

Sotomayor Hearing, Day 4 (07/16/2009), Parts 76 to 82

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XXX of their character.

RICCI: I am proud of the decision I made and proud of the principle that our group vindicated together.

In our profession, we do not have the luxury of being wrong or having long debates. We must be correct the first time and make quick decisions under the pressure of time and rapidly unfolding events. Those who make these decisions must have the knowledge necessary to get it right the first time.

Unlike the judicial system, there are no continuances, motions or appeals. Errors and delays can cost people their lives. In our profession, the racial and ethnic makeup of my crew is the least important thing to us and to the public we serve. I believe the countless Americans who had something to say about our case understand that now.

Firefighters and their leaders stand between their fellow citizens and catastrophe. Americans want those who are the most knowledgeable and qualified to do the task. I am willing to risk and even lay down my life for fellow citizens, but I was not willing to go along with those who place racial identity over these more critical considerations.

I am not a lawyer, but I quickly learned about the law as it applies to this case. Studying it as much I studied for my exam, I thought it clear that we were denied our fundamental civil rights. I expected Lady Justice with the blindfold on, and a reasoned court from a federal court of appeals telling me, my fellow plaintiffs and the public that the court's view on the law -- what the court's view on the law was and do it in an open and transparent way.

Instead, we were devastated to see a one paragraph unpublished order summarily dismissing our case, and indeed even the notion that we had presented important legal issues to that court of appeals. I expected the judges who heard my case along the way to make the right decisions, the ones required by the rule of law.

Of all that has been written about our case, it was Justice Alito who best captured our own feelings. We did not ask for sympathy or empathy. We asked only for even-handed enforcement of the law and prior to the majority justice opinion in our case, we were denied just that.

Thank you.

CARDIN (?): Thank you for your testimony. We'll now hear from Peter Kirsanow. Peter Kirsanow serves on the U.S. Commission on Civil Rights. He's a member of the National Labor Relations Board where he received a recess appointment from President George W. Bush. Previously, he was a partner with the Cleveland law firm of Benesch, Friedlander, Coplan and Aronoff. Mr. Kirsanow

received his law degree from Cleveland State University.

KIRSANOW: Thank you, Mr. Chairman, Senator Sessions, members of the committee, I am Peter Kirsanow, a member of the U.S. Commission on Civil rights. I am currently back at Benesch, Friedlander in the legal employment practice group. I am here in my personal capacity.

The U.S. Commission on Civil Rights was established...

SESSIONS (?): Is that microphone on?

KIRSANOW: The U.S. Commission on Civil Rights was established by the 1957 Civil Rights Act to, among other things, act as a national clearinghouse for information related to denials of equal protection and discrimination, and in furtherance of the clearinghouse process, my assistant and I reviewed the opinions in civil rights cases in which Judge Sotomayor participated while on the 2nd Circuit in the context of prevailing civil rights jurisprudence and with particular attention to the case of Ricci v. DiStefano.

Our review revealed at least three significant concerns with respect to the manner in which the three-judge panel that included Judge Sotomayor handled the case. The first concern was, as you've heard, the summary disposition of this particular case. The Ricci case contained constitutional issues of extraordinary importance and impact. For example, the issues of -- that are very controversial and volatile -- racial quotas and racial discrimination.

This was a case of first impression. No 2nd Circuit or Supreme Court precedent on point.

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XXX precedent on point.

KIRSANOW: Indeed, to the extent there were any cases that could provide guidance, such as Wigant (ph), Crosen (ph), Aderant (ph), even private sector cases, such as Johnson (ph) Transportation, Frank v. Xerox, Weather (ph) v. Steelworkers (ph), would dictate or suggest a result opposite of that reached by the Sotomayor panel.

The case contained a host of critical issues for review, yet the three-judge panel summarily disposed of the case, as you've heard, in an unpublished, one-paragraph, per curium opinion that's usually reserved for cases that are relatively simple, straightforward and inconsequential.

