U.S. SENATOR ORRIN HATCH (R-UT) HOLDS HEARING ON JUDICIAL NOMINATIONS

FDCH Political Transcripts

January 29, 2003 Wednesday

Section: COMMITTEE HEARING

Length: 87322 words

Byline: SENATE JUDICIARY COMMITTEE

U.S. SENATOR ORRIN HATCH (R-UT), CHAIRMAN

DEBORAH COOK FOR THE U.S. COURT OF APPEALS FOR THE, SIXTH CIRCUIT JOHN ROBERTS FOR THE U.S. COURT OF APPEALS FOR THE, D.C. CIRCUIT JEFFREY SUTTON FOR THE U.S. COURT OF APPEALS FOR THE, SIXTH CIRCUIT JOHN ADAMS FOR THE DISTRICT COURT FOR THE NORTHERN, DISTRICT OF OHIO ROBERT JUNELL FOR THE DISTRICT COURT FOR THE WESTERN, DISTRICT OF TEXAS S. JAMES OTERO FOR THE DISTRICT COURT OF THE CENTRAL, DISTRICT OF CALIFORNIA

Body

U.S. SENATE JUDICIARY COMMITTEE HOLDS A HEARING ON THE JUDICIAL

NOMINATIONS

JANUARY 29, 2003

SPEAKERS:

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U.S. SENATOR ORRIN HATCH (R-UT) HOLDS HEARING ON JUDICIAL NOMINATIONS

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HATCH: If we can begin. I guess I better turn this on here. Our hearings are open to the public and to the interested public, of course, as the champion of the ADA and the American's with Disabilities Act. I've done everything possible to accommodate the persons with disabilities who informed us yesterday that they would be attending the hearing.

Now, in fact, when we received word that there would be three deaf people in attendance, we immediately arranged an interpreter for them. When we were informed that up to 100 people with disabilities would be coming, we immediately began looking throughout the building for additional suitable room to accommodate all of them.

As background, the committee practices to allow the public to attend hearings on a first come, first service basis, and often many of the people who wait in line never get in. Rather than follow the usual practice and have most people in the hallways, we instead reserved STG50, a spacious first floor room for any guests who could not be accommodated in the hearing room.

Now, we're very disappointed that we were unable to get S216, which would have been a bigger room and would have allowed us, perhaps, to get everybody in. I've asked my staff to look at STG50 and see how full it is and see if we can accommodate everybody down there because we could immediately move down there if it is. But, our problem is all the television is set up and everything ***right*** now. But, we'll check on it and we'll see what we can do because I'm the last person on earth who would not want to accommodate those who are suffering from -- or those who are persons with disabilities.

So, we'll start here and we'll check out that room. If it's capable of handling this we'll try to accommodate if we can move everything down there. But, as of ***right*** now, I think we're going to have to proceed here until I receive back word from staff. And, I would like your staff to work with…

LEAHY: Yes, I would. I've already asked my staff to go down and look at STG50. When I went by there earlier this morning, it's a huge room. I think it would probably accommodate. We got people standing out here for an hour waiting. And, maybe one way to do it would be to have the starters who are here to make their (inaudible) do it. But, I would really strongly urge that we move down there. It's a much larger room and it'd be a lot easier to accommodate some people who have not been able to get in.

(UNKNOWN): I think that's a…

(UNKNOWN): I just hope that you'll follow the recommendations…

(APPLAUSE)

(UNKNOWN): I think that's a reasonable way to proceed in terms of hearing from the presenters here. And, then, as I understand as well, that ST50 is open and is available. And, it seems to me that we ought to give the opportunity for people who have an interest in these nominees an opportunity to hear them. So, I support Senator Leahy's proposal and hope that that can be…

HATCH: (Inaudible) that comment and I think I'm certainly amendable to that. So, let's have, Senator Leahy's staff and my staff do down there and see if we can accommodate us down there. If we can't, we're going to continue here. If we can, we'll move down there with this batch, because I'm not going to waste a lot of time moving. So, everybody's just going to have to move down as quickly as they can. But, I certainly want to always accommodate as many people as we possibly can, and especially those who suffer from disabilities. And, we'll just do it that way.

We can make our two statements and then we'll have the two Senators make theirs or any other Senators who want to come at this time.

Good morning. I'm pleased to welcome all of you to the committee's first judicial confirmation hearing of the 108th Congress. I first would like to acknowledge and thank Senator Leahy for his service as chairman of this committee ***over*** the past 16 months. I also would like to extend a particular welcome to Senator Bob Dole, our former majority leader, and to Commissioner Russell Redenbaugh, the three-term U.S. Civil ***Rights*** commissioner, who also happens to be the first disabled American to serve on that commission. It means a great deal to me that they are both here today to support Mr. Jeff Sutton's nomination. And, of course, I would also like to express my deep appreciation for the members we have here who have taken time to come and present their views on the qualifications of our witnesses today.

Our first panel features three outstanding circuit nominees who were nominated on May 9, 2001, whose hearing was originally noticed for May 23, 2001. I agreed to postpone that hearing for a week at the request of some of my democratic colleagues who claim that an additional week -- they needed an additional week to assess the nominees' qualifications. As we all know, control of the senate and the committee shifted to the democrats shortly thereafter on June 5, 2001. And, these nominees have been languishing in the committee without a hearing ever since. So, I am particularly pleased to pick up where we left off in May of 2001 by holding our first confirmation hearing for the same three nominees we noticed back then: Justice Deborah Cook, Jeffrey Sutton and John Roberts. It is with great pleasure that I welcome these distinguished guests before the committee this morning.

We also have three very impressive district court nominees with us today: John Adams for the Northern District of Ohio; Robert Junell for the Western District of Texas and S. James Otero for the Central District of California. I will reserve my remarks about these district court nominees until I call their panel forward.

Our first nominee is Ohio Supreme Court Justice, Deborah Cook, who has established a distinguished record as both a litigator and a jurist. Justice Cook began her legal career in 1976 as a ***law*** clerk for the firm now known as Roderick Linton, which is Akron's oldest ***law*** firm. Upon her graduation from the University of Akron's School of ***Law*** in 1978, Justice Cook became the first women hired by that firm.

In 1983 she became the first female partner in the firm's century of existence. And, I'm proud to have her before us as a nominee who knows firsthand the difficulties and challenges the professional women face in breaking through the glass ceiling.

During her personally 15 years in the private sector, Justice Cook has a large and diverse civil litigation practice. She represented both plaintiffs and defendants at trial and on appeal in cases involving, for example, labor ***law***, insurance claims, commercial litigation, torts and ERISA claims. In 1991 Justice Cook left the private sector after winning election to serve as a judge on the Ninth Ohio District Court of Appeals. During her four years on the Ninth District bench, she participated in deciding ***over*** 1,000 appeals.

The Ohio Supreme Court reversed only six of the opinions that she authored, and eight of the opinions on which she joined.

HATCH: In 1994, Justice Cook was elected to serve as the Justice on the Ohio Supreme Court. She, therefore, brings to the federal bench more than 10 years of appellant judicial experience, which is built on a foundation of 15 years of solid and diverse litigation experience. There can be little doubt that she is imminently qualified to be a Sixth Circuit jurist and I commend President Bush on his selection of her for this post.

Our next nominee is Jeff Sutton, one of the most respected appellate advocates in the country today. He has argued ***over*** 45 appeals for a diversity of clients in federal and state courts across the country, including a remarkable number, 12 to be exact, before the U.S. Supreme Court. His remarkable skill and pleasant demeanor have won him not only a lot of decisions, but also a wide variety of prominent supporters including Seth Waxman, President Clinton's Solicitor General, Benson Wolman, the former head of the Ohio ACLU; Bonnie Campbell, the Clinton nominee to the Eighth Circuit Court of Appeals; Civil ***Rights*** Commissioner Redenbaugh, the first disabled American to serve on the U.S. Civil ***Rights*** Commission; and former Senate Majority Leader, Bob Dole, who is among the country's most powerful advocates on behalf of persons with disabilities.

I feel it necessary for me to comment briefly on some of the recent criticisms we have heard. Of course, no one familiar with the nominees' nominations process is surprised. We have the usual gang opposing Republican nominees. Well, their opposition of Jeff Sutton is for all of the wrong reasons. But, as people who know me well will attest, I have always been willing to acknowledge a fair point made by the opposition.

So, in keeping with that principle, I want everyone to know that I found something commendable in the so-called report published by one of these ***groups*** about Jeff Sutton. And that report concluded -- or conceded that quote, "No one has seriously contended that Sutton is personally biased against people with disabilities." Now, that is a very important point, and should be obvious since Jeff Sutton has a well-known record of fighting for the legal ***rights*** of persons with disabilities.

And, he was raised in an environment of concern for the disabled. His father ran a school for people affected by cerebral palsy. Since the opposition to Jeff Sutton is not personal, then what is it? It seems to come down to a public policy disagreement about some Supreme Court decisions regulating the limits to federal power when Congress seeks to regulate state governments. Those cases include the City of Boerne, Kimel, and Garrett, among others. But, in those cases it was Jeffrey Sutton's job as the Chief Appellate lawyer for the State of Ohio and as a lawyer to defend his clients' legal interests.

As the American Bar Association ethics rules make clear, "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." Now, I don't think anyone on this committee would actually consider voting against a nominee out of dislike for the nominee's clients.

We have an important discussion about clients in connection with the confirmation of Marsha Berzon, now a judge on the Ninth Circuit who was born in Ohio, by the way. And, this committee ultimately decided not to hold her responsible for her clients' views. Judge Berzon had been a long-time of the ACLU, serving on the Board of Directors as the vice president of the Northern California Branch. She testified that, "If I am confirmed as a judge, not only will the ACLU's positions be irrelevant, but the positions of my former clients, and indeed my own positions on any policy matters will be quite irrelevant, and I will be required to, and I commit to look at, the statute, the constitution of provisions and the precedence only in deciding the case." That was on July 30, 1998.

Now, I want to remind my colleagues that that answer sufficed for Judge Berzon, and she was approved by this committee with my support and confirmed by the Senate. It took longer than I would have liked to -- it to have taken, but she was approved. I think we all agree that anybody involved in a legal dispute has a ***right*** to hire a good lawyer, even if that person is guilty of murder. And, Jeff's clients are not murders. They are state governments defending their legal ***rights***. So, let's not beat up on Mr. Sutton because he worked for the State of Ohio.

Of course I'm not suggesting that committee members must praise the effects of the Supreme Court's rulings in the City of Boerne, Kimel, and Garrett. Those decisions affected real people and undid some of the hard work on the part of Congress. I should know. A number of us on this committee and certainly Senator Kennedy and I did -- we did a lot of work on those cases. We put in a great deal of time and energy into drafting and passing the Religious Freedom Restoration Act, the Americans with Disabilities Act, and other ***laws*** that have been declared beyond federal power, including the Violence Against Women Act, which Senator Biden spent so much time on and myself.

I thought those ***laws*** would be good for the country and they still are. It was not easy to see them limited or struck down. Of course I understand the powerful constitutional principles and underpinning of the Supreme Court's decisions in those cases. But, I can sympathize with those who see things differently. I have no sympathy, however, for the notion that those Supreme Court decisions and the positions of the states that were Mr. Sutton's clients have somehow a legitimate reason to oppose Mr. Sutton's nomination. That's ridiculous.

So, since even the people for the American way concedes that Jeff Sutton harbors no personal bias. And, since Mr. Sutton cannot be held responsible for the Supreme Court's decisions and since we all agree that Ohio and Alabama and Florida have the ***right*** to representation in court, then I do not see any real reason to oppose this highly skilled and highly qualified and highly rated lawyer by the ABA. I do look forward to his testimony and would only urge my colleagues and observers to keep an open mind.

From the record I have observed so far I am convinced that Jeff Sutton will be a great judge and one who understands the proper role of a judge.

Our final circuit nominee today is Mr. John Roberts, who has been nominated for a seat on the D.C. Circuit Court of Appeals. He is widely considered to be one of the premiere appellate litigators of his generation. Most lawyers are held in high esteem if they have the privilege of arguing even one case before the U.S. Supreme Court. Mr. Roberts has argued an astounding 39 cases before the Supreme Court, at least that was the last count I had.

It is truly an honor to have such an accomplished litigator before this committee, and one of the most well recognized and approved appellate litigators in history. The high esteem in which Mr. Roberts is held is reflected in a letter the committee recently received urging his confirmation. This letter, which I will submit for the record was signed by more than 150 members of the D.C. Bar, including such well-respected attorneys as Lloyd Cutler, who was the White House Counsel to both Presidents Carter and Clinton; Boyden Gray, who was the White House Counsel for the first President Bush; and Seth Waxman who was President Clinton's Solicitor General. The letter states, "Although as individuals we reflect a wide spectrum of political party affiliation and ideology, we are united in our belief that John Roberts will be an outstanding Federal Court of Appeals judge and should be confirmed by the United States Senate. He is one of the very best and most highly respected appellate lawyers in the nation with a deserved reputation as a brilliant writer and oral advocate. He is also a wonderful professional colleague, both because of his enormous skills and because of his unquestioned integrity and fair mindedness."

This is high praise from a ***group*** of lawyers who themselves have clearly excelled in their profession, who are not easily impressed, and who would not recklessly put their reputations on the line by issuing such a sterling endorsement if they were not 100 percent convinced that John Roberts will be a fair judge who will follow the ***law*** regardless of his personal beliefs.

Let me just say a brief word about Mr. Roberts' background before turning to Senator Leahy. He graduated from Harvard College, summa cum laude in 1976 and received his ***law*** degree magna cum laude in 1979 from the Harvard ***Law*** School where he was managing editor of the Harvard ***Law*** Review. Following graduation, he served as a ***law*** clerk for Second Circuit Judge Henry J. Friendly, and for then Justice William Rehnquist of the Supreme Court.

From 1982 to 1986 Roberts served as Associate Counsel to the President in the White House Counsel's office. From 1989 to 1993, he served as Principle Deputy Solicitor General at the U.S. Department of Justice. He now heads the Appellate Practice ***Group*** at the prestigious D.C. ***law*** firm Hogan and Hartson. And, he has received the ABA's highest rating of unanimously well qualified. I have to say that this panel represents the best. And I commend President Bush for seeking out such nominees of the highest caliber.

Now, I just have a note here; let me see what it says and then I'll turn. OK, for everybody's information I have been advised that we can set up in another large room. We will proceed here until the other room is ready for us, at which time we will take a short recess and accommodate further the request made yesterday for additional accommodations.

So, I would prefer that and even though it's an inconvenience to all of you, let's see if we can try and get at least these folks into that room first because they were here first, as well as those persons with disabilities who desire to attend and we'll -- does anybody know what the room is? STG50 will be the room. So, apparently we can hold it there.

LEAHY: I just thank the Chair for the accommodation. I appreciate it.

HATCH: Well, that's fine.

LEAHY: Chairman, I think it was…

HATCH: Let me turn to the Ranking Member for his remarks.

LEAHY: I think it was a wise thing to do. As I said when I walked by there, there appeared to be plenty of room. I'm wondering, Mr. Chairman -- I'm wondering if we're going to be moving down there anyway, and Senator Warner and Senator Hutchison, I'd just as soon withhold my statement until we go down there to give as a courtesy to Senator Warner and Hutchison and Senator Voinovich because if they want to give their statement here and then I'll give my opening statement down there.

HATCH: I'd prefer for you to give your opening statement and then we'll hear from the two Senators.

LEAHY: OK. Happy to do that, Mr. Chairman. We meet an extraordinary -- I tried.

HATCH: I think my colleagues understand.

