Sotomayor's record: A judicial pragmatist and defender of corporate interests

Don Knowland
17 July 2009

As a nominee to the US Supreme Court, Sonia Sotomayor is reliable defender of corporate interests, siding with big business, government authority and the police far more than with the poor, the arrested or the oppressed. With 17 years on the federal courts, the most of any Supreme Court nominee in more than half a century, she is anything but an unknown quantity.

In her five years as a federal district court trial judge, Sotomayor issued hundreds of written decisions. In 12 years on the appellate court, she has been the principal author of over 150 opinions. She joined in the majority opinion in over 350 cases.

A survey of her written decisions reveals a jurist firmly wedded to the bourgeois mainstream, particularly when business interests are at stake, and not given to sweeping formulations. The *New York Times* legal correspondent assigned to cover the Supreme Court wrote that Sotomayor's opinions "reveal no larger vision, seldom appeal to history and consistently avoid quotable language."

A Congressional Research Service analysis found that Sotomayor's rulings could not be easily categorized in ideological terms, and "showed an adherence to precedent, an emphasis on the facts of a case, and an avoidance of overstepping the court's judicial role."

According to one of Sotomayor's former law clerks, "She is a rule-bound pragmatist-very geared toward determining what the right answer is and what the law dictates..." Sotomayor herself has professed to follow a narrow "just the facts" approach to judicial decision-making, a style described by some as judicial minimalism.

However, when important issues arise that affect more fundamental interests of the ruling elite, such as national security matters or big economic questions, Sotomayor comes down invariably on the side of the establishment, at the expense of the majority of society.

A law-and-order judge

As with most former prosecutors, Sotomayor has a negative if not hostile view of the rights of those accused of crimes. Encomiums from her former associates at the Manhattan District Attorney's office and various New York and national police organizations were read into the record of her confirmation hearing.

According to Leroy Frazer Jr., first assistant district attorney in Manhattan and a former colleague of Sotomayor, she "has contributed greatly to law enforcement in New York" as a judge. John Siffert, an attorney who taught appellate advocacy with Sotomayor at New York University School of Law for ten years, confirms that she is loath to overturn criminal convictions. "She was not viewed as a pro-defense judge" while she sat as a trial judge, Siffert told the press.

One decision Sotomayor authored as an appellate judge upheld the use of evidence police seized mistakenly, thinking they had a warrant. The Supreme Court's five-justice conservative bloc came to the same conclusion this year, over the dissent of the court's four moderate justices. Jeffrey Fisher, a Stanford Law School professor who was on the losing side of the January Supreme Court decision, said Judge Sotomayor's ruling displayed her "willingness to give police the benefit of the doubt."

One case decided by Sotomayor as an appellate judge involved the timeliness of the *habeas corpus* petition filed by a prisoner convicted of murder and rape. Congress had only recently passed President Bill Clinton's Anti-Terrorism-Effective Death Penalty Act, which imposed a one-year time limit on such petitions. Confusion existed in the federal courts regarding how the new law would be applied to pending cases. Following the advice of a court clerk, the defendant's attorney mailed in rather than filed the appeal the day it was due.

Sotomayor and her colleagues on the case refused to consider the petition, ruling that it was untimely and that its lateness was not excusable. They also summarily brushed off the defendant's claim to innocence, even though guilt was based on a confession the police coerced when the defendant was 17. The defendant then spent six more years in jail before DNA testing conclusively established his innocence.

Capital and labor

While frequently dissenting against reactionary rulings on issues

involving democratic rights, the four-justice moderate bloc on the Supreme Court has increasingly tended to join the court's right wing in favoring big business over workers and consumers where their economic interests are explicitly counterposed, as in cases involving punitive damage awards against giant corporations.

