

Sotomayor Hearing, Day 4 (07/16/2009), Parts 41 to 51

<http://transcriptswire.cq.com/do/transcriptView?id=16469725>

CQ Transcriptwire

Jul 16, 2009 12:50

SENATE-HRG-SOTOMAYOR -41

XXX make that clear.

HATCH: I might say that -- like I say, these are important issues. In one case, *Williams v. Zbaraz* and *Harris v. McRae*, the fund joined an amicus brief asking the Supreme Court to overturn restrictions on taxpayer funding for abortions.

The brief compared refusing to use Medicaid funds to pay for abortions to the *Dred Scott* case, the *Dred Scott v. Sandford* decision that refused citizenship to black people in our society and -- and treated them terribly.

At the time, did you know that the fund was filing this brief? At the time, did you -- well, let me ask you each one. At the time, did you know the fund was filing this brief?

SOTOMAYOR: No, sir.

HATCH: OK. At the time, did you know that the brief made this argument?

SOTOMAYOR: No, sir.

HATCH: At the time, did you support the fund filing this brief that made this argument?

SOTOMAYOR: No.

HATCH: At the time, did you voice any concern, objection, disagreement or doubt about the fund filing this brief or making this argument?

SOTOMAYOR: I was not like Justice Ginsburg or Justice Marshall. I was not a lawyer on the fund as they were, with respect to the organizations they belonged to. I was a board member.

And it was not my practice and not that I know of, of any board member, although maybe one with civil rights experience would have. I didn't have any in this area, so I never reviewed the briefs.

HATCH: All right. In another case, *Ohio v. Akron Center for Reproductive Health*, the fund argued that the First Amendment right to freely exercise religion undermines laws requiring parental notification for minors getting abortions. Now, at the time, did you know that the fund was filing this brief?

SOTOMAYOR: No, no specific brief. Obviously, it was involved in litigation, so I knew generally they were filing briefs, but I wouldn't know until after the fact that a brief was actually filed. But I wouldn't review it.

HATCH: The same questions on this. At the time, did you know that the brief made this argument? At

the time, did you support the fund filing this brief that made this argument? And at the time, did you voice any concern, objection, disagreement, or doubt about the fund filing this brief or making this argument?

SOTOMAYOR: No, because I never reviewed the brief.

HATCH: That's fine. I'm just going to establish this.

In another case, *Planned Parenthood v. Casey*, the fund argued against a 24-hour waiting period for obtaining an abortion. So, again, those questions. At the time, did you know that the fund was filing this brief? Did you know that the brief made this argument? Did you support the fund filing this brief that made this argument? And did you voice any concern, objection, disagreement or doubt about the fund filing this brief or making this argument?

SOTOMAYOR: For the same reason, no.

HATCH: OK.

Now, Judge, I'm going to be very easy on you now, because I -- I invited constituents in Utah to submit questions and got an overwhelming response. Many of them submitted questions about the Second Amendment and other issues that have already been discussed.

But one constituent asked whether you see the courts, especially the Supreme Court, as an institution for resolving perceived social injustices, inequities and disadvantages. Now, please address this both in terms of the justices' intention and the effect of their decisions.

That was the question. And I thought it was an interesting question.

SOTOMAYOR: No, that's not the role of the courts. The role of the courts is to interpret the law as Congress writes it. It may be the effect in a particular situation that, in the court doing that, in giving effect to Congress's intent, it has that outcome, but it's not the role of the judge to create that outcome. It's to interpret what Congress is doing and do what Congress wants.

MORE

<http://transcriptswire.cq.com/do/transcriptView?id=16469799>

CQ Transcriptwire

Jul 16, 2009 12:51

SENATE-HRG-SOTOMAYOR -42

XXX what Congress wants.

HATCH: Great.

One final question, Judge. You have described your judicial philosophy in terms of the phrase "fidelity to the law." Would you agree with me that both majority and dissenting justices in last year's gun rights decision in *District of Columbia v. Heller* were doing -- doing their best to be faithful to the text

and history of the Second Amendment?

SOTOMAYOR: Text and history, how precedent had analyzed it, yes.

HATCH: OK. In other words, do you believe that they were exhibiting fidelity to the law as they understood it?

SOTOMAYOR: Yes. Yes.

HATCH: OK. Then I take it that you would agree that the justices in the majority were not engaging in some kind of right-wing judicial activism that some have characterized the decision? Is that fair to say?

SOTOMAYOR: It is fair for me to say that I don't view what a court does as activism. I view it as each judge principally interpreting the issue before them on the basis of the law.

HATCH: Great. Well, let me just ask you one other constituent question. It's a short one. Another constituent asked, which is more important or deserves more weight, the Constitution as it was originally intended or newer legal precedent?

SOTOMAYOR: What governs always is the Constitution...

HATCH: Yes, which -- which -- which is more important or deserves more weight, the actual wording of the Constitution as it was originally intended or newer legal precedent? That's a tough question.

SOTOMAYOR: The intent of the founders was set forth in the Constitution. They created the words; they created the document. It is their words that is the most important aspect of judging. You follow what they said in their words, and you apply it to the facts you're looking at.

HATCH: Well, thank you, Judge.

I'll give back the remainder of my time, Mr. Chairman. LEAHY: Thank you. Thank you, Senator Hatch.

And I just would note, we do have this letter in the -- in the record from PRLDEF, the Puerto Rican Legal Defense and Education Fund, in which they say, "Neither the board as a whole nor any individual member selects litigation to be undertaken or controls ongoing litigation." I just think that should be very, very clear here. Probably why they get support from the United Way and a number of other organizations.

Senator Grassley?

GRASSLEY: Good morning, Justice -- Judge Sotomayor. Yesterday, you said you would take a look at Baker v. Nelson, so I ask this question. You said you hadn't read Baker in a long time and would report back. You added that if Baker was precedent, you would uphold it based upon stare decisis, consistent with your stance in cases like Keyhole (ph), Roe v. Wade, Griswold, many others that you mentioned this week.

Baker involved an appeal from the Minnesota Supreme Court which held that a Minnesota law prohibiting same-sex marriage did not violate the 1st, the 8th, the 9th or the 14th Amendment to the Constitution. The Supreme Court, in a very short ruling, concluded on its merits that, quote, "The

appeal is dismissed for want of substantial federal question."

Baker remains on the books as precedent. Will you respect the court's decision in Baker based upon stare decisis? And if not, why not?

MORE

<http://transcriptswire.cq.com/do/transcriptView?id=16469987>

CQ Transcriptswire

Jul 16, 2009 12:57

SENATE-HRG-SOTOMAYOR -43

XXX not, why not?

SOTOMAYOR: As I indicated yesterday, I didn't remember Baker. And if I had studied it, it would have been in law school. You raised the question, and I did go back to look at Baker. In fact, I don't think I ever read it, even in law school.

Baker was decided at the time where jurisdiction over federal questions was mandatory before the Supreme Court. And the disposition by the Supreme Court, I believe, was what you related, Senator, which is a dismissal of the appeal raised on the Minnesota statute.