LEAHY: No, I -- they're -- I know they're anxious to hear my statement anyway.

HATCH: Well, I'm certainly anxious to hear…

LEAHY: Following the chairman's example would be a little bit lengthy. We meet in an extraordinary session to consider six important nominees for lifetime appointments to the federal bench. During the last four years of the Clinton Administration, this committee refused to hold hearings and committee votes on qualified nominees to the D.C. Circuit and the Sixth Circuit. Today, in very sharp contrast, the committee's being required to proceed on three controversial nominations for those same Circuit Courts and do it simultaneously.

Many see this as part of a concerted and partisan effort to pack the courts and tilt them sharply out of balance. In contrast to the president's Circuit Court nominees, the District Court nominees to vacancies in California, Texas and Ohio seem to be more moderate and bipartisan. Today we'll hear from Judge Otero, nominated to the U.S. District Court for the Central District of California unanimously approved by California's bipartisan judicial advisory committee established through an agreement between Senator Feinstein and Senator Boxer with the White House.

I wish the White House would proceed to nominate another qualified consensus nominee like Judge Otero for the remaining vacancy in California. Because too often the last two years we've seen the recommendations of such bipartisan panels rejected or stalled at the White House. I note that Judge Otero's contributed to the community, worked on a pro bono project for the Mexican Legal Defense and Education Fund, served as a member of the Mexican Bar Association, the Stanford Chicano Alumni Association, and the California Latino Judge's Association, among others.

We will hear from Robert Junell, nominated to the U.S. District Court for the Western District of Texas, another consensus nominee who has a varied career at litigator and member of the Texas House of Representative, a life member of the NAACP, and a former member of the Board of Directors of La Esperanza Clinic. And, I spoke earlier with Representative Charlie Stenholm who strongly supported him.

And, then, of course, Judge Adams, nominated to the U.S. District Court for the Northern District of Ohio. These are not the ones that create the controversy. And, I'm disappointed the chairman has unilaterally chosen to pack so many Circuit Court nominees onto the docket of a single hearing. This is certainly unprecedented in his earlier

tenure as chairman. And, there's simply no way to consider the controversial divisive nominations in a single hearing.

It is not the way to discharge our constitutional duty to advise and consent to the president's nominees. When I was chairman ***over*** 17 months we reformed the process of judicial nomination hearings.

LEAHY: We made tangible progress in repairing the damage done to the process in the previous six years. We showed how nominations are viewed, public and present, could be considered twice as quickly in a democratic controlled Senate, as a republican controlled Senate they considered President Clinton's nominees.

We added new accountability by making the positions of home state Senators public for the first time and we did away with the previous republican process of anonymous holds. We made significant progress and happened to fill judgeships in the last Congress. The number of vacancies on the courts was slashed from 110 to 59, despite an additional 50 new vacancies that arose during that time. Chairman Hatch had written in September 1997 that 103 vacancies as we joined the Clinton Administration did not constitute a vacancy crisis. He also stated his position on numerous occasions as 67 vacancies meant full employment in the federal court. Even with the two additional vacancies that have risen since the beginning of the year, there are now 61 vacancies on the district and circuit courts. Under a democratic controlled Senate, we went well below the level that Chairman Hatch used to consider acceptable and the federal courts have more judges now than when Chairman Hatch proclaimed them in full employment.

We made the extraordinary progress we did by holding hearings on consensus nominees with widespread support moving them quickly, but, by also recognizing that this president's more divisive judicial nominees would take time. We urged the White House to consult in a bipartisan way and to keep the courts out of politics and partisan ideology. We urge the president to be a uniter, not a divider, when it came to our federal courts. We were rebuffed in that. All Americans need to be able to have confidence in the courts and judges. And, they need to maintain the independence necessary to rule fairly on the ***laws*** and ***rights*** of the American people to be free from discrimination, to have our environmental consumer protection ***laws*** upheld.

Under democratic leadership in the Senate, we confirmed 100 of President Bush's nominees within 17 months; two others were rejected by a majority vote of this committee. Several others were controversial. They had a number of negative votes, but they were confirmed. And, given all the competing responsibilities with the committee and the Senate in these times of great challenges to our nation, especially after the attacks of September 11, then later the anthrax attacks directed at Senator Daschle and myself, in fact, it killed several people and disrupted the operations of the Senate itself. Hearings for 103 judicial nominees, voting on 102 and favorably reporting a 100 in 17 months is a record we can be proud of and one that I would challenge anybody to show certainly in recent years to be matched.

During the 107th Congress the committee voted 102 of the 103 judicial nominees eligible for votes, that's 99 percent. Of those voted upon, 98 percent were reported favorably to the Senate, of those, 100 percent were confirmed. Incidentally, we completed the hearings on 94 percent of the judges that had their files completed.

Now this, 103 judges heard in 17 months is contrast to the less than 40 a year that the Republicans had when they had President Clinton as president. Indeed, they failed to proceed on 79 of President Clinton's judicial nominees in the two-year Congress in which they were nominated. More than 50 of them were never even given a hearing. Indeed, the Senate confirmed more judicial nominees in our 17 months than the republican controlled Senate did during 30 months. More achieved in half the time, but achieved responsibly. We showed how steady progress could be made without sacrificing fairness.

But, in contrast this hearing today portends real dangers to the process and to the results, all to the detriment of our courts and to the protections they are intended to afford to the American people. The Senate in this instance and the Congress in many others is supposed to act as a check on the executive and add balance to the process, the proceeding that the majority as unilaterally chosen today is unprecedented, it's wrong. It undercuts the ability of the committee and the Senate to provide balance.

Three controversial circuit nominations of a republican president for a single hearing. That is something the chairman, current chairman, it is something he never did for the moderate and relatively non-controversial nominees of a democratic president just a few years ago. One has to think it's a headlong effort to pack the courts and not withstanding our efforts not to carry out the same obstruction as we saw with the democratic president. We seem to be going back to a different rules for different presidents.

Jeffrey Sutton's nomination has generated significant controversy and opposition. I have questions about his efforts to challenge and weaken among other ***laws***, the Americans with Disabilities Act, the AIDS Discrimination Employment Act, the Violence Against Women Act, as perceived general empathy to the federal protection for state workers. I am concerned that more than 500 disability ***rights groups***, civil ***rights groups*** and women's ***groups*** are opposed to his confirmation because they feel he will act against their interest and not protect their ***rights***.

I am concerned about a reputation among observers of the legal community that he's a leading advocate for the state's ***rights*** revival. This is a nomination that deserves serious scrutiny and which ought to be considered -- it has been the practice, has been the practice for decades in this committee as the only circuit court nominee in this hearing. The process imposed my friends on the other side of the aisle as cheating the American people to the scrutiny of these nominees should be accorded.

We're also being asked to simultaneously consider the nomination of Deborah Cook. She's one of the most active dissenters on the Ohio Supreme Court. She comes to the committee with the judicial record deserving of some scrutiny. And it's also generated a good deal of controversy and opposition as well.

And, I'd note that these two difficult nominations of both the judgeships and the Sixth Circuit Court of Appeals, now that is a court to which President Clinton had a much harder time getting his nominees considered.

The Republicans fail to acknowledge that most of the vacancies that have plagued the Sixth Circuit arose during the Clinton Administration when President Clinton had nominated people to this court and they were never even given a hearing. The republicans closed the gates. They refused to consider any of the three highly qualified moderate nominees President Clinton sent to the Senate for those vacancies. Not one of the Clinton nominees for those current vacancies on the Sixth Circuit received a hearing by the Judiciary Committee under Republican leadership from 1997 through June of 2001.

Now, in spite of that history, when the Democrats took ***over***, we gave committee consideration and we confirmed two of President Bush's conservative nominees to that court last year. We did not play tit for tat. With the confirmations of Judge Julia Smith Gibbons of Tennessee, Professor John Marshal Rogers of Kentucky, Democrats confirmed the only two new judges to the Sixth Circuit in the past five years. Regrettably, despite our best efforts, the White House rejected all suggestions to address the legitimate concerns the Senators in that circuit. The qualified moderate nominees were blocked by the Republicans when they were in charge.

The Republican majority refused to hold hearings on the nomination of Judge Helene White, of Kathleen McCree Lewis, Professor Kent Markus. One of those seats has been vacant since 1995, the first term of President Clinton. Judge Helene White of the Michigan Court of Appeals was nominated in January of 1997. She did not receive a hearing on her nomination during the more than 1,500 days her nomination was before this committee. That probably set a record, four years, 51 months in fact, no hearing. She was one of 79 president judicial nominees who did not get a hearing during the Congress in which she was first nominated. And then she was denied a hearing after being re-nominated a number of times, including January 2001. Actually, the committee under Republican control had only about eight Court of Appeals nominees a year that they heard, in 2000 they only held five, as contrasted today when the Republican president they'll hold three in one day.

We had Kathleen McCree Lewis, a distinguished African American lawyer from a prestigious Michigan ***law*** firm was never accorded a hearing on her 1999 nomination to the Sixth Circuit. And that nomination was final withdrawn by President Bush. Professor Kent Markus, another outstanding nominee to a vacancy of the Sixth Circuit, never received a hearing on his nomination. And, while his nomination was pending his confirmation was supported by individuals of every political stripe, including 14 past presidents of the Ohio State Bar Association, and more than 80 professors and ***groups*** like the National District Attorney's Association, of course every newspaper in the state.

Now, Professor Markus did say in testimony another hearing how what happened to him, here's some of the things he said. On February 9, 2000, I was the president's first judicial nominee in that calendar year, and then the waiting began. At the time my nomination was pending, despite lower vacancy rates in the Sixth Circuit in calendar year 2000, the Senate confirmed circuit nominees to the Third, Ninth and Federal Circuit, no Sixth Circuit nominee was given a hearing. With more vacancies in the way, why then did my nomination expire without even a hearing? And, then to quote him, "To their credit, Senator Dewine and his staff and Senator Hatch's staff and others close to him were straight to me. ***Over*** and ***over*** again they told me two things, there will be no more confirmations of the Sixth Circuit during the Clinton Administration. This has nothing to do with you personally. It doesn't matter who the nominee is, what his potential they may have, or what support they may have, they're not going to be heard." Professor Markus has identified some of the other side of the aisle have these seats open for years for a republican president to fill instead of proceeding fairly.

That's why there's now so many vacancies on the Sixth Circuit. Had Republicans not blocked President Clinton's nominees to the Sixth Circuit, and the three Democratic nominees had been confirmed that President Bush had appointed the judges to the other vacancies on the Sixth Circuit, that court would be almost evenly balanced between judges appointed by Republican and Democratic presidents. And, that's why the Republicans blocked it. They do not want balance. And, the same is true of a number of other circuits.

The former Chief judge of the Sixth Circuit, Judge Gilbert Merritt wrote to the Judiciary Committee chairman years ago to ask that nominees get hearings. He predicted by the time the next president is inaugurated, there'll be six vacancies on the Court of Appeals; almost half the court will be vacant. But, no Sixth Circuit hearings were held in the last three, four years of the Clinton Administration, almost the entire second presidential term, despite these pleas. And, when I scheduled the April 2001 hearing on President Bush's nomination of Judge Gibbons to the Sixth Circuit, it was the first hearing on a Sixth Circuit nomination in almost five years, even though there'd been three pending for President Clinton that had never got heard. And, we confirmed Judge Gibbons by a vote of 95 to nothing.

But, we didn't stop there. We proceeded to hold this hearing on a second Sixth Circuit nominee just a few short months later, Professor Rogers. He, too, was confirmed. It was very similar to what had happened in the Circuit Court of Appeals for the District of Columbia, the nation's circuit plays a significant role in environment areas, OSHA, the National Labor Relations Board, there, again, President Clinton's nominees were not allowed to be heard, although we did hold a hearing for one of President Bush's last year.

Allen Schneider (ph), of the ***law*** partner of Mr. Roberts, a former clerk to Chief Justice Rehnquist, he was never allowed a committee vote. Republicans refused to give Professor Elena Kagan, another D.C. circuit nominee, a hearing during the 18 months she was pending. Today's nominee to the D.C. circuit, John Roberts, worked in the Reagan Justice Department, the Reagan White House for the former Solicitor General Kenneth Starr, it's obvious the Bush Administration feels far more comfortable with him.

Also, home state Senators have not, I understand have not been consulted in these judges -- we're not certain they've not received any blue slips back. I think the American -- what we're doing is we're appointing people to the highest courts in the land, no more attention and scrutiny then we've paid to appoint these for a temporary federal commission. It's a disservice to the American people. The American people can be excused for sensing that there's a smell of an inkpad in the air, rubber stamps already out of the drawer.

Thank you, Mr. Chairman.

HATCH: Thank you, Senator Leahy.

We'll have order in the room. We'll turn to -- Yes, sir?

(UNKNOWN): Thank you, Mr. Chairman. I know we don't have opening statements, and I don't want to get into any of the substance here. But, I would ask that a letter that a number of us signed to you…

HATCH: We'll put both your letter…

(UNKNOWN): … we ask that the record. And, I just make this point, we received noticed of who the witnesses would be at 4:45 yesterday. It does not give anyone any chance to prepare. The committee hasn't organized. We don't have rules. You're changing the rule of the tradition of the blue slip, but we don't know what it is.

This is just being rushed beyond -- aside from the fact, which Senator Leahy dealt with in terms of the three nominees. Now, we've received notice for a hearing next Tuesday. We don't know who is going to be on the hearing, and there's a rule in the committee of a one-week notice. And, so, there's just a tremendous rush to judgment here that is just not fair. We know we have differences on these nominees. But, all the procedures seem to be being ripped up in an effort to rush things through.

And I would just ask that you give the letter that we sent you some consideration. It is not fair to tell us at 4:45 last night as to who the witnesses were going to be. On important judges like this, it is important that we get a chance to prepare. And I would just urge that in the future, this policy or whatever it is be reexamined. We have no chance, no chance to adequately prepare and if the impression that Senator Leahy said that we're just trying to rush things through without thorough examination is rankling some people, it's no wonder, because of all these things. It's just not ***right*** for us.

And, I would ask you really give consideration to the letter, as you were generous enough to move the room as well. We're going to have an awful time ***over*** the next year if we are not going to get an adequate chance to prepare, to ask questions fully, et cetera. And, that's not -- I know it's not been your way in the past.

(CROSSTALK)

HATCH: Well, I appreciate the Senator's remarks. Certainly, your letter will go into the record and our response to your letter will go into the record as well. And, I intended to put them in the record. Also, I've been announcing for two weeks who the witnesses are. They've been waiting 630 days. I think that's adequate time to prepare. But, on the other hand, if there is a problem here, I'm going to solve it for you. We'll try and give better notice. But, our obligation that gives notice of the hearing, sometimes it's very difficult to adjust and get people, you know, prepared and there. But, I'll certainly take your comments into consideration.

Let's turn to Senator Warner and then Senator Hutchison. And, then Senator Voinovich and then, of course, we have Senator Dewine, who also, along with Senator Voinovich, has two Ohio State judges and then Senator Feinstein, if you'd care to make your remarks about your judge here today, or we could do it ***right*** before they call…

FEINSTEIN: (OFF-MIKE)

HATCH: I'll accommodate you. I'll accommodate you.

FEINSTEIN: I'd be happy to, since I'm going to be here, I'd be happy to let the other Senators…

HATCH: And, then wait until your judge is called?

FEINSTEIN: Yes. ***Right***.

HATCH: That'll be fine.

Senator Warner?

