

SOTOMAYOR CONFIRMATION HEARINGS, DAY 3, PART III

We'll have four Dems in a row: Klobuchar, Kaufman, Specter, and Senator Al Franken (!).

Oops, just two up before lunch.

Klobuchar: How patient your mother has been. She has a lot she'd like to say. Plenty of stories. I thought I might miss my questioning opportunity. Much more patient than my mother has been, leaving messages like, "how long do these guys have to go on. DiFi was brilliant, what are you going to do?" Coburn, Heller. In Maloney, bound by precedent in Circuit. Keep an open mind of SCOTUS takes up question.

SS: Take every case case by case.

Klobuchar: Whitehouse, PRLDF, minor follow-up, ABA code of conduct bars board members from engaging in litigation because of lack of lawyer-client relationship. Not going into Wise Latina, 1994, provided to Senate for confirmation in 1997, 1998, no Senator asked you about it.

Klobuchar: What I want to talk about: criminal prosecutor. One thing I have found, if come into Crim system thinking you can change ills of society, not where those kinds of changes can be made.

SS: By time criminal defendant ends up in Court, they've been shaped by their lives. If you want to give people best opportunity for success, it has to be through early childhood forward. Pay attention to education, message not lost on me when I became a prosecutor. Success of communities depends on improving education and parental participation.

Klobuchar: Limited role judge has to not make

laws. Is that correct?

SS: Focusing on different part of that, as prosecutor, role not what punishment should have been, set in law.

Klobuchar: Tough decisions you have to make as prosecutor.

SS: I was influenced by television show, passion as prosecutor, Perry Mason. One of the first lawyers portrayed on television. In all cases except one, he proved his client innocent. Got actual murderer to confess. End of episode, met with character that played prosecutor. Perry said, expend all that effort to have charges be dismissed. Prosecutor: no, my job is to do justice. I thought that's quite amazing. Look at each case individually. Some times to bring tough charge. Periodically look at quality of evidence, say there's just not enough.

Klobuchar: Want to take pragmatic experience as prosecutor. A month ago, baggage carrier, Are you going to vote for that woman? Aren't you worried that her emotions get in front of the law. If anyone heard the TWA case where you had to make a decision against some very sympathetic victims, I think that would have been good answer. Practical work. Go through some criminal cases, handled as judge. US v. Falso case, child pornography. Ruled that officers didn't have probable cause, evidence should still be considered bc judge not knowingly misled.

SS: Complicated question Second Circuit Law. Two panels, extensive discussions about implications of cases, use of internet. How much information police should or should not have before look to get a warrant. Computer = freedom of speech, accessing and thinking about it. To me, conflict in case law. Important for police officer to share with judge. Examine facts that police had. Considering whether existing 2nd Circuit, had the police actually violated [pause] get a warrant or not. One member said yes-violated Constitution. Yes. That was the way the law, the result the law required. Principles underlying

unreasonable search and seizure. Don't want police violating Constitutional basis without probable cause. Require them to go to a judge. Make police responsible for what would otherwise be the judges error? They said to judge, I don't know. Judge's review command warrant. Held that acts violated Constitution but evidence could be used, officers, in law, good faith exception.

Klobuchar: Clerical error.

SS: I came out the way the Supreme Court came out.

Klobuchar: Reaction to Diaz, lab workers, opens up 90 years of precedent? Unreasonable for what we expect of criminal justice system. Create difficulties for prosecutors.

SS: Difficult to deal with people's disappointments. Difficult to do prosecutions. It's a decided case. As I said, I do recognize that there can be problems as former prosecutor. Can't compel a result.

[Klobuchar comes off as a bigger hardass on crime than SS.]

Klobuchar: Interesting story a few weeks ago. Tenacious, getting to bottoms of facts. Experts criticize you for spending too much time to figure out facts. Defended by former Thomas clerk, extraordinarily thorough. Talking about Melendez Diaz, or any issues, did delve into facts. Why important?

SS: Facts are the basis for legal decision. Judge deals with particular factual setting. To extent there's criticism. We're not fact finders. but ensure we understand the facts of the case to understand what legal principle applying to. Not to create hypothetical case, but to answer case that exists. My view, not suggesting any justice does or doesn't do this, sensitize me to understand starting from the facts. Apply law to facts as they exist. Perhaps like Souter, who has that reputation, it may be that background, people are noticing, noticing where we picked up that habit.

Klobuchar: Transactional records clearing house. More people to prison, longer sentences. Greater than 6 months, in which collar cases. Twice as likely to send white collar criminals to more than 2 years in prison. More sympathy ten years ago for white collar. Judge had former Miss America to why he shouldn't go to jail. Sentencing, Sentencing of white collar.

SS: When I was District Court Judge, sentencing laws different than they've become. Amount of fraud, not consequences, number of victims. All circumstances of crime. Different perspective.

[The GOP is going to go nutter on this. "She wants to put white men in jail for as long as brown people!!!"]

SS: Crime is crime. To extent you protect interest of society, sentencing range Congress sets, all my cases, balance indiv sentence with interest society sought to protect. Guidelines mandatory.

Klobuchar: Now, guidelines, not mandatory.

SS: Booker, Phan phan, SCOTUS told district courts, consideration to guidelines, they are staying within guidelines. Prove useful as starting point.

Klobuchar: All these guys have been asking about baseball. Watch all-star last night?

SS: Haven't seen television for a very long time, turned it on for a bit.

Klobuchar: Derek Jeter tied it up, scored only bc hit by Joe Mauer a Twin.

