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Equal justice issues merit attention

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July 13, 2009

During her confirmation hearing, Judge Sonia Sotomayor will be asked about all the hot-button issues: her views on abortion, the death penalty, the Second Amendment, affirmative action and probably same-sex marriage. If the past is any guide, the issue of meaningful access to the courts for those who are too poor to afford counsel will not be mentioned.

For most justices, the question never comes up when questioned by senators. During the confirmation hearing of Chief Justice John Roberts Jr., it was mentioned only once. In response to a question, he urged private lawyers to do more pro bono. Nothing was said about the obligation of the courts or government to ensure access to all.

The justice system is out of reach for millions of Americans. The barriers to access should be on the minds of every judge, especially those on the highest court in the land. More than 37 million people live below the federal poverty line, and millions more are too poor to afford a lawyer. Legal aid programs serve those living in poverty, but they are underfunded and cannot meet the need. Less than one-half of 1% of all money spent on lawyers is used for civil legal aid. As a result, more than 80% of the legal needs of people with low incomes are never met.

The consequences can be devastating. Courts are not designed for the unrepresented, and even a simple matter can be impossible to navigate without counsel. The unavailability of a lawyer may prevent a woman from leaving a violent relationship, leave a child without health care due to a Medicaid error, fail to save the home of a senior preyed upon by fraud or allow a family to become homeless when an eviction is preventable.

Local courts are overwhelmed. A majority of matters in state courts involve at least one party who does not have a lawyer. Lawyers appear in only a small number of complex cases — matters that no one who could afford counsel would ever address alone. In most child custody, eviction, foreclosure, unemployment-compensation and debt-collection cases, one or both parties appear on their own.

The burden of poverty and the resulting justice gap does not fall equally, but is borne disproportionately by children, women and people of color. While approximately 12% of the nation lives in poverty, more than one in five African-Americans or Latinos are poor. The picture is starker for female-headed households: 30% live in poverty. Families headed by African-American or Latino women are poor at a rate of nearly 40%. The inability to get a fair opportunity in legal proceedings is one factor that keeps families poor, promotes generational poverty and perpetuates inequality. Unequal justice is both a product and a cause of racial and gender inequality.

NOT JUST A LOCAL ISSUE

Even though the problem is most severe in local courts, it should still be of concern to the U.S. Supreme Court. Justice is different for those who are poor. As a consequence, the Court sits at the apex of a justice system that is corroding at the core. The question of equal justice finds its way to the Court from time to time. In the criminal context, the right to a lawyer has long been held essential. In *Gideon v. Wainwright*, the Court recognized the "obvious truth" that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."

Although the promise of *Gideon* is far from fulfilled, the Court may also face the question of whether civil litigants in

cases involving important rights should have a lawyer. The Court looked at the issue in 1981 in *Lassiter v. Dep't of Social Services* and found that the stakes in civil cases can be great and that the proceedings can "overwhelm" unrepresented litigants. The Court held that a lawyer should be provided in some cases, but left it to trial judges to decide on a case-by-case basis. That approach has not worked, and very few lawyers have been appointed.

Since the decision in *Lassiter*, the crisis in equal justice has deepened. The percentage of litigants without a lawyer has grown and the federal government has retreated from its commitment to fund legal aid. In 2006, the American Bar Association squarely confronted the crisis. By unanimous resolution, it urged governments to ensure that lawyers are provided to people who cannot afford counsel in "adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody." This resolution recognizes that the loss of a child or a home, the denial of health care or safety are interests of importance similar to the risk of incarceration, and that a poor person has no better chance of getting justice in these proceedings than in a criminal case without counsel.

It is time that this issue took center stage and joined the other issues of importance that will be part of the confirmation process. Sotomayor, and every federal court nominee that follows, should be asked where she stands on equal justice.

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