Judge Sotomayor's First Amendment Jurisprudence

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As a judge for the Second Circuit Court of Appeals since 1998 and for the Southern District of New York for the preceding six years, United States Supreme Court nominee Sonia Sotomayor has approached First Amendment issues narrowly and contextually, demonstrating traditionally liberal views in some cases and more conservative views in others. If confirmed, it seems most likely that Sotomayor will side with the Court's liberal wing on many First Amendment issues. However, her seeming unpredictability in cases involving free speech could make her an important swing vote in some cases.

Sotomayor's First Amendment record during her 17 years on the federal bench is not extensive, but it does give some insight into her views on the First Amendment generally and media law specifically. Among Sotomayor's more notable free speech decisions, Sotomayor dissented in a Second Circuit case in which the majority affirmed the district court's decision to uphold the New York Police Department's decision to terminate a Police Officer after an investigation discovered he made anonymous racist comments via mail. Sotomayor also authored an opinion striking down a gag order on the news media that prevented the press from revealing the name of any juror during the retrial of a former bank executive.

These views are contrasted with other decisions favoring withholding records under the Freedom of Information Act and upholding a public high school's right to bar a student from running for class office after she posted offensive comments about school administrators in her off-campus blog. These decisions are discussed below.

Pappas v. Giuliani, 290 F.3d 143 (2d Cir. 2002), involved a First Amendment claim by a New York City Police Officer who was terminated after an internal New York Police Department investigation found that he anonymously disseminated racist and anti-semitic materials via the U.S. Postal Service. The majority affirmed the district court's dismissal of the action upon a motion for summary judgment by the defendants, concluding that the NYPD's "reasonable perception of serious likely impairment of its performance of its mission outweighed Pappas's interest in free speech."

Sotomayor dissented, stating that the potential harm to the NYPD's performance of its mission did not outweigh Pappas's First Amendment rights. Sotomayor stated that the potential harm to the NYPD was low because (1) Pappas did not occupy a high-level supervisory, confidential, or

policymaking role in the NYPD, (2) Pappas did not have law enforcement contact with the public through his position as a computer operator in the NYPD, and (3) Pappas "engaged in the speech anonymously, on his own time, and through mailings sent from his home." Acknowledging the particular nature of the speech involved in the case, Sotomayor explained:

To be sure, I find the speech in this case patently offensive, hateful, and insulting. The Court should not, however, gloss over three decades of jurisprudence and the centrality of First Amendment freedoms in our lives because it is confronted with speech it does not like and because a government employer fears a potential public response that it alone precipitated.

Sotomayor's views in Pappas are contrasted by her views in *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008), in which she joined in a ruling holding that a public high school student's First Amendment rights were not violated when the school disqualified her from running for Senior Class Secretary based on inflammatory comments written off-campus in her personal blog. Pre-existing jurisprudence concerning free speech in public schools allowed schools to regulate some student speech occurring on school grounds or at school-related events while acknowledging that students "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Doninger* extended the scope of a school's authority to regulate expression that occurs beyond the confines of campus or campus activities.

In reaching its decision to extend the school's authority, the court wrote that "Avery's posting—in which she called school administrators 'douchebags' and encouraged others to contact [a school administrator] 'to piss her off more'—contained the sort of language that properly may be prohibited in schools." However, the court emphasized that the particular nature of the discipline in the case influenced its decision to side with school administrators, stating that "given the posture of this case, we have no occasion to consider whether a different, more serious consequence than disqualification from student office would raise constitutional concerns."