

FROM: Mark Patton, RPC
SUBJECT: Sotomayor Nomination: Questions about judicial demeanor and temperament
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The New York Times this morning runs an interesting story about Judge Sotomayor's "blunt and even testy side," highlighting her aggressive behavior from the bench in a recent case with serious national security implications, and quoting several lawyers critical of her demeanor. ("[Sotomayor's Sharp Tongue Raises Issue of Temperament](#)," *The New York Times*, May 29, 2009, A14.) The story, which is pretty remarkable coming from the Times, picks up on what was probably the most widely-discussed profile of Judge Sotomayor during the past month—a surprisingly critical appraisal of her performance as an appellate judge by liberal law professor and legal commentator Jeff Rosen, published in the New Republic. ("[The Case Against Sotomayor](#)," *The New Republic*, May 4, 2009.)

First, some highlights from the Times story, which leads off with a vignette from the oral argument last December before the full Second Circuit.

Judge Sotomayor peppered a government lawyer with skeptical questions.

"So the minute the executive raises the specter of foreign policy, national security," Judge Sotomayor asked the lawyer, Jonathan F. Cohn, "it's the government's position that this is a license to torture anyone?"

Mr. Cohn managed to get out two and a half words: "No, your hon — ."

Judge Sotomayor cut him off, then hit him with two more questions and a flat declaration of what she said was his position. The lawyer managed to say she was wrong, but could not clarify the point until the chief judge stepped in.

"Why don't we just get the position?" he asked.

("Sotomayor's Sharp Tongue Raises Issue of Temperament," *The New York Times*, May 29, 2009, A14.)

The Times notes the positive spin on this from Judge Sotomayor's fans, who say she will hold her own against Justice Scalia and argue that her manner is evidence of intellect and good preparation. Some of her supporters also accuse critics of being sexist—arguing she's no nastier than some male judges, and that some lawyers bristle more at harsh questioning from a woman. But the story also points out that she has detractors (men and women) who say "she doesn't let you finish your argument," she's "very temperamental," or that "she used her questioning to make a point, as opposed to really looking for an answer to a question she did not understand." Her colleagues on the Second Circuit quoted in the Times story have only praise for her. But it is interesting that several practicing lawyers were willing to go public with their criticisms and that the chief judge of her court felt he needed to publicly rein her in so that the court could actually hear the arguments in an important national security case.

The profile of Judge Sotomayor in The New Republic paints a similar picture. Rosen's piece is short, and worth reading in full, but here are some highlights:

Over the past few weeks, I've been talking to a range of people who have worked with her, nearly all of them former law clerks for other judges on the Second Circuit or former federal prosecutors in New York. Most are Democrats and all of them want President Obama to

appoint a judicial star of the highest intellectual caliber who has the potential to change the direction of the court.

...

The most consistent concern was that Sotomayor, although an able lawyer, was "not that smart and kind of a bully on the bench," as one former Second Circuit clerk for another judge put it. "She has an inflated opinion of herself, and is domineering during oral arguments, but her questions aren't penetrating and don't get to the heart of the issue." (***During one argument, an elderly judicial colleague is said to have leaned over and said, "Will you please stop talking and let them talk?"***)

(**["The Case Against Sotomayor,"](#) *The New Republic*, May 4, 2009.)**

Later, in defending himself against critics from the left, Rosen pointed to an interesting source for corroboration of his apparently dim view of Judge Sotomayor—the Almanac of the Federal Judiciary. (**["More Sotomayor,"](#) *The New Republic*, May 8, 2009.) As I noted yesterday, the Almanac collects comments from lawyers who practice before federal judges and digests them to provide a review. The reviews are all anonymous, but most remarks about appellate judges range from neutral to complimentary. Given that context, some of the comments made about Judge Sotomayor in the 2009 edition of the Almanac (circulated on Tuesday, but attached again here with highlights) are remarkable in what they say about her demeanor and her perceived biases:**

"I'd say she is in the bottom of this court--but, the competition is pretty stiff."

"She is one of the few civil rights lawyers to be appointed to the court. Sometimes I think she is at war with herself. In her heart I think she still thinks from the bottom up. When you argue before her you have the sense that she is waiting for you to give her a reason to win. If you don't give it, she will rule against you."

"She is a terror on the bench." "She is very outspoken." "She can be difficult." "She is temperamental and excitable. She seems angry." "She is overly aggressive--not very judicial. She does not have a very good temperament." "She abuses lawyers." "She really lacks judicial temperament. She behaves in an out of control manner. She makes inappropriate outbursts." "She is nasty to lawyers. She doesn't understand their role in the system--as adversaries who have to argue one side or the other. She will attack lawyers for making an argument she does not like."

To be fair, Rosen's pieces ran early this month, and were likely aimed at pushing Obama to choose someone who was a liberal legal "superstar" rather than someone who Rosen thought has a reputation for being cantankerous or merely competent. Now that Obama has settled on Sotomayor and the White House talking points praising her legal qualifications are in wide circulation, Rosen has spoken out in her favor, and one assumes there will be no more criticism from the left. Nevertheless, the private concerns to which Rosen gave voice, the lawyers' reviews of her demeanor on the bench in the Almanac, and the willingness of some lawyers to go public with their criticism in the pages of the New York Times may raise questions for some Senators about Judge Sotomayor's judicial temperament and her understanding of her judicial role once she is no longer constrained to follow the rulings of a higher court.

Temperament or demeanor from the bench is not the only meaningful measure of a judicial nominee, any more than bedside manner is the only or best measure of a doctor. But it may be reflective of a nominee's understanding of his or her judicial role—an area in which, as I noted yesterday, Judge Sotomayor's own words have raised some eyebrows.