THE NATIONAL LAW JOURNAL

The battle ahead for Sotomayor

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June 01, 2009

Pity the U.S. Supreme Court nominee about to face 19 senators, each with a set of issues, some predictable, some not, and many far removed from the day-to-day work of a justice — or for that matter, a judge or lawyer. The predictable menu of issues is already being written for Judge Sonia Sotomayor by senators and special interest groups. Perennial favorites include abortion, the scope of the right to privacy, the death penalty and when stare decisis should prevail.

Sotomayor's own record will add to the list. Her statements about appellate courts' making policy and the experiences of a Latina judge versus those of a white male judge are certain to provoke intense questioning about judicial activism. And her participation in the abbreviated panel ruling against white firefighters in New Haven, Conn., will trigger scrutiny of her views on affirmative action.

A confirmation hearing, some have said, is a window on the legal debates of the day. The window does not open wide enough, according to others. Key issues affecting businesses, workers, consumers, criminal defendants and others generally are ignored because senators do not earn much political capital by raising them, according to lawyers and scholars. Those issues, however, will have a profound impact on more people than will most of the predictable menu items. And, they add, Sotomayor's views on those issues would be more predictive of her role as a Supreme Court justice.

A BIG UMBRELLA

Under the business umbrella, for example, "there's not a corporation out there, as well as the plaintiffs' bar, that doesn't know how important and critical is the issue of the private right of action under 10b-5 of the securities law," said corporate law scholar J. Robert Brown of the University of Denver Sturm College of Law. "But I doubt it will come up."

Rule 10b-5 is the leading statutory basis for private securities fraud claims, he said. The Supreme Court's most recent decision in this area — *Stoneridge Investment Partners LLC v. Scientific-Atlanta Inc.* — was a 5-3 victory for third-party business defendants by the Court's conservative wing. The decision evinced hostility toward 10b-5 actions and a desire to contain them, said Brown. Just last week the Court agreed to decide another key 10b-5 challenge involving when the statute of limitations begins to run. *Merck & Co. Inc. v. Reynolds* , No. 08-905.

Retiring Justice David Souter dissented in *Stoneridge* . Although Sotomayor authored a relatively pro-investor ruling in *Merrill Lynch v. Dabit* (vacated and remanded by the Supreme Court in 2006), her opinions reflect no discernible philosophy in this area, said Brown and others.

Is she pro-management or pro-investor? Does she interpret Section 10b of the Securities Exchange Act narrowly or broadly? Given ongoing fallout from the economic crisis and the federal government's response, the high court is likely to be dealing with securities and corporate governance issues in the next few terms. "Although the senators are focused on social issues, we need to know her views on this investor protection provision and others," said Brown. "You would want to pound away at this."

Executive power and separation-of-power issues are likely to play out in the context of the president's authority as commander in chief and the treatment of detainees, but they also run through areas critical to business. "A tricky issue to explore is the so-called unitary executive theory," said executive power scholar Peter Shane of Ohio State University Michael E. Moritz College of Law.

Sotomayor should be asked whether, when Congress directs the head of an independent agency to make policy, the president has constitutional authority to tell that agency head what policies to adopt, he said. If the answer is yes, he added, she should be asked if independent agencies are unconstitutional.

"The area where this could conceivably count for quite a great deal is in regulatory oversight," said Shane.

BAILOUTS AND BANKRUPTCIES

Shane and others said that there is a good question about the legality of using Troubled Asset Relief Program (TARP) funds for auto company bailouts. Under a recent Supreme Court decision suggesting that taxpayers don't have standing to challenge executive branch expenditures, "it's hard to imagine who would have standing to raise TARP issues," Shane said.

Sotomayor should be asked about standing, he and others said, because it is a key access-to-the-courts issue in many areas of the law. "Justice [Antonin] Scalia seems to have a particularly narrow view of citizen standing in part because he views the doctrine of standing as a way that courts can protect policymaking by the executive branch," Shane said. "What would be her view of that?"