WARNER: Chairman Hatch, Senator Leahy and members of the committee, I'll ask to submit my statement for the record. Three reasons, first as a courtesy to the committee and to our guests how have been very patient. Secondly, this nominee, John Roberts, is indeed one of the most outstanding that I've ever had the privilege of presenting on behalf of a president in my 25 years in the United States Senate. His record needs no enhancement by this humble Senator, I assure you.

So, I ask that the committee receive this nomination. He's accompanied by his wife, Jane, his children, Josephine and John, who've been unusually quiet and we thank you very much, and patient, his parents and his sisters.

Mr. Chairman, and members of the committee, just if I may indulge a personal observation, Mr. Roberts is designated to serve on the Circuit Court of Appeals for the District of Columbia. Exactly one half century ago, 50 years, I was a clerk on that court, and, so I take a particularly interest in presenting this nominee. Also, the nominee is a member of the firm of Hogan and Hartson, one of the leading firms in the nation's capital. 50 years ago, I was a member of that firm. And, I just reminisced with the nominee, I was the 34th lawyer in that firm, which was one of the largest in the nation's capital. Today there are 1,000 members of that ***law*** firm, to show you the change in the practice of ***law*** in the half century that I've been a witness to this.

Mr. Chairman, you've covered in your opening remarks every single fact that I had hopefully desired to inform the committee. So, again, for that reason you have most courteously, Mr. Chairman, stated all the pertinent facts about this extraordinary man, having graduated from Harvard, summa cum laude in '76; three years later he graduated from Harvard School magna cum laude where he served as managing editor of the Harvard ***Law*** Review. Those of who pursued the practice of ***law*** know that few of us could have ever attained that status. Even if I went back, started all ***over*** again, I couldn't do it.

He served as ***law*** clerk to Judge Friendly on the United States Court of Appeals for the Second Circuit and worked as a ***law*** clerk to the current Chief Justice of the Supreme Court today, Judge Rehnquist, Justice Rehnquist. So, I commend the president. I commend this nominee. I'm hopeful that the committee will judiciously and fairly consider this nomination and that the senate will give us advice and consent for this distinguished American to serve as a part of our judicial branch.

I thank the chair and members of the committee.

HATCH: We appreciate it.

Senator Hutchison?

HUTCHISON: Thank you very much, Mr. Chairman.

I'm very pleased to introduce my friend, Rob Junell, whose been nominated to serve as a district judge for the Western District in Midland, Texas. This court is identified as a judicial emergency by the Judicial Conference of the United States. Rob has brought his wife Beverly with him today and I know he will introduce her later. But, I want to say that Rob and Beverly are real friends of mine. Sometimes we nominate people that are great on the merits, but we don't know them. Well, Rob is great on the merits and I know him well.

He served seven terms in the Texas House of Representatives, retiring voluntarily last year. He was Chairman of the House Appropriations Committee and the House Budget Committee. And, I worked with him when I was state treasurer and just a little (inaudible) about the kind of person he is. I was elected to a four- year term as state treasurer and introduced a very complicated piece of legislation to limit our state debt to the legislator, asked Representative Junell to carry that bill since he was Chairman of the Appropriations Committee. And, I thought since it was so complicated that I would put it out there, talk about it, let the members have a chance to really look at it and study it and then in my second year, second part of my term, after the fourth year, I thought we would try to pass it.

Well, Representative Junell did such a terrific job of carrying the bill, that he passed it the first session that I had given it to him. And, we do have a limit now on general obligation debt in Texas, which has served us very well throughout the ups and downs of the economy of our state.

Rob graduated from NMMI, then graduated from Texas Tech and Texas Tech ***Law*** School with honors. He received a Masters Degree from the University of Arkansas. He's very active in his local community of San Angelo, including service on the boards of the United Way of the Concho Valley, the San Angelo AIDS Foundation and Shriner University in Coralville, Texas. He's a lifetime member of the NAACP. He also has received numerous honors and awards recognizing his leadership in serving the people of Texas.

He's earned the distinction as legislator of the year, given by the Texas Public Employees Association, the Vietnam Veterans' Association, and the Greater Dallas Crime Commission. The Dallas Morning News named him one of the best of the best in the Texas legislature in 1995.

In addition to Rob's legislative service, he has continued to maintain a ***law*** practice. In Texas, the legislature only meets five months every other year, a practice that I would recommend to the United States Congress. So, these are people who have real jobs in the real world. He has been a practicing lawyer, very well respected in the San Angelo and West Texas communities and has a wide range of clients, including hospitals, small businesses, school districts and individuals.

I recommend my friend, Rob Junell, highly to you and hope that we can have an expeditious confirmation of his nomination.

HATCH: Senator, sorry you had to wait this long. But, it's just the way it is on this committee. So…

HUTCHISON: Thank you.

HATCH: … we appreciate you, your patience.

LEAHY: And, I appreciate you being here too. You've mentioned him before the same (inaudible). He should know that even when he's not (inaudible) you've always said such nice things about him. And, as the good Congressman Stenholm called me too to say similar things. And, I do appreciate it.

HUTCHISON: Yes. Thank you very much.

HATCH: We'll turn to Senator Voinovich first and then we'll wind up with Senator Dewine.

VOINOVICH: Thank you, Mr. Chairman.

Members of the committee, I thank you for allowing me to speak on behalf of three deserving attorneys from the State of Ohio. I'm anxious to express my strong recommendations for Justice Deborah Cook, Jeffrey Sutton, both of whom the president nominated to serve on the United States Court of Appeals for the Sixth District, as well as Judge John Adams whose been nominated to serve on the U.S. District Court for the Northern District of Ohio.

Judge Cook and Mr. Sutton were members of the original ***group*** that the President of the United States nominated for the federal judiciary. And, I'm very pleased that this committee is finally having a hearing on their nominations.

I've known Judge Cook for ***over*** 25 years. I know her to be a brilliant lawyer, a wonderful person. She graduated from the University of Akron ***Law*** School in 1998, or '78, and immediately went to work for the ***law*** firm of Roderick, Myers and Linton, Akron's oldest ***law*** firm. She was the first female lawyer to be hired by this firm. And in 1983 she became its first female partner.

Deborah remained at Roderick, Myers until '91 when she was elected to Ohio's Ninth District Court of Appeals. She remained on this bench until '95 when she was elected to the Supreme Court of the State of Ohio, an office which she continues to hold. She's married to her husband Robert Linton and Deborah has always exhibited a love of her family and community and I'm glad that her brother and her nephews are here today for this hearing. It's a historic day for their family.

As a long-time resident of Akron, Deborah has demonstrated her commitment to her community, involved in the Akron Women's Network, the Akron Bar Association, the Akron Volunteer Center, Summit County United Way and the Akron Art Museum, just to name a few.

Throughout these 25 years I have found Deborah to be a women of exceptional character and integrity. Her professional demeanor and thorough knowledge combine to make her truly an excellent candidate for appointment to the Sixth Circuit.

Deborah has served with distinction on Ohio Supreme Court since her election in '94 and reelection in the year 2000. My only regret is the confirmation of the Sixth District that we will lose an outstanding judge in our Supreme Court. However, I'm confident that she will be a real asset to the federal bench. With the combined years of 10 years of appellate judicial experience on the Court of Appeals, and the Supreme Court, she uniquely combines keen intellect, legal scholarship and consistency in her opinions.

She's a strong advocate of applying the ***law*** without fear or favor and not making policy towards a particular constituency. She is a committed individual and trusted leader and it's my pleasure to give her my highest recommendation. I'd just like to mention in closing that newspapers from Ohio have endorsed her on two occasions. And, recently on January 6, 2003, the Columbus Dispatch said since 1996 she has served on the Ohio Supreme Court where she has distinguished herself as a careful jurist with a profound respect for judicial restraint and the separation of powers between the three branches of government. The Plain Dealer, the largest newspaper in Ohio said Cook is a thoughtful, mature jurist, perhaps the brightest on the state's highest court.

And, in May of 2000 the Beacon Journal, the Akron paper, stated that Deborah Cook's work has been a careful reading of the ***law***, buttress by closely argued opinions and sharp legal reasoning.

I think that Deborah is someone that's very ideal for the federal bench.

Jeffrey Sutton, another nominee. I'm pleased to speak on behalf of Jeffrey, a man of unquestioned intelligence and qualifications with vast experience in commercial, constitutional and appellate legislation litigation.

Jeffrey graduated first in his ***law*** school from the Ohio State University, followed by two clerkships with the United States Supreme Court, as well as the Second Circuit. Because he was the Solicitor General of Ohio when I was governor I worked with him extensively when he represented the governor's office.

VOINOVICH: And, in my judgment, he never exhibited any predisposition with regard to an issue. He has contributed so much with his compassion for people and the ***law***. In my opinion, Jeffrey Sutton is exactly what the federal bench needs, fresh, objective perspective. He's fair and eminently qualified.

His qualifications for this judgeship are best evidenced through his experience. He has argued nine cases before the United States Supreme Court, including Hahn versus the United States, in which the court invited Mr. Sutton's participation; and Becker versus Montgomery, in which he represented prisoners' interests pro bono. It is worthy to note that when I recently visited the Supreme Court to move the admission of some of my fellow Ohio State University graduates, that the Clerk of the Court himself commented favorably on Jeff's ability. I'll never forget it. We were moving him through and went of the way.

In addition to the U.S. Supreme Court, Jeff has argued 12 cases in the Ohio Supreme Court and six in the Sixth Circuit. While his unwillingness to shy away from challenging or controversial issues has in some instances led critics to question his qualifications and accomplishments, I believe such comments don't accurately reflect Jeff Sutton's heart.

What these detractors fail to mention is how he argued pro bono on behalf of a blind student seeking admission to medical school, how he filed an amicus curiae brief with the Ohio Supreme Court in support of Ohio's hate crimes ***law*** on behalf of the Anti-defamation League, NAACP and other human ***rights*** bar association, or his work on behalf of the Equal Justice Foundation arguing on behalf of the poor. You don't hear that much about Jeff.

Jeff Sutton is also should not be criticized on assumptions that past legal positions reflect his personal views. Instead, he should be lauded for always zealously advocating his clients' interest matter what the issue. In fact, the letters I received in support of Jeff's nomination are some of the best evidence of his overwhelming, across the board support in the State of Ohio. And, I'm going to ask that these letters that I've got be submitted for the record, Mr. Chairman.

HATCH: We'll put them in the record.

VOINOVICH: But, I'd like to just read an excerpt from Benson Wolman. Benson Wolman and I have known each other since we were in ***law*** school together. He was probably the most liberal member there at the Ohio State University. He's the former executive director of the ACLU of Ohio, a self-proclaimed liberal democrat. And, here's what he said. "Jeff's commitment to individual ***rights***, his civility as an opposing council, his sense of fairness, his devotion to civic responsibilities and his keen and demonstrated intellect all reflect the best that is to be found in the legal profession.

Greg Myers, chief counsel in the death penalty division of the Office of the Public Defender remarked, "Jeff's integrity, respect, tolerance and understanding, not only for the lawyers who advocate different positions, but for the legal ideas that stand in opposition to his."

Mr. Chairman, I could go on praising Jeff for the outstanding -- he's one of the brightest -- he may be the brightest lawyer we got in the entire state. I question his sense of wanting to serve on the federal bench at his young age with a family that he has. But, you'll see from his testimony. He's an unbelievably qualified individual that really wants to serve his country. He's been active in his community. I'm glad that his wife and his children are here today with him and members of his family. And, I want to thank them for the sacrifice that they're willing to make to allow him to serve in the judiciary.

So, Mr. Chairman, I've worked with Deb and with Jeff and they're wonderful people and they'll be real assets to the court.

And, the last individual, and I'll try to make it short, is John Adams. John is a native of Orville, Ohio. He's a very qualified candidate for the U.S. District Court for the Northern District. Judge Adams received his degrees from Bowling Green, his Jurist Doctorate from the University of Akron. He currently is a judge in the Court of Common Pleas in Summit County, the Court of Common Pleas is the primary state court, having original jurisdiction in all criminal felony cases and all civil cases where the amount in controversy is ***over*** 15,000. And, prior to that, the judge worked as a partner in the ***law*** firm of Kaufmann and Kaufmann in Akron. As a Summit County prosecutor, and as an associate with the ***law*** firm of German, Arandi and Cicilini (ph).

Judge Adams has demonstrated a commitment to the community he lives in. He's a member of the Akron Bar Association, Ohio Bar. He received a volunteer award in 2000 for the dramatic brain injury collaborative. He has memberships in the Summit County Mental Health Association, the NAACP, Summit County Criminal Justice Coordinating Counsel, Summit County Civil Justice Commission.

I sincerely hope that the committee acts favorably on Judge Adams nominations and sends this qualified nominee to the Senate floor as soon as possible.

And, Mr. Chairman, I'd like to say one other thing. I know there's been a lot of controversy about the sixth district and who did what and so on and so forth, whether it was during the Clinton Administration, now the Bush Administration. The Sixth District is in need of new, more judges. They are in a crisis situation. And I would ask this committee to expeditiously move on those two nominees. And, you know, either they're up or down, but let's get on with it. It's important. We have -- I mean it's just unbelievable to me that this going on as long as it has. And, I'm hopeful that maybe somehow all of you can work together to move forward to fill those two vacancies on that court.

Thank you very much for giving me a chance to be here.

HATCH: Thank you, Senator.

LEAHY: (Inaudible) it's been a long time and we want to fill them. But, it would work a lot better if the White House consulted with some of the Senators in the area involved, such as Senators Levin and Stabenow, who had nominated people for years. They weren't even given a hearing. There's a way to move things along. But, it's not simply saying, this is who we pick after we blocked everybody you wanted, now you must do those. That's all I'd say to my good friend, who I know is a very fair-minded person.

HATCH: Well, let me just say this that the administration has consulted with the instate Senators from Ohio on this matter, which is their obligation. And, I expect them to consult with the Senators from the other states when they have nominees that are up from their states. And, I demanded that they do. And, I believe they are doing that. Now, I think they've met the requisite consultation here without question, and both Senators are for all three of these Ohio nominees.

But, your statement, Senator, it's high praised indeed. With the experience that you've had in the State of Ohio, I think you've made a terrific statement for these nominees from Ohio and I commend you for it and sorry you had to wait so long. But, we're grateful to have had you here.

Now, let me just say this -- yes, go ahead, Senator.

LEAHY: I think it's fair to say that the two Senators from Ohio, I think it's fair to say the two Senators from Ohio are well liked by everybody on this committee on both sides of the aisle. I certainly appreciated serving with them. I was struck, though, by something that Senator Voinovich said about the delays in getting vacancies filled in the Sixth Circuit.

I wished that, frankly, George, I wish there'd been more in your party who had expressed the same concern when there was several moderate nominees, including one from your own state as strongly supported in your state. During the Clinton Administration there's been more effort to get them to at least have a hearing so that they might have been put on there.

I contrast that with when I became chairman we moved two people to the Sixth Circuit within a relatively short time from the time of their hearing to the time they were going on the floor was a matter of weeks at best, and I think that you would not see the vacancies had there been more of a bipartisan effort to get those nominees of President Clinton's, to get them through rather than to be held up by a republican holds.

HATCH: Senator Feinstein has asked to be able to go now. And, then I'm going to give Senator Dewine -- we understand the room that's available downstairs prepared. So, Senator Dewine if you'd prefer to go here or down there, we'll give you that choice.

DEWINE: It doesn't matter, Mr. Chairman.

HATCH: Well, then we'll wait…

VOINOVICH: Thank you very much, Mr. Chairman.

HATCH: Thank you, Senator Voinovich. Then, if you don't mind…

DEWINE: No, (inaudible).

HATCH: … we'll wait until we get down there and then you can finish your statement.

