

# **SOTOMAYOR CONFIRMATION HEARINGS, DAY 3, PART IV**

Sotomayor back, Leahy reading a letter of some sort. There was some confusion bc Leahy's mike didn't work. Franken let Leahy use his. I think it was Sessions who joked it was the fastest rise of a Senator ever, suggesting Franken was taking over as Chair.

Leahy: Lily Ledbetter. Savanah Redding. How might it affect the confidence of those seeing only one woman on Court.

SS: Every president in last 20 years has attempted to promote diversity bc confidence increases when Court reflects all members of society.

Leahy: Gideon v. Wainwright. Right to counsel.

SS: Right to counsel on criminal and competent counsel. Question of whether incompetent counsel has caused damage.

Leahy: If Constitution guarantees fundamental right to exercise right, these rights are only meaningful if American can enforce right in court.

SS: We work to ensure given meaning in Court.

Leahy: Safe to say, Constitutional right, only safe if you can enforce it.

SS: Given meaning through actions, through leg, retention of qualified counsel.

Sessions: Judicial activism, Senator [can't say it can you, Sessions] um, our new Senator asked that. Hatch has a definition. Personal views overcome. Liberal or conservative activist judge. Sill concerned. We must ask questions. Wise latina.

Sessions: Second Amendment. It's a big issue.

SS: It may well come up. Not familiar enough with 50 states, to know about absolute prohibition. All I can speak about, question for court would not be whether govt action in isolation, what's the nature of govt interest.

Sessions: Don't you think you should recuse yourself since I don't like your approach to guns?

Sessions: Has anyone said not a fundamental right? (I'm going to keep interrupt you so you can't answer.)

SS: Fundamental is a legal term.

[Oops—had a phone call, missed some—Kohl asked about when to overturn precedent]

Kohl: Antitrust.

SS: I don't make policy. How much had to be plead, didn't understand it to mean that presentation of evidence at pleading to withstand motion to dismiss.

Kohl: You would not be bound by Twomley?

SS: It has to be considered.

Kohl: My reading of Twomley and your reading, my understanding it'll have negative impact to bring anti-trust bc of requirement that they produce enormous amount of evidence before proceed. If I understand correctly, a precedent of problem.

SS: Every argument gets made to the courts, and not once but many times.

Kohl: Which cases it hears. 1% of appeals they receive.

[explains conflicting issues, other reasons to take a case]

Hatch: Seventh Circuit re incorporation doctrine. Footnote of Scalia, here's what that footnote says. Cruikshank, 1868, immunities clause to justify incorporation, continuing

validity on incorporation, we note that Cruikshank also said 1st did not apply and 14 did not apply. 14th due process clause is how you bring about incorporation. All 7th C said was incorporate immunities. Due process well over a century. That's the issue that's gonna get to SCOTUS. 9th got it right.

Hatch: Your statement on judicial philosophy needs more development. You said some on this last time before Committee (Appeals job). Do you still believe can't read new rights into Constitution.

SS: Constitution creates rights, is immutable. Can't be added onto, except by amendment or by court. Could court write new right into Constitution. Different than whether a Court, in applying to a claimed interest, would protect that interest. Misnomer about right to privacy. I've not been reading as Court creating a right. Court saying, "there's this situation, someone's privacy being affected by govt regulation," Does liberty of due process protect indiv. People in shorthand have called it right to privacy. Court saying, states, police officers, can't do this act, can do this act.

Hatch: Courts changing means of words in Constitutions.

Hatch: Constitution governs both courts and legislatures.

SS: Oh, you forgot the executive.

Hatch: Can it govern Courts if Courts can change its meaning.

SS: SCOTUS infallible bc its final. That is its function of checking or considering acts of govt. Constitution is interpreted by Court.

Hatch: Fellow SJC colleague, judges may perceive need for change and may make change through decisions.

SS: Role of judges to interpret Constitution and law.

Hatch: HW Bush appointed you in 1992. Appointed Thomas, called him empathetic. Said he'd apply the facts. Which is closer to your own view. Distinguishing empathy from impartiality.

[Hatch is going to go through transcending personal biases in about 20 different formulations. Someone check—he didn't do so for Thomas, did he?]

SS: Two have used the word empathy. Each has given it their different meaning. I can't speak for their choice of the word or make a choice between what their meaning is. Life experiences help understand, law always directs the decision. Cannot be decided on bias or sympathy.