

Sotomayor Hearing, Day 4 (07/16/2009), Parts 21 to 29

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SENATE-HRG-SOTOMAYOR -21

XXX of the electorate."

CORNBYN: You said, "Can elected officials say with credibility that they're carrying out the mandate of a democratic society representing only the generally public good when private money plays such a large role in their campaigns?"

Judge Sotomayor, what is the difference, to your mind, between a political contribution and a bribe?

SOTOMAYOR: The context of that statement was a question about what was perking through the legal system at the time and has been, as you know, before the Supreme Court since Buckley v. Vallejo. In Buckley...

CORNBYN: I -- I agree, Your Honor. But what -- my question is, what, in your mind, is the difference between a political contribution and a bribe?

SOTOMAYOR: The question is, is a contributor seeking to influence or to buy someone's vote? And there are situations in which elected officials have been convicted of taking a bribe because they have agreed in exchange for a sum of money to vote on a particular legislation in a particular way. That is -- violates the federal law.

The question that was discussed there was a much broader question as to, where do you draw that line as a society? What choices do you think about in terms of what -- what Congress will do, what politicians will do?

I've often spoken about the difference between what the law permits and what individuals should use to guide their conduct. The fact that the law says you can do this doesn't always mean that you as a person should choose to do this.

And, in fact, we operate within the law. You don't -- you should not be a lawbreaker. But you should act in situations according to that sense of what's right or wrong.

We had the recent case that the Supreme Court considered of the judge who was given an extraordinary amount of money by a campaign contributor, dwarfing everything else in his campaign in terms of contributions, funding a very expensive campaign.

CORNBYN: In fact -- in fact -- in fact, that was not a direct contribution to the judge, was it?

SOTOMAYOR: Well, it wasn't a direct contribution, but it was a question there where the Supreme Court said, the appearance of impropriety in this case would have counseled the judge to get off, because...

CORNYN: Let's get back to my question, if I can, and let me ask you this. Last year, President Obama set a record in fundraising from private sources, raising an unprecedented amount of campaign contributions. Do you think, given your law review article, that President Obama can say with credibility that he's carrying out the mandate of a democratic society?

SOTOMAYOR: That wasn't what I was talking about in that speech. I don't -- I don't know...

CORNYN: Well, I realize he wasn't elected in 1996, but what I'm -- what I'm getting at is, are you basically painting with such a broad brush when it comes to people's rights under the First Amendment to participate in the political process, either to volunteer their time, make in-kind contributions, make financial contributions? Do you consider that a form of bribery or in any way improper?

SOTOMAYOR: No, sir.

CORNYN: OK. Thank you.

SOTOMAYOR: No, sir.

CORNYN: Thank you for your answer.

In the short time we have remaining, let me return to -- to the New Haven firefighter case briefly. As you know, two witnesses, I believe, will testify after you're through, and I'm sure you will welcome being finished with this period of questioning.

A lot of attention has been given to the lead plaintiff, Frank Ricci, who is a dyslexic and the hardship he's endured in order to prepare for this competitive examination only to see the competitive examination results thrown out.

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XXX results thrown out.

CORNYN: But I was struck on July the 3rd in the New York Times, when they featured another firefighter, who will testify here today, and that was Benjamin Vargas. Benjamin Vargas is the son of Puerto Rican parents, as you probably know, and he found himself in the odd position, to say the least, of being discriminated against based on his race, based on the decisions by the circuit court panel that you sat on.

The closing of the article, because Lieutenant Vargas -- who hopes to be Captain Vargas as a result of the Supreme Court decision because he scored sixth on the comprehensive examination -- at the very last paragraph in this article, he -- it says, "Gesturing toward his three sons, Lieutenant Vargas explained why he had no regrets. He said, 'I want to give them a fair shake. To get a job on the

merits, not because they're Hispanic or to fill a quota.' He said, 'What a lousy way to live.'" That's his testimony.

So I want to ask you, in conclusion, do you agree with Chief Justice John Roberts when he says, "The best way to stop discriminating based on race is to stop discriminating based on race"?

SOTOMAYOR: The best way to live in our society is to follow the command of the Constitution, provide equal opportunity for all. And I follow what the Constitution says, that is, how the law should be structured and how it should be applied to whatever individual circumstances come before the court.

CORNYN: With respect, Judge, my question was do you agree with Chief Justice John Roberts's statement, or do you disagree?

SOTOMAYOR: The question of agreeing or disagreeing suggests an opinion on what the ruling was in the case he used it in, and I accept the court's ruling in that case. And that was a very recent case.