What I have learned is the question of -- it's what the meaning of that dismissal is is actually an issue that's being debated in existing litigation. As I indicated yesterday, I will follow precedent according to the doctrine of stare decisis. I can't prejudge what the precedent means in the issue comes before -- what a prior decision of the court means and its applicability to a particular issue is until that question is before me as a judge or a justice, if that should happen.

So at bottom, because the question is pending before a number of courts, the ABA would not permit me to comment on the merits of that. But as I indicated, I affirm that, with each holding of the court to the extent it is pertinent to the issues before the court, it has to be given the effects of stare decisis.

GRASSLEY: Am I supposed to interpret what you just said as anything different than what you said over the last three days in regard to Kelo or Roe or Griswold or any other precedents you said or precedents? Or would it be exactly in the same tone as you mentioned in previous days are previous precedents under stare decisis?

SOTOMAYOR: Well, those cases have holdings that are not open to dispute. The holdings are what they are. Their application to a particular situation will differ on what facts those situations present.

The same thing with the Nelson case which is what does the holding mean. And that's what I understand is being litigated because it was a one-line decision by the Supreme Court and how it applies to a new situation is what's also -- would come before a court.

GRASSLEY: OK. My last question for your appearance before your committee involves a word I don't think that's showed up here yet -- vacuums. And it's a question that I asked Judge Roberts and Justice Alito. And it comes from a conversation I had -- a dialogue I had at a December hearing when

Judge Souter was before us, now Justice Souter, involving the term "vacuums in law."

And I think the term "vacuums in law" comes from Souter himself as I'll read to you in just a moment. I probed Judge Souter about how he would interpret the Constitution and statutory law. In his response, Justice Souter talked about the court filling vacuums left by Congress. And there's several quotes that I can give you from 19 -- I guess it was 1990. But I will just read four or five lines of Judge Souter speaking to this committee.

MORE

<http://transcriptswire.cq.com/do/transcriptView?id=16469989>

CQ Transcriptwire

Jul 16, 2009 12:57

SENATE-HRG-SOTOMAYOR -44

XXX to this committee.

GRASSLEY: Because if, in fact, the Congress will face the responsibility that goes with the 14th Amendment powers, then by definition, there, to that extent, not going to be a kind of vacuum of responsibility created in which the courts are going to be forced to take on problems which sometimes in the first instance might be better addressed by the political branches of government.

Both prior to that and after that, Judge Souter talked a lot about maybe the courts needed to fill vacuums. Do you agree with Justice Souter? Is it appropriate for the courts to fill vacuums in the law?

And let me quickly follow it up. Do you expect that you will fill in vacuums in the law left by Congress if you're confirmed to be an associate justice?

SOTOMAYOR: Senator Grassley, one of the things I say to my students when I'm teaching, brief writing, I start by saying to them, it's very dangerous to use analogies, because they're always imperfect. I wouldn't ever use Justice Souter's words, because they are his words, not mine.

I try always to use -- and this is what I tell my students to do -- is use simple words. Explain what you're doing without analogy. Just tell them what you're doing. And what I do is not described in the way -- or I wouldn't describe it in the way Justice Souter did.

Judges apply the law. They apply the holdings of precedent. And they look at how that fits into the new facts before them.

But you're not creating law. If that was an intent that Justice Souter was expressing -- and I doubt it -- that's not what judges do. Judges do what I just described, and that's not, in my mind, acting for Congress. It is interpreting Congress's intent as expressed in a statute and applying it to the new situation.

GRASSLEY: Thank you.

I'm done, Mr. Chairman.

LEAHY: Thank you very much, Senator Grassley.

Senator Kyl, did you want another round?

KYL: Yes, thank you, Mr. Chairman. I'm not sure how long this will take. But, Judge, I think maybe we're, to use the president's analogy that we talked about in my very first question to you, we may be in about the 25th mile of the marathon, and I might even be persuaded to have a little empathy for this last mile here. I think you're just about done.

I wanted to go over three quick things, if I could. The first is the exchange that we had this morning regarding the decision in Ricci in which you insisted that you were bound by Supreme Court and Second Circuit precedent. I quoted from the Supreme Court decision to the effect that I -- I believe that that contradicted your answer.

If you have anything different to say than what you said this morning, I wanted to give you another opportunity to say it. We don't need to re-plow the same ground. But is there anything different that you would like to offer on that?

SOTOMAYOR: Senator, after each round, I go to the next moment. Without actually looking at the transcript, I couldn't answer that question. It's just impossible to right now. I'm glad you're giving me the opportunity, but I would need a specific question as to something I said and what I meant before I could respond.

KYL: All right. Since we will probably have a few questions as follow up in writing and you'll be providing us answers to those, maybe the best thing is just to ask a general question or, if there is something specific that I can relate it to, and then you can respond in that way.

SOTOMAYOR: Thank you, sir.

MORE

<http://transcriptswire.cq.com/do/transcriptView?id=16470241>

CQ Transcriptswire

Jul 16, 2009 13:04

SENATE-HRG-SOTOMAYOR -45

XXX Thank you, sir.

KYL: You're very welcome.

Now, the second question has to do with the Second Amendment. In the Maloney case, you held that it was not incorporated into the 14th Amendment. And what -- well, maybe I should ask you what that means. Let me ask you in two separate situations, as a practical matter.

If the Supreme Court does not review that issue, then is it the case that, at least in the Second Circuit and the Seventh Circuit, the states that are in the Seventh and Second Circuit, those states could pass laws that restrict, or even prohibit, people from owning firearms?

SOTOMAYOR: I do not hold -- it was not incorporated. I was on a panel that viewed Supreme Court precedent and Second Circuit precedent as holding that fact.

KYL: Right.

SOTOMAYOR: You can't talk in an absolute. There always has to be a reason for why a state acts. And you -- also has to be a reason for the extent of the regulation the state passes.

And so the question in Maloney for us was a very narrow question, which was are these nunchuck sticks, and I have described them previously as these martial arts sticks tied together by a belt that, when you swing them, if somebody comes by, there could be -- it's not serious deadly force in some situations -- whether the state had a reason recognized in law for determining that it was illegal to own those sticks.

The next issue that would come up by someone who challenged the regulation would be what's the nature of the regulation, and how does it comport with the reason the state gives for the actions it did. So it -- absolute regulation, it's not what I would answer. I would answer with the regulation...

KYL: Let me -- I -- excuse me. I appreciate your answer.

What would be the test that would be applied by a court in the event that a state said because of the danger that firearms to present to others, we're going to require that only law enforcement personnel can own firearms in our state, and someone challenged that as an affront to their rights, they would say the federal government can't take that right away from us because of the Second Amendment.

What would the test be that the court would apply to analyze the regulation of the state?

SOTOMAYOR: Well, that's very similar, although not exactly, if I understood it, to the Heller, the facts in Heller. And the court there said that the regulation in D.C. was broader than the interest asserted.

That question in a different state would depend on the circumstances of it's barring...

KYL: Well, is -- excuse me for interrupting.

