

Sotomayor Hearing, Day 4 (07/16/2009), Parts 51 to 66

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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?

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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."

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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.

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CQ Transcriptwire

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 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.

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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."

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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.

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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

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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

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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

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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?

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Jul 16, 2009 14:42

SENATE-HRG-SOTOMAYOR -61

XXX The ranking member?

SESSIONS: Thank you. Thank you, Mr. New Chairman. Good to be with you.

The American Bar Association was critical of former President Bush -- well, former former President Bush -- for not asking for evaluations before the nomination was made. President Obama followed that same process.

Since that time, have you changed your view about the viability or the advisability of conducting or asking the president to give the names -- name or names that -- before final decision is made?

ASKEW: As chair of the committee, let me answer that. The committee does not take a stand on that. The ABA may take a stand on whether it thinks it is a better idea for a president to nominate on a pre- or post-nomination basis, but the Standing Committee is divorced of the policy side of the ABA.

It is our position, and always has been, that we will conduct a neutral, nonpartisan peer review whenever the president gives us that information.

SESSIONS: With regard to the temperament question, there were some questions here asked about that, and they add to the almanac on whatever had the chief -- Judge Sotomayor -- turned out they have quite a much more negative feedback from lawyers -- a terror on the bench, a bit of a bully, a lot of statements like that.

And yet you still gave her the highest rating. You -- so you talked to those people, and you -- you're OK with that?

ASKEW: We absolutely are. And just to give you a sense, we talked to over 500 lawyers. And not to minimize any comments, because sometimes one criticism can be the most important comment that we get on a nominee, but of the 500 lawyers that we spoke to, we received comment on the temperament issue from less than 10 lawyers.

They were mostly lawyers and judges who were outside of the 2nd Circuit and were not as familiar with 2nd Circuit precedent.

SESSIONS: Well, you know, I hope the 2nd Circuit doesn't approve of beating up lawyers too much.

ASKEW: Well, they do not.

SESSIONS: They like... (UNKNOWN): Just enough.

SESSIONS: Let me ask you. Did you -- I was troubled by the handling of the Ricci case. That was a summary order at first, until other judges on the panel objected, and then was a pro curiam opinion. But I think the -- the process of making that a summary opinion was to me pretty much takes you back. Did -- how did you conclude? Did you look at that precisely?

ASKEW: We did look at that case, Senator. We do not take a position on whether an opinion is right or is wrong. That's not what our function is.

However, we did look at the procedure that was followed in the Ricci case. And that is the case in which the 2nd Circuit panel heard full briefing and oral argument, and following which the panel, which was not presided over by Judge Sotomayor, but the panel decided to adopt in effect the District Court ruling, because they affirmed the ruling, and they agreed with its reasoning.

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Jul 16, 2009 14:43

SENATE-HRG-SOTOMAYOR -62

XXX with its reasoning.

SESSIONS: Well, that's...

ASKEW: And they did not...

SESSIONS: ... basically true. However, one judge was quite reluctant, and another one moderated, and a judge apparently wanted to do it this way and -- and prevail. But the only thing I was asking about, and if you're prepared to make an expression of opinion, is the decision to decide it as a summary matter, not even a per curiam opinion. Did you deal with that issue?

(UNKNOWN): We are aware of how the Second Circuit handles summary opinions. We did not talk to her about that. We did not believe that was within the criteria that we evaluate with judges.

We did read the opinion in great detail. Members of the reading groups, all three reading groups, indeed. We were very lucky to receive the Supreme Court opinion on this before our report was finalized. So we got a complete briefing on that case.

SESSIONS: Well, one more thing. A recent group of political scientists did a study of the ABA nomination process from '85 to 2008 and found that the ABA must take affirmative steps to change its system for rating nominees to avoid favor and bias in favor of liberal nominees.

Do you take that seriously? Will you willing to look at how you handle these things?

(UNKNOWN): We take any critique of our process seriously. I can tell you that we judge every nominee based on the record that is presented to us and the background and experience of a nominee.

SESSIONS: Well, let me just say this. I think it is a valuable contribution to the process.

(UNKNOWN): Thank you.

SESSIONS: It is -- when you talk to lawyers and sometimes -- most people are very -- tend very much to be supportive of any nominee, especially if -- you know, they just tend to be supportive and minimize problems.

But sometimes, I think so, you could pick up things that other people wouldn't, and it would be valuable to this process. And I thank you. (UNKNOWN): Thank you.

BOIES (?): Senator, if I may, I'd like just to go back briefly to the Ricci decision. And one thing that I did look at is that, in calendar year 2008, the Second Circuit issued 1,482 opinions not counting the non-argued asylum cases. And of those 1,482, the 1,081 were decided by summary order.

Only 401 full opinions were issued. And as I read the record, the -- one of the reasons the panel believed it could proceed by summary order is because it believed that there was controlling Second Circuit precedent which a panel is not in a position to change.