Robert Levy of the libertarian Cato Institute and William Mellor of the Institute for Justice, which also describes itself as libertarian, have a long list of business-related constitutional questions for Sotomayor. "TARP is manifestly an unconstitutional delegation of legislative power," Levy insisted. "I also think treatment of the bondholders in the bailouts raises takings issues."

He and Mellor said that they would welcome questions probing Sotomayor's views on: What are the constitutional limits on congressional power to regulate and redistribute assets?; What limits on federal power does the 10th Amendment impose and how does she view the scope and meaning of the commerce, contracts, general welfare, takings, necessary and proper, privileges and immunities, and nondelegation clauses? "Those are questions that are jurisprudential in nature and appropriate," said Levy.

Other business litigators do expect to hear questions about what constitutional limits exist on punitive damages because of Souter's high-profile ruling limiting those damages in the Exxon Valdez oil spill case last term. They also hope for questions on federal pre-emption and pleading requirements — all areas in which the high court has been generally pro-business and in which little is known about her views.

"To the extent the hearings raise business issues, I think individual stories, like Diana Levine's in the *Wyeth* case and Lily Ledbetter's in the Title VII case, will lead to questions about pre-emption, which is still critically important to business, and job discrimination," said Roy Englert, partner in Washington's Robbins, Russell, Englert, Orseck, Untereiner & Sauber.

Chrysler LLC bankruptcy law issues, antitrust enforcement, patent reverse payment issues, arbitration and class action issues, he added, are unlikely to get aired.

HIGH-TECH CRIME

Sentencing scholar Douglas Berman of Ohio State's Moritz College of Law and author of the *Sentencing* blog, calls "inevitable" senators' questions about the death penalty and the Second Amendment and gun control.

Sotomayor is already drawing heavy criticism from gun rights advocates because of a panel decision that she joined in January, holding that prior Supreme Court precedent saying that the Second Amendment only applied at the federal level is still binding law: *Maloney v. Cuomo* .

But, Berman said, "what senators should be talking about is technology," seeking her views on microchip implants in felons, videoconferencing in prisons to conduct initial medical diagnoses and other functions, and the use of DVDs containing victim impact statements in death penalty and other trials.

"Almost invariably, technology has pros and cons, but this is the future," he said. "We're already working through GPS tracking of sex offenders. It's only a matter of time — in fact, I think it's happening in Europe — whether we implant microchips in every felon so we can keep track of them. Having a healthy respect for the benefits and the detriments of technology is extraordinarily important now in a new justice."

Berman said that challenges to the scope of the 2004 Crime Victims' Rights Act are percolating in the lower courts, and Sotomayor's views on that statute should be tested. He laments the near disappearance of criminal justice issues from Supreme Court confirmation hearings, and labor and employment scholar Paul Secunda of Marquette University Law School has a similar complaint about his field.

But that does not mean there are no issues, particularly amid the recession, Secunda said. "To me, the most pressing thing right now is the ability of plaintiffs to get a remedy under ERISA [the Employee Retirement and Income Security Act]," he said. "It sounds arcane, but affects everyone on the economic ladder. There are no consequential damages, no back pay. Lots of employers now are looking to save money on these legacy costs — promises to pay generous health benefits. They're freezing pension benefits left and right."

Senators should ask Sotomayor, he said, where she sees the entitlement to social welfare. "What role does the Supreme Court have in guaranteeing minimum entitlement to social welfare benefits?"

He would also like questions about a constitutional right to bargain collectively. "Does it come under the First Amendment as expressive association or even under the 14th amendment as a privacy right?" he asked. "Do employers have any right to ask who you are married to, who you are sleeping with? And what right does an employer have to know and make decisions about what employees do when they're not at work?"

In the end, he said, "All that should really matter is whether the nominee is competent and has the acumen to be a good judge. But that's not how it is."

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