Is there no standard to -- I mean, we're familiar with strict scrutiny, the reasonable basis test, and so on. Is there a standard of which you're aware that the court would use to examine the state's right to impose such a restriction, given that the Second Amendment would be deemed not incorporated?

SOTOMAYOR: In Maloney, the court addressed whether there was a violation of the equal protection statute of -- equal protection of the 14th Amendment and determined that rational basis review. Now that I understand that you were asking about a standard...

KYL: Sure. I'm sorry. I didn't (inaudible)...

SOTOMAYOR: Of review that's...

MORE

<http://transcriptswire.cq.com/do/transcriptView?id=16470403>

CQ Transcriptwire

Jul 16, 2009 13:08

SENATE-HRG-SOTOMAYOR -46

XXX Of review that's...

KYL: Now, of the tests that the court applies traditionally, the rational basis is the least difficult of states to meet in justifying a regulation, is it not?

SOTOMAYOR: I'm not going to be difficult with you. It's the one where you don't need a -- an exact fit between the exact injury that you're seeking to remedy in the legislation...

KYL: Could I...

SOTOMAYOR: So it does have more...

KYL: Flexibility for the...

SOTOMAYOR: Well, flexibility is the wrong -- more a deference to congressional findings about what...

KYL: Or -- or state law.

SOTOMAYOR: Exactly.

KYL: Right. You -- you know that the -- the general rule that the rational basis test is the least intrusive on a state's ability to regulate, whereas strict scrutiny is -- is the most intrusive on the state's ability. Is that a fair characterization?

SOTOMAYOR: It's a fair characterization that when you have strict scrutiny, the government's legislation must be very narrowly tailored.

KYL: Right. So...

SOTOMAYOR: When a rational basis, there is a broader breadth for the states to act.

KYL: So wouldn't it be correct to say that as between the application of the Second Amendment to the District of Columbia, for example, compared to a situation in which a state or city imposed a regulation on the control of firearms, that it would be much more likely that the court would uphold the state's ability or the city's ability to regulate that than it would -- in the abstract, I'm talking about here -- than it would a federal attempt to regulate it under the Second Amendment?

SOTOMAYOR: That's a problem within the abstract, because what the court would look at is whatever legislatures -- state legislative findings there are and the fit -- I'm -- fit between those findings and the legislation.

KYL: Right. And -- and I appreciate that you're not going to -- without knowing the facts of every case, you can't opine. But just as a general proposition, obviously, if the amendment is incorporated, it will

be much more difficult for a government to impose a standard than if it is not incorporated.

SOTOMAYOR: Well, the standard of review, even under the incorporation doctrine, was actually not decided in Heller. And that issue wasn't resolved, so what that answer will be is actually an open question that I couldn't even discuss in a broad term, other than to just explain that...

KYL: All right. Let -- let me ask you -- again to interrupt, because we're less than two minutes now -- if Senator Leahy says, gee, in Vermont he's not worried about the fact that the Second Amendment isn't incorporated. Maybe if I lived in New York or Massachusetts or some other state, I would be worried.

The question, I do, I would ask here is can you understand why someone who would like to own a gun would be concerned that if the amendment is not deemed incorporated into the 14th Amendment as a fundamental right, that it would be much more likely that the state or the city in which that individual lived could regulate his right to own a firearm?

SOTOMAYOR: Very clear to me from the public discussions on this issue that that is a concern for many people.

KYL: Final question. You're familiar -- this goes to the foreign law issue -- you're familiar with the difference in the treatment of foreign law by the U.S. Supreme Court in Kennedy v. Louisiana on the one hand and in Roper v. Simmons on the other.

In Roper the court ruled it was cruel and unusual to apply the death penalty and drew substantially on foreign law. In Kennedy v. Louisiana, an adult was convicted of raping an 8-year-old child, and the same five justices who wrote the opinion in Roper ruled that it was cruel and unusual to sentence the individual to death, but cited no foreign law whatsoever.

Some have said that a discussion of foreign law was left out of the Kennedy case because it actually cut against the majority's opinion. What do you think?

MORE

<http://transcriptswire.cq.com/do/transcriptView?id=16470406>

CQ Transcriptwire

Jul 16, 2009 13:08

SENATE-HRG-SOTOMAYOR -47

XXX do you think?

SOTOMAYOR: I can't speak for why they did. I can only do what you did, which is to describe what the courts did in what they said. It's impossible for me to speak about why a particular court acted in a particular way or why a particular justice analyzed an issue outside of what the opinion says.

KYL: I'll just tell you, my view is it kind of tells me that if the court can find some foreign law that supports its opinion, it might use it. If the opinion is on the other side, then it doesn't.

In my view, that's one of the problems with using foreign law. And I gather from what you said earlier,

you don't think the court should use foreign law, either, except in cases of treaty and other similarly appropriate cases.

SOTOMAYOR: I do not believe that foreign law should be used to -- to determine the result under constitutional law or American law, except where American law directs.

KYL: Thank you very much. Thank you, Judge.

LEAHY: Thank you.

Senator Graham?

GRAHAM: Thank you, Judge. I guess we do get to talk again.

When you look at the fundamental right aspect of the Second Amendment, you'll be looking at precedent, you will be looking in our history, you will be looking at a lot of things. Hopefully, you've talked to your godchild, who's an NRA member. You can be -- you can assimilate your view of what America is all about when it comes to Second Amendment.

But one thing I want you to know, that Russ Feingold and Lindsey Graham have reached the same conclusion, so that speaks strong of the Second Amendment, because we don't reach the same conclusion a lot. So I just want you to realize that this fundamental right issue of the Second Amendment is very important to people throughout the country, whether you own a gun or not, and it's one of those things that I think, when you look at, you'll find that America, unlike other countries, has a unique relationship to the Second Amendment.

Today, Khalid Sheikh Mohammed is appearing in a military tribunal at Guantanamo Bay, Cuba. He will be appearing before a military judge, and he'll be represented by military lawyers and there will be a military prosecutor.

And the one thing I want to -- to say here, that I've been a judge advocate, a member of the military legal community for well over 25 years. And to America and the world who may be watching this, I have nothing but great admiration and respect for those men and women who serve in our Judge Advocate Corps who will be given the obligation by our nation to render justice against people like Khalid Sheikh Mohammed.

And I just want to say this, also, on this historic day. To those who wonder why we do this, why do we give him a trial? Why are we so concerned about him having his day in court? Why do we give him a lawyer when we know what he would do to our people in his hands?

I would just like to say that it makes us better than him. It makes us stronger for us to give the mastermind of 9/11 his day in court, represented by counsel. And any verdict that comes his way won't be based on prejudice or passion or religious bigotry; it will be based on facts.

Now, let's talk about what this nation is facing. This Congress, Judge, is trying to reauthorize the Military Commission Act, trying to find a way to bring justice to the enemies of this country in a way that will make us better in the eyes of the world and also make us safer here at home. Have you had an opportunity to look at the Boumediene, Hamdan, Hamdi decisions at the Supreme -- Rasul cases?