And, Senator Feinstein, if you'd care to make yours now, I'd be happy to accommodate you.

FEINSTEIN: Thank you very much, Mr. Chairman. I'm very pleased to introduce Judge James Otero to the committee. He's nominated for the Central District of California. He is the sixth candidate to come before this committee as a product of California's bipartisan screening committee, which the White House, Senator Boxer and I have set up. He received the unanimous six zero vote from this screening committee.

He is joined at the hearing today by his wife, Jill, his son, Evan, and his daughter Lauren. Jill is a special education teacher in the Los Angeles Unified School District. She's been that for 28 years. Evan is a junior at my alma mater, Stanford, where he's majoring in Political Science; and, Lauren, a high school senior just got accepted to Stanford University. I'd like to ask them to stand and be acknowledged by the committee.

Thank you very much for being here.

Judge Otero is a native Californian. He spent his entire legal career in the state. He graduated from California State University North Ridge in 1973 and Stanford ***Law*** School in 1976. Immediately out of ***law*** school he joined the Los Angeles City Attorney's Office. He practiced there for 10 years.

He held a number of important assignments, including assistant supervisor for the city's criminal division where he was in charge of 35 trial deputies. In '87 he entered private practice as a lawyer for Southern Pacific Transportation Company. His time in private practice was brief as he was appointed to the municipal court of Los Angeles in 1988. Two years later he was elevated to the Supreme Court.

His 13-year career on the state bench has been distinguished. Notably, from '94 to '96 he served as the supervising judge of the Northern District in Los Angeles. In 2002 he was named Assistant Supervising Judge for the court's civil division. And, he's earned a reputation as one of the top judges in Los Angeles City.

I can give you many quotes from Judge Gregory O'Brien, Attorney Tom Girardi (ph), Los Angeles Supreme Court judge, Chris Conway (ph), whose described him as one of the best judges on the court.

He's active in professional and civic activities. He's secretary of California Latino Judges' Association and previously served as vice president of the California Judges' Association. He's a board member of the Salesian Boys and Girls Club and the Salesian Family Youth Center.

I could also note he's a fitness buff and ***over*** the past years he's run in ***over*** 100 races, included 10 marathon. I think it's fair to say that I strongly recommend Judge Otero.

And, I thank you, Mr. Chairman.

HATCH: Well, thank you, Senator Feinstein.

Now, here's what we're going to do. We're going to move down to STG50. We would like all of you in this room, we're trying to accommodate you by having the Sergeant of Arms and his people accompany you downstairs so that you can get seated down there. So, we would like you, row by row, after the dais is cleared, to come through this door, just come up through there, through that door. And, we'll try and get this started. We're going to recess for 10 minutes and hope we can set up in that time down there.

(RECESS)

(AUDIO GAP DUE TO ROOM CHANGE)

DEWINE: … Justice Cook in all five of those cases. Let me repeat that, the United States Supreme Court has agreed with Justice Cook in all five of those cases. Of those cases, one of those cases was simply unanimous Ohio Supreme Court decision affirmed by the U.S. Supreme Court eight to one. But, in the other four (inaudible) Cook had dissented in the underlying Ohio case. She was the dissenter. In each of these four cases, the U.S. Supreme Court reversed, reversed Ohio Supreme Court's majority opinion and reached the same conclusion, the same conclusion as Justice Cook did.

Now, these were not all just a close five to four decision that we sometimes see in the U.S. Supreme Court. In a Fifth Amendment self-incrimiation case, the Supreme Court sides with Justice Cook nine to nothing. Another case went eight to one against siding with Justice Cook's dissent. So, it's clear from these statistics that Justice Cook's decision when we was dissenting in these cases was well founded.

Now, Mr. Chairman and members of the committee, another useful gage of a sitting judge is the evaluation she gets from the Deputy Observers who watch the court on a day-to-day basis. In Ohio the major newspapers closely watched our high court.

After observing Justice Cook on the Ohio Supreme Court for a full six-year term, Justice Cook was endorsed by all the major newspapers in the state of Ohio for her 2000 reelection campaign. These newspapers included the

Cleveland Plain Dealer, the Columbus Dispatch, the Cincinnati Enquirer, the Akron Beacon Journal, the Dayton Daily News and the Toledo Blade.

And, let me just say, someone who has a lot of experience with these newspapers, that covers the entire political spectrum in the State of Ohio. Since the election in the past few weeks, several Ohio papers have endorsed her nomination to the Sixth Circuit.

The Cincinnati Post wrote on January 8 of this year, and I quote, Mr. Chairman, "Cook is serving her second term on the Ohio Supreme Court where she has been a pillar of stability and good sense. Her role on that court, one which in the last few years has repeatedly marched on four to three votes into the realm of policymaking, has often been writing sensible dissents."

On December 29, 2002, insisting that the Judiciary Committee act on Justice Cook, the Cleveland Plain Dealer wrote, and I quote, "Cook is a thoughtful mature jurist, perhaps the brightest on the state's highest court." The Akron Beacon Journal wrote on January 6, 2003, and I quote, "Those who watched the Ohio Court know Cook is no ideologue. She has been a voice of restraint in opposition to a court majority determined to chart and aggressive course, acting as problem solvers more than jurists. In Deborah Cook, they have a judge most deserving of confirmation, one dedicated to judicial restraint."

And, the Columbus Dispatch wrote on January 6, 2003, and I quote, "Cook's record is one of continuing achievement. Since 1996, she has served on the Ohio Supreme Court where she has distinguished herself as a careful jurist with a profound respect for judicial restraint and the separation of powers between the three branches of government."

Now, Mr. Chairman, these quotes are from papers across the political spectrum, all of which endorse Justice Cook. As these comments make clear, Justice Cook is a talented, serious judge who works diligently to follow the ***law***. And, at the same time she also dedicates, though, a great deal of her time to volunteer work and community service. Justice Cook has served on the United Way Board of Trustees, the Volunteer Center Board of Trustees, the Akron School of ***Law*** Board of Trustees and the Women's Network Board of Directors. She was named Woman of the Year in the 1991, by the Women's Network. She has volunteered for the safe landing shelter and for mobile meals. And, she has served as a board member and then president of the Akron Volunteer Center.

Furthermore, Mr. Chairman, Justice Cook has served as a commission on the Ohio Commission for Dispute Resolution and Conflict Management, where she focused on, among other things, truancy, mediation for disadvantaged students. She has chaired Ohio's commission on public legal education and has taught continuing legal education seminars on oral argument and brief writing.

I find it, Mr. Chairman, remarkable that Justice Cook has found time for this level of commitment to her community. And, I have yet to describe the most amazing to me, commitment Justice Cook has made helping the underprivileged in Ohio. Like many of us, Justice Cook believes that the ticket out of poverty is a quality education. And, ***over*** the years, Justice Cook and her husband, in their everyday lives have come across hard working young people who are making an effort to improve their lives through education. Tasha (ph) Smith is one of those people. Justice Cook met her when she was struggling to put herself through college at Kent State by working as a waitress. Justice Cook assisted her with tuition for several years. And, today this woman is in her final year of nursing school carrying a 3.8 grade point average.

Tara King is another of these students. With Justice Cook's help she recently graduated from the University of Akron and she just enrolled in graduate school at Cleveland State. After helping several students in this manner, Justice Cook and her husband decided they should structure their assistance so they could help more young people early on in their education.

Four years ago they started the College Scholars Program with a ***group*** of 20 disadvantaged third graders from an inner-city school. The students were selected to participate based on teacher recommendations, financial need, and level of family support. Justice Cook matched each of the students with a mentor in the community. The students met with their mentors weekly and participated in other program activities. If the student maintained good grades

and conduct through secondary school, Justice Cook and her husband will pay for four years of their tuition in any public university in Ohio. Let me repeat that, Justice Cook is going to pay for four years of college tuition for 20, 20 disadvantaged children.

Now, Mr. Chairman, and members of the committee, these activities demonstrate a commitment to the community and dedication to helping the disadvantaged that we would like to see in everyone. And these are qualities that help make Justice Deborah Cook a fine judge.

Now, Mr. Chairman, and members of the committee, let me turn my attention to another one of our fine nominees from Ohio, Mr. Jeff Sutton. Mr. Sutton, who is from Columbus is here today with his family. And I'd like to introduce the committee to his wife, Peggy, and their three children, Margaret, who is six years old; John, who is nine years old; and Nathaniel, who just today is turning 11.

Happy birthday, Nathaniel.

I'd like also to welcome Jeff's parents, Nancy and David Sutton, his sister, Amy; his brothers Craig and Matt and several additional friends and family. We're very pleased that all of you could be here on this very important day.

Mr. Chairman, Mr. Sutton's legal and life experiences are extensive. A couple of years ago, before high school, his father took ***over*** -- a couple of years before high school his father took ***over*** a boarding school for children with severe cerebral palsy. ***Over*** six years, Mr. Sutton spent much of his time around the school, doing odd jobs for this father. He was deeply affected by this experience and by the interactions that he had with these students during his formative years. It reinforced what he had been taught by his parents, that serving others is an important calling and virtue.

Mr. Sutton attended Williams College where he was a laymen scholar and varsity soccer player. He graduated with honors in history. And, after college from 1985 to 1987, Mr. Sutton was a seventh grade geography teacher and tenth grade history teacher, as well as a high school varsity soccer coach and the middle school baseball coach.

From there he went on to ***law*** school and graduated first in his class from the Ohio State University College of ***Law*** where he served as Issue Planning Editor of the ***Law*** Review. Mr. Sutton clerked for Judge Thomas Meskill on the U.S. Court of Appeals for the Second Circuit. He clerked for two U.S. Supreme Court Justices, retired Justice Powell and Justice Scalia.

In 1995 to 1998, Mr. Sutton was the State Solicitor of Ohio, which is the state's top appellate lawyer. During this service, the National Association of Attorneys General presented him with the best brief award for practicing in the U.S. Supreme Court, a recognition he received an unprecedented four years in a row.

Mr. Sutton is currently a partner in the Columbus ***law*** firm of Jones, Day, Reavis and Pogue. He's a member of the Columbus Bar Association, the Ohio Bar Association and the American Bar Association. He has also been adjunct professor of ***law*** at the Ohio State University College of ***Law*** since 1994, where he teaches seminars on federal and state constitutional ***law***. And, recently, Mr. Chairman, the American Lawyer rated him one of its 45 under 45. That is, they ranked, named him as one of the top, one of the 45 top lawyers in the country under the age of 45.

He's appeared frequently in court, I think argued 12 cases before the United States' Supreme Court, where he has a nine and two record, with one case still pending. In the Supreme Court's 2000-2001 term, Mr. Sutton argued four cases, that's more cases than any other private practitioners in the entire country.

Can we imagine preparing to argue one case before the Supreme Court, much less than four? And, to no one's surprise, Jeff Sutton won all four.

Mr. Sutton also has argued 12 cases before the Supreme Court, six cases before various U.S. Courts of Appeals and numerous cases before the State and federal trail courts.

And, ***over*** the years Mr. Sutton has been the lawyer for a range of clients on a wide range of issues. Some of these cases are quite well known. For example, he represented the State of Ohio on Flores versus the City of Boerne,

the State of Florida in Kimel versus Florida Board of Regents; and the State of Alabama in the University of Alabama versus Garrett. But, Mr. Chairman, I would like to tell the committee about some less well-known cases.

He represented as my colleague, Senator Voinovich has indicated, Cheryl Fischer, a blind women who was denied admission to a state-run medical school in Ohio because of her disability. He represented the National Coalition of Students with Disabilities in a lawsuit alleging Ohio universities were violating the federal motor voter ***law*** by failing to provide their disabled students with voter registration materials.

He filed an amicus brief in the Ohio Supreme Court defending, defending Ohio's hate crimes statute. And he filed it on behalf of the NAACP, the Anti-defamation League and other civil ***rights groups***.

He defended Ohio's minority set-aside statute against constitutional attack. He filed an amicus brief in the Sixth Circuit on behalf of the Center for the Prevention of Handgun Violence, defending, defending an assault weapon ordinance. He represented two capital inmates in state and federal court. And he represented an inmate who brought a prisoners' ***rights*** lawsuit in the United States Supreme Court.

Mr. Chairman, I'm sure we'll have the opportunity to go through these cases in some detail and many other cases, but I'm confident the committee will be impressed by Mr. Sutton's ability in representing these various clients in these cases.

Like Justice Cook, and consistent with his upbringing, Mr. Sutton has found an extraordinary amount of time to give back to his community. Between a demanding ***law*** practice and time with his very young family, he serves on the Board of Trustees of the Equal Justice Foundation, a non-profit provider of legal services to disadvantaged individuals and ***groups***, including the disabled. He has spent considerable time doing pro bono legal work, averaging between 100 and 200 hours per year.

DEWINE: He is an elder and deacon in the Presbyterian Church, as well as a Sunday school teacher. He participates in numerous other community activities, including, I Know I Can, which provides college scholarships to inner-city children and Pro musica (ph), the chamber of music organization. He also coaches soccer and basketball teams.

Finally, Mr. Chairman, I was struck by something I once read that Mr. Sutton wrote in the Columbus Dispatch about former Supreme Court Justice Powell. In describing Justice Powell's practical voice in the court, he wrote the following, and I quote, "Justice Powell never lost sight of the context in which each decision was made and the people, the people that it would affect. He believed in people more than ideas and experience, and experience more than ideology, and in the end embraced a judicial pragmatism that served the country well."

Mr. Chairman, I believe the same description applies to Mr. Sutton. He will approach the bench in the same pragmatic tempered and very thoughtful well. I appreciate the chairman's time and I yield the floor.

HATCH: Well, thank you, thank you, Senator.

We'll call the three nominees, the Honorable Deborah Cook, Mr. John Roberts and Professor Jeffrey Sutton to the witness table, and, if you'll stand and raise your ***right*** hand. Do you solemnly agree to tell the truth, the whole truth and nothing but the truth, so help you God?

We'll start with you, Justice Cook, and if you have any opening statements we'd like you introduce your families again, and those who are with you. And we're just delighted to have you here and we look forward to completing this hearing.

COOK: Thank you, Mr. Chairman.

My family has been introduced, but I would like to introduce one additional friend who has appeared today with me and it's Mr. Robin Weaver (ph). Robin is a partner with the international firm of Squires, Sanders and Dempees (ph) in the home office in Cleveland. And Robin also serves as the president of the Cleveland Bar Association. And he was kind enough to come today and I wish to thank him and introduce him.

HATCH: Delighted to have you here, Mr. Weaver. I've heard of you and we're very privileged to have you in our audience today.

COOK: Thank you, Mr. Chairman.

HATCH: Do you care to make an opening statement?

COOK: I thought I -- I won't reintroduce my family. They…

HATCH: (Inaudible).

COOK: … were good enough to already stand…

HATCH: But, if you have a statement?

COOK: I have no statement, thank you.

HATCH: That'll be fine.

Mr. Roberts, we'll turn to you.

ROBERTS: Thank you, Mr. Chairman. I would like to introduce my wife, Jane.

HATCH: Nice to meet you (inaudible).

ROBERTS: The committee has already heard some unscheduled testimony from my children, Josephine and Jack. And, I thank the committee for its indulgence. I thought it was important for them to be here. Also here are my parents, Jack, Senior and Rosemary Roberts.

HATCH: We're delighted to have you here.

ROBERTS: My three sisters, Kathy Godby (ph), Peggy Roberts and Barbara Burke (ph); my brothers in ***law***, Tim Burke (ph), and Gus Godby (ph) and my niece Katie Godby (ph), and many other friends that I'm very happy to have here today.