The second concern is that the Sotomayor panel's order would inevitably result in the proliferation of de facto racial and ethnic quotas. The standard endorsed by the Sotomayor panel was lower than that adopted by the Supreme Court's test of strong basis in evidence.

Essentially, any race-based employment decision invoked to avoid a disparate impact lawsuit would provide immunity from Title VII review. Under this standard, employers who fear the prospect or expense of litigation, regardless of the merits of the case, would have a green light to resort to racial

quotas.

But even more invidious is the use of quotas due to racial politics, and, as Judge Alito's concurrence showed, there was glaringly abundant evidence of racial politics in the Ricci case.

Had the Sotomayor panel decision prevailed, employers would have license to use racial preferences and quotas on an expansive scale. Evidence adduced before the Civil Rights Committee shows that when courts open the door to preferences just a crack, preferences expand exponentially.

For example, evidence adduced before hearings of the Civil Rights Commission in 2005 and 2006 show that despite the fact that Aderant (ph) was passed more than -- or decided more than 10 years ago, federal agencies persist in using race conscious programs in federal contracting, governmental contracting, as opposed to race-neutral alternatives.

Moreover, even though the Supreme Court had struck down the use of raw numerical weighting in college admissions in Gratz v. Bollinger, thereby requiring that race be only a mere plus factor, a thumb on the scale in the admissions process, powerful preferences show no signs of abating. A study by the Center for Equal Opportunity showed that in a major university preferences were so great that the odds that a minority applicant would be admitted over a similarly situated white comparative were 250-1. At another major university, 1,115-1. That's not a thumb on the scale, that's an anvil.

And had the reasoning of the Ricci case in the lower court prevailed, what happened to Firefighter Ricci and Lieutenant Vargas would happen to innumerable more Americans of every race throughout the country.

The third concern is that the lower court's decision that would permit racial engineering by employers would actually harm minorities who were the purported beneficiaries of that particular decision.

Evidence adduced at a 2006 Civil Rights Commission hearing shows that there's increasing data that preferences create mismatch effects that actually increase the probabilities that minorities will fail if they receive beneficial treatment or preferential treatment.

For example, black law students who were admitted in preferences are two and a half times more likely not to graduate than their similarly situated white or Asian comparatives; four times as likely not to pass the bar exam on the first try; and six times as likely never to pass the bar exam, despite multiple attempts.

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XXX despite multiple attempts.

KIRSANOW: Mr. Chairman, it's respectfully submitted that, if a nominee's interpretative factoring permits an employer to treat one group preferentially today, there's nothing that prevents them from

treating another group or shifting their preferences to another group tomorrow.

And it's contrary to the color-blind ideal contemplated by the 1964 Civil Rights Act, Title VII, which was the issue decided in the Ricci case.

Thank you, Mr. Chairman.

WHITEHOUSE: And thank you for your testimony.

We'll now from Linda Chavez, who's chairman of the Center for Equal Opportunity and a political analyst for Fox News Channel.

She's held a number of appointed positions, among them White House director of public liaison and staff director of U.S. Commission on Civil Rights.

CHAVEZ: Thank you, Mr. Chairman and members of the committee.

I testify today not as a wise Latina woman but an American who believes that skin color and national origin should not determine who gets a job, a promotion or a public contract or who gets into college or receives a fellowship.

My message today is straightforward. Mr. Chairman, do not vote to confirm this nominee. I say this with some regret, because I believe Judge Sotomayor's personal story is an inspiring one, which proves that this is truly a land of opportunity, where circumstances of birth and class do not determine whether you can succeed.

Unfortunately, based on her statements both on and off the bench, I do not believe Judge Sotomayor shares that view. It is clear from her record that she has drunk deep from the well of identity politics.

I know a lot about that well, and I can tell you that it is dark and poisonous. It is, in my view, impossible to be a fair judge and also believe that one's race, ethnicity and sex should determine how someone will rule as a judge.

Despite her assurances to this committee over the last few days that her "wise Latina woman" statement was simply a quote, "rhetorical flourish fell flat," nothing could be further from the truth.