There is no quarrel that I have, no disagreement. I don't accept that, in that situation, that statement the court found applied. I just said the issue is a constitutional one - equal opportunity for all under the law.

CORNYN: I understand that you might not want to comment on what Chief Justice John Roberts wrote in an opinion, even though I don't think he was speaking of a specific case but rather an approach to the law which would treat us all as individuals with equal dignity and equal rights.

But let me ask you whether you agree with Martin Luther King when he said he dreamed of a day when his children would be judged not by the color of their skin, but by the content of their character. Do you agree with that?

SOTOMAYOR: I think every American agrees with that (inaudible).

CORNYN: Amen.

Yield back, Mr. Chairman.

LEAHY: Thank you, Senator Cornyn.

Just so we'll note for the schedule, we're going to go to Senator Specter, who is a long-time member of this committee and one of the most senior members here. And I would, once Senator Specter's questions are finished, we will take a very short break. And does that work for you, Judge? I...

SOTOMAYOR: It most certainly does.

LEAHY: OK. So...

SOTOMAYOR: Thank you.

LEAHY: Senator Specter is recognized for up to 20 minutes.

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XXX to 20 minutes.

SPECTER: Thank you, Mr. Chairman.

Judge Sotomayor, you have been characterized as running a hot courtroom, asking tough questions. What we see popping out of the Supreme Court opinions from time to time, statements about pretty tough ideological battles in their conference room. Justice Scalia was quoted as saying, "The court must be living in another world. Day by day, case by case it is busy designing a Constitution for a country I do not recognize."

Referring to a woman's right to choose in *Roe v. Wade*, he said this, quote, "Justice O'Connor's assertion that a fundamental rule of judicial restraint requires us to avoid reconsidering *Roe* to not be taken seriously." Do you think it possible that, if confirmed, you will be a litigator in that conference room, take on the ideological battles which pop out from time to time from what we read in their opinions?

SOTOMAYOR: I don't judge on the basis of ideology. I judge on the basis of the law and my reasoning. That's how I have comported myself in the circuit court. When my colleagues and I, in many cases, have initially come to disagreeing positions, we've discussed them and either persuaded each other, changed each other's minds and worked from the starting point of arguing, discussing, exchanging perspectives on what the law commands.

SPECTER: Well, perhaps you'll be tempted to be a tough litigator in the court. Time will tell, if you are confirmed, if you have some of those provocative statements.

Let me move on to a case which you have decided. You have been reluctant to make comments about what other people have said. But I want to ask you about your view as to what you have said. In the case of *Entergy v. Riverkeeper*, which involved the question which is very important to matters now being considered by Congress on climate control and global warming, you ruled in the 2nd Circuit that the best technology should be employed, not the cost-benefit.

The Supreme Court reversed five-to-four saying it was cost benefit. Could we expect you to stand by your interpretation of the Clean Water Act when, if confirmed, you get to the Supreme Court and could make that kind of a judgment because you're not bound by precedent?

SOTOMAYOR: Well, I am bound by precedent to the extent that all precedents is entitled to the respect it -- to respect under the doctrine of *stare decisis*. And to the extent that the Supreme Court has addressed this issue of cost benefit and its permissibility under the Clean Water Act, that's the holding I would apply to any new case that came. And the framework it established is the framework I would employ to new cases.

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XXX to new cases.

SPECTER: Let me return to a subject I raised yesterday but from a different perspective. And that is the issue of the Supreme Court taking on more cases. In 1886, there were 451 cases decided by the Supreme Court, in 1985, 161 signed opinion, in 2007, only 67 signed opinions. The court has not undertaken cases involving circuit splits.

In the letter I wrote to you, which will be made a part of the record, listing a great many circuit splits and the problems that that brings when one circuit decides one day, another circuit another, and the other circuits are undecided and the Supreme Court declines to take cases.

Do you agree with what Justice Scalia said, dissenting in (inaudible), where the court refers to take a key circuit split that when the court decides not to, quote, "it seems to me, quite irresponsible to let the current chaos prevail with other courts not knowing what to do"?

Or stated differently, do you think the Supreme Court has time to and should take up more circuit splits?

SOTOMAYOR: It does appear that the Supreme Court's docket has lessened over time, its decisions that it's addressing. Because of that, it certainly does appear that it has the capacity to accept more cases. And the issue of circuit splits is one of the factors that the court's own local rules set out as a consideration for justices to think about in the cert process.

So in answer to your question, the direct answer is, yes, it does appear that it has the capacity.

