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Analysis: Sotomayor record thin on executive power

By MARK SHERMAN – 12 hours ago

WASHINGTON (AP) — Supreme Court nominee Sonia Sotomayor's thin record on the limits of presidential power suggests she will be neither reflexively hostile to broad expansion of a president's authority nor a reliable rubber stamp in support of it.

Three cases in particular offer clues:

As a judge on the 2nd Circuit U.S. Court of Appeals, Sotomayor dismissed complaints of commuters about random searches aimed at stopping terrorists on a ferry 300 miles north of New York City.

Citing an earlier ruling by the Supreme Court on the same topic, she upheld President George W. Bush's decision to prohibit U.S. aid to international family planning groups that support abortion.

On the other hand, Sotomayor joined colleagues in striking down parts of the anti-terror USA Patriot Act that Bush sought automatically prohibiting Internet service providers from telling customers when the government asks for private information about them.

Sotomayor has ruled in only a handful of foreign policy and national security cases that turned in part on constitutional limits to the powers enjoyed by the president, including the government's ability to respond to the threats, fears and vulnerabilities laid bare by the Sept. 11, 2001, terrorism attacks.

In those rulings, as well as a speech she gave in 2003 at the Indiana University law school, she appeared to be more willing to consider robust use of presidential authority than was Justice David Souter, the man she would replace.

Souter, who retired last week, was among the justices most skeptical of the powers asserted by the Bush administration following Sept. 11.

While Sotomayor has leaned heavily on earlier court decisions to support her rulings — as appeals court judges must — she soon could face potentially groundbreaking cases on national security if President Barack Obama asserts executive authority to continue detaining suspected terrorists.

Obama's far-reaching steps to deal with the economy also could provoke legal challenges that could make their way to the high court. The justices recently rejected a bid to stop Chrysler LLC's sale of most of its assets to Italian automaker Fiat.

"What you have from Sotomayor is fairly mixed," said Gene Healy, vice president at the libertarian Cato Institute in Washington.

In the case over aid to family planning groups, Sotomayor stuck squarely with precedents from the 2nd Circuit and the Supreme Court in ruling for Bush.

The dispute stemmed from President Ronald Reagan's decision in 1984 to institute the Mexico City Policy that bars U.S. financial help for international family planning groups that support abortion, even with their own money, through services, counseling or lobbying.

President Bill Clinton rescinded the policy in 1993, but Bush reimposed it shortly after taking office.

"The Supreme Court has made clear that the government is free to favor the anti-abortion position over the pro-choice position," she wrote for a three-judge panel in 2002. Obama lifted the so-called global gag rule in January.

The appeals court in New York, where Sotomayor has been a judge since 1998, does not hear many national security cases. But Sotomayor's sparse record indicates "she won't be a pushover for the claim that the president gets to do what he wants in any area that he defines as national security," Healy said.

In the most recent ruling, in December, Sotomayor signed onto an opinion by Judge Jon Newman that forces the government to seek a court's approval if it wants to prevent an Internet provider from telling a customer that authorities are seeking information about him.

The appeals court said the courts must be given a role in protecting rights even when the government says disclosure of information may endanger national security or interfere with diplomatic relations.

"To accept deference to that extraordinary degree would be to reduce strict scrutiny to no scrutiny, save only in the rarest of situations where bad faith could be shown," the appeals panel wrote.

Sen. John Cornyn, R-Texas, a member of the Senate Judiciary Committee that will question Sotomayor next week, said the case raises important questions about the role of courts in the fight against terrorism. "Does Judge Sotomayor believe that the Constitution permits any deference to the elected branches in the area of national security?" he said.

Based on Sotomayor's opinion in the ferry case, the answer is yes.

Two regular ferry passengers who crossed Lake Champlain from their homes in Vermont to their jobs in New York objected to random searches instituted by the ferry operator in 2004.



FILE -- In this June 1, 2009 file photo, Supreme Court nominee Sonia Sotomayor meets with members of the White House Counsel's office at the Eisenhower Executive Office Building in the White House Complex in Washington. (AP Photo/Charles Dharapak, File)

Map