All of us in public life have, at one time or another, misspoken. But Judge Sotomayor's words weren't uttered off the cuff. They were carefully crafted, repeated, not just once or twice, but at least seven times over several years.

As others have pointed out, if Judge Sotomayor were a white man who suggested that whites or males made better judges, again, to use Judge Sotomayor's words, quote, "Whether born from experience or inherent physiological or cultural differences," end quote, "we would not be having this discussion. Because the nominee would have been forced to withdraw once those words became public."

But, of course, Judge Sotomayor's offensive words are just a reflection of her much greater body of work as an ethnic activist and judge.

Identity politics is at the core of who this woman is. And let me be clear here. I'm not talking about the understandable pride in one's ancestry or ethnic roots, which is both common and natural in a country

as diverse and pluralistic as ours.

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XXX pluralistic as ours.

CHAVEZ: Identity politics involves a sense of grievance against the majority, a feeling that racism permeates American society and its institutions and the belief that members of one's own group are victims in a perpetual power struggle with the majority.

From her earliest days at Princeton University, and later, Yale Law School, to her 12-year involvement with the Puerto Rican Legal Defense and Education Fund, to her speeches and writings, including her jurisprudence, Judge Sotomayor has consistently displayed an affinity for such views.

I have outlined at much greater length in my prepared testimony, which I ask permission be included in the record in full, the way in which I believe identity politics has permeated Judge Sotomayor's life's work. But let me briefly outline a few examples.

As an undergraduate, she actively pushed for race-based goals and timetables for faculty hiring. In a much-praised senior thesis, she refused to identify the United States Congress by its proper name, instead referring to it as the North American Congress or the Mainland Congress.

During her tenure as chair of the Puerto Rican Legal Defense and Education Fund's Director Litigation Committee, she urged (inaudible) seeking lawsuits challenging the civil service exams, seeking race-conscious decision-making similar to that used by the city of New Haven in Ricci.

She opposed the death penalty as racist. She supported race-based government contracting. She made dubious arguments in support of bilingual education and more broadly in trying to equate English language requirements as a form of national origin discrimination. As a judge she dissented from an opinion that the Voting Rights Act does not give prison inmates the right to vote.

And she has said that as a witness -- eyewitnesses' identification of an assailant may be unconstitutional racial profiling in violation of the equal protection clause, if race is an element of that identification. Finally, she has shown a willingness to let her policy preferences guide her in the Ricci case.

Although she has attempted this week to back away from some of her own intemperate words and has accused her critics of taking them out of context, the record is clear. Identity politics is at the core of Judge Sotomayor's self-definition. It has guided her involvement in advocacy groups, been the topic of much of our public writing and speeches, and influenced her interpretation of law.

There is no reason to believe that her elevation to the Supreme Court will temper this inclination, and much reason to fear that it will play an important role in how she approaches the cases that will come before her, if she is confirmed.

I therefore respectfully urge you not to confirm Judge Sotomayor as an associate Justice of the Supreme Court. Thank you.

CARDIN: Thank you for your testimony.

Let me first recognize our chairman, Chairman Leahy, who I understand wants to reserve his place.

LEAHY: Thank you, Senator Cardin. I wanted to thank you and the other senators who have filled in on this prior to -- I was here throughout the -- throughout all the testimony by Judge Sotomayor, and the questions asked by both Republicans and Democrats are reserved by time.

I do welcome all the witnesses, who are both for and against the nominee. They -- Senator Sessions and I joined together to make sure that everybody was invited, everybody was given a chance to testify. And if any of you wish to add to your testimony, the record will be open for -- for 24 hours for you to do that.

Thank you very much.

CARDIN: Thank you, Mr. Chairman.

Mayor Bloomberg, let me start with you, if I might, in my questioning. There's been a lot of discussion about the Puerto Rican Legal Defense and Education Fund, including during this panel discussion. And Judge Sotomayor served on the board and had nothing to do with the selection of individual cases from the point of view of its content, but served in a voluntary capacity with that board.

