

## Uncommon Detail Marks Rulings by Sotomayor

She Almost Oversteps Her Role, Experts Say

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Supreme Court nominee Sonia Sotomayor's opinions show support for the rights of criminal defendants and suspects, skepticism of corporations, and sympathy for plaintiffs alleging discrimination, an analysis of her record by The Washington Post found. And she has delivered those rulings with a level of detail considered unusual for an appellate judge.

During nearly 11 years on the federal appeals court in New York, Sotomayor has made herself an expert on subjects ranging from the intricacies of automobile mechanisms to the homicide risks posed by the city's population density. Her writings have often offered a granular analysis of every piece of evidence in criminal trials, and sometimes read as if she were retrying cases from her chambers.

Legal experts said Sotomayor's rulings fall within the mainstream of those by Democratic-appointed judges. But some were critical of her style, saying it comes close to overstepping the traditional role of appellate judges, who give considerable deference to the judges and juries that observe testimony and are considered the primary finders of fact.

"It seems an odd use of judicial time, given the very heavy caseload in the 2nd Circuit, to spend endless hours delving into the minutiae of the record," said Arthur Hellman, a University of Pittsburgh law professor and an authority on federal courts.

Adrienne Urrutia Wisenberg, a Washington criminal appellate lawyer, said appellate judges "are not in the role of reweighing the credibility of a witness. Someone's demeanor is not reflected on a transcript."

But Wisenberg said she admires Sotomayor's "tenacious trial lawyer's personality," and Dan Himmelfarb, a Washington lawyer and former clerk to conservative Supreme Court Justice Clarence Thomas, said Sotomayor is "extraordinarily thorough, and a judge would ordinarily be praised for writing thorough opinions."

To examine the record of Sotomayor, whose Senate confirmation hearings begin Monday, The Post reviewed all 46 of her cases in which the 2nd Circuit issued a divided ruling, nearly 900 pages of opinions. Although Sotomayor has heard about 3,000 cases, judicial scholars say split decisions provide the most revealing window into ideology because in such cases the law and precedent are often unclear, making them similar to cases heard by the Supreme Court. President Obama, who nominated Sotomayor to replace retiring Justice David H. Souter, has said Supreme Court justices will be in agreement 95 percent of the time.

Sotomayor's votes in split cases were compared with those of other judges through a database that tracks federal appellate decisions nationwide, a random sampling of 5,400 cases. The

database codes decisions as "liberal" or "conservative" based on what its creator, University of South Carolina political scientist Donald Songer, says are common definitions. Votes in favor of a defendant, for example, are classified as liberal, while those supporting prosecutors are called conservative.

Sotomayor's votes came out liberal 59 percent of the time, compared with 52 percent for other judges who, like her, were appointed by Democratic presidents. Democratic appointees overall were 13 percent more liberal than Republican appointees, according to the database analysis.

Experts said the results show that Sotomayor's ascension would probably not alter the balance of a high court closely divided between conservatives and liberals such as Souter. But they also provide a more nuanced picture of the 17-year federal judge than those offered by her supporters and her critics.

The White House has portrayed Sotomayor as a tough-on-crime moderate who favors the "judicial restraint" often sought by Republicans, while conservatives call her a liberal activist whose decisions are influenced by ideology and her Latina heritage.

"She looks like a classic Democrat," Songer said. "I don't think it's fair to classify her as tough on crime. I would use the term 'moderately liberal,' not 'moderate.' But she certainly seems to be in the mainstream of Democratic judges."

The split decisions, which are heavy on the criminal and business cases that tend to dominate the Supreme Court's docket, show Sotomayor voting to overturn convictions or sentences eight times, at a rate comparable to that of other Democratic-appointed judges. Six times, she affirmed them.

In one case, Sotomayor and seven mostly Democratic colleagues voted to set free a convicted murderer who did not contest his guilt but had been tried on what the court called the wrong murder charge. In another, she joined an opinion that cited flawed jury instructions in throwing out a man's conviction for enticing someone he believed was a 13-year-old girl into sex.

And when she threw out a life prison term for a convicted heroin dealer, ordering that he be resentenced, Sotomayor wrote that judges should not show "slavish adherence" to the "literal terms" of then-mandatory sentencing guidelines when their language is flawed. The view echoed her criticism of the guidelines from the bench that became an issue in her 1997 confirmation hearings.

