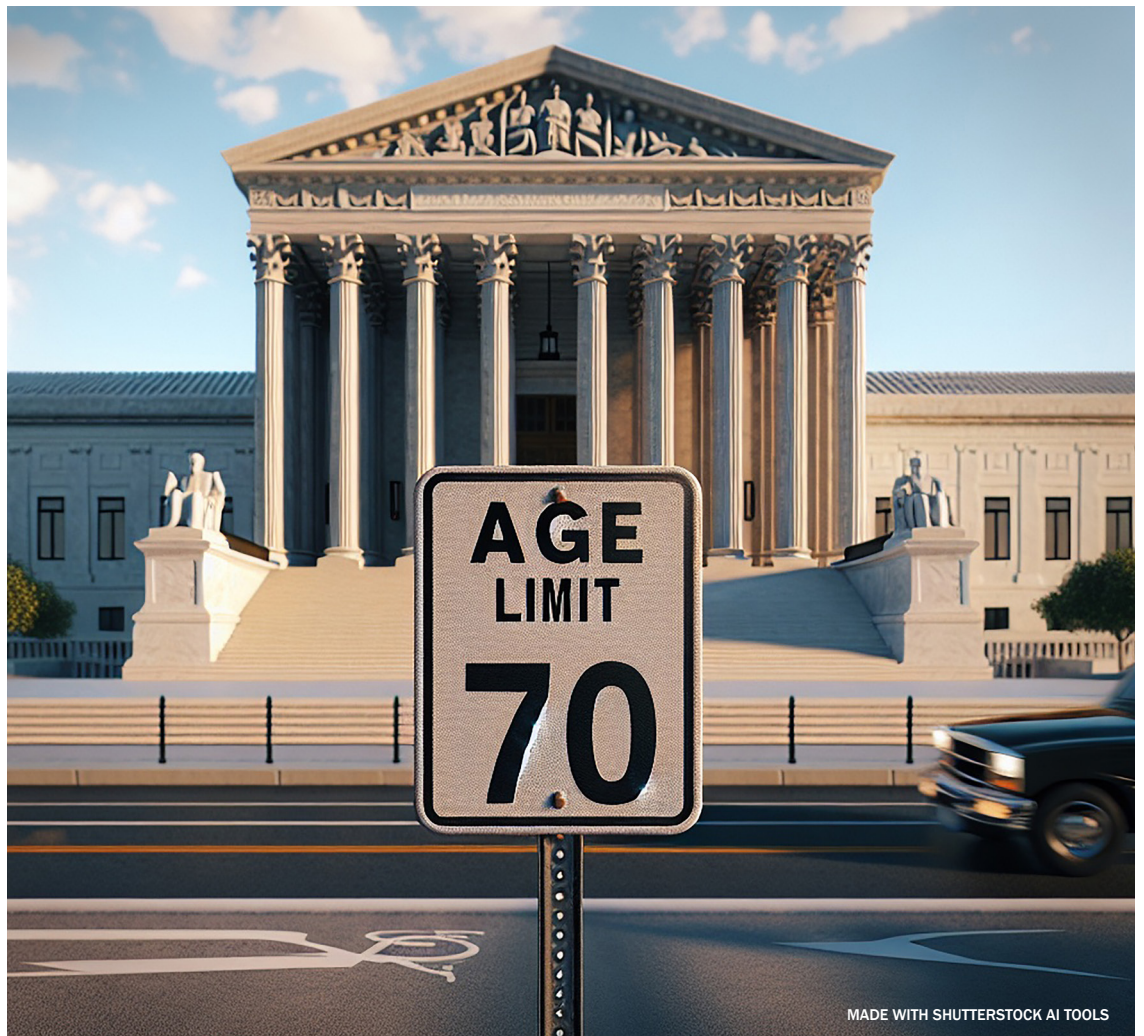
Sotomayor's retirement debate sparks discussion on sexism, ageism, and ableism

By Itak Moradi

Over the last several months, U.S. Supreme Court Justice Sonia Sotomayor, who turns 70 this month and has underlying health conditions, has faced growing calls to retire. This has sparked a debate about whether these requests are sexist, ageist or ableist, or just practical. It also begs the question of how to address a more fundamental anxiety about reforming the bench altogether.

The liberal commentators and Democrats leading the charge for her retirement cite one reason. If Sotomayor becomes unfit to serve before another Democratic president is elected, the current SCOTUS 6-3 conservative majority will likely grow to an unprecedented 7-2. With Biden's current election polling and the fear that Democrats may give up an already-slim control of the Senate, they believe the party should heed lessons learned from Justice Ruth Bader Ginsburg's decision to not resign when President Obama was in office. After rejecting years of calls for her retirement, Ginsburg passed in September 2020. Donald Trump, in just eight days, appointed his third nominee to the Court, Amy Coney Barrett. Barrett cast a deciding vote to overturn *Roe v. Wade* less than two years later, and there has been a string of debilitating civil rights rulings since.

