

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

of the nomination of Judge Sonia Sotomayor to the Supreme Court of the United States.

We've all heard all week about her compelling life story and impressive accomplishments. I have the highest respect and admiration for her and I'm proud to testify on behalf of this person who was first appointed by President George H.W. Bush, and then by my most famous predecessor in the Arkansas Attorney General's Office, President Bill Clinton.

More specifically, I'm here to rebut any assertion that her participation in the matter of *Ricci v. DeStefano* in any way reflects upon her qualifications or abilities to serve as a Justice on the United States Supreme Court.

When the Supreme Court granted certiorari in the *Ricci* case, I, on behalf of the State of Arkansas, joined with five other attorneys general in support of the Second Circuit. Before I address the case and the brief, let me address the parties and their issues.

I entered the world of public service long before I became an elected official. After college, I turned down my admission into law school and took a civil service exam in my hometown of Jonesboro, Arkansas. I became a police officer and I saw firsthand the heroism and dedication of the men and women who protect and serve our communities very day. Firefighters like Frank Ricci and his colleagues run into homes and buildings when everyone else is running out. I have the highest respect and gratitude for all who serve our communities, States, and Nation. They are heroes among us and they deserve to be treated fairly by our system.

My personal experience with the civil service exam was a favorable one, but not all are so lucky. I understand the frustration that the firefighters felt with this process. I also understand the city's fear of litigation and unfair results. I am for a process that is fair. No one should be given an unfair advantage, but no one should be subject to an unfair disadvantage either.

As Attorney General, I represent hundreds of State agencies, boards and commissions in matters of employment law. My job is to allow my clients to do their job without fear of unreasonable litigation. The law had, until recently, allowed for flexibility, necessary for public employers. The Supreme Court's ruling in this case will likely increase costly litigation and the taxpayers will ultimately pay the bill.

All who have commented on the nomination process in recent years have been critical of those who have been labeled an "activist" judge. It's important to note that the Second Circuit's ruling in this case was not judicial activism at work; to the contrary, they followed existing law.

In *Ricci*, the panel adopted the lengthy analysis of the District Court, which they called "thorough, thoughtful and well-reasoned". The District Court cited cases dating back some 28 years. The ruling was consistent with the law and the doctrine of *stare decisis*. Granted, the Supreme Court, in a closely divided opinion, ruled differently, but in doing so it set new precedent.

It is also important to note that the Second Circuit's ruling was supported by many prestigious groups, including the EEOC, the Department of Justice, the National League of Cities, the National Association of Counties, International Municipal Lawyers Associa-

tion, and the Republican and Democratic Attorneys General of Alaska, Iowa, Arkansas, Maryland, Nevada, and Utah. There's a large body of research available on Judge Sotomayor's record.

No allegation that she rules based on anything other than the law can stand when cast in the light of her actual record. The Congressional Research Service concluded, "Perhaps the most consistent characteristic of her approach as an appellate judge could be described as an adherence to the doctrine of *stare decisis*", that is, upholding past judicial precedents.

One only has to look so far as to her own words. In *Hayden v. Pataki*, she wrote in a dissent, "It is the duty of a judge to follow the law, no question its plain terms." She concluded by saying, "Congress would prefer to make any needed changes itself rather than have courts do so for it. In my opinion, Judge Sotomayor is abundantly qualified and is an excellent nominee. I believe that the people of the United States would be well served by her presence on the courts.

It is my great honor and privilege to be here at this Committee, and I thank you ever so much for the opportunity to appear here today. Thank you.

Senator WHITEHOUSE. Thank you very much, Attorney General McDaniel.

We will do a round of questions for the Attorney General and then once the—since the panel is completely assembled, I will have all the witnesses sworn and then we will proceed to Mayor Bloomberg, to District Attorney Morgenthau, and on across the panel, with one brief interruption to allow the distinguished Senator from the State of New York, Senator Schumer, to introduce Mayor Bloomberg.

Attorney General McDaniel, as a—as an experienced lawyer, is—let me ask you, is it not the case that it's the Supreme Court's task very frequently to resolve conflicts between the Circuit Court of Appeal?

Mr. MCDANIEL. Yes, of course it is, Senator.