So I don't mean to open the issue, but I would like to put it into some context as to how the Second Circuit normally operates.

SESSIONS: That's a nice way to say it. But this is a -- the rules said if it has jurisprudential importance, you should have an opinion. I think it was in violation of the rules. I don't know why they did it, but it was in violation of the rule, in my judgment, as a practicing lawyer.

I would have thought you would have agreed, Ms. Boies.

ACTING CHAIRMAN: We will hear next from the distinguished senator from Pennsylvania, Senator Specter.

SPECTER: Thank you, Mr. Chairman.

No questions. Just a comment to thank you for your service. There have been occasions when the American Bar Association was not consulted, and I think that the ABA has a special status.

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Jul 16, 2009 14:44

SENATE-HRG-SOTOMAYOR -63

XXX a special status.

SPECTER: The Judiciary Committee is hearing from all interested parties, not possible to invite all interested parties to appear in person, but we welcome comments from anyone in a free society to tell

us what they think of the nominee, but the ABA performs this function with -- regularly with all federal judges, and you interview a lot of people who are knowledgeable and have had contact, and I think it is very, very useful. So thank you for your service.

I have no questions, Mr. Chairman, on the substance (ph).

(UNKNOWN): Thank you.

ACTING CHAIRMAN: And we will turn to Senator Cardin of Maryland.

CARDIN: I also do not have any questions, but I do want to make an observation, because I very much respect the opinions of the American Bar Association and fellow lawyers. I think it's the highest compliment when your peers give you the highest rating. They're your toughest critics. I know that lawyers who are selecting a jury will almost always strike lawyers from that jury list because they're the toughest audience that you have. And so this is -- I think speaks to the nominee.

And as I understand it, the manner in which you go about rating a judge is not only her experience, but also the way that she's gone about reaching her decisions from the point of view of the appropriate role of a judge, her judicial temperament, and the absence of biased in rendering those decisions. And they're exactly what we are looking for for the next justice on the Supreme Court.

So I just really wanted to thank you for giving us this information and participating in the process.

(UNKNOWN): Thank you, Senator.

ACTING CHAIRMAN: Senator Cornyn?

CORNYN: Thank you, Mr. Chairman.

I just want to welcome our two witnesses and thank you for your assistance to the committee, and particularly to say how good it is to see Kim Askew, my constituent from Dallas, Texas, and she does great work as chair of the committee, and welcome. Thank you for your assistance to the committee and performing its constitutional function.

ASKEW: Thank you.

ACTING CHAIRMAN: There being no further questions, the panel is excused with our gratitude for a commendable and very diligent effort.

SESSIONS: Thank you very much.

ASKEW: Thank you.

ACTING CHAIRMAN: We will take a five-minute recess while the next panel assembles.

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Jul 16, 2009 14:47

SENATE-HRG-SOTOMAYOR -64

XXX next panel assembles.

(RECESS)

ACTING CHAIRMAN: The hearing of the Judiciary Committee will come back to order.

We are awaiting the arrival of Mayor Bloomberg and District Attorney Morgenthau, who are coming down from New York. I am told that they are five minutes away, but the five minutes that people are away can be a longer five minutes than a regular five minutes. So in the interest of the time of the proceeding and of the other witnesses, we will proceed and come to them when they arrive and have a chance to take their seats.

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Jul 16, 2009 15:00

SENATE-HRG-SOTOMAYOR -65

XXX take their seats.

SESSIONS: Well, in -- in the mayor's defense, he probably thought we would be operating under Senate time, and we would certainly be late, and he could have a little extra time.

ACTING CHAIRMAN: That is our custom.

SESSIONS: We're moving along well. Thank you, Mr. Chairman.

ACTING CHAIRMAN: Our first witness, then, will be Dustin McDaniel. He is the attorney general for the state of Arkansas and the southern chair of the National Association of Attorneys General. Previous to his election as attorney general, he worked in private practice in Jonesboro, Arkansas. Prior to taking office, Mr. McDaniel also served as a uniform patrol officer in his hometown of Jonesboro, Arkansas. He is a graduate of the University of Arkansas Little Rock Law School.

Attorney General McDaniel, would you please stand to be sworn? Do you affirm that the testimony you're about to give before the committee will be the truth, the whole truth and nothing but the truth, so help you God?

MCDANIEL: I do.

ACTING CHAIRMAN: Please be seated.

Attorney General McDaniel, please proceed with your statement

MCDANIEL: Thank you, Mr. Chairman and Ranking Member Sessions.

My name is Dustin McDaniel, and I'm the attorney general of the state of Arkansas. I am here today to speak in support of the nomination of Judge Sonia Sotomayor to the Supreme Court of the United States.

You've all heard all week about her compelling life story and impressive accomplishment. I have the highest respect and admiration for her, and I'm proud to testify on behalf of this person, who was first appointed by President George H.W. Bush, and then by my most famous predecessor in the Arkansas attorney general's office, President Bill Clinton.