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XXX with that board.

CARDIN: And first I'm going to quote from you, and then give you a chance perhaps to expand upon it, where you have been quoted as saying, "Only in Washington could someone's many years of volunteer service to a highly regarded nonprofit organization that has done so much good for so many, be twisted into a negative, and that group has made countless important contributions to New York City."

I just want to give you a chance to respond to Judge Sotomayor's service on the Puerto Rican Legal Defense and Education Fund.

(UNKNOWN): Well, this is an organization that has defended people who don't have the wherewithal to get private counsel or don't have traditions of understanding the law, and it happens to focus on people mainly who come from Puerto Rico and have language problems, in addition to a lack of perhaps understanding of how our court system works.

And it provides the kind of representation that we all, I think, believe that everybody that appears before a judge and before the law deserves. They raise money privately to pay lawyers to defend. I

don't agree with some of their positions and I agree with other ones. But having more of these organizations is a lot better than having less. At least people do have the option of getting good representation.

CARDIN: Thank you.

Mr. Henderson, during the hearing of Judge Sotomayor, we had a chance to talk a little bit about the voting rights and the recent case before the Supreme Court, and the fact that one justice questioned the constitutionality, in fact pretty well determined the constitutionality of the -- of the Voting Rights Renewal Act, saying it was no longer relevant.

Judge Sotomayor, during her testimony, talked about deference to Congress, the fact that it was passed by a 93 to 0 vote in the United States Senate and by a lopsided vote in the House of Representatives, the 25-year extension. I just want to get your comments as to whether the Voting Rights Act is relevant today and your confidence level of Judge Sotomayor as it relates to advancing civil rights for the people of our nation.

HENDERSON: Thank you, Mr. Chairman, for your question.

Let me back up for just a minute and say that these hearings have really been a testament to the wisdom of the founding fathers in setting up a three-part system of government, with the president making a nomination for an associate justice on the Supreme Court, and the Senate Judiciary Committee providing its advice and consent.

Under our system of government, the Senate and the House have a particular responsibility to delve deeply into the constitutional rights of all Americans, particularly around the right to vote. Voting really is the language of democracy. If you can't vote, you don't count. And the truth is that notwithstanding the 15th Amendment to the Constitution, the 13th and 14th Amendments, African Americans, Latinos, women, other people of color were often denied their right to vote well into the 20th century.

It took not just those amendments, but actually a statute enacted by this Congress to ensure that the rights of Americans to vote indeed could be preserved, and it was only in the aftermath of the '65 Voting Rights Act that we have seen the expansion of the franchise and democratization -- small "d" - - of our, you know, republic in a way that serves the interests of the founders.

Having said that, Congress reached a decision in reauthorizing the Voting Rights Act in 2006 that this law was necessary. Sixteen- thousand pages of the Congressional Record speak eloquently to that important interest. The fact that this issue was held both with congressional review and also a national commission set up by the Lawyers Committee for Civil Rights and others in the civil rights community, holding hearings around the country added to the record that was created.

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XXX that was created.

HENDERSON: The fact that this bill passed -- rather the reauthorization of the Voting Rights Act -- 390-33 in the House and 98-0 in the Senate, speaks eloquently about the important need of this act and the continuing need for it.

So the fact that some on the Supreme Court found otherwise doesn't disturb me at all. There is a need for it; that need continues, and notwithstanding evidence.

CARDIN: Well, thank you for correcting my numbers on the number that had voted. I appreciate that.

I just want to ask Mr. McDaniel a quick question, and that is, during the confirmation hearings both Democratic and Republican senators have been urging from our nominee that you need to look at what the law is, and you can't judge based upon emotion. You have to do -- you have to follow the precedents of the court.

And I have a simple question to you in the Ricci case. Do you believe that the Sotomayor decision with the three-judge panel was within the mainstream of judicial decision-making when that decision was reached?