Sotomayor is unlikely to buck that trend. She currently sits in the Second Circuit Court of Appeals, which hears the most important appeals affecting Wall Street and the financial industry. That court's 2006 decision strongly favored Wall Street in a group of cases involving thousands of investors suing dozens of the largest banks and investment houses, including Merrill Lynch, Goldman Sachs, Credit Suisse, Morgan Stanley, JPMorgan Chase, Deutsche Bank and the now defunct Bear Stearns and Lehman Brothers. The plaintiffs charged massive fraud involving manipulation of the market for initial public offerings of company shares. Such schemes played a major role in inflating the dot.com and telecom bubbles.

As a practical matter, the plaintiffs in the case could proceed only if they could band together for class actions. The appellate ruling dismissed the cases on the basis that questions as to what information and assurances individual plaintiffs relied on in purchasing shares precluded finding sufficient commonality to permit the cases to proceed on a class action basis. This amounted to an extremely strained reading of the rules regarding class action suits and reduced the value of the plaintiffs' recovery by many billions of dollars.

Sotomayor's most well known decision as a district court judge involved her issuing an injunction in 1995 against baseball team owners during the longest strike in baseball history, which followed an owner lock-out of players. Sotomayor ruled that the National Relations Labor Board had cause to believe that baseball owners committed unfair labor practices by eliminating free agency and salary arbitration provisions of the expired collective bargaining agreement. She ordered the owners to bargain in good faith on those issues. The strike then ended.

As an appellate judge, Sotomayor has favored working class plaintiffs mainly in disability cases. In one case, Sotomayor ruled that New York did not sufficiently accommodate a dyslexic applicant taking the bar examination.

Sotomayor dissented in a 2003 case brought by the federal Equal Opportunity Employment Commission against a major trucking company relating to discrimination against drivers who took medication that the company believed impaired driving. Federal regulations provide that discrimination occurs if a company perceives that a worker or workers have an impairment as to a "class of jobs" compared to average persons of comparable skill, as opposed to single jobs. The majority dismissed the case, saying that the evidence showed only that the employer perceived the drivers as incapable of long-distance, stressful driving jobs. Sotomayor argued that there was sufficient evidence that the employer perceived the impairment to extend to any truck driving jobs, an entire "class of jobs," such that the case should proceed to trial.

Constitutional rights

Outside of the criminal case context, Sotomayor has shown some favor toward suits challenging violation of the Fourth Amendment probable cause and warrant requirements and due process rights.

In a 2002 case, Sotomayor wrote that New York City's policy of seizing and then keeping for an extended period of time, sometimes for years, vehicles used by alleged drunk drivers or in other misdemeanor crimes violated the due process clause of the Fourteenth Amendment to the Constitution.

The City's ordinance permitted it to file a civil case seeking the forfeiture of vehicles of those found guilty. But the forfeiture cases were often deferred for many months or even years, while the underlying criminal cases were resolved. Sotomayor's ruling required a meaningful hearing at a meaningful time as to whether the vehicle's owner could recover it. Her decision reversed the trial court ruling of then-District Judge Michael Mukasey, who later became George Bush's last attorney general.

In a case seeking damages for a house search based on a flawed warrant, Sotomayor dissented in order to challenge the formulation used by the majority to define when a police officer is entitled to "qualified immunity" from suit for such a violation. The Supreme Court excuses an officer from such constitutional violations unless the law is so clear that an objectively reasonable officer could not believe his conduct is lawful. Sotomayor objected to her circuit's formulation of this defense that gave police officers extra latitude in meeting that standard.

Sotomayor wrote a 2006 opinion approving suspicionless searches of passenger carry-on luggage and car trunks before boarding a ferry, based on the government's purported interest in deterring terrorist attacks on large vessels engaged in mass transportation. She joined another decision that struck down a portion of the Patriot Act relating to disclosure of National Security Letters on First Amendment grounds.

In a 2002 case, Sotomayor authored an opinion that gave prison officials wide latitude to infringe prisoner First Amendment rights by withholding incoming mail if they could articulate some security justification for such action. In other cases, Sotomayor has granted latitude to prisoners in exercising religious rights.