SPECTER: The current rule in the Supreme Court is that petition for certiorari are applied, and there is a so-called cert pool where the -- seven of the nine justices, excluding only Justice Stevens and Justice Alito, do not participate in the cert pool so that they -- people applying for cert don't have the independent judgments.

When Chief Justice Roberts was -- before he became chief justice, he said that the cert pool's powers of little disquieting. Would you join the cert pool? Or would you maintain an independent status as Justice Stevens and Justice Alito do in having their own clerks and their own individual review as to whether cert ought to be granted?

SOTOMAYOR: I would probably do what Justice Alito did, although, I haven't decided if I'm given the honor of becoming a member of the Supreme Court. I haven't decided anything. I'm not even sure where I would live in New York if this were to happen -- in Washington.

But putting that aside, Senator, my approach would probably be similar to Justice Alito, which is experience the process, take, for a period of time, consider its costs and benefits, and then decide

whether to try the alternative or not and figure out what I think works best in terms of the functioning my chambers and the court.

I can't give a definitive answer because I generally try to keep an open mind until I experience something and can then speak from knowledge about whether to change it or not.

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XXX it or not.

SPECTER: Judge Sotomayor, you have had some experience on the pilot program conducted by the judicial -- federal judicial conference. And these were the conclusions reached by the pilot program. They said, quote, "Attitudes of judges toward electronic media coverage of civil proceedings were initially neutral and became more favorable after experience under the pilot program."

Quote, "Judges and attorneys who had experience with electronic media coverage under the program generally reported observing a small or no effects of the camera presence on participants in the proceedings, courtroom decorum, or the administration of justice." Would you agree with that based on your own personal experience having television in your courtroom?

SOTOMAYOR: My experience was limited, so I can't speak to the more broad conclusion of that report. I can say that as I -- as we discussed when I met with you, Senator, mine was positive.

In the two cases -- I believe I only had two cases where the camera -- where the media asked to record a proceeding. I may not remember others, but I do remember two. And on the circuit court, we do provide tapes upon request, and some -- some media have asked to record our oral arguments.

But my experience has generally been positive, and I would certainly be able to recount that.

SPECTER: C-SPAN has conducted a survey which shows that 61 percent of the American people would like to see the Supreme Court televised. And in the survey, it disclosed how little the American public knows about the Supreme Court.

Mr. Chairman, I'd ask consent this be included in the record.

LEAHY: Without objection, it will be included in the record.

SPECTER: The interest that has been generated by this confirmation proceeding, encouraged by the television, shows the enormous interest that people have in what the court does. And there has been a fair amount of coverage by the justices on television, as I cited yesterday. Many have appeared on television. Justice Kennedy says he believes the television is inevitable.

Everybody has said who's testified that there's a grave concern about the collegiality, and people do

not want to make a judgment before talking to their colleagues. And the sense has been derived that if anybody really has a strong objection -- and Justice Souter has expressed that view, as noted on his widespread comment that if cameras -- if TV cameras were to come to the court, they'd have to come in over his dead body.

And if confirmed, Justice Souter's body won't be there at all. Would you tell your colleagues the favorable expression -- experience that you've had with television in your courtroom and perhaps take a role in encouraging your colleagues to follow that experience for the Supreme Court?

SOTOMAYOR: I would certainly relay my experiences. To the extent some of them may not know about the pilot study in many courts, I would share that with them, although I do suspect they do know, and will participate in discussions with them on this issue. And those things I would do, Senator.

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XXX would do, Senator.

SPECTER: Some of my colleagues have questioned whether, as you stated, your panel in the Maloney case was really bound by Supreme Court precedent. The Seventh Circuit reached the same decision your panel did.

And in that opinion written by a highly respected Republican judge, Frank Easterbrook, the Seventh Circuit pointed out that Heller specifically declined to reconsider older Supreme Court cases which have held that the Second Amendment applies only to the federal government. Judge Easterbrook wrote, quote, "That does not license the inferior courts to go their own way. It just notes that the older precedent is open to reexamination by the justices themselves when the time comes."

That was your court's conclusion also, wasn't it?

SOTOMAYOR: It was. And I understand, having reviews Justice Easterbrook's opinion, that he agreed with the reasoning of Maloney on that point.

SPECTER: I want to return to the issue of basic authority, responsibility of the Supreme Court to decide the major cases on separation of power. There was a case which the Supreme Court denied certiorari just a couple of weeks ago involving claims for damages brought by survivors of victims of September 11th against certain individuals in Saudi Arabia. And this case posed a classical conflict between executive and legislative responsibilities.