MCDANIEL: Senator, I do believe that. And to hear the stories of these firefighters in person, I -- I don't have any reason not to use the word empathy. I have a great deal of empathy for the circumstances that they have described, and I don't know that I have a great deal for how the city fathers handled the matter.

But by the time it made it to the 2nd Circuit I believe that the panel did what the law required, and I don't think that there is a just legal criticism for the way that the panel handled the matter. And the fact that the Supreme Court chose to change the law in a bare majority also is their prerogative.

CARDIN: Thank you very much.

Senator Sessions?

SESSIONS: Thank you.

Thank all of you. It's a very important panel. And actually much of your testimony was moving, and I appreciate it. And I think you're calling us to a higher level of discussion on these issues because they go to the core of who we are as Americans. And I just want to share that. We are worried about the Second Amendment. I will just ask the mayor that you signed a brief in favor of the D.C. gun ban, which would bar even a handgun in someone's home. So I would assume you would be agreeable with the opinion of Judge Sotomayor and her view.

We've got different views about these things.

Mayor, I want to tell you, I appreciate your leadership. It's a tough job to be mayor of New York. You're showing strength and integrity.

Mr. Morgenthau, you're the dean of prosecutors. I hear many people over the years that have worked for you and they're very complimentary of you, and I know you're proud of this protege of yours who's moved forward.

MORGENTHAU: Senator, may I tell you that my grandmother was born in Montgomery, Alabama.

SESSIONS: I am impressed to hear that.

(LAUGHTER)

I feel better already. That's good.

(LAUGHTER)

Mr. Attorney General, thank you for your able comments.

And, Mr. Henderson, it's good to work with you.

Senator Leahy and I are talking, during these hearing, we're going to do that crack cocaine thing that you and I have talked about before. We got to...

(LAUGHTER)

HENDERSON: Thank you, Senator. I appreciate it.

(CROSSTALK)

SESSIONS: Let me correct the record.

(UNKNOWN): You need to rephrase it, Senator.

(LAUGHTER)

Please rephrase.

SESSIONS: I misspoke.

HENDERSON: No. Quite all right.

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XXX Quite all right.

SESSIONS: We're going to reduce the burden of penalties in some of the crack cocaine cases and make them fair.

So, Mr. Ricci, thank you for your work.

I would say, Mr. Henderson, that I said the PRLDEF legal defense fund is a good organization in my

opening statement.

And I think it has -- it has every right to advocate those positions that it does, but the nominee was on the board for a long time, and I did take some positions that she rightly was asked about, whether or not she agreed to it, especially during some of those times she was chairman of the litigation committee.

But I value the -- these -- I value that groups can come together and file lawsuits and take the matter to the court.

Just briefly, Mr. Kirsanow, on a slightly different subject than you started -- I think you probably know this answer -- but could tell us for the purpose of this hearing, as briefly as you can, what the concern is in the Voting Rights Act?

It's not that we're against -- anybody's against the voting act. I -- I voted for it. But there are some constitutional concerns. Could you share precisely what that is?

KIRSANOW: Sure. And specifically, with respect to the latest Supreme Court decision related to that, what was articulated is that the pre-clearance provisions of the Voting Rights Act pertain to a legacy of discrimination that occurred in many states where poll taxes and literacy tests were being imposed on black citizens.

However, in this particular case, the often critical subdivision came into existence after all of the -- the legacy of this administration had actually occurred or even after the Voting Rights Act itself had been passed. And the question is, how could it be that you've got a pre-existing law that is almost -- for lack of a better term -- ex post facto applying to an organization that came into existence after the law was in effect.

There was no history of discrimination or denials of equal protection or denial of voter rights by this particular political subdivision. So it was peculiar in that regard, and I think there were several justices who evinced some concern about the approach in that particular case. SESSIONS: Thank you. It's just -- there are two sides to that story. And we passed the bill, and we extended it, and all of it had some angst and worry.

I'd said I wanted to vote for it, and we did. We extended it for probably longer than we should have, and not that it would ever end. Huge portions of it may never end, but some portions of it may not be needed to continue.