At those hearings, Republicans criticized Sotomayor for apologizing to a defendant for a mandatory minimum sentence she imposed and for calling the sentence an "abomination." She told senators that the apology expressed her frustration over a feature in the sentencing rules that Congress later changed, conceded she should not have used the word "abomination" and expressed general support for the guidelines.

Other cases displayed Sotomayor's support for First Amendment protections, campaign finance reforms challenged by conservatives and privacy rights. She ruled against corporations in six of eight business cases.

Although her decisions are filled with citations of the law and precedent, Sotomayor once pointed to "powerful policy considerations" in allowing a lawsuit against Visa and MasterCard to go forward, and she worried about damage to U.S.-British relations in arguing that British subjects should have access to U.S. courts. Conservatives have criticized Sotomayor for saying in 2005 that "the Court of Appeals is where policy is made. I know this is on tape, and I should never say that." The White House has defended her, saying the remark was taken out of context.

Sotomayor, appointed to the appeals court by President Bill Clinton, is a former assistant district attorney in Manhattan and a trial judge, and acquaintances say that background has helped shape her judicial style. She overturns lower courts at roughly the same rate as other Democratic appointees. Her writings are full of details from the trial record, especially in criminal matters, where she often meticulously analyzes witness testimony.

When she reinstated a verdict against Ford Motor Co. in 2002 in the lawsuit of a woman who said her van suddenly accelerated without her touching the gas pedal, Sotomayor wrote that one witness's testimony "requires two simultaneous malfunctions in the cruise control circuitry. The first is an open ground connection to the speed amplifier, resulting from a loose or broken wire."

Last year, in voting to overturn a firearms defendant's sentence, Sotomayor joined a Democratic appointee and a Republican in analyzing whether New York City's dense population puts bystanders at greater risk from gunfire than those elsewhere. She wrote a separate dissent, acknowledging that the trial judge's opinion on the subject was "detailed" but citing government reports and newspaper articles to argue it was "insufficient" to support a sentence above the range recommended by federal guidelines.

A Republican appointee who disagreed wrote that "appellate courts are not factfinders. . . . I do not understand it to be our role . . . to engage in this kind of dissection of the empirical evidence cited by the district court. Nor is it to identify competing studies or news articles pointing in other directions."

In 2004, Sotomayor appeared to go beyond the facts established at trial in arguing that two teenage girls were illegally strip-searched at Connecticut juvenile detention facilities. Their lawsuit against the state was dismissed by a federal judge but reinstated in an opinion written by a Democratic 2nd Circuit appointee, who said four of the strip searches at issue were unlawful but four others were legal.

Sotomayor dissented, arguing that all were illegal and blasting any strip search as "severely intrusive." Citing documents from pretrial discovery, she broke down all 34 strip searches at the facilities in which contraband was found on a prisoner from 1995 to 2000 -- searches that were not part of the lawsuit. She concluded that there was "absolutely no evidence that suspicionless strip searches were necessary."

(The Supreme Court last month voiced skepticism of strip-searching teenage girls, ruling 8 to 1 that Arizona school officials violated the constitutional rights of a 13-year-old girl when they strip-searched her on suspicion that she might be hiding ibuprofen in her underwear.)

Hellman, the law professor, called Sotomayor's approach "a kind of carpet-bombing, a relentless mustering of facts. She goes well beyond what is necessary for the case and is determined not to just defeat the other side, but to annihilate it."

Sotomayor's style is consistent even when she finds against defendants, such as when she affirmed the conviction of a child pornography defendant in 2004. A U.S. district court judge had concluded after an evidentiary hearing that the man was innocent but denied his petition because it was filed too late.

Even though she had decided the core issue -- the conviction -- Sotomayor broke down the witnesses and testimony at the judge's hearing. She concluded that his finding of innocence was "clearly erroneous," even as she said that district courts "are generally best placed to evaluate testimony in light of the witnesses' demeanor."

A fellow Democratic appointee, Judge Rosemary S. Pooler, dissented. Sotomayor's opinion, she wrote, was based on "speculations and conjectures" and disregarded the judge's "role as the finder-of-facts."

"It is inappropriate in all but the most extraordinary cases for this Court to second-guess a district court's credibility findings," Pooler concluded. "The majority's dissection of the district court's decision departs from our precedents and wrongly supplants the lower court's assessment of the evidence with its own factual inferences, never having seen or heard any of the testimony that it now seeks to discredit."

*Database editor Sarah Cohen contributed to this report.*

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