SOTOMAYOR: I have, sir.

MORE

<http://transcriptswire.cq.com/do/transcriptView?id=16470457>

CQ Transcriptswire

Jul 16, 2009 13:10

SENATE-HRG-SOTOMAYOR -48

XXX I have, sir.

GRAHAM: OK. You will be called upon in the future, if you get on the court, to pass some judgment over the enactments of the Congress. When it comes to civilian criminal law, do you know of any concept in civilian law that would allow someone be held in criminal law indefinitely without trial?

SOTOMAYOR: When you're talking about civilian criminal law, you're talking about...

GRAHAM: Domestic criminal law.

SOTOMAYOR: Domestic criminal prosecutions.

GRAHAM: Right.

SOTOMAYOR: After conviction, defendants are often sentenced...

GRAHAM: I'm talking about you're held in jail without a trial.

SOTOMAYOR: The speedy trial act, and there are constitutional principles that require a speedy trial, so in answer to -- no, there is no...

GRAHAM: That is a correct statement of the law, Judge, in my opinion. You cannot hold someone in domestic criminal settings indefinitely without trial.

Under military law, the law of armed conflict, is there any requirement to try in a court of law every enemy prisoner?

SOTOMAYOR: There, you have an advantage on me.

GRAHAM: Well, I...

SOTOMAYOR: Because I -- I -- I'm sorry.

GRAHAM: Fair enough. The point I'm trying to make, and check if I'm wrong. You'll have some time to do this. As I understand military law, if we, as a nation, one of our airmen is downed in a foreign land, held by an adversary, it's my understanding we can't demand under the Geneva Convention that that airman or American soldier go to a civilian port.

That's not the law. If we have a pilot in the hands of the enemy, there is no requirement of the detaining force to take that airman before a civilian judge. I think that's the law. There is no

requirement under military or the law of armed conflict to have civilian judges review the status of our prisoner. That's a right that we do not possess.

The question for the country and the world, if people who operate outside the law of armed conflict that don't wear uniforms, are they going to a better deal than people that play by the rules? And as we discuss these matters, I hope you take into account that there is no requirement to try everyone held as an enemy prisoner, and do you believe that there's a requirement in the law that, as a certain point in time, that a prisoner has to be released -- an enemy prisoner -- just through the passage of time?

SOTOMAYOR: I can only answer that question narrowly. And narrowly because the court's holdings have been narrow in this area. First, military commissions and proceedings under them have been a part of the country's history.

GRAHAM: Right.

SOTOMAYOR: And so there's no question that they are appropriate in certain circumstances.

MORE

<http://transcriptswire.cq.com/do/transcriptView?id=16470483>

CQ Transcriptwire

Jul 16, 2009 13:10

SENATE-HRG-SOTOMAYOR -49

XXX in certain circumstances.

GRAHAM: And, Judge, they will have to render justice, they will have to meet the standards of who we are. My point to some critics on the right who've objected to my view that we ought to provide more capacity is that whatever the flag flies and whatever courtroom, there's something attached to that flag. So we're going to work hard to create a military commission consistent with the values of this country.

But I just want to let you know that, under traditional military law, it is not required to let someone go who is properly detained as part of the enemy force because of the passage of time. Judge, it would be crazy for us to capture someone, give them adequate due process, independent judicial review, and the judges agree with the military you're part of Al Qaida, you represent a danger, and say at a magic point in time, "Good luck. You can go now."

The people that we're fighting, if some of them are let go, they're going to try to kill us all. And it doesn't make us a better nation to put a burden upon ourselves that no one else has ever accepted.

So what my goal, working with my colleagues, is to have a rational system of justice that will make sure that every detainee has a chance to make the argument, "I'm being improperly held," have a day in court, have a review by an independent judiciary, but we do not take it so far as that we can't keep an Al Qaida member in jail until they die, because some of them deserve to be in jail until they die.

And I want the world to understand that America is not a bad place because we will hold Al Qaida

members under a process that is fair, transparent until they die.

My message to those who want to join this organization or are thinking about joining it is that you can get killed if you join and you may wind up dying in jail.

As this country and this Congress comes to grips with how to deal with an enemy that doesn't wear a uniform, that doesn't follow any rules, that would kill everybody they could get their hands on in the name of religion, that not only we focus, Senator Whitehouse, on upholding our values, that we focus on the threat that this country faces in an unprecedented manner.

So, Judge, my last words to you will be: If you get on this court and you look at the Military Commission Act that the Congress is about to pass, when you look at whether or not habeas should be applied to a wartime battle-filled prison, please remember, Judge, that we're not talking about domestic criminals who robbed a liquor store.

We're talking about people who have signed up for a cause that's every bit as dangerous as any enemy this country has ever faced and that this Congress, the voice of the American people who stand for re- election, has a very difficult assignment on its hands.

There are lanes for the executive branch, the judicial brand, and the congressional branch, even in a time of war. Please, Judge, understand that 535 members of Congress cannot be the commander-in-chief and that unelected judges can't run the war.

Thank you, and Godspeed.

SOTOMAYOR: Thank you, Senator.

MORE

<http://transcriptswire.cq.com/do/transcriptView?id=16470868>

CQ Transcriptswire

Jul 16, 2009 13:19

SENATE-HRG-SOTOMAYOR -50

XXX Thank you, Senator.

LEAHY: Senator Cornyn?

CORNYN: You're almost through, Judge. I just want to ask three relatively quick items just to -- that I was not able to get to earlier just for your brief comment.

You wrote in 2001 that neutrality and objectivity in the law are a myth. You said that you agreed that, quote, "there is no objective stance, but only a series of perspectives, no neutrality, no escape from choice in judging." Would you explain what that means?

SOTOMAYOR: In every single case, and Senator Graham gave the example in his opening statement, there are two parties arguing different perspectives on what the law means. That's what litigation is about. And what the judge has to do is choose the perspective that's going to apply to that

outcome.

So there is a choice. You're going to rule in someone's favor. You're going to rule against someone's favor. That's the perspective of the lack of neutrality. It's that you can't just throw up your hands and say, "I'm not going to rule." Judges have to choose the answer to the question presented to them.

And so that's what that part of my talking was about, that there is choice in judging. You have to rule.

CORNYN: You characterized in your opening statement that your judicial philosophy is one of fidelity to the law. Would you agree that both the majority and the dissenting justices in last year's landmark gun rights case, the D.C. v. Heller case, were each doing their best to be faithful to the text and the history of the Second Amendment? In other words, do you believe that they were exhibiting fidelity to the law?

SOTOMAYOR: I think both were looking at the legal issue before them, looking at the text of the Second Amendment, looking at its history, looking at the court's precedent over time and trying to answer the question that was before them.

CORNYN: Do you think it's fair to characterize the five justices who affirmed the right to keep and bear arms as engaged in right-wing judicial activism?

SOTOMAYOR: It's -- that -- I don't use that word for judging. I eschew labels of any kind. That's why I don't like analogies and why I prefer, in brief writing, to talk about judges interpreting the law.