HATCH: We're delighted to have all of you here. And we look forward to this hearing, and I hope you do to.

Mr. Sutton?

SUTTON: Thank you, Mr. Chairman. My family, I guess they could stand up again. I think most of them have been introduced. But there are a few that did not get mentioned. My brother in ***law***, Bill Sutherd (ph), has come down from Boston; another brother in ***law***, Jim Sutherd (ph), from Ohio, and Jim's two kids, Emily and Tyler have joined us as well. And, my sister Amy's boyfriend, Chris Sterndale (ph) who's earning a lot of praise from me, in Amy's…

HATCH: I didn't see Chris stand up here. OK. I see, OK.

SUTTON: And, of course thank you very much for the opportunity to have this hearing today.

HATCH: Well, thank you so much. We're delighted to have all of you here. We welcome you to the committee. We're going to have 15- minute rounds. We have our staffs that are sitting in the middle. He is going to hold up cards that will have -- tell the times left. What are the three cards? That one -- the red is what? That's out of time. OK. Orange is one minute. OK. Well, he'll give you notice that the -- and when five minutes are remaining and then one minute and then we're out of time.

We're going to cut off, but if a Senator feels that they just have to pursue a line of questioning, we'll certainly consider allowing that. We'll turn to Senator -- I'll reserve my time and use it later. And, we'll turn to Senator Kennedy. This time with the permission of the ranking member.

LEAHY: Mr. Chairman, if I could also just ask that permission the number of letters referring to Professor Sutton, I know you've introduced letters in favor of him and I've introduced this stack for the record…

HATCH: Without objection, we'll put them in the record.

KENNEDY: Thank you very much, Mr. Chairman. I must say just before questioning our nominees here, and I want to congratulate all of them on receiving their nomination. I'm troubled, like other members, of the committee of having three nominees who are controversial and having one hearing that is going to do this. Out of necessity and desire will attend a memorable service for the death of a former congressman from Utah this afternoon, which I had long scheduled to be an hour and a half. We generally allocate 9:30 in the morning and I'm glad to stay here what of the time. But, I think there's -- this cramped process and procedure I think is unworthy, quite frankly, of the committee.

These are enormously important nominees. These are incredibly important issues and it -- the scheduling of three nominees and others here suggests that policy to try and jam those that have serious questions. And I resent it and I find that it's not a particularly good way to expect that we're going to have a wide to cooperation. If we have to exercise all of our ***rights*** in order to protect them, then so be it. And if that's the desire to do so, so be it as well.

We have three nominees here for the Circuit Court. Mr. Sutton is the nominee for the Court Appeals for the Sixth Circuit, has actively sought to weaken Congress's ability to protect the civil ***rights*** and the ability of individuals to enforce their federal ***rights*** in court. His efforts to challenge and weaken the ***laws*** are central to our democracy and providing equal opportunity are well-documented.

He has argued for the limitation on the reach of the Civil ***Rights*** Act of 1964, the Americans with Disabilities Act, the Age Discrimination Act and Employment Act, the Violence Against Women Act, the Medicaid Act, to name just a few.

A large number of national state and local disability ***rights groups***, civil ***rights groups***, women's ***groups***, senior citizen organization and others have raised serious questions about Mr. Sutton's nomination.

Justice Deborah Cook, another nominee for the U.S. Court of Appeals has a disturbing record and a bias in favor of business and corporation ***over*** the interest of injured individuals, workers, consumers and women, numerous Ohio citizens and ***groups*** to raise strong concerns about her nomination, including the Ohio National Organization of Women, Ohioans with Disability.

And, the nomination of John Roberts to the U.S. Court of Appeals for the D.C. Circuit raises concerns. The D.C. Circuit, one of the most important courts in the country having jurisdiction ***over*** many workplace, environment, civil ***rights***, consumer protection statutes, wiretap, other important security issues. I am concerned about Mr. Roberts efforts to limit reproductive ***rights*** as a government lawyer, his advocacy against affirmative action and federal environment protection ***laws*** in his efforts to shields states from individual suits, and to limit Congress's ability to pass legislation regulating state conduct in the name of the state's ***rights***. And, given the strong concerns raised by each of the nominees to pack them into a single hearing impairs our ability to fulfill, I think, our constitutional duty to rigorously review their records. So, I will move towards questioning the nominees. Mr. Sutton.

I happen to be here, Professor Sutton, during the enactment of virtually all of these pieces of legislation, the Americans with Disabilities Act. I remember the hours of hearings, the length of the hearings, the work that was done. Senator Hatch may remember opposition at that time objected to our considering the Americans With Disability Act. We had to meet after the sessions of the Senate well into the evening until it was actually filibustered to one or two in the morning.

And, then we saw those in the disability community in wheelchairs come on into the hearing room, first of all, five, 10, eventually about 100 or 150. Suddenly televisions began to come into the committee room, more and more of them. And, then finally at 2:30, the individual, the Senator who was filibustering, no longer in the Senate at this time, yielded and we were able to pass it. We spend weeks and months in building a wreck (ph) because that -- the Americans with Disability Act follows a very important movement in this country to knock down walls for

discrimination, which you're very familiar with. In terms of knocking down the walls of discrimination on the basis of race, religion, ethnicity, gender and then finally, the Americans with Disability Act, and we still have, I think, work to do in terms of sexual orientation of the Americans with Disability Act.

So, this was something that those of us who had been a part of that whole movement were here at the time when we made the progress in terms of knocking down the walls of discrimination on race, knocking down the walls of discrimination on gender, knocking down on the eliminating the discriminatory provisions of the Immigration Act, nation origin quotas in the Asia Pacific triangle saw this progress made. And then we passed that Americans with Disability Act and we find that there is -- and when we passed it and said we wanted it to apply to all Americans, we meant all Americans. But, we find that the Supreme Court said that the we, under arguments that you made, may very effectively, does not apply to the state employees. And it means that state employees cannot get protection, of that.

We also had the age discrimination, age discrimination and we find out under your arguments on the reaches of the constitution that we cannot apply that to state employees. The Title VI in the (inaudible) impact regulations can't be privately enforced in positions that you presented to the court supported.

Those that find out that there are sightings of toxic dumps in minority communities that are resulting in the poor children suffering and contacting asthma, other cancer, but the fact that it is being used in a discriminatory way, something that we take very seriously as legislators now. With understanding your position in terms of the Constitution, that's no longer -- those kinds of remedies aren't going to be able to be out there. Title Nine regulations, now I remember the battle that we had. Going back, we heard the eloquent statement not long ago when Senator Bayh the current Senator Bayh's father spoke about the work that was being done on the Title Nine and we find out that it cannot be privately enforced because the Sandoval decision.

And the Religious Restoration Act that the chairman has referenced and that we had, all extremely important kinds of progress ***over*** the period of these past years. Now, you have supported a viewpoint that has effectively dismantled many of these protections. And, it is one that's been embraced in some instances by five four decisions of these courts, virtually divided by the Supreme Court in terms of these protections, which effect millions of fellow citizens, those that have been left out and left behind, those that are getting the short stick in our society. I'm impressed, deeply impressed by your own personal kinds of involvement reaching out with the works that you've done privately.

But, there is very legitimate kind of questions about your being on the courts and whether you are going to take this position with you in terms of continuing the dismantlement of the works of the Congress, and the remedies, the remedies, we'll come to that in just a moment, which you have also questioned.

KENNEDY: The ability for private citizens to actually provide remedies for these statutes, which I think for many of us who have seen the efforts and the progress in civil ***rights*** cases just assume, but you challenged this, particularly go out of your way in terms of amicus brief, go out of your way.

It says that we'll hear a list of these, this is very constitutionally, should we try (inaudible). But, you go out of your way in the amicus brief in the Westside issue to try and diminish (inaudible).

I'm interested just about how you came to this position and your own kind of experience and your views on it. What you can tell us about where you think, as a judge bring, what -- and what you would say to so many of those people that are left out and behind that your presence on the court is not going to endanger, further, their ***rights*** that have been passed by Congress.

SUTTON: Thank you, Senator Kennedy, for an opportunity to address those is issues and to discuss them with you and other members of the committee. I do appreciate this opportunity, and am admirer of your work in all of those areas, and I hope there's nothing on top my career that makes you think otherwise.

I guess I have a few thoughts and I hope I can answer this question and maybe I'll be able to explore this with some other questions as well. But, I guess the first point I would make is that in all of the cases you referenced I was, of

course, and advocate, not a sitting judge and not a scholar, and I'm flattered that someone has put professor in front of this. The people at Ohio State University will be amused by that designation. But, I'm an advocate and I have been since graduating from Ohio State in 1990 and since finishing my two clerkships.

And, while I do understand, in all of these areas, and certainly in the disability ***rights*** area, concern that an advocate would be willing to represent a state making the arguments in Garrett. At the same time, I would hope people would appreciate that the clients I have had and the cases I have worked on, whether for parties, for amicus entities or on a pro bono bases have covered the spectrum of issues really almost every social issue of the day and I have had an opportunity to be on opposite sides of almost every one of these issues.

If one talks about the issue of disability ***rights***, I've had more cases on the side in which I was represented a disabled individual than the opposite. In fact, there's only one case that I can think of in my career where I had two clients come to me at the same time and say you can represent either side of this particular case. That, of course, was the Cheryl Fischer case, which arose when I was State Solicitor of Ohio in the mid-1990s.

Ms. Fischer, as you may know, is blind and was denied admission to Case Westerns Medical School on account of her blindness. The Ohio Civil ***Rights*** Commission issued an order saying that that violated state civil ***rights laws***, which incidentally went even further than the ADA and Section 504 of the Rehabilitation Act. When that case came to the Ohio Supreme Court there was the Ohio Civil ***Rights*** Commissioner order to defend on the one hand, and on the other hand the state universities of Ohio thought that Case Western was correct, that this had not been a discrimination.

It was then my job to go to the Attorney General and explain to her that in a somewhat unusual situation she needs to appoint lawyers on both sides of this difficult issue. It fell to me to make a recommendation to the Attorney General what should be done. I thought that the State Solicitor of Ohio, the position I held, should argue Cheryl Fischer's case. I agreed with her position in the trial court, I thought it was the better of the positions.

And, I recommended to the Attorney General that I argue that side of the case. She agreed. She appointed someone else to argue the other side of the case. We established an ethical wall. And, I think, while I certainly understand people who are interested in these important nominations looking at briefs and oral arguments I made in Garrett, I would hope that they would take the same time to read the briefs that I wrote in the Cheryl Fischer case.

My opening brief and my reply brief and the oral argument I made there. I'd be stunned if anyone read those briefs and thought there was any risk whatsoever of hostility to disability ***rights***. I think if anything the concern would be just the opposite.

I've had an opportunity to represent other individuals with disabilities, most recently in federal court, I'm sorry, I don't…

KENNEDY: No, no, I'm just watching that clock. I don't want to interrupt you, but I did -- there are -- I want to let you complete, but I do want to get to, in this round, get to one other area, if I…

SUTTON: Well, I'll be brief. Just on the advocacy point, I've represented several other clients with disabilities. And all of those cases, as the ABA rules made clear, the client's position can't be ascribed to the lawyer. And that's quite dangerous. And, in fact, my risk in this hearing is not the failure to win a vote of the Democrat, I may lose everybody if one looks at all of my representations. Chairman Hatch said, unfortunately, that I never represented murders. Well, it turns out I have. I've represented two. And, I don't stand a chance in trying to become a judge if one looks at all of my clients and decides whether they agreed with their views.

I was not working at the university of Alabama when they formulated their policy. I didn't work on the case in the lower courts. That position had been formulated by the time it got to the U.S. Supreme Court. I'm sorry.

HATCH: I just -- Senator, but I'm going to give you additional time, because I know…

KENNEDY: Just on this, the fact it is, it isn't just in the cases themselves, Professor Sutton. You have in your writings and your speeches, in your talks, you've been very eloquent and have been very -- continue to be very supportive of this concept. I think we ought to disabuse ourselves that this isn't something that is just your representing a client, because I have the examples in your statements and your writings and the speeches, where there's positions where you took in there are -- anyone, I think, fair-minded person would read those would find that they're deeply held.

Let me go just to one other area and that is the limitations that you put in terms of the individual remedies. We all understand a ***right*** without a remedy is not a ***right*** at all. You, in Westside filed the friend of the court, you didn't have to do that. There's no obligation. This was not applied. You went about filing an amicus brief because you wanted to, felt compelled to. And, in that brief, if your position had been sustained, would have effectively overturned 65 years of federal court jurisprudence in terms of the Medicaid spending clause into the Medicaid Act.

And, effectively, it would have, in those cases, would have closed down the courthouse doors to the working parents in North Carolina who drove three and a half hours each way to get dental care for their children because they could not find a dentist closer to home who would accept Medicaid, even though the Medicaid Act requires states to ensure adequate supply of providers, or children with mental retardation and development disability in West Virginia who face institutionalization because they could not get Medicaid to pay for home-based services they need, even though the Medicaid Act requires the states to cover the services, or families in Arizona who are not receiving notices of impartial hearings when their Medicaid HMO's denied or delayed needed treatments, even though the Medicaid Act requires states to provide those ***rights*** to such persons.

You went into the court effectively to have them overturn 65 years of ***rights*** of individuals to pursue and to try and get a remedy. What do you think the -- those, again, that are the least able to protect themselves when you're on the court, you're on the court and look at you.

How do you think they're going to view your views about their ***rights*** and being able to ensure that they're going to be able to get remedies which have been, in legislation passed by the Congress, intended to be and passed by the Congress, and with your own, I suppose, knowledge, that the efforts to reduce the enforcement of those is quite common knowledge in terms of where the Congress is at the present time in terms of enforcement of these ventures?

I thank the chair for the additional time.

SUTTON: Thank you, Senator Kennedy. I think the case you're referring to is the Westside Mother's case, a District Court case in Michigan. And, I respectfully disagree with one component of your question, and that's the indication that I volunteered to take that case, so I wrote the briefs on my own behalf and that those -- that brief reflected my views. That is not the case.

As has happened to me before in my career I was lucky enough to have the U.S. Supreme Court want to invite me to brief an issue that the advocates had not briefed or that one advocate is not willing to brief. They asked me to brief it, and I -- you know, it's not a call you…

KENNEDY: This was an amicus brief?

SUTTON: Yes. It's not a call you choose not to return. Exactly. That's the Howen (ph) case where I wrote an amicus brief for the O Supreme Court. In the…

KENNEDY: Who asked -- excuse me, who asked you to file this?

SUTTON: In the Howen (ph) case it was…

KENNEDY: No, in the Westside.

SUTTON: The judge, Judge Cleland. His clerk called me, asked me to -- said he had briefing on what he perceived to be a very difficult issue and I think the way it was ultimately turned out in the case, two competing lines of U.S.

Supreme Court authority, it wasn't this -- unlike the Howen (ph) case, this brief was not on behalf of myself. The Michigan Municipal League ultimately asked me to write the brief.

So, there was a client in the case. And, I did exactly what I did in the Howen (ph) case when the U.S. Supreme Court called me, which is brief the issue that I was asked to brief. And, I want -- it's very important to me to explain that, I mean, I was doing everything I could to advocate that particular position. I could not fairly have said to the court, yes, I'll brief that argument and then pulled my punches and not explained every conceivable argument that could have been raised on that side of the case. I, of course, was not involved in the case for Michigan.

