

SOTOMAYOR CONFIRMATION HEARINGS, DAY 2, PART III

Picking up from Christy's earlier posts (Part I and Part II).

Leahy: If I have to work for a living I want to be a photographer. Phone rings, mom, don't you ever say that they'll think you don't work.

Grassley up.

Grassley: Questions about individual property rights and how they're protected by Constitution. Big difference between developed and developing countries and it's because of respect for private property. Important for Ag interests. I'm sure ordinary Americans besides economic interests concerned about where you stand. Kelo. Your understanding of state of 5th Amendment Takings clause?

SS: Share your view of importance of property rights. Corporate lawyer. Not difference between developed and underdeveloped countries, invest in US bc of respect for property rights. WRT Kelo, issue is whether or not state who had determined there was a public purpose to takings. Can you contract with private developer to effect the public purpose.

Grassley: Public use. Kelo, public purpose. Is public use and public purpose the same thing?

SS: Courts precedents over time. Two informed each other.

Grassley: Everyone believes it was an expansion.

SS: Many litigants expressed that view. Question of whether SCOTUS overstepped Constitution, the Court believed and explained why it thought not.

Grassley: I was going to ask whether Kelo

undermines property rights.

SS: Only say in context to that case, it is the Court's holding, entitled to stare decisis.

Grassley: Does the Constitution allow takings with no compensation.

SS: Well, takings is complex.

Grassley: Would you strike down taking that provided no compensation at all?

SS: If taking violates Constitution, I'd be required to strike it down.

Grassley Didden. Chain drug store.

SS: Right to day in court important one, right to require that you come to court in timely fashion.

[SS trying really hard to explain to Grassley what a statute of limitation is.]

Grassley: Regardless of statute of limitations why not publish opinion.

SS: Kelo didn't govern. Statute of limitations did.

Grassley: EPA could not use cost/benefit. Clean Water Act, EPA had to use best technology even when upgrades were cost prohibitive. Agency interpretation entitled to deference. Do you find EPA shouldn't be able to use cost-benefit analysis.

Feingold: Enjoying listening to you. So when you consider cameras in the court room.

SS: You were a very good lawyer.

Feingold: Executive power. 2003 Law school, issues since 9/11. How people found common threads as Americans, hard to imagine something positive could come out of it, coming together as community, we'd all help each other get through this. In weeks and months that followed, gravely disappointed, events were sometimes used, Judge, to justify policies that departed so far from what we stand for. Change view of

individual rights and civil liberties?

SS: Horrible tragedy. I was in NY. My home is very close. I spent days not being able to drive a car into my neighborhood. Issue of country's safety. Continuing discussion, not just Senators, whole nation. In the end, Constitution, by its terms, protects certain individual rights. Often fact-specific. What's an unreasonable search and seizure. In answer to specific question? Did it change view? No sir. Constitution is timeless document.

[Feingold looks like he's not going to like what he hears. I think SS just basically decided the al-Haramain case against the plaintiffs.]

Feingold: Any elements that you think we as a nation will look back on with regret?

SS: Historian by undergrad training. How difficult it is to make judgments about one's current positions. History permits us to look back. Leg branch makes laws, it's up to President to take his actions. Up to Court to examine situation as it arises.

Feingold: Courts already dealing. You sat on panel, struck down national security act statute. Common themes or lessons. Rasul, Hamdan, Hamdi, Boumediene?

SS: Look at individual set of facts.

Feingold: SCOTUS believes mistakes were made?

SS: We don't decide whether mistakes were made.

Feingold: In each problem with Constitution or constitutional act. Many of us discussed at length. Deeply concerned about broad invocation of exec power. You discussed with DiFi the lowest ebb category. Congress could pass law that would violate Constitution. Never relied on Youngstown to rule that President can ignore law? Your understanding?

SS: Not enough cases to say I can remember every precedent. Youngstown, President had not acted within his powers. Framework doesn't change.

Feingold: August 2002, TSP memo, did not cite Youngstown. Strike you as odd that complex analysis did not mention Youngstown?

SS: Never been advisor to President. Don't want to comment on what was done or not done. Likely that some question—I can't comment on whether that's surprising or not. I'd be surprised if Court didn't consider Youngstown.

Feingold: 2nd Amendment, individual right to bear arms. Question of whether incorporated into 14th Amendment. Maloney—you'd have to recuse.

SS: Judicial code that govern recusals command that would be inappropriate.

Feingold: What about other decision that took same position as you did in Maloney.

[I love that Feingold is so perfectly consistent as a civil libertarian. And all I can think of is seeing a bunch of deer carcasses hung up to be cleaned. Those 'Sconsan's love them their guns.]

Feingold: Secret law. FISA secret law. OLC issues legal opinions binding but kept from public and Congress. These docs may contain classified operational law. Flies in face of open transparent system. Importance of law being public.

SS: Judge would look at it. Policy choices Congress makes in legislation. Some issues were part of Congressional legislation as to how FISA would operate. As you've mentioned, that has been amended.

Feingold: Korematsu. Seems inconceivable that USG would have put huge numbers of people away bc of race. Was it wrongly decided.

SS: It was.

Feingold. Responsibility in war time.

SS: Judge should never rule from fear. Should rule from law.

Feingold: How does a judge resist those kind of

fears.

SS: Wisdom of Harlan and Plessy, wisdom to understand always that Constitution has held us in good stead for over 200 years, survival depends on upholding it.

Kyl: Maloney.

SS: Good afternoon, by the way.

[Schools him on manners.]

Kyl: Two other decisions based on incorporation. 7th similarly, 9th, differently.

Kyl: Recuse recuse recuse.

Kyl: Recuse recuse recuse. I'm going to try to trick you into getting off gun cases.

Kyl: Last 5% legal process will not lead to decision, supplied by heart. First 25 miles of marathon. Do you agree?

SS: Wouldn't approach issues of judging the way President does. Judges can't rely on what's in their heart. Congress makes the laws.

SS: We apply law to facts, we don't apply feelings to facts.

Kyl: Obama will clearly seek nominees that he's comfortable with. I disagree with.

Kyl: Just subjective, relativism run amuck.

Shorter Kyl: Why can't girls judge like men?

Shorter Kyl: Why aren't you more grateful for old white male judges?

I really think these arrogant male fucks believe they need to worry about being mean to SS. She's kicking their ass, so far as I've seen.

Shorter Kyl: I'm not saying women don't rule differently, but I think they should set that aside.

Kyl: Any decision where you being a wise Latina meant you made a better decision?

SS: I never understood SDOC meant to say those disagreeing with her were not wise judges. I think that's what Alito referring to when he said, when I decide a case I think about my Italian ancestors.