To the question of sexism at play, some maintain that a man in the same



position would never be asked to retire under similar circumstances, that women face unrealistic expectations to act for the greater good at personal expense, and that some-

one who has accomplished such rank should be able to live out the achievement—a lifetime appointment—with autonomy. This is an understandable reaction for a simple rea-

son: Women are pressured to act in professional settings in ways that men are not. It is also, at least partly, an inaccurate subversion of the issue. Consider the aggressive

“Breyer, retire!” campaign in 2022 that resulted in Justice Stephen Breyer’s retirement (and in Justice Ketanji Brown-Jackson’s appointment as replacement). To be clear, Breyer was fourteen years older than Sotomayor. And take what you will from the fact that it is largely men who have written think pieces calling for her retirement and largely women who come to her defense.

Nevertheless, both women and men, both conservatives and liberals, have chosen to retire so that the sitting president could pick their successor. More retirements have been strategic than not. If we accept the underlying premise that the call to step down rests on political strategy, then we can understand why it’s happening to someone in Sotomayor’s circumstances, and not someone like Justice Clarence Thomas.

Some believe it is ageist to call for retirement when the average retiring age for justices is in the mid-70s. Others argue that 69 is still beyond conventional retirement age, and that Sotomayor is the eldest of the three liberal justices. (The Ginsburg moment was certainly different in this respect. She was more than a decade older than Sotomayor, had served on the bench much longer, and was battling a second bout of cancer to which she ultimately succumbed.)

There are the takes that the request is ableist: that championing true bodily autonomy includes believing that people who live with underlying health conditions know their health and the limits thereof best, that such decisions are and should be inherently personal, and that type 1 diabetics don’t necessarily lead much shorter lives than the average person without the disease. Many point out that the public does not have the information necessary about Sotomayor’s

health to even have discussions about it meaningfully. But of this position, and against the backdrop of the stakes that Democrats face confronting it, journalist Josh Barro wrote for *The Atlantic* that the “cowardice in speaking up about Sotomayor – a diabetic who has in some instances traveled with a medic – is part of a broader insanity in the way the Democratic party thinks about diversity and representation.” (It is unconfirmed whether Sotomayor traveled with a medic or just with medical equipment, something type 1 diabetics of any age need and do regularly.)

Then there are the serial statisticians. They posit the electoral polls are boding poorly enough for Democrats that even if the party retains the presidency, they’ll lose the Senate, Sotomayor’s retirement window will shrink, and political calculation here leaves only one meaningful choice, irrespective of anyone’s belief that she fare years to come in good health. This frantic number-crunching has only intensified after the controversy of Justice Antonin Scalia’s replacement, when Republican Senators refused to even consider Obama’s nominee for ten months so that Trump could appoint Justice Neil Gorsuch.

Much has been – and will be – written about Justice Sotomayor. Some call her the conscience of the Supreme Court. She is the first Latina appointment to the bench. Her dissents often go viral for being impassioned, progressive, and courageous. She is certainly a no brainer for this *Daily Journal* issue highlighting trends for women and for their achievements in our industry.

Her impressive record on the Court feels even weightier against two observations. First is the increasing incidents of misconduct and breaches of public trust by the

Justices—see, e.g., Thomas accepting millions of dollars’ worth of gifts and travel from a conservative billionaire, and Alito flying politically charged flags at his residence. These are allegations of unethical, possibly illegal behavior, brought against people whom we collectively mandate to act in furtherance of the public interest. In that context, the retirement of a trailblazing justice with a forceful and respected critique, who has not betrayed the public’s trust but rather imbues it, would be a big loss. Second, we are in a period of extreme congressional dysfunction. SCOTUS is issuing decisions on abortion, gun laws, LGBTQ+ rights, student loans, and voting rights in a time when strong public sentiment on these issues is not translating into legislative action. In that sense, SCOTUS—a body completely un beholden to voters – has stepped into the vacuum left by legislators and is unnervingly operating as a more powerful branch of government.

There is no clear path to a more even make-up of the bench in the foreseeable future. Indeed, a 2023 University of Chicago study found that liberals may not control the Supreme Court again until 2065. That means we should be asking different questions. It’s easy to opine on the individual goodness of a person, on a reactionary strategy when one of two choices are before us, or on the sociopolitical implications of a public dialogue. But we have now returned to this dialogue at least four times in a short period – Ginsburg, Breyer, and Kennedy before Sotomayor – and when taken to its logical end, the conversation often leads us to face the same existential questions about our country:

Why is it that the mortality of nine people can determine the future

and fate of our democracy? Why do we insist that this process and these appointments are explicitly non-political, when the last several decades have repeatedly indicated otherwise?

Does it make sense to be one of only two countries in the entire world with no term limits and no retirement age for the highest position in the land? (Aruba is the other.)

How much does our confidence in this institution need to wane before we finally enact structural, democratically imposed change? Instead of experiencing this periodic – and more frequent – dread, we should focus on the roadblocks in the way of proceeding with at least one of the solutions we have already identified: expanding the court, enacting term limits, or imposing a retirement age.

Today, 70% of the public disapproves of the Supreme Court. Trust in the institution is at an all-time low. Questioning whether it is ageist, sexist, or anything else to ask anyone with a lifetime appointment to retire seems like avoiding bigger questions about the stability of our democratic institutions.

Itak Moradi is an associate at Joseph Saveri Law Firm, LLP.