I would point out as well in hearing criticisms about that particular decisions. Well, I'm not going to criticize Judge Cleland's decision. The one thing I would ask you to look at if you're concerned about the case, is to please compare the brief we wrote and the decision. Many of the positions he took in that case were not positions we had advocated. So, I feel that that is not been accurate in the sense that it was something I…

KENNEDY: Yes, but the only point, and I know the time is going on, is that you argued. It's not that they didn't accept it, because it would have basically overturned, I believe, a fair reading the existing ***law*** in terms of the ***rights*** of individuals to be able to seek remedies. The only point, and this is my last one, is just how can we be sure that you're not going to continue this agenda should you get on the court? If you could just give us a brief comment on that.

SUTTON: Well, and I really hope I can do my best to give you that assurance. Again, I would point out, I never heard of this case until I got a call from a federal district court judge asking me to brief that side of it. There was nothing willful about that case and my involvement in it. I was an invited by an Article Three judge to do it and I did it just as I did when the U.S. Supreme Court invited me.

The second thing is if one is concerned about some of these issues in general or civil ***rights*** and more particularly I would hope that the members of the committee would not just consider the cases and the issues in the cases, but look at the briefs I worked on and wrote, any of the cases that

I'm sure you would be quite supportive of, whether it was defending Ohio's set aside statute in two different cases, whether it was defending Ohio's hate crimes statute on behalf of virtually every civil ***rights group*** in the state that supports that form of legislation, whether it was writing an amicus brief voluntarily in the Sixth Circuit on behalf of the Center for the Prevention of Handgun Violence, whether it was seeking out a prisoner's civil ***rights*** case in the U.S. Supreme Court, where, again, one cannot criticize that as state's ***rights***. I was representing Dale Becker (ph), incarcerated in Chillicothe, Ohio against my former boss, the Attorney General Betty Montgomery. So, I do understand your questions and I think they're very important, but I hope people will -- and I think this is why the public wouldn't be concerned about my being a judge. If I looked at these other representations where I was acting as an activist.

KENNEDY: I thank the chair for extending…

HATCH: Thank you, Senator Kennedy.

Let me ask a couple questions for you. You've argued three very important controversial cases, among others, in front of the U.S. Supreme Court concerning the scope of Congress's power under Section Five of the Fourteenth Amendment to regulate state governments. Some of your critics suggest that your involvement in those cases should someone disqualify from this position on the bench. So, just let me ask you a few questions about those cases.

And, I'm sure you know that I worked very hard, along with Senator Kennedy and others, to enact some of the ***laws*** that you argued against. We wrote the Religious Freedom Restoration Act. We brought together almost everybody in congress on that bill, which was struck down in the City of Burney case. And, of course, I was one of the principle sponsors, as was Senator Kennedy, of the Americans with Disabilities Act, which was limited in scope by the University of Alabama versus Garrett.

I also worked closely with Senator Biden, it was the Biden Hatch bill, on another ***law*** that the Supreme Court has found to be beyond federal power, in part at least, and that's the Violence Against Women Act. It was not easy for me, as well as my other people who worked -- with whom I worked, and who worked with me, to see these struck down after we'd put so much time and energy into their enactment.

HATCH: Of course, I understand the powerful constitutional principles underpinning the Supreme Court's decisions in those cases. But, I can also sympathize with those who might see things differently. Regardless of my views about these Supreme Court decisions, I certainly do not believe that your acting as a lawyer for your clients in those cases by itself should be any means, disqualify you from the bench.

So, what we need to know is whether you understand the difference between efficacy and judicial decision making, and whether you are firmly committed to the highest standards and principles of judicial restraint.

SUTTON: Thank you, Mr. Chairman, for an opportunity to discuss those cases. I guess the first point I would make in response to that concern is there's nothing about the issues in those cases or what happened in those cases that would have precluded me from happily representing the other side in any of them. And, as a Court of Appeals judge I have no idea what I do with those difficult issues except to say follow whatever U.S. Supreme Court precedent was at the time.

The other point I would make is in 1995 when I became State Solicitor of Ohio, I couldn't even have given the definition of federalism, much less a definition before this body. It wasn't something I had any involvement with. It's not something I'd studied in ***law*** school. And, as State Solicitor of Ohio, though, I suddenly found myself for three and a half years with the responsibility of representing the state's interest. Sometimes in cases like the Cheryl Fischer case, sometimes in the set aside cases. But, also in the City of Boerne case, which arose while I was state solicitor. And, the Attorney General of Ohio made the decision that the state was going to challenge RFRA. It was not a decision I was involved in. That was a challenge that started at the district court level. I didn't involved in that issue until it got to the U.S. Supreme Court. And, at point in time, Steve said it would be appropriate to have an amicus brief on behalf of many states explaining the states' perspective on these difficult issues, and that's what we did.

And, I do think the argument we made, while there's plenty of reason to disagree with the decision, reasonable minds can disagree about these issues. The fact is the matter is not one justice of all nine members of this court disagreed with the position advocated in the City of Boerne that ultimately the court has the final decision about the Constitution means. In Kimel, that's the ADEA case that Senator Kennedy mentioned, the same is true. Not one member of the court disagreed with the position we advocated. Four members of the court disagreed with the Seminole Tribe (ph) decision, but no one disagreed with what we argued in our brief in terms of what Section 5 of the Fourteenth Amendment means.

And, in the Garrett case, yes there was disagreement. The disagreement was five, four and the disagreement there was about your record and whether it sufficed. And, I can certainly understand how different people take it different views on the deference that should be given to the record, the extensive and exhaustive record that you compiled. But, it wasn't my job to decide that case, it was my job as a lawyer to represent the state and do my best to advocate deposition. And, that's what I tried to do.

HATCH: Well, and I agree with that. I think that's the point. Do you commit the deciding cases on the basis of relevant statutes and binding precedence and the Constitution rather than relying on any preconceptions on policy opinions that you might hold personally?

SUTTON: Absolutely.

HATCH: All ***right***. Now, some people think this is not so much of the adhering to your own clients as to whether you're arguments for those clients are within the mainstream of American legal fud (ph). So, if you don't mind I'm going to just go ***over*** those cases again so everybody here understands.

In the City of Boerne versus Flores (ph) it was a six to three decision dealing with the Religious Freedom Restoration Act, something that a number of us on this committee feel very deeply about. And, let me just ask it again. How many justices on the Supreme Court disagreed with the position you advocated in that case?

SUTTON: None. The only…

HATCH: Not one.

SUTTON: … disagreement was about a prior decision…

HATCH: ***Right***.

SUTTON: … in the court called Smith, which is not something…

HATCH: And, you mentioned the Kimel versus Florida Board of Regents case. How many justices on the Supreme Court disagreed with the interpretation of the Fourteenth Amendment that you advanced in that case?

SUTTON: None.

HATCH: Not one. All of the justices agreed with you.

SUTTON: I should make the point that the four dissenters disagreed with Seminole Tribe (ph), a prior decision…

HATCH: And you've made that point.

(CROSSTALK)

SUTTON: … which we did not brief and I did not -- was not involved in it.

HATCH: Well, and finally, just once again, in the Garrett case, how many of the justices rejected your position in that case?

SUTTON: Well, not to be too technical, but it was the State of Alabama's position and I was arguing as their lawyer, but four justices disagreed with the state's position in that case.

HATCH: All ***right***. Well, you know, I think that, you know, there is a difference being an advocate for clients where you have to give the best you can for them and being somebody who's out in mainstream of legal thought. The fact of the matter is that apparently you not only were in the mainstream, you were overwhelmingly approved.

Well, I have some other questions, I'll reserve the rest of my time and turn to Senator Leahy.

LEAHY: Thank you, Mr. Chairman.

Senator Kennedy had touched on this and, of course, Senator Hatch has said that it is one thing to be advocating for a client and another thing for stating your own position. And all of us who have tried cases either at the trial level or at the appellate level understand that you have to take -- you take your clients' position. But, I look at the way you do it. You have -- we've discussed the Florida case. You have advocate include claims and the state employees with disabilities persons who are denied Medicaid benefits. One newspaper called you the leader of the states' ***rights*** revival. And, then you said yourself in a Legal Times article that you're quote, "on the look out" for the types of federalism cases you've become known for.

In fact, you once said that while advocating for states' ***rights*** doesn't get you invited to cocktail parties, that nevertheless you believe in this stuff. So, isn't this a little bit different than (inaudible) walks in and to press the sudden, please take my position, here's what I'd like you to argue. If you feel I'm ***right*** on that, go forward. And, rather what you're doing is looking for the particular cases that you can carry out your own agenda. Is that correct?

SUTTON: Thank you for an opportunity to discuss this. I would respectfully disagree with that characterization, and here's why. I think the one general accusation…

LEAHY: Not to interrupt, but just when you disagree with having said what I have quoted you as saying in Legal Times.

SUTTON: No I didn't. I wanted to explain what I said…

LEAHY: OK.

SUTTON: … and what I meant by it. I'm on the lookout for U.S. Supreme Court cases that I can be fairly accused of. I was on the lookout for U.S. Supreme Court cases after I left the State of Ohio, had the good fortune to argue four cases there while state solicitor. And, when I returned to Jones, Day in 1998 I really was interested in continuing in developing that practice. And, that is true. I don't think it's accurate to say I was only looking for federalism cases, a fairly difficult term. I mean that covers a lot of things. I could cover any case involving a state. And, the proof of that is one case I sought out soon after leaving the state solicitor's office with the Becker versus Montgomery case that I referenced earlier, which was a pro se, indigent civil ***rights*** case brought against the State of Ohio where I was representing Dale Becker on a pro bono basis. And, I will say I was willing to represent just about anybody at the U.S. Supreme Court because I did want to develop a U.S. Supreme Court practice, which is not easy to do in Columbus Ohio. And I tried very hard to do that. That's what I think -- that's what the first quote references and that's quite true.

As to the believing in this federalism stuff, well, in one sense, yes, of course, I do believe at the end of the day there is a checks and balances system here in our government, one that has checks and balances among the national branches of the government and one that has a vertical checks and balances between Congress on the one hand and the states. But, that's a principle as deeply respected as (inaudible). The question is…

LEAHY: Do you have a feeling in your own mind, or interpretation in your own mind of the expression new federalism?

SUTTON: The new federalism that I'm familiar with is the one I teach at the Ohio State ***Law*** School which is about Justice Brennan's landmark article in 1977 explaining that state Supreme Court and state Supreme Court justices should be aggressively construing their state Constitutions to further civil liberties and go beyond what Justice Brennan perceived a U.S. Supreme Court was not doing.

LEAHY: You stated in that, the syllabus for that seminar that the most controversial results of the new federalism are, quote, "increased disuniformity of the ***law*** and attempting new latitude for potentially result or entered judicial decision making", which is what I would hope that all of us up here would be concerned with.

SUTTON: Well, you know, maybe I -- it's possible I'm misapprehending your question because I think…

(CROSSTALK)

LEAHY: Let me state it another way, if you were confirmed as a judge would you be able to resist the temptation to use results oriented reasoning to implement an agenda of new federalism?

SUTTON: Absolutely. I thought the accusation that I wasn't doing enough of that. I'm making the point the new federalism that Justice Brennan advocated is one that has been advancing civil liberties for the last 25 years. That's the whole point of it, and doing it through the vehicle of state courts. The state Constitutional ***law*** syllabus to which you're referring, I should point out is one written by Richard Cordjray (ph) who first -- as you may know, he's a Democratic officer holder in the state of Ohio. He created that class at the Ohio State University. He's a friend of mind. And we have co-taught the class, and we use the same syllabus he wrote. But, I think you -- I'd be very surprised, Senator Leahy, and maybe this proves I'm misapprehending your question, but I'd be very surprised if you attended that class and listened to what we were talking about and saw the textbook we were using. It's a textbook that is advancing civil liberties at every turn. That's the whole point of it.

LEAHY: Would you feel it was a fair argument that someone said that you advocate states' ***rights*** ***over*** the national standards?

SUTTON: I've been on both sides -- I've been on virtually every side…

LEAHY: Which side are you on today?

SUTTON: I'm on the side of trying very hard, very hard, Senator, to show you that I would be an objective judge. And that the client I would have is the client that is the rule of ***law***, not a former client, but the rule of ***law***. And that's the great honor…

(CROSSTALK)

LEAHY: Which do you prefer, states' ***rights*** or the national standards?

SUTTON: I have no idea and it would depend on the client of the day. Again, if you looked at the cases I've represented, you'd see I've been -- when I worked for the state I only had the option for three and a half years of representing the state.

LEAHY: Let me give you a couple examples, desegregation and the Jim Crow ***laws***, the arguments were made that a state's ***rights*** should override national standards, which side do you come down on?

SUTTON: Well, the U.S. Supreme Court correctly rejected all of those. And, as a Court of Appeals judge I would obviously follow that U.S. Supreme Court precedent.

LEAHY: Then, do you see the -- let me ask another way, absent a Supreme Court decision, on all fords, which do you feel carries more weight, states' ***rights*** or national ***rights***?

SUTTON: You know, there's no doubt when a federal statute is passed, as the U.S. Supreme Court has made clear, it deserves -- there's a heavy presumption of constitutionality. The court has said that in cases of holding federal ***laws*** and striking them. And, there's no doubt that a Court of Appeals judge has every obligation to follow that presumption.

LEAHY: You're well aware of the fact that there's been a number of writings, along by people strongly supporting you, they feel you should be here because of your advocacy as states' ***rights*** at the expense of national standards. Are they -- are your friends giving you too much credit?

SUTTON: Absolutely. Absolutely.

LEAHY: Well, the reason I ask that, and I don't ask it lightly, Professor, because I've said ***over*** and ***over*** again, I've been here with six different presidents, on this committee, and I voted an awful lot of Republican nominees and on those occasions when they'd let us vote on the Democratic nominees, I've voted on those. But, I've always had the same standard. I've also voted against nominees of both Democratic presidents and Republican presidents when I felt that a litigant would not have a fair hearing. And I have said so many times in this committee that to get my vote I must be convinced that a judge not only has the abilities, and you obviously have the legal abilities, but have the abilities and the moral character, but also if somebody came into that judge's courtroom, they wouldn't feel the case had been prejudged either because of who they are, that they'd be treated differently depending upon which side of an issue, whether a plaintiff or defendant, whether they're rich, poor, Republican, Democrat or anything else.

LEAHY: And, what I'm concerned about in your writings and actually and maybe you feel your friends have done you a disservice in their strong support and the strong support of the president and others that you will be one who would give far more weight on states' ***rights*** and a number of these federal ***laws*** ***over*** a national standard. Now, the Supreme Court has done that, as you know, in a couple of areas. They issued a series of five to four decisions under the Commerce clause in U.S. versus Lopez they said that the Congress couldn't enact a ***law*** to prohibit guns in or near schools. And Morrison they struck down a provision of federal ***law*** that allowed women to ***sue*** their

attackers in federal court. They held that Congress may not regulate what the court calls non-economic activity, gender motivated crimes and violence for example.

Now, do you agree that Congress's power to regulate an intrastate activity should turn on whether the activity can be classified as economic or non-economic?

SUTTON: You know, I would agree, of course to do what the U.S. Supreme Court has said in that area, and my understanding of the Lopez, Morrison, Wicker versus Fillburn (ph), Jones versus Laughlin, Jones and Laughlin cases, is that while the holdings of the cases to date have been primarily economic, the court has never said it can only be economic. In fact, they specifically reserved that point in Morrison. And, in terms of what I would do, I have no idea. I don't know, you know, obviously I haven't gone through the process of what a judge would do and that process is critical to being a fair-minded judge and that's, you know, having an open mind about both party's positions, looking carefully at their briefs, looking for any indications that the Supreme Court has given as to what the Court of Appeals or District Courts should do, listening with an open mind and a fair mind to what the oral argument is and then discussing the issue with your clerks, with your colleagues on the court and doing your best to get it ***right***. And I promise that's exactly what I would try to do.