More specifically, I'm here to rebut any assertion that her participation in the matter of Ricci v. DeStefano in any way reflects upon her qualifications or abilities to serve as a justice of the United States Supreme Court. When the Supreme Court granted certiorari in the Ricci case, I, on behalf of the state of Arkansas, joined with five other attorneys general in support of the Second Circuit. Before I address the case in the brief, let me adjust the parties and their issues.

I entered the world of public service long before I became an elected official. After college I turned down my admission into law school and took a civil service exam in my hometown of Jonesboro, Arkansas. I became a police officer, and I saw firsthand the heroism and dedication of the men and women who protect and serve our communities every day.

Firefighters like Frank Ricci and his colleagues run into homes and buildings when everyone else is running out. I have the highest respect and gratitude for all who serve our communities, states and nation. They are heroes among us, and they deserve to be treated fairly by our system.

My personal experience with a civil service exam was a favorable one, but not all are so lucky. I understand the frustration that the firefighters felt with this process. I also understand the cities fear of litigation and unfair results. I am for a process that is fair. No one should be given an unfair advantage, but no one should be subject to an unfair disadvantage either.

As attorney general, I represent hundreds of state agencies, boards and commissions in matters of employment law. My job is to allow my clients to do their job without fear of unreasonable litigation. The law had, until recently, allowed for flexibility necessary for public employers. The Supreme Court's ruling in this case will likely increase costly litigation, and the taxpayers will ultimately pay the bill.

All who have commented on the nomination process in recent years have been critical of those who have been labeled an activist judge. It's important to note that the Second Circuit's ruling in this case was not judicial activism at work. To the contrary, they followed existing law.

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Jul 16, 2009 15:23

SENATE-HRG-SOTOMAYOR -66

XXX followed existing law.

MCDANIEL: In Ricci, the panel adopted the lengthy analysis of the district courts, which they called "thorough," "thoughtful," and "well-reasoned." The district court cited cases dating back some 28 years. The ruling was consistent with the law, and the doctrine of stare decisis.

Granted, the Supreme Court, in a closely divided opinion, ruled differently. But in doing so, it set new precedent.

It's also important to note that the 2nd Circuit's ruling was supported by many prestigious groups, including the EEOC, the Department of Justice, the National League of Cities, the National Association of Counties, International Municipal Lawyers Association and the Republican and Democratic attorneys general of Alaska, Iowa, Arkansas, Maryland, Nevada and Utah.

There's a large body of research available on Judge Sotomayor's record. No allegation that she rules based on anything other than the law can stand, when cast in the light of her actual record.

The Congressional Research Service concluded, quote, "Perhaps the most consistent characteristic of her approach as an appellate judge could be described as an adherence to the doctrine of stare decisis, that is upholding of past judicial precedents."

One only has to look so far as to her own words. In Hayden v. Pataki she wrote in a dissent, quote, "It is the duty of a judge to follow the law, not question its plain terms."

She concluded by saying, quote, "Congress would prefer to make any needed changes itself, rather than have courts do so for it."

In my opinion, Judge Sotomayor is abundantly qualified and is an excellent nominee. I believe that the people of the United States would be well-served by her presence on the court.

It is my great honor and privilege to be here at this committee, and I thank you ever so much for the opportunity to appear here today.

ACTING CHAIRMAN: Thank you ever so much, Attorney General McDaniel.

We will do a round of questions for the attorney general, and then once the panel is completely assembled, I will have all the witnesses sworn. And then we will proceed to Mayor Bloomberg, to District Attorney Morgenthau and on across the panel, with one brief interruption to allow the distinguished senator from the state of New York, Senator Schumer, to introduce Mayor Bloomberg.

Attorney General McDaniel, as a -- as an experienced lawyer, let me ask you, is it not the case that it's the Supreme Court's task very frequently to resolve conflicts between the circuit courts of appeal?

MCDANIEL: Yes, of course it is, Senator.

ACTING CHAIRMAN: And if a circuit court is bound by its own prior precedent and therefore the doctrine of stare decisis controls a particular decision, that does not in any way inhibit the Supreme

Court from reviewing that second decision against conflicting decisions from other circuits in its task in resolving those conflicts. Correct?

MCDANIEL: That is correct.

ACTING CHAIRMAN: Is it your sense that that is what occurred in this case, that the 2nd Circuit in Ricci felt itself bound by stare decisis, as a result of its prior precedent, but that the Supreme Court took the case to resolve issues of conflict with other circuits?

MCDANIEL: Well, it certainly seems clear that the -- the binding law from the Supreme Court, which dated back up to 28 years, made it clear that remedial actions, although race-conscious but race-neutral, were permissible.

I think that that is precisely what the case demonstrated and how the court ruled and why the states that participated, Arkansas included, thought that it was important to preserve for our clients the ability to try to avoid litigation, if they think they cannot defend an existing practice. If they cannot defend it, no lawyer would tell their client, "Oh, go do it, anyway."

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