Senator WHITEHOUSE. And if a Circuit Court is bound by its own prior precedent and therefore the doctrine of *stare decisis* controls a particular decision, that does not in any way inhibit the Supreme Court from reviewing that second decision against conflicting decisions from other circuits in its task in resolving those conflicts, correct?

Mr. MCDANIEL. That's—that is correct.

Senator WHITEHOUSE. Is it your sense that that is what occurred in this case, that the Second Circuit, in *Ricci*, felt itself bound by *stare decisis* as a result of its prior precedent, but that the Supreme Court took the case to resolve issues of conflict with other circuits?

Mr. MCDANIEL. Well, it certainly seems clear that the—the binding law from the Supreme Court, which dated back up to 28 years, made it clear that remedial actions, although race-conscious, race-neutral, were permissible. I think that that is precisely what the case demonstrated and how the court ruled, and why the States that—that participated, Arkansas included, thought that it was important to preserve for our clients the ability to try to avoid litigation if they think they cannot defend an existing practice. If they

cannot defend it, no lawyer would tell their client, oh, go do it anyway. But clearly the Supreme Court thought that it was ripe for review, and they also thought that it was ripe to change the law, which is their purview, and that's what they did.

Senator WHITEHOUSE. That's an interesting point. And many observers, including prominent observers who have had their views expressed in the public media about this, have indicated that that decision changed the landscape of civil rights law. If a judge is a cautious and conservative jurist on a Circuit Court, do you believe it's appropriate for the Circuit Court to change the landscape of civil rights law?

Mr. MCDANIEL. Absolutely not. I don't think that the Second Circuit did anything short of what it had to do, which was to apply the existing law. The fact that the majority—a bare majority—in the United States Supreme Court decided to change existing law, frankly, that would have been inappropriate for the Second Circuit to take that responsibility on itself.

Senator WHITEHOUSE. Thank you, Attorney General.

Senator SESSIONS. Thank you, Mr. McDaniel. I was a 2-year Attorney General, and it was a great honor.

With regard to the *Ricci* case, are you aware that the panel attempted to decide this case on a summary order, writing no opinion, not even a pro curium opinion?

Mr. MCDANIEL. I am aware of that, sir.

Senator SESSIONS. And are you aware that by chance one of the other members of the Circuit found out about that and an uproar of sorts occurred because the people—the other members—other members of the Circuit were very concerned about the opinion and thought it was an important opinion. Are you aware of that?

Mr. MCDANIEL. I know that the—I know that the panel, or at least the body of judges, chose to review the matter and they voted not to meet en banc, and that there was—

Senator SESSIONS. That's correct.

Mr. MCDANIEL.—a pro curium that was issued.

Senator SESSIONS. That's correct. Now, by you—now, you say that there was Second Circuit opinion and authority to uphold this case. But—but on re-hearing, the slate is wiped clean and the panel can develop or formulate new authority or determine clearly whether or not that previous case may have applied. And are you aware that when they voted, the vote was 6:6 and Judge Sotomayor was the key vote in deciding not to re-hear the case? Therefore, we can conclude that not only did she decide this case, but it's really not accurate to say she was just following authority since it was her vote that didn't allow that authority to be reevaluated.

Mr. MCDANIEL. Well, Senator, she was in the majority, so it's fair to say that any one of those judges could be the deciding vote that—

Senator SESSIONS. That is correct. But it's not fair, I think, to say that she didn't have an opportunity to reevaluate it. She was simply applying a law that she was bound to follow when she could have—if she felt differently, she could have called—she could have allowed it to have been re-discussed.

Mr. MCDANIEL. Well, I also think that there were Supreme Court cases, not just Second Circuit cases.

Senator SESSIONS. Well, are you aware that the Supreme Court says there were not? Are you aware the Supreme Court, in their opinion, said there was no Supreme Court authority on this matter?

Mr. MCDANIEL. I have read their opinion and I tend to agree with the minority, that this was, in fact, squarely within the—

Senator SESSIONS. Okay. Now, you filed—which I give you credit for. I did some of these things when I was Attorney General. You—you joined with 32 other State attorneys general in submitting an amicus brief to the U.S. Supreme Court on the *Heller* case. You took the provision—the brief argues that “the right to keep and bear arms is among the most fundamental of rights because it is essential to securing all other liberties”. I see the Mayor not happily listening to that.

[Laughter.]

