



“Are there any limits to the power of Congress under Article I, Section 8 of the Constitution?”

Article 1, Section 8 of the U.S. Constitution provides Congress with numerous powers including the power to “regulate Commerce with foreign Nations, and among the Several States.” In preparation for this week’s hearing, Senator Cornyn commented that courts have exceeded the powers granted to them under the Commerce Clause and questioned whether Judge Sotomayor will do the same if nominated to the Supreme Court.

Senator Cornyn released a statement and cited four cases from Judge Sotomayor’s voluminous seventeen-year judicial record as proof that she may fail to accurately understand the true reach of the Commerce Clause. In each of these cases, she ruled that the federal statutes in question did not exceed Congress’ authority. Although the Senator suggests that by failing to invalidate the law, Sotomayor may have abdicated her responsibility to check Congress’ power, one need only read the cases to determine that her rulings are well within the legal mainstream. Today Senator Leahy noted her ruling in one case, *Giordano*.

- *U.S. v. Iodice*, 525 F.3d 179 (2d Cir. 2008): Judge Sotomayor joined a unanimous panel finding that an arsonist who burned down a vacant restaurant, whose owners planned to re-open, could be convicted under a federal statute, 18 U.S.C. § 844(i), prohibiting arson of buildings used in interstate commerce. This decision not only followed circuit precedent but was also in accordance with rulings of the 3rd, 5th, and 7th Circuit Courts of Appeals.
- *U.S. v. Giordano*, 442 F.3d 30 (2d Cir. 2006): In a matter of first impression before all federal courts, Judge Sotomayor wrote for the majority in a decision applying a federal criminal statute, 18 U.S.C. § 2425, to in-state cell phone communications used to seek sex from minors (an eight and twelve year old) by the mayor of Westbury, Connecticut. She held that the statute as applied was constitutional because the calls took place on a national network that routed the calls through an adjoining state, and drew on prior circuit precedent applying federal law to intrastate calls used in a murder-for-hire scheme.
- In *U.S. v. Harris*, 358 F.3d 221 (2d Cir. 2004): Judge Sotomayor wrote for a unanimous panel upholding that constitutionality of a federal statute, 18 U.S.C. § 2251(a), criminalizing the possession of child pornography. She found that production -- which is undoubtedly illegal -- and possession are essentially one in the same because of the surreptitious, untraceable means by which the goods enter the national market.
- In *U.S. v. Gaines*, 295 F.3d 293 (2d Cir. 2002): Joining a unanimous panel, Judge Sotomayor agreed that a federal statute, 18 U.S.C. § 992(g)(1), prohibiting felons from possessing firearms was appropriately applied. The court held defendant’s concession the firearm had “traveled at some time in interstate commerce” was sufficient to satisfy the minimal nexus necessary to apply the law.

In all of these decisions, Judge Sotomayor exhibits a very mainstream understanding of the Commerce Clause. Moreover, modern jurisprudence overwhelmingly supports the notion that very few federal laws violate the Commerce Clause. The Supreme Court has so rarely ruled that Congress' powers under the Commerce Clause have been exceeded that six decades passed before it invalidated an act on this basis. *See U.S. v. Lopez*, 514 U.S. 549 (1995) (finding that Congress exceeded its authority in Gun-Free School Zones Act of 1990); see also *U.S. v. Morrison*, 529 U.S. 598 (2000) (striking down the Violence Against Women Act as unconstitutional because it exceeded Congress' power under Fourteenth Amendment and Commerce Clause). So, in response to the question "are there any limits to the power of Congress under Article I, Section 8 of the Constitution," clearly the answer is yes, but simply because Judge Sotomayor has not yet ruled that a statute is invalid does not indicate any fault on her behalf.