

## OPINION

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### Sotomayor: A presidential power skeptic?

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Most sane Americans are sick of identity politics. More's the pity, then, that race and gender will likely take center stage in the coming Supreme Court fight. If so, Sonia Sotomayor can hardly cry victim: She's fed the fire by repeatedly suggesting that women and minorities read the Constitution differently than white males.

That sentiment is an affront to the rule of law, but, surprisingly, it doesn't seem to be reflected in Sotomayor's own record. She's never been a reliable vote for pro-choice litigants, and, despite her "wise Latina" empathy, she rejected 80 percent of the race discrimination claims that came before her as an appellate judge.

It's a shame to watch another confirmation battle cover the same tired old territory. Far more important issues are at stake. Why do we have federal courts in the first place? According to James Madison, they were meant to serve as "an impenetrable bulwark against every assumption of power in the legislative or executive."

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.

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.

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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.

As Pulitzer-Prize winning reporter Charlie Savage explains in his book *Takeover*, President Bush didn't pick Harriet Miers because he wanted to reward a friend; rather, Bush and Cheney saw her as someone who "could be counted on to embrace Bush's expansive view of presidential powers," their key criteria for judicial nominations. In that sense, in *Roberts* and *Alito*, the country got smarter versions of Harriet Miers.

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.

*Examiner columnist Gene Healy is a vice president at the Cato Institute and the author of "The Cult of the Presidency."*

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