Leahy: Hesitate to make any Red Sox comment. As knowledgeable as anyone, having run it for years before becoming Senator. Senator impediment to staff. Air conditioning went out. Press freezing in skybox.

Kaufman: Toughest assignments is to stand between audience and lunch. Take a different tack, your time as prosecutor. Commercial litigator. What were the thoughts behind

deciding to go into commercial practice.

SS: Had in DA's office realized that criminal law couldn't affect changes, opportunity for people. Increase of oppty had to involve increase in economic oppty. Economic development for different communities. Broaden personal understanding of law. Change, concentrate on commercial matters rather than criminal. Much of the pro bono work I did thereafter. Questions of finance and economic oppty.

Kaufman: What actually were you dealing with?

SS: Small firm. Thought to myself, can't go to those firms where I would be fifth guy on totem pole. Smaller firm, tended to work directly with partner. Wide variety. Grain commodity trading. Orange peels as feed for animals. Contracts they were involved in. Represented Ferrari. Dealer relationships. Customer relationships. Dealer relations of Pirelli Tire. Fendi. Trademark questions. Real estate, contracting, banking. Wide berth of issues.

Kaufman: How help on District and Circuit court?

SS: One of lessons I learned, I learned context, first, of grain commodity, commercial disputes. One main lesson. Business predictability of law may be most necessary. People organize business relationships by how they understand courts interpret contracts.

Kaufman: District Court, avoid trial. How did commercial experience help with that?

SS: Remember client coming with substantial litigation. Novel theories here. You can win, but serious question about cost to get there. Gonna cost you millions. Client went to another lawyer. Went with that other lawyer, my firm lost that income. Figure I put on litigation exactly what they spent. Settlements are economic decisions.

Kaufman: How did District help you on Circuit.

SS: Looking at facts. If something not addressed, I'd ask clerks to find out why those

questions were not asked. I'd ask, "did you argue this before District?" Other colleagues would note. Don't permit parties to argue new things on appeal. Sensitivity to facts.

Kaufman: Commercial experience, business cases really important current Court ignores settled law. Congress will pass foreign regulatory package. Make sure system not undermined by Court. Congress have Constitutional Authority to regulate markets?

SS: First thing that will come up. Can't answer that.

Kaufman: Congress' Constitutional authority.

SS: Can't answer that. Congress, pass laws affecting interstate commerce. Nature of statute, what facts it relies upon and it institutes. Depend on nature of statute.

Kaufman: Congress does basically have ability regulate markets.

SS: Make laws that involve commerce between states. Pass laws that affect commercial interstate transaction.

Kaufman: What role should judge have in wisdom of statute.

SS: Trying to think of any situation where judge would have role to judge on that.

Kaufman: Wisdom of executive agencies?

SS: Deference shown in that area as well.

Kaufman: Securities law. What constituted securities law in 2nd circuit?

SS: Everything. Home of NYC. We are the business capital of the world (I'm sure another city is going to complain). We deal with every variant of securities law. Whatever Congress has regulated, our Circuit has ruled on, or it starts with District, we'll eventually hear argument. It has been a part of my work as District and Circuit court.

Kaufman: NYSE, fear that it would affect market, you gave NYSE immunity even though conduct appeared egregious.

SS: Important to recognize limited role Courts serve. Remedy against whom and for what? Indivis injured by third parties who had done allegedly illegal acts against them.

Kaufman: Press v. Deferred to SEC's interpretation of its own ruling.

SS: Chevron deference. Goes to issue of who makes decisions. Policy questions. To extent an agency interpretation not inconsistent with Congressional commands, judge can't substitute their own judgment about what policy should be. A set of exceptions. Apply consideration of set of exceptions. Other situations in which I have ruled that agency not interpreting statute in accordance with Congressional intent.

Riverkeeper case. SCOTUS came to different view of words Congress used. Role of courts not to substitute own judgments. Apply principles of law in accordance with acts agencies doing.

Kaufman: regulators too lax. Role of private rights of access to right law oversight?

SS: Right Congress has given. It's a part of many securities, anti-trust laws. Govt doesn't have unlimited resources. In some cases, Congress grants to private course of action.

Kaufman: Antitrust law?

SS: No direct experience in private practice. District, baseball was one of them. I had anti-trust cases there as well. Often, cases settled. Managing them primary responsibility. I can get back to you. On Circuit, different, have participated directly, joining panels. At least two or three or four or five.

Kaufman: Legion case, legalized private agreements to prevent private retailing. Reason to question legal theory. Role of court using economic theory to interpret acts of Congress.

SS: Don't use economic theory to determine

constitutionality of Congressional actions.
Legon, how to apply law.

Kaufman: Illinois Brick, White wrote,
considerations stare decisis. When Congress free
to change course of interpretation.

SS: SD not dependent on one factor.
Administrative workability, reliance factor put
into rule, cost to change it, underlying
doctrines in related areas would lead a court to
question whether prior precedent has framework
consistent with understanding in other areas.
Has there been change in society that shows
factual findings on which it was premised may
be wrong.

Kaufman: Erosion in anti-Trust. Too big to fail.
Should Court sitting on antitrust consider too
big to fail?

SS: Purpose of anti-trust theory is premised on
competition. Question like the one you pose is
one that would come in particular context.
Challenge to a particular approach. Court is
always looking at what activity is claimed to be
illegal. Question frequently is, is a particular
area subject to per se barring?

Leahy: Break til 2–Specter and Franken up at 2.
Then closed session, then second round of 20
minutes each. A lot of questions have been
asked, not everyone has asked every question.