

Cases, talks offer hints to her views

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By Michael Kranish and Alan Wirzbicki, Globe Correspondent | May 27, 2009

WASHINGTON - Introducing Sonia Sotomayor yesterday as his first Supreme Court nominee, President Obama relished telling her up-from-poverty life story and highlighting her history-making ethnic roots. But he stressed that he picked her because of her intellect, judicial experience, and her determination "to approach decisions without any particular ideology or agenda."

Obama, however, was quickly challenged by critics who contended she was picked more for her personal story - and her gender and ethnicity - than her legal credentials. They buttressed their contention by noting that she recently joined a three-judge panel that ruled unanimously against white firefighters in a case that centers on racial preferences. Critics also pointed to two speeches - one in which Sotomayor suggested that "our experiences as women and people of color affect our decisions," another in which she said that judges sometimes make policy.

As a result, the Sotomayor storyline almost immediately split in two directions - a heartwarming narrative of Horatio Alger proportions to her defenders, and a cautionary tale of liberal judicial activism to her critics. While the Democratic-controlled Senate is expected to confirm her, Sotomayor's life and record nonetheless are certain to be hotly debated in the weeks to come.

"Her personal story is an impressive one," said Laurence Tribe, a Harvard Law School professor who advised Obama on the nomination and attended yesterday's announcement at the White House. Tribe strongly supports Sotomayor's nomination, but he agreed that the New Haven, Conn., firefighter case is one of the most divisive facing the Supreme Court in its term ending next month "and certainly her role in it will be a subject of continuing controversy."

Drawing widespread condemnation from conservatives, the three-judge panel that included Sotomayor backed the city of New Haven, which was sued by a group of white firefighters who claimed they were unfairly denied promotions when the city invalidated an exam because no African-Americans and only two Hispanics were likely to be made lieutenants or captains based on the results.

Conservative colleagues on the Second US Circuit Court of Appeals rebuked the panel, saying that its six-sentence ruling "failed to grapple with the questions of exceptional importance" raised by the case.

Sotomayor has been involved in one decision related to abortion, often the most contentious issue during confirmation hearings. In a 2002 case, she backed the Bush administration's policy of withholding foreign aid funding to groups that provide or support abortions, dismissing the groups' claim that the government was trampling on their First Amendment rights by denying funding. "The government is free to favor the anti-abortion position over the pro-choice position, and can do so with public funds," she wrote.

In an interview yesterday, Nancy Northup, president of the Center for Reproductive Rights, downplayed the ruling, which she noted upheld a prior precedent. Still, she called on senators to press Sotomayor on her stance on abortion in her confirmation hearing.

While Democrats praised Sotomayor, some Republican senators expressed concern. Senator John Cornyn of Texas said in a statement that Sotomayor "must prove her commitment to impartially deciding cases based on the law, rather than based on her own personal politics, feelings, and preferences."

Harsher criticism came from some analysts, including Ilya Shapiro of the libertarian Cato Institute. While Shapiro agreed that Sotomayor's personal story is extraordinary, he said that she "is not a star of the federal judiciary" and that she was nominated largely because Obama wanted to name the first Hispanic to the Supreme Court.

Sotomayor, 54, a self-described "kid from the Bronx," grew up in public housing. Her father, a welder, died when she was 9. Her mother often worked two jobs as she brought up Sotomayor and her brother. One day, while Sotomayor watched "Perry Mason" - the television defense attorney - she decided to be a judge.

Sotomayor won scholarships to Princeton University and Yale Law School, where she was editor of the law review. After serving as a local prosecutor in New York and working as a corporate lawyer, she was successfully nominated by

President George H.W. Bush in 1992 to the federal district court, where she famously ended a baseball strike in a 1995 case in which she sided with the players' union. In 1997, President Clinton nominated her to the federal appeals court, and she was confirmed on a 68-to-28 vote in which she drew some bipartisan support, but all 28 "no" votes came from Republicans.

On the federal bench, Sotomayor has taken centrist to left-leaning positions on civil rights, business regulation, and privacy. But legal analysts cautioned that gauging Sotomayor's judicial philosophy from her rulings is unusually difficult because judges on the Second Circuit often work in three-judge panels, with only one judge writing a ruling. Indeed, in some cases, such as the one of the Connecticut firefighters, Sotomayor has never publicly explained her reasoning behind the decisions.

"It's hard to get a sense of her individually as opposed to whatever the panel decides," said Carl Tobias, a constitutional law professor at University of Richmond.

Several speeches also provide insights into her thinking, analysts say, and portions of them have been seized on by critics. In a 2001 speech at the University of California at Berkeley, she said that "America has a deeply confused image of itself that is in perpetual tension" between a nation proud of its ethnic diversity and the view that Americans should "function and live in a race and colorblind way." She then reeled off statistics that showed a dearth of Hispanic and female judges, which she called "sort of shocking."

"I wonder whether by ignoring our differences as women or men of color we do a disservice both to the law and society," she said, adding: "I would hope that a wise Latina woman with the richness of her experience would more often than not reach a better conclusion than a white male who hasn't lived that life."

Four years later at Duke law school, Sotomayor said the "court of appeals is where policy is made."

Critics have seized upon her comment as evidence that she would legislate from the bench, while her defenders said she was citing the difference between district and appeals courts. "I know this is on tape, and I should never say that because we don't make law. I know," she quickly added in the speech. "I'm not promoting it, I'm not advocating it." ■

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