LEAHY: Well, for example, last year the House of Representatives passed a bill to prohibit human cloning. Is human cloning more or less economic in nature than gun trafficking near schools or gender motivated crimes?

SUTTON: You know, I have no idea. The one thing, though, that that kind of ***law***, partial birth abortion, all of the controversial issues that you all deal with, there's one thing that does have to be true, and I certainly agree with it, that to the extent there is a principle of federalism that the U.S. Supreme Court is requiring lower courts to follow and it does have to be followed in an even handed way and there's just no doubt about that.

LEAHY: Well, then let's talk about that, we've mentioned Lopez before and I mentioned that because the president in his first State of the Union message to the education is a top federal priority because education's a first essential part of job creation. And I tend to agree with President Bush on that. But, then the Supreme Court in U.S. versus Lopez said that education is a non-economic activity, therefore outside the federal regulatory power. Who's ***right***, the Supreme Court or the president?

SUTTON: That's a great question and I'm happy…

LEAHY: I'm waiting for a great answer.

SUTTON: … I'm happy that it's the U.S. Supreme Court that has to finally decide it. The one thing I can assure is that I would follow whatever decision they reached on that issue and adhere to it as every Court of Appeals just has to.

LEAHY: Well, and we'll get back to this on another round. But, I'm worried because the variety of the Constitution requires deference of the sovereignty of states. But, when the Constitutional ***rights*** are asserted, due process protection, reproductive ***rights***, the ***right*** to be free of states trampling upon 14th Amendment freedoms, the standard report we get from many, including many that support you, is that the techs of the Constitution doesn't articulate these ***rights*** they don't exist. Can't the same point be made of a theory of states sovereignty? I mean is there any words explicitly in the Constitution giving out the ***right*** of state sovereignty?

SUTTON: It's a very difficult question and, as I think you know, the U.S. Supreme Court has struggled with it for 200 years. I mean you can go back to Chisholm versus ***Georgia*** Hahns (ph) and then many of the cases in the last two decades addressing it. You know, of course it is up to the U.S. Supreme Court at the end of the day to decide whether there is such a thing as sovereign immunity that applies to states, so far they have. I guess I don't know what they're explanation would be…

LEAHY: What is you philosophy on it, without -- and I realize and I certainly will grant you this and I have no question you're honest enough in this when you say that the Supreme Court has a decision, you're going to follow

the start of decises. But, you're apt to get the -- you staying all the way up to the Court of Appeals, you'll apt to be getting a lot of cases of first impression. What is your philosophy on that?

SUTTON: Well, I mean my philosophy, I mean the point of sovereign immunity, I just wanted to mention, is a difficult one for the national government and the states.

LEAHY: That's ***right***.

SUTTON: In other words, the national government has sovereign immunity as well, of course, that's this body and that's not mentioned either. So, that's I think the reason the court's been struggling. In terms of my philosophy, my philosophy is about what's a good Court of Appeals judge and what it does and what the good Court of Appeals judge should do is look at every case with an exceedingly open mind and when they look at that case, do what I've actually tried it sometimes as an advocate, all times to do, see the world through other people's eyes, see the world through, when I'm an advocate, out of the judge's eyes, my opponent's eyes. And, I think when you're a Court of Appeals judge it's a different perspective. You're trying to see the world through different advocates. We have this adversarial system. Their job, these lawyers, is to present the best conceivable arguments within reasonable bounds that advances their client's position and I would think I would do what I think a good Court of Appeals judges do and that's honestly and in a fair way consider those arguments and do your best job to get it ***right***. And, getting it ***right*** nine out of 10 times is not a 100 percent of the times, turns on understanding what U.S. Supreme Court precedent is and adhering to it.

LEAHY: Is that a way of saying that people should have no fear depending upon who they are, whether they're taking the position via the state or opposed to the state, of whether they're liberal, conservative or whatever coming before a Judge Sutton as compared to Professor Sutton?

SUTTON: Absolutely your honor, absolutely.

LEAHY: You don't have to call me your honor. I don't know if I've made that.

SUTTON: Old habits die slowly.

LEAHY: If it's any consolation and I'll yield in this, and if it's any consolation, I tried a huge number of cases before I came here and I did a lot of appellate work. And I found myself calling -- I was a junior most member of the Senate, I found myself referring to the chairman as his honor so many times that the inside my mouth was sore from the number of times I bit my tongue on the inside of my mouth on that.

SUTTON: Well, forgive me. I…

LEAHY: No, no…

(CROSSTALK)

LEAHY: … do my best not to do it again.

LEAHY: Thank you.

HATCH: I always thought you liked to be called your honor.

LEAHY: Excellency, Excellency.

HATCH: Excellency. Excellent, that's ***right***. I keep getting it wrong.

Senator Chambliss?

CHAMBLISS: Mr. Sutton, I was instructed to refer to Mr. Leahy as his honor. So, don't -- we all do that.

Let me just make a general comment about all the nominees we've got today. I having looked at your bios and knowing the background of all six nominees, it's a pretty impressive ***group***. And, also, having been recommended by colleagues in this body that I have such great respect for, it's good to see legal minds of the caliber that all six of you have to be up here today to be nominated. And, I commend all of you for that.

I'm a little bit disconcerted by some of the criticism that I've heard today and that I've read about with respect to our nominees, and that is, having practiced ***law*** for 26 years myself and having argued both sides of cases and particularly early in my career, having been appointed to criminal cases that I didn't necessarily want to be appointed to. But, those of us who practice ***law***, which I think is by far the greatest profession in the world, there are positions which we have to take that are in the best interest of our clients, irrespective of what your personal feelings are. And, it's pretty obvious that when all six of our nominees have been in that same position, you've done a heck of a job of representing your client, whatever the position that your client was in. So, I think that kind of criticism really doesn't do justice to you.

I want to first of all, Judge Cook, ask you about some of this criticism that's been directed at you. It's been said that you dissent an awful lot and opinions that are rendered by the Ohio Supreme Court. Well, again, having argued an awful lot of cases on appeal and having lost some of those cases, I was kind of glad to see that there some dissenting opinions that agreed with me.

I want to ask you about one case in particular, though, the state ex rel. Bray v. Russell (ph). In that you declared in your dissenting opinion that in order for the court to declare a statute unconstitutional, and I quote, "It must appear beyond a reasonable doubt that the statute is incompatible with particular provisions." And in this particular case you're dissent from the court's ruling meant that you would have allowed state prison boards to sentence convicted criminals to extra time for bad time violations. Would you please elaborate on your decision in that case and tell me generally what your views are on the constitutionality of statutes enacted by the general assembly in Ohio in your case and at the federal level by the Congress?

COOK: Thank you, Senator. The case to which you refer, indeed, I was a dissenter in that case. But, the matter involved a statute that permitted the executive branch to impose what is called bad time on inmates for their behavior or conduct during incarceration. And the disparity between the majority and the dissent regarded the -- just differing views on the interpretation of the statute.

In that case, one of my colleagues, who is, if you'd look at percentages, typically is on the other side that I'm on, he's typically not with me to join the dissent. And, the standard of review that you mentioned that it has to be unconstitutional -- or beyond a reasonable doubt is the accepted standard in Ohio. And the statute made -- this was all about -- it all concerned separation of powers. The majority felt that the -- that allowing the executive branch to impose additional time was a violation of the separation of powers doctrine. I merely opined that the doctrine regarded those situations where one branch interfered with another branch and in as much as the statute at hand allowed bad time as part of the original judicially imposed sentence. There was no separation of powers impediment to this statute.

And, therefore, I would have upheld it. But, as I say that was a dissenting view. Yet, it was joined by one of the members of the court who is often said to be at odds with me. So, I think it was a well-supported decision.

CHAMBLISS: OK. Thank you.

Mr. Sutton, it appears that a lot of your criticism, or a lot of criticism that's directed at you has to do with your work on disability cases. And, obviously, from the questions that have been directed to you today that is a very prominent area of ***law*** in which you have practiced. I was particularly concerned about a case which you handled for my state, the State of ***Georgia***, or I say you handled, you were involved in and I want to first of all before I ask you a question about it for my colleagues I want to sort of set the stage for that.

In 1978 the State of ***Georgia*** adopted a program for treating mentally disabled citizens through what was called community placements instead of institutions. Due to limited resources the State of ***Georgia*** resisted assigning

these plaintiffs in the case that arose out of the situation existing regarding these placements to a community placement.

The State of ***Georgia*** was ***sued*** by these plaintiffs, the actual person ***sued*** was the Director of DHR, Mr. Tony Olmstead. So, it's been referred to as the Olmstead case, which I know you remember very clearly. They claimed that the State of ***Georgia*** discriminated against them under the Americans with Disabilities Act. In this case the State of ***Georgia*** was ***sued*** by this ***group*** on an issue that all of us are extremely sensitive to and that's the issue of a mental disability, and how and where those mentally disabled patients were to be placed.

If I recall correctly, you helped the State of ***Georgia*** argue this case before the Supreme Court or at least you participated in the preparation of the young lady who did argue that case before the Supreme Court. And the basic argument was that the ADA did not require states to transfer individuals with mental disabilities into community settings rather than institutions.

Would you please tell a little bit about your involvement in that case, the argument you put forth and the actual outcome of that case?

SUTTON: Yes, thank you, Senator.

The Olmstead case, I think went to the district courts, yes it did, the district court in ***Georgia***, then the 11th Circuit and I did not have any involvement in the case at that point.

SUTTON: But when the U.S. Supreme Court decided to review the 11th Circuit's decision in Olmstead, I was hired by the state to help them write what was two briefs in the case at the U.S. Supreme Court and help prepare Trisha Downing for the oral argument. And, as you've acknowledged, the very -- the institutionalization's a difficult issue. I mean, in fact, it's actually an easy issue in the states, every state supports it. In fact, ***Georgia*** has a ***law*** that requires the institutionalization for those who are capable of living in a community setting. So, the rub in the case was not that policy debate. That had long been decided in the late '70's and early '80's that everyone -- that every state should move in this direction.

But, the problem I think ***Georgia*** must have run into was that they had a budget shortfall, something not dissimilar to what some states are having now and wasn't able to move individuals as quickly as they had in the past from state hospital settings to community settings. And, so, when that happened, when that budget crunch happened, they were ***sued*** under the ADA and the gist of the plaintiff's claim was that the state has to continue to move patients more quickly regardless of resources. And, of course, even that's a very tricky issue.

The position we advocated primarily was the position of whether that money, you know, whether, no matter the costs, the State of ***Georgia*** had to move every single patient as soon as they hired a lawyer and ***sued***, or whether there was a reasonableness component to this. At the end of the day, all nine members of the court agreed there was a reasonableness component, eight members of the court said it needed to be sent back to the Court of Appeals and eventually the district court to determine whether, in fact, the state had acted reasonably in not moving these two plaintiffs into community settings.

And, you know, I did my best to help the client.

CHAMBLISS: Well, the attorney general in ***Georgia*** is a gentleman named Thurbert Baker who happens to be an elected democrat and is a good friend of mine and, as I told you after I talked to you earlier, I was going to check on you. And I did. And Attorney General Baker had this to say about you, he said that "Mr. Sutton is extremely intelligent. He's a hard worker and he would have a great judicial temperament." And that temperament, particularly, I think obviously we know you're mental capabilities, but for somebody who has worked very closely with you to say that you have a good judicial temperament I think says volumes about you.

One other thing that I was impressed with about you, Mr. Sutton, is the fact that another constituent of mine, a lady named Beverly Benson Long, has written a letter to Senator Leahy with reference to your nomination. And I want to just -- if this letter is not already in the record, Mr. Chairman, I would like to ask that it be made a part of the record.

HATCH: Without objection we'll make it part of the record.

CHAMBLISS: Mrs. Long is the immediate past president of the World Federation for Mental Health. She's been president of the Mental Health Associations of Atlanta, the State of ***Georgia*** and the National Mental Health Association. She was a commissioner on the president's commission on mental health, having been appointed by President Carter. She has an extensive background in this field.

And here's what she says about Mr. Sutton. "I have no doubt that Mr. Sutton would be an outstanding Circuit court judge and would rule fairly in all cases, including those involving persons with disabilities." She also says that she's familiar with the lobbying against Mr. Sutton by various person who advocate on behalf of the disabled. Her comment is that this effort is unfortunately and I am convinced is misguided. Again, I think that's a high compliment to you, Mr. Sutton. And I look forward to bringing all three of you to a vote in the very near future.

Thank you.

HATCH: I thank you, Senator.

We will go to Senator Feinstein for 15 minutes. And, then I think we will have a short break for about a half hour. And give you a little bit of a break.

Senator Feinstein?

FEINSTEIN: Thanks very much, Mr. Chairman.

Good morning, Doctor Sutton.

I've been surprised to see that your nomination has really generated a kind of intense opposition from the disabilities community, even as far as my state, California, with a number of organizations weighing in very strongly. So, I've been trying to figure out why. And, one of the cases I looked at was a case that was mentioned earlier and that was the Garrett case.

And, you can correct me if I misstate any of these facts, but my understanding is that Ms. Garrett was a 56-year old woman who was diagnosed with breast cancer. She was the Director of Nursing for Women's Services at the University of Alabama. And she cared very much about her job. So, she arranged to have her chemotherapy after work on Friday to allow her the weekend to recover. And she didn't really take very seriously the warning she got from a colleague that her supervisor didn't like sick people and had a history of getting rid of them.

And, as it turned out her supervisor did try to get rid of her by locking her out of the computer and by beginning recruitment for a replacement of her job. And, you represented the state, the University of Alabama in that case. And you made this argument about the need for the Americans for Disabilities Act, and I quote, "All 50 states have provisions of their own designed to guard against disability discrimination by the sovereign. These ***laws*** and administrative regulations predate the passage of ADA, far exceed the rational basis requirements of equal protection review. All permit monetary relief against the sovereign. And, in the end markedly ***over*** protect, rather than under protect the constitutional ***rights*** of the disabled."

How do you reconcile that with Governor Hodges recent statement apologizing for South Carolina ***law***, which involuntarily sterilized in the past decades a number of mental patients. In essence, according to the governor, these ***laws*** were believed, and this is a quote, "to promote reproduction by people with good and healthy genes, and discourage reproduction by those with genes considered unfit. The goal was a healthier population. Instead these ***laws*** allowed the state to create a second-class citizenship deprived of their most basic civil ***rights***."

How do you reconcile your statement in this case, the statement by Governor Hodges which clearly shows the insufficiency of state ***law*** to meet any kind of what would be considered a fair national standard?

SUTTON: Thank you, Senator.

I'm not familiar with that statement, but I think I understand what it's about, and, so, I'll do my best to respond to it.

FEINSTEIN: This is about the sterilization of mental patients.

SUTTON: Exactly. And, that's where I wanted to start. The reply brief in that very case, Garrett, addressed that issue and that horrendous history in this country. And it addressed it by talking about a case in the U.S. Supreme Court where, of all people, Justice Holmes wrote in the Buck decision for the U.S. Supreme Court that, in fact, the very for sterilization you're talking about, did not violate the United States Constitution. Believe it or not, that case still is on the books.

We did something, which was unusual for any state to do. We said that case was wrongly decided and quoted Justice Souter for the excellent point that when Justice Holmes errors, he errors grandly. And, he did in that case. And the brief on behalf of the state made that very point. And, so, there was no debate about that issue.

