

Judge SOTOMAYOR. Thank you all.

Chairman LEAHY. We stand in recess for 10 minutes.

[Whereupon, the Committee was recessed at 1:24 p.m.]

AFTER RECESS

[1:42 p.m.]

Senator WHITEHOUSE. 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 5 minutes or under. Your full written statement will be put in the record, and Senators will each have 5 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 is 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 give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Ms. ASKEW. I do.

Ms. BOIES. I do.

Senator WHITEHOUSE. Please be seated. You may proceed with your statements.

STATEMENT OF KIM J. ASKEW, ESQ., CHAIR, STANDING COMMITTEE ON THE FEDERAL JUDICIARY, AMERICAN BAR ASSOCIATION, ACCOMPANIED BY MARY M. BOIES, MEMBER, STANDING COMMITTEE ON THE FEDERAL JUDICIARY, AMERICAN BAR ASSOCIATION

Ms. ASKEW. Thank you. Good afternoon and thank you for having us. I am 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 gave her its highest rating and unanimously found that she was "Well Qualified."

For 60 years, the Standing Committee has conducted a thorough, non-partisan peer review in which we do not consider the ideology of the nominee, and we have done that with every Federal judicial nominee. We evaluate the integrity, the professional competence, and the judicial temperament of the nominee. The Standing Committee does not propose, 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 are 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. Our practitioners 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 2,600 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 contacts, and we personally interviewed or received detailed letters or emails 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, a judge, a legal lecturer. She has served with distinction for almost 17 years on the 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 and 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 aspects of her judicial temperament. Those are set forth in detail in our correspondence to this Committee, and we ask that they be made a part of the record.

[The information appear as a submission for the record.]

Ms. ASKEW. In determining that these concerns did not detract from the highest rating of "Well Qualified" for the judge, the Stand-

ing Committee was persuaded by the overwhelming responses of lawyers and judges who praised her writings and overall temperament.

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.

[The prepared statement of Ms. Askew appear as a submission for the record:]

Senator WHITEHOUSE. Thank you so much.

Ms. Boies, do you have a separate statement you wish to make?

Ms. BOIES. I do not, Senator. We are happy to answer your questions.

Senator WHITEHOUSE. 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 nonpartisan nature of the effort, if you would.

On page 6, 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 not 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, as 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?

Ms. 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 the judges and lawyers who respond to our letters or whom they identify as someone who knows or has worked with Judge Sotomayor. 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 3 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 pages 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—we, the Standing Committee, took many of her opinions, and we divided them 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 will 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 sheet 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 looked 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 ten other lawyers and another member of the panel.

Ms. ASKEW. And that is 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 are telling us. We will ask you about the case that you were 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.

Senator WHITEHOUSE. 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.”

Ms. BOIES. That is correct.

Senator WHITEHOUSE. Thank you very much.

The Ranking Member, Senator Sessions.

Senator SESSIONS. Thank you, Mr. New Chairman. It is good to be with you.

Senator WHITEHOUSE. And you, sir.

Senator SESSIONS. 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 the—asking the President to give the names—a name or names before a final decision is made?

Ms. 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 or to 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, non-partisan peer review whenever the President gives us that information.

Senator SESSIONS. With regard to the temperament question, there were some questions you asked about that, and I guess the Almanac or whatever that Judge Sotomayor turned out, they have quite a—much more negative feedback from the 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. So you talked to those people, and you are Okay with that?

Ms. ASKEW. We absolutely are. And just to give you a sense, we talked to over 500 lawyers, and not to minimize any comment, 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 comments on the temperament issue from less than 10 lawyers. They were mostly lawyers and judges who were outside

of the Second Circuit and were not as familiar with Second Circuit precedent.

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

Ms. ASKEW. Well, they do not—

Senator SESSIONS. But, anyway—

Senator WHITEHOUSE. Just enough.

Senator 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 per curiam opinion. But I think the process of making that a summary opinion was—to me, pretty much takes you back. How did you conclude—did you look at that precisely?

Ms. BOIES. We did look at that case, Senator. We do not take a position on whether an opinion is right or is wrong. That is not what our function is. However, we did look at the procedure that was followed in the *Ricci* case, and that is a case in which the Second 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, and they did not—

Senator SESSIONS. Well, that is basically true. However, one judge was quite reluctant, another one moderated, and the judge apparently wanted to do it this way and prevailed. But the only thing I was asking about—and if you are 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 and specifics?

Ms. ASKEW. 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. And we—

Senator SESSIONS. One more thing. A recent group of political scientists did a study of the ABA nomination process from 1985 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? Are you willing to look at how you handle these things?

Ms. ASKEW. 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 the nominee.

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

Ms. ASKEW. Thank you.

Senator SESSIONS. 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 you could pick up things that other people wouldn't that could be valuable to this process, and I thank you.

Ms. ASKEW. Thank you.

Ms. BOIES. Senator, if I may, I would like just to go back briefly to the *Ricci* decision. 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, 1,081 were decided by summary order. Only 401 full opinions were issued.

And as I read the record, 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.

Senator SESSIONS. Well, that is a nice way to say it. But this was a—the rule said if it has jurisprudential importance, you should have an opinion. I think it was in violation of the rule. 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.

Senator WHITEHOUSE. We will hear next from the distinguished Senator from Pennsylvania, Senator Specter.

Senator SPECTER. Well, 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. The Judiciary Committee is hearing from all interested parties. It is 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 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.

Senator WHITEHOUSE. Then we will turn to Senator Cardin of Maryland.

Senator 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 is the highest compliment when your peers give you the highest rating. They are your toughest critics. I know that lawyers who are selecting a jury will almost always strike lawyers from that jury list because they are the toughest audience that you have. So this, 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 has gone about reaching her decisions from the point of view of the appropriate role of a judge, her judicial temperament, and the absence of bias in rendering those decisions. And they are exactly what we are looking for from the next Justice on the Supreme Court.

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

Ms. ASKEW. Thank you, Senator.

Senator WHITEHOUSE. Senator Cornyn.

Senator 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. She does great work as Chair of the Committee, and welcome. Thank you for your assistance to the Committee in performing its constitutional function.

Ms. ASKEW. Thank you.

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

Senator SESSIONS. Thank you very much.

Senator WHITEHOUSE. We will take a 5-minute recess while the next panel assembles.

[Whereupon, at 2:08 p.m., the Committee was recessed.]

After Recess [2:12 p.m.]

Senator WHITEHOUSE. 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'm told that they are 5 minutes away, but the 5 minutes that people are away can be a longer 5 minutes than a regular 5 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.

Senator SESSIONS. Well, 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.

Senator WHITEHOUSE. That is our custom.

Senator SESSIONS. But we're moving along well. Thank you, Mr. Chairman.

Senator WHITEHOUSE. 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 uniformed patrol officer in his hometown of Jonesboro, Arkansas. He is a graduate of the University of Arkansas Little Rock Law School.

Attorney General McDaniel, will you please stand to be sworn?

Do you affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. MCDANIEL. I do.

Senator WHITEHOUSE. Please be seated.

Attorney Morgenthau, please be seated.

Attorney General McDaniel, please proceed with your statement.

**STATEMENT OF DUSTIN MCDANIEL, ATTORNEY GENERAL,
STATE OF ARKANSAS**

Mr. 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