Senator SESSIONS. You—but—so you believe that the Second Amendment is a fundamental right. Are you aware that Sandy Froman, the former president of NRA—you’re probably not familiar with this letter. But she’s a lawyer, and—and pointed out that *Heller* was just a 5:4 opinion, with some Justices arguing that the Second Amendment does not apply to private citizens, or that if it does, even a total gun ban would be upheld if a legitimate government interest could be found. The dissenting Justices also found that DC’s absolute gun ban on handguns within the home a reasonable restriction. That wouldn’t play too well in Alabama, and probably not Arkansas, Oklahoma, or Texas. But most places.

So I guess I’m saying, are you concerned that—and are you aware, of course, of the *Maloney* case in which Judge Sotomayor—and I think she can contend there was authority in that case that justified her concluding the Second Amendment does not apply to the States, but I was disappointed in the breadth, and the way she wrote it gave me concern.

So are you aware that one vote on the Supreme Court can make the difference on the question of whether or not the right to keep and bear arms is protected against mayors or legislatures of States who disagree?

Mr. MCDANIEL. Well, I was proud to join Arkansas into the brief on *Heller v. District of Columbia*. I intend to join again in the *NRA v. Chicago* in the attempt to have the Supreme Court review and take up the question, which I believe is ripe, as to whether or not the Second Amendment is applied to the States as incorporated by the Fourteenth Amendment. I do believe that the Second Amendment is a fundamental right, and I do believe that it is an individual right, not one tied to participation in a militia.

The Attorney General, the current Attorney General in Texas, Senator Cornyn’s successor, and I have spent some time on that issue, even recently. And I am not, nonetheless, concerned with Judge Sotomayor’s position. I am confident that her answers that she’s provided to this Committee and her record are consistent with one another, and I do not believe that the right to keep and bear arms is at risk with this nominee, or frankly I wouldn’t testify for her.

Senator SESSIONS. Well, thank you. I think it is.

Senator WHITEHOUSE. Now that the panel is assembled, I will swear the entire panel in. We will return to regular order. You can all give your opening statements, and then questioning will begin at the conclusion of those opening statements.

Would you please stand to be sworn? You may sit.

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

Mayor BLOOMBERG. I do.

Mr. MORGENTHAU. I do.

Mr. HENDERSON. I do.

Mr. RICCI. I do.

Mr. VARGAS. I do.

Mr. KIRSANOW. I do.

Ms. CHAVEZ. I do.

Senator WHITEHOUSE. Please be seated.

I will recognize Senator Schumer for a moment to welcome his constituent and the mayor of New York City, Michael Bloomberg.

Senator SCHUMER. Well, it's my honor to welcome two very distinguished constituents here. I want to thank every witness for coming, but particularly extend a welcome to two of New York's greatest public servants, Mayor Bloomberg and District Attorney Morgenthau. As you know, this nomination is the source of enormous pride to all New Yorkers, and your support for Judge Sotomayor has been extremely helpful to this Committee, to the Senate as a whole, and to the Nation in understanding what kind of Justice she will be, and very much appreciate your being here.

Thank you, Mr. Chairman.

Senator CARDIN. Welcome.

Mayor Bloomberg is the mayor of New York City. He is currently serving in his third term as mayor. He founded Bloomberg, LP, a New York City company that now has employees in more than 100 cities. Mayor Bloomberg is a graduate of Johns Hopkins University located in Baltimore, Maryland and Harvard Business School.

We look forward to your testimony.

STATEMENT OF HON. MICHAEL BLOOMBERG, MAYOR, CITY OF NEW YORK

Mayor BLOOMBERG. Mr. Chairman, thank you. Ranking Member Sessions, thank you very much. Senator, Senator, Senator. Senator Sessions, I must say, as a former gun owner, a former member of the NRA, and also a staunch defender of the Second Amendment, we probably don't disagree very much if we really had a chance to talk.

In any case, I wanted to thank everyone for the opportunity to testify before you today. I'm Mike Bloomberg and I'm here not only as the mayor of New York City, the city where Judge Sonia Sotomayor has spent her entire career, but also as someone who has appointed or reappointed more than 140 judges to New York City's criminal and family courts. So, I do appreciate the job before you.

About 3 months ago when President Obama invited Governor Schwarzenegger, Ed Rendell, and me to the White House to discuss infrastructure policy, I did find an opportunity to tell him what