CORNYN: What about the 10 Democratic senators, including Senator Feingold, who's been mentioned earlier, who joined the brief, the amicus brief to the U.S. Supreme Court urging the court to recognize the individual right to keep and bear arms? Do you think, by encouraging an individual right to keep and bear arms, that somehow these senators were encouraging the court to engage in right-wing judicial activism?

SOTOMAYOR: I don't describe people's actions with those labels.

CORNYN: I appreciate that.

You testified earlier today that you would not use foreign law in interpreting the Constitution statutes. I'd like to contrast that statement with an earlier statement that you made back in April. And I quote, "International law and foreign law will be very important in the discussion of how to think about unsettled issues in our legal system. It is my hope that judges everywhere will continue to do this," close quote.

Let me repeat the words that you used three months ago. You said, "Very important," and you said, "Judges everywhere." This suggests to me that you consider the use of foreign law to be broader than you indicated in your testimony earlier today. Do you stand by the testimony you gave earlier today? Is it -- or do you stand by the speech you gave three months ago, or can you reconcile those for us?

<http://transcriptswire.cq.com/do/transcriptView?id=16470852>

CQ Transcriptwire

Jul 16, 2009 13:20

SENATE-HRG-SOTOMAYOR -51

XXX those for us?

SOTOMAYOR: Stand by both, because the speech made very clear in any number of places where I said you can't use it to interpret the Constitution or American law, and I went through -- not a lengthy because it was a shorter speech -- but I described the situations in which American law looks to foreign law by its terms, meaning, it's counseled by American law.

My part of the speech said people misunderstand what the word "use" means. And I noted that use appears to be -- to people to mean if you cite a foreign decision, that's means it's controlling an outcome or that you are using it to control an outcome. And I said, no. You think about foreign law as a -- and I believe my words said this -- you think about a foreign law the way judges think about all sources of information, ideas. And you think about them as ideas both from law review articles and from state court decisions and from all the sources, including, Wikipedia, that people think about ideas. OK?

They don't control the outcome of the case. The law compels that outcome. And you have to follow the law. But judges think. We engage in academic discussions. We talk about ideas. Sometimes, you'll see judges who choose -- I haven't -- it's not my style, OK? But there are judges who will drop a footnote and talk about an idea. I'm not thinking that they're using that idea to compel a result. It's an engagement of thought.

But the outcome, as in, you know, you could always find an exception, I assume if I looked hard enough. But in my review, judges are applying American law.

CORNBYN: Well, Your Honor, why would a judge cite foreign law unless it somehow had an impact on their decision on their decision making process?

SOTOMAYOR: I don't know why other judges do it. As I explained, I haven't. But I look at the structure of what the judge has done and explained and go by what that judge tells me. There are situations -- that's as far as I can go.

CORNBYN: You said at another occasion that you find foreign law useful because it, quote, "gets the creative juices flowing," close quote. What does that mean?

SOTOMAYOR: To me, I am a part academic. Please don't forget that I taught at two law schools. I do speak more than I should.

(LAUGHTER) And I think about ideas all the time. And so, for me, it's fun to think about ideas. You sit at a lunchroom among judges, and you'll often hear them saying, did you see what that law school professor said. Or did you see what some other judge wrote and what do you think about it and -- but it's just talking. It's just sharing ideas.

What you're doing in each case -- and that's what my speech said, you can't use foreign law to determine the American Constitution. It can't be used neither as a holding or precedent.

CORNBYN: Do you agree with me that if the American people want to change the Constitution, that is a right reserved to them under the Constitution to amend it and change it rather than to have judges,

under the guise of interpreting the law, in effect, change the Constitution by judicial fiat?

MORE

<http://transcriptswire.cq.com/do/transcriptView?id=16470906>

CQ Transcriptswire

Jul 16, 2009 13:22

SENATE-HRG-SOTOMAYOR -52

XXX by judicial fiat?

SOTOMAYOR: In that regard, the Constitution is abundantly clear. There is amendment process set forth there. It controls how you change the Constitution.

CORNBYN: And I would just say, if academics or legislators or anybody else who's got creative juices flowing from the invocation of foreign law, if they want to change the Constitution, my contention is the most appropriate way to do that is for the American people to do it through the amendment process, rather than for judges to do it by relying on foreign law.

SOTOMAYOR: We have no disagreement.

CORNBYN: Thank you very much, your honor.

LEAHY: Thank you.

Senator Coburn?

COBURN: Thank you, Mr. Chairman.

I'm going to go into an area that we have not covered, no one has covered yet. And I'm reminded of Senator Sessions talking to you about pay. You know, I would predict to you, in about 15 -- 15 or 18 years -- I'm sorry?

(UNKNOWN): (OFF-MIKE)

COBURN: ... pay, in 10 or 15 years -- judicial pay -- we may not be able to pay your salary, if you look -- 9 years from now, we're going to have \$1 trillion worth of interest on the national debt. It's not very funny. What it does is it undermines the freedom and security of our children and our grandchildren.

And I want to go to -- to Madison. Madison's the father of our Constitution, and I want to get your take on three issues: one, the commerce clause; two, the general welfare clause; and, number three, the 10th Amendment.

And I don't know if you've read the Federalist Papers, but I find them very interesting to give insight into what our founders meant, what they said when they wrote our Constitution.

In Federalist 51, Madison expressed the importance of a restrained government by stating, "In

framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed and, in the next place, oblige it to control itself."

Do you believe that our federal courts enable the federal government to exceed its intended boundaries by interpreting Article I's commerce clause and necessary and proper clause to delicate virtual unlimited authority to the federal government?

SOTOMAYOR: The Supreme Court, in at least two rules or one, has said there are limits to all powers set forth in the Constitution. And -- and the question for the court in any particular situation is - is to determine whether whatever branch of government or state is acting within the limits of the Constitution.

COBURN: So you would say -- but let me read you another Madison quote, again, the father of our Constitution. "If Congress can employ money indefinitely to the general welfare and are the sole and supreme judges of general welfare, they may take the care of religion into their own hands. They may appoint teachers in every state, county and parish and pay them out of the public treasury."

"They may take into their hands -- their own hands the education of our children, establishing like-manner schools throughout the union. They may assume the provision for the poor. They may undertake the regulation of all roads other than post roads. In short, everything from the highest object of state legislation down to the most minute object of police would be thrown under the power of Congress."

"Were the power of Congress to be established in the latitude contended for, it would subvert the very foundations and transmute the very nature of the limited government established by this Constitution and the American people."

MORE

<http://transcriptswire.cq.com/do/transcriptView?id=16471254>

CQ Transcriptswire

Jul 16, 2009 13:32

SENATE-HRG-SOTOMAYOR -53

XXX the American people."

COBURN: I guess my question to you is, do -- do you have any concerns, as we now have a \$3.6 trillion budget, \$11.4 trillion worth of debt, \$90 trillion worth of unfunded obligations that are going to be placed on the back of our children, that maybe some reining in of Congress in terms of the general welfare clause, the commerce clause, and reinforcement of the 10th Amendment under its intended purposes by our founders, which said that everything that was not specifically listed in the enumerated powers was left to the states and the people -- do you have any concerns about where we're heading in this nation and the obligations of the Supreme Court may be to re-look at what Madison and our founders intended as they wrote these clauses into our Constitution?