Let's -- Lieutenant Vargas, that was a moving story you gave us. Let me just ask you this. Do you think that other members of the fire department, had they studied as hard as you and mastered the subject matter as well as you did, could have passed the test -- more of them would have passed if they'd studied as hard as you?

VARGAS: Absolutely.

SESSIONS: You think you...

VARGAS: Absolutely. I studied with a group of them, and they all supported me and what I was doing, because they knew the effort that I put in. And -- and they were right there. We really weren't all that far behind.

And, you know, minorities would have been promoted. That's something that -- that continues to get left out. There would have been minorities promoted to captain, minorities promoted to -- to lieutenant, as well.

And, you know, when you take these exams, sometimes you have winners and sometimes -- you know, but you go into that situation knowing that that's going to be the case.

SESSIONS: Mr. Kirsanow, you indicated that all the judges -- I believe your phrase was -- on the Supreme Court rejected the standard of review that the panel -- Judge Sotomayor's panel set for the firefighter exam. Is that right?

KIRSANOW: Senator, even the dissent had a different standard. It was good cause standard, which was given a little bit more definitiveness to the approach that defendants could take in defending.

As you know, Title VII has a safe harbor of job-related consistent with business necessity. If you can establish that, in fact, the -- that the firefighters took were job-related, consistent with business necessity, then only under those -- the only way you could show a disparate impact is if those tests weren't made. Even the dissent said it should have been sent back on remand.

SESSIONS: Thank you.

And, Ms. Chavez, I noticed one thing. According to the ABA statistics, only 3.5 percent of lawyers in America in 2000 were Hispanic, yet they -- Hispanics make up 5 percent of the federal district court judges and 6 percent of circuit court judges. Would you comment on that?

CHAVEZ: Well, first of all, I think it's important -- you know, there's been a lot of attention focused on the phrase a "wise, Latina woman." I used it myself, obviously, ironically, in testifying today.

But I think it's important to read Judge Sotomayor's entire speech, because, in fact, it wasn't just that she was saying a wise, Latina woman would make a better judge. What she was saying was that the race, ethnicity and gender of judges would and should make a difference in their judging.

And she says in the speech itself -- she says she doesn't know always how that's going to happen, but she even cites some studies, sociological studies that take a look at the way in which women judges have handed down decisions and makes the case that women judges decide cases differently than men do, and she speaks of this approvingly.

And she talks about statistics and how few Latinos there are on the bench. And the statistics that you just cited come from an article that I wrote in retort (ph) to the -- the statistics that she used.

I bring that up because inherent in that analysis of hers is the notion that there ought to be proportional representation on judicial panels, that we ought to be selecting judges based on race, ethnicity and gender, and that we ought to have more or less proportional representation.

And I have to say that, you know, that really, I think, comes very close to arguing for quotas, a position, by the way, that she has taken with -- when she was with the Puerto Rican Legal Defense and Education Fund. By the way, she was not just on the board; she actually signed some memorandum. Those are in the record, and I've cited some instances of that in my written testimony.

And the point is that, if there is so-called under-representation of some groups, it means there's over-representation of others. And I said in my testimony that, if we are concerned about the number of

Latino judges, first thing you need to be a judge is a college degree and a law degree. And, in fact, if just using Judge Sotomayor's own statistics, if anything, if you look at the number of attorneys who are Latino at the time that she was writing, Hispanics were actually somewhat over-represented on the judicial bench.

I reject all of that. That doesn't bother me in the least that they are over-represented. I think we should not be making ethnicity and race or gender a qualification for sitting on the bench or being a firefighter or being a captain or lieutenant on a firefighting team. I think we ought to take race, ethnicity and gender out of the equation.

SESSIONS: Thank you.

WHITEHOUSE: Senator Durbin?

DURBIN: Ms. Chavez, do you think that Judge Sotomayor's being awarded the Pyne award at Princeton for high academic achievement and good character being summa cum laude and Phi Beta Kappa was because it was a quota, that they wanted to make sure there was a Latina who received that?