Congress had legislated under sovereign immunity in 1976 that tort claims like flying an airplane into the World Trade Center were an exception of sovereign immunity, and the executive branch interposed objections to having that case decided because of the sensitivity of matters with Saudi Arabia. And the case involved circuit splits and very, very important matters in that tragedy which

you've commented reached you, being very close to the incident.

Don't you think that that's the kind of a case the Supreme Court should have heard to decide that kind of a very basic conflict between Article I powers of the Congress and Article II powers of the executive?

SOTOMAYOR: Senator, obviously issues related to September 11th and national security are very important issues to the country as a whole. For the reasons I mentioned earlier, I lived through September 11th, so I understand its great tragedy and effect on America. The question you ask me, though, is one that asks me to make judgment about an act the Supreme Court has done. And I didn't participate in their discussions. I didn't review the cert petitions. I didn't talk about with them their reasons. It would seem, and is, inappropriate to me to comment on a question that I wasn't a party to in making the decision.

SPECTER: Well, wouldn't you at least agree with the proposition that conflicts between the Congress and the executive branch are of the highest duty for the Supreme Court to consider and to decide?

SOTOMAYOR: The -- all conflicts under the Constitution, all issues arising from the Constitution are important.

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XXX issues arising from the Constitution are important.

SPECTER: Well, I know that, but that's a pretty easy question to answer. I'm not asking you to agree with Justice Roberts that the court ought to take more cases, which seemed to me to be pretty easy, or a question about Justice Scalia saying that there's turmoil when the circuit split.

And you don't have the Supreme Court taking cert, but isn't that of the highest magnitude? Our discussions here have involved a great many issues, but I would suggest to you that, on separation of powers and when you undertake the role of the Congress contrasting with the role of the president, Congress is Article I. It was placed with primacy, because we're closest to the people.

And when you have a question which you wouldn't comment on yesterday, like the terrorist surveillance program, which flatly contradicts the congressional enactment on Foreign Intelligence Surveillance Act, that the only way you'd get a wiretap is with court approval, and the case is declared unconstitutional in the Detroit district court, and the Sixth Circuit dodges the case on standing with very questionable grounds, and the Supreme Court won't even hear it, and you have a case involving September 11th and a very blatant conflict between Congress powers expressed under Article I with the sovereign immunities act, and the president is stepping in under foreign powers, isn't -- isn't that a category of the highest magnitude?

SOTOMAYOR: It is so difficult to answer that question in the abstract. For the reason I've just

explained, the issue is much, much more complicated than an absolute that says, if a case presents this question, I'm always going to take it.

That's not how a judge looks at the issue of granting or not granting certiorari, I assume, because the fact is weighing so many different factors at the time that decision is made. I...

SPECTER: Judge, I don't want to interrupt you, but I've got a minute-and-a-half left and a couple of comments I want to make in conclusion.

I would ask you to rethink that. And I would also ask you to rethink the issues you didn't want to answer yesterday about conflict between the Congress and the court.

Even though the Constitution made Congress Article I and the president Article II, the Supreme Court has really reversed the order. The judiciary is now really in Article I, if the powers were to be redefined.

And I'd ask you to take a look -- you have said repeatedly that the job of the court is to apply the law, not to make the law. And take a look again at the standard of proportional and congruent and see if you don't agree with Justice Scalia that that's another way for the court to make law.

And take a look, too, at what Justice Roberts said here in the confirmation hearings, that there would be deference and respect for congressional fact-finding, how that is not done in the Garrett case and in the voting rights case.

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XXX voting rights case.

SPECTER: And out of consideration for the people who are going to appear here later on, I'm not prepared yet to announce my own vote, but it is my hope that -- and the conventional wisdom is very strong for your confirmation -- that you'll use some of those characteristics of your litigation experience to battle out the ideas that you believe in, because I have a strong hunch that they're closer to the ones that I would like to see adopted to the court.

And don't let the issues of separation of powers skip by. The Congress is entitled to deference on these big issues, and at least they ought to be decided by the court.

Thank you very much, Judge Sotomayor. You've done quite an outstanding job as a witness.

Thank you, Mr. Chairman.

LEAHY: Thank you, Senator Specter.

And, Judge, we're going to take a -- we're going to take a short break. And thank you for all this. When we come back, we'll go to -- we'll recognize Senator Coburn, who's next. Thank you.

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XXX next. Thank you.

(RECESS)

LEAHY: Judge, thank you. And I do want to -- I do want to thank the press for cooperating. We've tried to make it as possible for TV and print and Congress.

And, Your Honor, you've been very gracious in that regard. And now I think we're coming close to the end of this round.