SOTOMAYOR: One of the beauties of our Constitution is the very question that you asked me: Is the

dialogue that's left in the first instance to this body and the House of Representatives?

The answer to that question is not mine in the abstract. The answer to that question is a discussion that this legislative body will come to an answer about as reflected in the laws it will pass. And once it passes those laws, there may be individuals who have rights to challenge those laws and will come to us and ask us to examine what the Constitution says about what Congress did.

But it is the great beauty of this nation that we do leave those lawmaking to our elected branches and that we expect our courts to understand its limited role, but important role, in ensuring that the Constitution is upheld in every situation...

COBURN: So...

SOTOMAYOR: ... that's presented to it.

COBURN: I believe our founders thought that the Supreme Court would be the check and balance on the commerce clause, the general welfare clause, and the insurance of the 10th Amendment, and that's the reason I raised those issues with you.

I wonder if you think we've honored the plain language of the Constitution and the intent of the founders with regard to the limited power granted to the federal government.

SOTOMAYOR: That's almost a judgment call. I don't know how to answer your question, because it would seem like it would lead to the natural question: Did the courts do this in this case? And that would be opining on a particular view of a case, and that case would have a holding, and I would have to look at that holding in the context of another case.

I'm attempting to answer your question, Senator, but our roles and the ones we choose to serve -- your job is wonderful. It is so, so important. But I love that you're doing your job, and I love that I'm doing my job as a judge. I like mine better.

COBURN: I think I would like yours better as well, although I doubt that I could ever get to the stage of a confirmation process.

Well, let me just end up with this.

(CROSSTALK)

(LAUGHTER)

COBURN: It would be entertaining, wouldn't it?

(UNKNOWN): (OFF-MIKE), I'll preside over it.

MORE

<http://transcriptswire.cq.com/do/transcriptView?id=16471387>

CQ Transcriptswire

Jul 16, 2009 13:35

SENATE-HRG-SOTOMAYOR -54

XXX preside over it.

COBURN: Well, now, it's not likely to happen.

Let me -- let me just end with this. You know, I -- people call me simple, because I really believe this document is the genesis of our success as a country. And I believe these words are plainly written, and I believe we ignore them at our peril. And my hope is that the Supreme Court will re-look at the intent of our founders and the 10th Amendment, where they guaranteed that everything that wasn't spelled out specifically for the Congress to do was explicitly reserved to the states and to the people. To do less than that undermines our future.

And all we have to do is take a little snapshot of where we are today, economically, financially and leadership-wise, to understand we ignored their plain words. And we find ourselves near bankruptcy because of them.

I thank you, Mr. Chairman.

LEAHY: Thank you.

When I -- and this -- it is almost over -- there was one question, and I've withheld the balance of my time before, and I want to make sure I ask this question, because I asked it of Chief Justice Roberts and Justice Alito when they were before this committee.

As you know, in death penalty cases, it takes five justices to stay an execution but only four to grant certiorari to hear a case. You could grant certiorari to hear a case, but the execution is not stayed. It could become a moot point. The person could be executed in between.

So usually, if those four justices wanted to hear a case, somebody agrees to the fifth vote to stay an execution just as a matter of courtesy, so the cert does not become moot, so the person is not executed in the few weeks that might be between granting a cert and the hearing of the case.

Both Chief Justice Roberts and Justice Alito agreed that this was -- rule was sensible, the rule of five, or a courtesy fifth. It appears, according to a study done by the New York Times, that very reasonable rule and the rule that both Chief Justice Roberts and Justice Alito said it was very reasonable, and I think the majority of us on the committee thought it was reasonable.

They said that -- suggest that that rule has not been adhered to, the rule of four, because there have been number of cases where four justices voted to the -- for cert, but -- and wanted to stay the execution, but the fifth would not, and the person was executed before the case was heard.

If you were on the Supreme Court, and this is basically the same thing I asked Justice Roberts and Justice Alito, if you were on the Supreme Court, four of your fellow justices said they'd like to consider a death penalty case, and they asked you to be a fifth vote to stay the execution, even though you didn't necessarily plan to vote for cert, how would you approach that issue?

SOTOMAYOR: I answer the way that those two justices did, which is I would consider the rule of the fifth route (ph) vote in the way it has been practiced by the court. It has a sensible basis, which is that,

if you don't grant the stay, an execution can happen before you reach the question of whether to grant certiorari or not.

MORE

<http://transcriptswire.cq.com/do/transcriptView?id=16471424>

CQ Transcriptswire

Jul 16, 2009 13:36

SENATE-HRG-SOTOMAYOR -55

XXX certiorari or not.

LEAHY: Well, I thank you.

And I applauded both Chief Justice Roberts and Justice Alito for their answer. It appears that perhaps somewhere between the hearing room and the Supreme Court their minds changed.

Now, in 2007, Christopher Scott Emmett was executed, even when four justices had voted for stay of execution. Justice Stevens wrote a statement and joined by Justice Ginsberg calling for a routine practice of staying executions scheduled in advance of our review of the denial of a capital defendant's first application -- first application for a federal writ of habeas corpus.

I'm not asking for a commitment on what Justices Stevens and Ginsburg said, but is that something that ought to at least be considered?

SOTOMAYOR: Unquestionably. As I said, there is an underlying reason for that practice.

LEAHY: And there's an understanding that the -- when the case is reviewed, it may very well end up - - the sentence below may well be upheld and the execution will go forward, but this is on the various steps for that hearing.

SOTOMAYOR: Yes, sir.

LEAHY: Thank you.

Senator Sessions, did you want to...

SESSIONS: Well, just briefly, I'd thank you again for your testimony. And I know judges come before these committees, and they make promises, and they mean those things, and then they're lucky. They get a lifetime appointment.

And I think most likely the judicial philosophy will take over as the years go by, the 10, 20, 30 years on the bench. And so it's an important decision for to us reach and to consider. And we'll all do our best.

I hope you've felt that it's been a fairly conducted hearing. That's been my goal.

SOTOMAYOR: Thank you, Senators, to all senators. I have received all the graciousness and fair hearing that I could have asked for.

And I thank you, Senator, for your participation in this process and in ensuring that.

SESSIONS: Thank you. You're very courteous.

I think, for the record, a number of significant articles should be in the record. One...

LEAHY: Without objection.

SESSIONS: ... the Washington Post on July 9th, "Uncommon Detail"; Wall Street Journal, "Defining Activism Down"; July 15th, New York Times, "New Scrutiny of Judge's Most Controversial Case" by Adam Liptak; New York Times, "Nominee's Rulings are Exhaustive but Often Narrow"; Ninth Justice, "How Ricci Almost Disappeared"; the Ninth Justice, "Justices Reject Sotomayor Position 9-0"; and the Wall Street Journal, "The Wise Latina" article of June 15th, which is an important analysis.

