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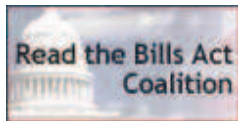
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## Sotomayor's Record on Government Authority

Posted on: June 12, 2009 9:09 AM, by [Ed Brayton](#)

Gene Healy, a Cato Institute scholar who specializes in executive power, has done a thorough review of Judge Sotomayor's record on favoring the government over the individual and has [good news and bad news](#). First, the bad news:

When it comes to checking government power, Sotomayor's record is pretty poor. Civil libertarians can't be happy with her pro-police orientation: The former prosecutor has backed law enforcement in more than two-thirds of criminal cases that she's heard.

Her record on property rights is no more promising: In 2006's *Didden v. Village of Port Chester*, she ratified an eminent domain abuse that makes the infamous *Kelo* case look mild.

The landowner in *Didden*, who wanted to build a CVS, refused to pay off a politically connected developer, so the town gave his property to the developer to build a Walgreen's. Sotomayor's panel saw no evil in this case of state-sponsored extortion.

And now the good news:

In the years to come, though, an "impenetrable bulwark" will be especially vital in checking presidential power. Obama's rhetoric is kinder and gentler than his predecessor's, but, like Bush, he claims to be the sole "decider" on warrantless wiretapping and executive secrecy. Sotomayor's record here is thin, but it gives us reasons for cautious optimism.

The Second Circuit, Sotomayor's home for the last 11 years, gets few national security cases. But what we can glean from three key cases she's participated in suggests she agrees with former Justice Sandra O'Connor that the War on Terror "is not a blank check for the president." The Second Circuit, Sotomayor's home for the last 11 years, gets few national security cases. But what we can glean from three key cases she's participated in suggests she agrees with former Justice Sandra O'Connor that the War on Terror "is not a blank check for the president."

A Justice Sotomayor is unlikely to move in lockstep with the ACLU in this area. In *Cassidy v. Chertoff* (2006), she rejected a Fourth Amendment challenge to post-9/11 security searches conducted by a ferry operator acting at the behest of the Bush administration.

But in 2008's *Doe v. Mukasey*, she joined two colleagues to strike down provisions of the Patriot Act related to National Security Letters (NSL). NSLs allow the FBI to seize private customer information from ISPs and other businesses, and place the recipient under a "gag order," preventing disclosure of the demand.

Still before the Second Circuit is the case of Maher Arar, a Canadian citizen sent to Syria under the U.S. government's extraordinary rendition program and tortured there. At oral argument last December, Sotomayor questioned the administration's lawyer sharply: "So the minute the executive raises the specter of foreign policy, it is the government's position that that is a license to torture?"

Sotomayor is unlikely to participate in the final decision, but her line of questioning suggested skepticism toward broad claims of executive power. That record isn't much to go on, but it hints that Sotomayor won't be as pro-executive as recent GOP nominees...

For all her faults, it's unlikely that Sonia Sotomayor will be a pushover for any wartime president. Constitutionalists and civil libertarians should take comfort in the fact that it could have been worse.

As Daphne Eviatar opined the day before the nomination was announced, it certainly could have been worse. Elena Kagan has a pretty bad record on executive power issues and would likely have been about as bad as Alito or Roberts in that respect.

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