Mr. Chairman, for the record, I'd also offer a letter from Sandra Froman, former president of the National Rifle Association, and a series of other people who co-signed that letter making this point. I think it's important, Sandra Froman herself a lawyer.

"Surprisingly, Heller was a 5-4 decision with some justices arguing that the Second Amendment does not apply to private citizens or, if it does, even a total gun ban could be upheld if a legitimate government interest could be found."

"The dissenting justices also found D.C.'s absolute ban on handguns within the home to be a reasonable restriction. In this -- if this had been the majority view, then any gun ban could be upheld and the Second Amendment would be meaningless."

MORE

<http://transcriptswire.cq.com/do/transcriptView?id=16471669>

CQ Transcriptwire

Jul 16, 2009 13:43

SENATE-HRG-SOTOMAYOR -56

XXX would be meaningless."

SESSIONS: It goes on to say, "The Second Amendment survives today by a single vote in the Supreme Court. Both its application to the states and whether there will be a meaningful strict standard of review remain to be decided. Justice Sotomayor has revealed her views on these issues, and we believe they are contrary to the intent and purposes of the Second Amendment and the Bill of Rights. As Second Amendment leaders, we are deeply concerned about preserving all fundamental rights for current and future generations. We strongly oppose this nominee."

I offer that and a letter from Americans United for Life, the 60- Plus Association North Carolina Property Association.

LEAHY: We will hold the record open to the -- to 5 o'clock tonight for any other materials people wish to submit to the record.

SESSIONS: Thank you, Mr. Chairman. And thank you for your courtesy throughout.

LEAHY: Thank you.

We will also hold the record open until 5 o'clock tomorrow for additional questions that senators wish to ask.

And now, Judge Sotomayor, this hearing has extended over four days. And the first day you listen to our opening statements rather extensively. You shared with us a very concise statement about your own fidelity to the law. I suspect it will be in law school text in years to come.

Over the last three days, you've answered our questions from senators on both sides of the aisle. And I hope I speak for all the senators, both Republican and Democratic, on this committee when I thank you for answering with such intelligence, grace and patience.

I also thank the members of your family for sitting here also for such intelligence, grace, and especially patience.

During the course of this week, almost 2,000 people have attended this hearing in person -- 2,000. Millions more have seen it, heard it, or read about it, thanks to newspapers, blogs, television, cable, webcasting.

I think through these proceedings, the American people have gotten to know you. Even though I sat on two different confirmation hearings for you over the past 17 years, I feel I've gotten to know you even better.

The president told the American people in his Internet address back in May as a justice of the Supreme Court, you would, quote, "bring not only the experience acquired over the course of a brilliant legal career, but the wisdom accumulated over the course of an extraordinary journey, a journey defined by hard work, fierce intelligence and enduring faith in America. All things are possible."

We bore witness of that this week. Experience and wisdom will benefit all Americans. And when you walk under that piece of Vermont marble over the door of the Supreme Court, speaking of equal justice under law, I know that will guide you.

Judge Sotomayor, thank you. Godspeed.

SOTOMAYOR: Thank you all.

(UNKNOWN): Thank you.

LEAHY: We stand recessed for 10 minutes.

MORE

<http://transcriptswire.cq.com/do/transcriptView?id=16472969>

CQ Transcriptwire

Jul 16, 2009 14:19

SENATE-HRG-SOTOMAYOR -57

XXX for 10 minutes.

(RECESS)

ACTING CHAIRMAN: Good afternoon, everyone. The ranking member has joined us, and the hearing will now come to order.

We have a considerable number of witnesses to get through today, so I would ask Ms. Askew and Ms. Boies and the witnesses who will follow them to please be scrupulous about keeping your oral statements to five minutes or under. Your full written statement will be put in the record, and senators will each have five minutes to ask questions of each panel.

Along with Ranking Member Sessions, I am very glad to welcome ABA witnesses Kim Askew and Mary Boies. Kim Askew is the chair of the ABA Standing Committee on the Federal Judiciary, and Mary Boies the ABA Standing Committee's lead evaluator on its investigation into Judge Sotomayor's qualifications to be an associate justice on the Supreme Court of the United States.

The ranking member and I both look forward to their testimony. And if I could ask them please to stand and be sworn, we will begin.

Do you affirm that the testimony you are about to bring before the committee will be the truth, the whole truth and nothing but the truth, so help you God?

Please be seated. You may proceed with your statements.

ASKEW: Thank you. Good afternoon and thank you for having us. I'm Kim Askew of Dallas, Texas, chair of the Standing Committee on the Federal Judiciary. This is Mary Boies. Mary Boies is our Second Circuit representative, and as you mentioned, she was the lead evaluator on the investigation of Judge Sonia Sotomayor.

We are honored to appear here today to explain the Standing Committee's evaluation of this nominee. The Standing Committee gave her its highest rating and unanimously found that she was well qualified.

For 60 years the Standing Committee has conducted a thorough, nonpartisan peer review in which we did not consider the ideology of the nominee, and we have done that with every federal judicial nominee. We evaluate the integrity, the professional competence of the judicial temperament of the nominee.

MORE

<http://transcriptwire.cq.com/do/transcriptView?id=16472991>

CQ Transcriptwire

Jul 16, 2009 14:19

SENATE-HRG-SOTOMAYOR -58

XXX of the nominee.

ASKEW: The Standing Committee does not proposal, endorse or recommend nominees. Our sole function is to evaluate the professional qualifications of a nominee and then rate the nominee either well qualified, qualified or not qualified.

A nominee to the Supreme Court of the United States must possess exceptional professional qualifications. That is, a high degree of scholarship, academic talent, analytical and writing ability, and overall excellence. And because of that, our investigations of Supreme Court nominees is more extensive than the nominations to the lower federal courts.

And they're procedurally different in two ways. First, all circuit members participate in the evaluations. An investigation is conducted in every circuit, not just the circuit in which the nominee resides. Second, in addition to the Standing Committee reading the writings of the nominee, we commission three reading groups of distinguished scholars and practitioners who also review the nominee's legal writings and advise the Standing Committee.

Georgetown University Law Center and Syracuse University School of Law formed reading groups this year, and these groups were comprised of professors who are all recognized experts in their substantive areas of law. A practitioner's reading group was also formed, and that group was also comprised of nationally recognized lawyers with substantial trial and appellate practices. All of them are familiar with Supreme Court practices, and many have clerked for justices on the U.S. Supreme Court.

In connection with Judge Sotomayor's evaluation, we initially contacted some 2600 persons who were likely to have relevant knowledge of her professional qualifications. This included every United States federal judge, state judges, lawyers, law professors and deans, and, of course, members of the community and bar representatives. We received 850 responses to our contracts, and we personally interviewed or received detailed letters or e-mails from over 500 judges, lawyers, and others in the community who knew Judge Sotomayor or who had appeared before her.

We also analyzed transcripts, speeches, other materials, and, of course, Ms. Boies and I interviewed her, and it is on that basis that we reached the unanimous conclusion as a Standing Committee that she was well qualified.

Her record is known to this distinguished committee. She has been successful as a prosecutor, a lawyer in private practice, judge, a legal lecturer. She has served with distinction for almost 17 years on a federal bench both as a trial court judge and an appellate judge. She has taught in two of the nation's leading law schools, and her work in the community is well known.

She has a reputation for integrity and outstanding character. She is universally praised for her diligence in industry. She has an outstanding intellect, strong analytical abilities, sound judgment, an exceptional work ethic, and is known for her courtroom preparation.

Her judicial temperament meets the high standards for appointment to the court. The Standing Committee fully addressed the concerns raised regarding her writings and some aspect of her judicial temperament. Those are set forth in detail in our correspondence on this committee, and we ask that

they be made a part of the record.

In determining that these concerns did not detract from the highest rating of well qualified for the judge, the Standing Committee was persuaded by the overwhelming responses of lawyers and judges who praised her writings and overall temperament.

MORE

<http://transcriptswire.cq.com/do/transcriptView?id=16473209>

CQ Transcriptswire

Jul 16, 2009 14:26

SENATE-HRG-SOTOMAYOR -59

XXX and overall temperament.

ASKEW: On behalf of the Standing Committee, Ms. Boies and I thank you for the opportunity to be present today and present these remarks, and we are certainly available to answer any questions you may have.

ACTING CHAIRMAN: Thank you so much.

Ms. Boies, do you have a separate statement you wish to make?

BOIES: I do not, Senator. We're happy to answer your questions.

ACTING CHAIRMAN: Very good. I appreciate it.

I just want to summarize a few conclusions from the report, and then ask you a little bit about the scope of the effort that went into it in terms of the numbers of people who were interviewed and the duration and non-partisan nature of the effort, if you would.

On page six, you conclude that, "Judge Sotomayor has earned and enjoys an excellent reputation for integrity and outstanding character. Lawyers and judges uniformly praised the nominee's integrity."

On page 11, you report that, "Judge Sotomayor's opinions show an adherence to precedent and an absence of attempts to set policy based on the Judge's personal views. Her opinions are narrow in scope, address only the issues presented, do no revisit settled areas of law, and are devoid of broad or sweeping pronouncements."

On page 13, you report that, "The overwhelming weight of opinion shared by judges, lawyers, courtroom observers and former law clerks is that Judge Sotomayor's style on the bench is, A consistent with the active questioning style that is well known on the Second Circuit" -- and which, on a personal aside, I will say I liked as a practitioner -- B, directed at the weak points in the arguments of parties to the case, even though it may not always seem that way to the lawyer then being questioned; C designed to ferret out relative strengths and shortcomings of the arguments presented; and, D, within the appropriate bounds of judging."

And finally, "The committee unanimously found an absence of any bias in the nominee's extensive

work. Lawyers and judges overwhelmingly agree" -- this is your quote -- "That she is an absolutely fair judge. None, including those many lawyers who lost cases before her, reported to the Standing Committee that they have ever discerned any racial, gender, cultural or other bias in her opinions or in any aspect of her judicial performance. Lawyers and judges commented that she is open-minded, thoroughly examines a record in far more detail than many circuit judges, and listens to all sides of the argument."

Could you tell us a little bit about the scope of the review that took place that enabled you to reach those firm conclusions?

BOIES: Unlike with most federal judicial nominees, in the case of a Supreme Court nominee, the entire 15-member committee writes letters to the entire judiciary throughout the country, and also to lawyers throughout the country. We go through her opinions, and we look to see what lawyers appeared in front of her, and we write many letters to those people.

In addition, we write to -- as Chair Askew said, to law school deans and law professors. And as she mentioned, we commissioned three reading groups of professors and practitioners. There were 25 law professors from Syracuse Law School and from Georgetown Law Center who read her opinions, as did 11 practitioners, many of whom themselves were former Supreme Court law clerks.

And the standards that we look at, and the only standards, are the professional competence, judicial temperament, and integrity. And each circuit member interviews all of the judges and lawyers who respond to our letters or whom they identify as someone who knows, or has worked with, Judge Sotomayor.

MORE

<http://transcriptswire.cq.com/do/transcriptView?id=16473335>

CQ Transcriptswire

Jul 16, 2009 14:28

SENATE-HRG-SOTOMAYOR -60

XXX with, Judge Sotomayor.

BOIES: Those interviews are then collected. I review them. The chair and I had a personal interview with Judge Sotomayor in her chambers in New York. We met for over three hours, and we discussed with her in detail every criticism that we had heard of her judging and the factors that we look at.

And following that, we received the reading group reports which were each one hundreds and hundreds of page that went through her opinions one by one. They didn't merely give an overall summary. We read those. In addition, I read every opinion that she wrote on the Second Circuit and many that she wrote on the district court.

In addition, we took many of her leave of Standing Committee, took many of her opinions, and we divided them up among themselves so that we, too, read those opinions not merely the reading groups.

And I think that is a snapshot of the scope of our review, but I'll give you one example, if I may, of how

we operate. And that is, we received a critical review from a lawyer about her conduct at a particular oral argument. We identified the date of that argument and the case. We then went through the court records and the opinions that were written, and we identified all of the lawyers who were involved in that case. We identified the docket street from the Second Circuit for that date so that we could identify any other lawyers who might have been present in the courtroom even though they were not there for that particular case. And we identified all of the lawyers who had any argument that day because maybe they would have a view of the panel.

And then, finally, we talked to the other members of the panel to ask what their view was on her judicial temperament because we had received a fairly important criticism. And so we not only reviewed that criticism, but we look to see how others viewed the same conduct.

Now, you may say that this is stacking the deck against her because we know we have a critical comment and maybe she was having a very bad day and maybe she wasn't up to her -- the way she normally would be on the bench.

But we talked to at least 10 other lawyers and another member of the panel.

(UNKNOWN): And that's what the peer review process is. Much of what you will read anecdotally, if you talk to, you know, the legal press, you may not have personal knowledge necessarily of what the judge does or you may not have been the lawyer who actually participated in that argument.

The reason we talk to lawyers is because we examine whether you have personal knowledge of what you're telling us. We will ask you about the case that you are in because then we can go forward and investigate. So we talked to all the lawyers. We talked to the judges. In some instances, we even had the pleasure of listening to the transcript because one of the allegations here was a lack of temperament.

That cannot always be picked up from the written record. Luckily, we were able to find out there so we could hear the tone and the tenor of the hot courtroom that has been described before this committee. And so when we come to this distinguished committee and say that this was in keeping with the practice of the Second Circuit, we have looked at it in every way that we possibly can to ensure what took place.

ACTING CHAIRMAN: Well, let me conclude by thanking you for the thoroughness of your evaluation. And as I understand it, the ultimate conclusion was to evaluate her as well qualified, which is the highest available ranking, which was unanimous, and you considered her conduct as a judge over 17 years to be -- and I quote -- "exemplary"?

(UNKNOWN): That's correct.

ACTING CHAIRMAN: Thank you very much.

The ranking member?