FEINSTEIN: But, that isn't my point. In reading the two of them you're arguing in this case that state ***law*** offers sufficient protection, therefore, the Americans for Disabilities Act is really not necessary, that state ***law*** actually overprotects individuals with disabilities.

SUTTON: ***Right***. I don't…

FEINSTEIN: To me is not correct.

SUTTON: And, if we had argued that I could be accused of malpractice because that's not what we argued. And that's not what the state's position was and that's not what I as an advocate recommended…

FEINSTEIN: You didn't make this statement in your brief?

SUTTON: I made that statement, but I want to put it in context.

FEINSTEIN: OK.

SUTTON: The issue in the Garrett case was a constitutional issue. The issue was not whether the ADA was needed. The brief contains many statements to the effect of to its credit; the federal government passed the ADA. So, there are many statements conceding that Ms. Garrett could get her job back under the ADA.

The issue in the case arose because of the court's Seminole Tribe (ph) decision and that's the question of whether money damages were permissible. And, in that setting the question, according to the U.S. Supreme Court, under the City of Boerne, a decision that still to this day, no justice of the court has disagreed with, the question is whether the states have violated the constitutional ***rights*** of their citizens.

Now, the one thing I think the Senate and the Congress could certainly be frustrated with is the City of Boerne was decided after the ADA was passed and that, of course, made it difficult for you to compile exactly the record that the court ultimately required.

But, the point, Senator, that the brief was making is we were applauding the 50 state ***laws*** that protected disability ***rights***. And we were simply making the point that with those ***laws*** in place it was difficult to show that the states were not, since the ***law***'s been passed, violating the constitutional ***rights*** of their citizens. Now, that position, keep in mind, is not a position I made up. I mean I wasn't involved -- Obviously, I wasn't involved in the underlying decision with Ms. Garrett. I wasn't involved in the district court; I wasn't involved in the Court of Appeals. These were positions the Alabama attorney general's office had developed, made the constitutional challenge. And when it got into the U.S. Supreme Court they asked me to argue the case for them and I did.

But, you know, maybe we didn't do as well as we could have, and the statements you read makes me worry about that. But, the brief was trying very hard to show that the states were being sensitive to disability ***rights***. And, I would point out in Ms. Garrett's case she had a parallel claim under another federal ***law***, Section 504 of the Rehabilitation Act, which applies wherever federal dollars are involved. The University of Alabama gets federal

money. We specifically in a brief I wrote said the U.S. Supreme Court should not review the constitutionality of that issue. That would be premature. And that issue is still in the lower courts. I mean at the end of the day Ms. Garrett may get her money relief. That hasn't been decided yet.

FEINSTEIN: And let me ask you during a radio interview with Nina Totenberg on this very case you made this statement, which puzzled me. There are legitimate reasons for treating the competent differently from the incompetent in certain settings. And what the court has said for some time now is it's going to give states and the federal government quite a bit of latitude when it comes to drawing those distinctions because these are very difficult social issues and ones that political bodies in each area need quite a bit of latitude ***over***. I'm puzzled what you mean by treating the competent differently from the incompetent with respect to civil ***rights***.

SUTTON: Sure. I don't remember the statement, but I do understand the point, so I'm happy to address it. The point I assume I was addressing in response to a question from her relates to the court's City of Clayburn (ph) decision, a U.S. Supreme Court case about what level of equal protection scrutiny individuals with disabilities get. And what the court has said there, and presumably was the point I was making in this interview, was that most the time in the equal protection setting what courts are doing is they're saying it makes -- it's not ever, if rarely, if ever, appropriate to make a distinction based on someone's status of their age, their race, their ethnic background, their religious background and that presumptively their gender, presumptively those ***laws*** are invalid.

When it comes to ***laws*** dealing with the disabled, in an odd sort of way, particularly in the recent decades, things are switched. Why are they switched? Because both federal and state governments happily have passed lots of ***laws*** based exactly on the classification of disability precisely to provide accommodations for the disabled. Of course, that's exactly what the ADA does. It makes classifications based on whether you're disabled or not. So, I was making that point that's a good thing. And that's exactly the why this constitutional issue's so difficult. It makes one wonder whether, you know, the due process clause isn't a better vehicle for brining these arguments. But, the distinction is a happy one.

FEINSTEIN: Thank you very much. If I might I'd like to change subjects for a minute and go to some questions about the ***right*** to privacy. Do you believe there's a constitutional ***right*** to privacy? And, if so, would you describe what you believe to be the key elements of that ***right***?

SUTTON: Well, the U.S. Supreme Court has made quite clear in a series of decisions that there is a 14th Amendment constitutional ***right*** to privacy, growing principally out of the substance of due process and the Fourteenth Amendment.

SUTTON: They've said that in many areas. And, I can assure you, it's not an area where I've done a lot of litigation, so it's not that I have lots of familiarity with, but I can assure you that as a Court of Appeals judge I would follow the U.S. Supreme Court's decisions, instructions across the board in any case involving the ***right*** to privacy.

FEINSTEIN: Does that apply to Roe v. Wade?

SUTTON: Absolutely.

FEINSTEIN: So, what are your feelings about the Roe case?

SUTTON: Well, you know, like many a ***law*** student and many a lawyer probably had many different views of it at various times. I can say, as a Court of Appeals judge, the thing that would be very important to me is making sure that I followed what the U.S. Supreme Court had required lower court judges to do, both in Roe and later in the Casey (ph) decision. And that's exactly what I would do.

FEINSTEIN: So, do you believe that Roe is a settled case?

SUTTON: Well, from a Court of Appeals perspective, it sure is. I mean I can't think of any case that a Court of Appeals judge would say there's -- it's somehow not settled and the Court of Appeals judge would have a license to do something different from the U.S. Supreme Court. That's exactly the opposite of their oath.

FEINSTEIN: So, let me just put it a little more boldly. Do you support the holding of Roe that women have a constitutionally recognized and protected ***right*** to choose?

SUTTON: I would absolutely follow that decision and Casey (ph) and every case before me that implicated it.

FEINSTEIN: Thank you very much.

Thank you, Mr. Chairman.

HATCH: I said we would break, but Senator Feingold has a meeting at 1 o'clock and he's asked if we can finish with and then we'll break for a half hour.

FEINGOLD: Thank you very much, Mr. Chairman.

My apologies, Professor Sutton.

HATCH: Do any of you need a break ***right*** now, because if we can just wait for another 15 minutes, we'll break?

FEINGOLD: Perhaps this will shorten the afternoon.

And, Mr. Chairman, I had planned an extensive critique of your decision to have all three of these people today. But, in light of your courtesy it will be a brief critique.

HATCH: Well, that is very much appreciated.

FEINGOLD: Mr. Chairman, I've just been so impressed with the way that you have run this committee in the past and your role as ranking members and always appreciated your fairness. And, I just have to say that I would have to be in the camp of those who say that having all three of these distinguished nominees in the same day is not the way that you've done things in the past. And, I note your letter where you suggest that in response to us that these nominees are not controversial. Well, the fact is they're extremely qualified people, but I don't think it's in the eyes of the chairman to determine whether they're controversial or not. That's sort of our job.

And, these are controversial people…

HATCH: I'll tell you, that is the firs time that the poor chairman has been taken ***over*** the coals like that is all I can say.

FEINGOLD: Well, it's brutal.

HATCH: That's all ***right***.

FEINGOLD: I certainly do understand the pressures on you with regard to this all the back and forth on this issue with the administration and all these nominations. But, I would urge that this not be done again, that we only have one controversial or allegedly controversial nominee per hearing.

HATCH: Well, Senator, if I could just interrupt you for a second without costing you any time. This is important that we move with these three at this time. I'm going to try to an accommodate you, but I can't limit it to just one. We held I think 11 with two last time. Senator Biden's held one with three. This is my one with three. I can't guarantee you I'll never do it again. But, I think we ought to be able to move ahead and I'm prepared to, you know, to do what we have to do. But, I'll try to -- I'll certainly take all of my colleagues' advice into great consideration.

FEINGOLD: Thank you, Mr. Chairman.

Professor Sutton, I understand that you filed an amicus brief on behalf of the State of Alabama in Solid Waste Agency of Northern Cook County versus the United States Army Corp of Engineers. In the brief you argued that in passing the Clean Water Act if Congress delegating authority to the corps along the promulgation of the migratory

bird rule such a delegation represented, in your words, "every measure of constitutional excess in full force." unquote, under the commerce clause.

As you know, the court, by a five to four majority, limited the authority of federal agencies to use the so-called migratory bird rule as the basis for asserting Clean Water Act jurisdiction ***over*** non- advocable intrastate isolated wetlands, streams, ponds, and other water bodies. In effect, the court's decision removed much of the Clean Water Act protection for between 30 to 60 percent of the nation's wetlands.

An estimate from my home state of Wisconsin suggested that 60 percent, 6-0, percent of the wetlands lost federal protection in my state. Wisconsin is not alone as Nebraska, Indiana, Delaware and other states face water loss that have and will continue to have a devastating effect on our environment.

Now, in response to this decision of the Supreme Court, my own state, Wisconsin, passed legislation to assume the regulation of waters no longer under federal jurisdiction. But, many states have not followed suite. So, last Congress I introduced a Clean Water Authority Restoration Act to clarify Congress's view that all waters of the United States, including those referred to as isolated, fall under the jurisdiction of the Clean Water Act.

Now, is it your view that Congress's authority for passing the Clean Water Act stem solely from the commerce clause, or might one find reason for congressional authority ***over*** protection of wetland in, not just the commerce clause, but, perhaps, the property clause, the treaty clause, or the necessary and proper clause?

SUTTON: Yes. Thank you, Senator. Obviously, in the federalism area environmental issues raise some issues that aren't raised in other federalism cases. And that's principally as a result of the externality problem that I'm sure you're familiar with when one state does something that imposes no cost to them and imposes cost in another state, whether it's water or air. And I think the U.S. Supreme Court has been very attentive to that and the cases make that clear.

In terms of writing that brief, again for a client in that case, it was a statutory interpretation case. It was not a constitutional case necessarily. It was a statutory interpretation case first and foremost and that, of course, is how it ultimately was resolved on the grounds you indicated.

And, on behalf of the client, we made the argument that the underlying statute, and the underlying statute referred to federal jurisdiction ***over***, quote, "navigable waters" and the position that was taken and actually the lead lawyer for the case is someone who's done a lot of work in a lot of different areas in this, but took the view that navigable can't possibly mean every, you know, water there is anywhere in the country. It has to be water connected to something that's quote "navigable". And we advanced that position of brief on behalf of that client.

The second argument that is made that I'm sure you're familiar with is what's called a constitutional avoidance argument. And the notion of a constitutional avoidance argument is really it's a back up to a statutory interpretation argument. And what lawyers are trying to do there and I really -- I do feel I had an obligation to make this argument, I think it would have been malpractice…

FEINGOLD: But, in an answer to my question, you don't rule out the possibility of congressional authority ***over*** protection of wetlands based on the other clauses of the Constitution?

SUTTON: Of course not, of course not.

FEINGOLD: Let me ask a more general question. In passing our federal environmental ***laws***, Congress, in some cases seeks to justify such action on commerce clause grounds by describing the relationship between the resource we seek to protect and economic activities conducted in or effecting those resources that are part of interstate commerce. For example, in passing the Clean Water Act, Congress restricted discharges from point sources, such as manufacturing plants, which make products that are then sold in interstate commerce. Do you believe that such justifications, if included in the legislative history or congressional findings are insufficient to establish the basis for congressional action to protect the environment under the Constitution?

SUTTON: Well, I have to acknowledge it's not something I know a lot about in the ***laws*** that you're referring to. So, it's not something I've dealt with and I don't know whether it's something that could come before me as a judge. I do know that the U.S. Supreme Court decisions give broad deference to Congress and they have given broad deference to Congress in the environmental arena. In fact, I'm not aware of -- there probably is such a case, someone's going to find it. But, I'm just not aware of a case where they've struck an environmental ***law*** on the ground that it exceeded Congress's commerce clause powers. So, it seems to me those precedence support what you're suggesting. And if that's true, Court of Appeals judges would have to follow them.

FEINGOLD: Well, then let's turn to a better decision of Justice Holmes, whose been discussed before. In 1920 Justice Holmes explained that the federal government must provide protection for migratory birds because actions by the states individually would be ineffectual. He said migratory birds can be protected only by national action in concert with that of another power. We see nothing in the Constitution that compels the government to sit by why a food supply is cut off and the protectors of our forest and our crops are destroyed. It is not sufficient to rely upon the states, Justice Holmes wrote.

Your brief in the Swank (ph) case takes a directly contrary position. Whereas, Justice Holmes viewed the protection of migratory birds and wetlands as a national interest of very nearly the first magnitude you argued that it is truly a matter of local oversight.

Do you really believe that the protection of these habitats is simply just a matter of local oversight? In what circumstances are federal protections warranted?

SUTTON: Yes, I am -- it's been awhile, I think the case you're referring to may be Missouri versus Holland (ph). It's been a while since I've read it. I'm not sure if I've got the ***right*** case. But, I thought if it's the case I'm thinking of, I thought it was a case that was about Congress's treaty powers. I may be wrong about that. And, obviously, that was not implicated at all in the Cook County case that you're referring to.

But, the point I would make is, again, I was simply representing a client and it was first and foremost a statutory interpretation case. The constitutional arguments that were made were made as constitutional avoidance arguments. And the whole premise of that argument is asking the court not to reach the constitutional argument. That's why an advocate makes that argument. They're signaling to the court you do not want to wrestle with the difficult constitutional issues raised by this ***law***. And you shouldn't do that. And the best way to do that is to deal with the case on a statutory interpretation grounds and that's what the court ultimately did.

FEINGOLD: Fair enough. In the amicus brief you also argued that the interstate commerce justifications for regulating wetlands used by migratory birds were false because activities conducted in wetlands such as bird watching and hunting are non-economic. Well, in my home state of Wisconsin, hunters spend $500 million on deer hunting alone in 2002. And we have been deeply concerned that the emergence of chronic wasting disease in our state has curbed the hunting effort and has hurt our economy.

Can you explain why you consider these activities to be non- economic?

SUTTON: Well, I'm not a hunter. I've never fired a gun. So, maybe that's my problem. I didn't appreciate that fact and maybe that's exactly what the court should have said in dealing with that argument. But, again, it was part of a constitutional avoidance argument that the court didn't reach and we were actually encouraging them not to reach in that case.

FEINGOLD: Let me ask you, finally in this point, more generally, if we were to try to protect these habitats under your argument, we would in effect have the only differing state Clean Water Act for protection. How can you ensure Americans that under this system, your vision of the way this works, that there would be any sort of floor of national environmental protections or any uniformed standard for clean water in this country?

SUTTON: Well, I think that point goes exactly to what you were saying Justice Holmes said in the case that I may be misremembering. But, at least what you were reading from the case makes clear the point I said at the outset. That environmental concerns the U.S. -- environmental ***laws*** and environmental cases the U.S. Supreme Court has

made clear there are externality issues that alter the equation. And the reason they alter the equation is exactly the reason you're suggesting. And that reason is that sometimes one state, one city, one county, can impose cost, environmental costs, pollution costs on others because of the direction of the wind, the direction of the water, a navigable water flows, and that's exactly why Congress has entered that sphere and it's exactly why the U.S. Supreme Court has said they should enter that sphere. And Court of Appeals judges would be obligated to follow those decisions and I certainly would be happy to.

FEINGOLD: I appreciate your answers to those questions. Let me turn to the age discrimination issue, Kimel decision, which came down in 2000. In Kimel versus Florida Board of Regents, again the Supreme Court ruled five to four that state employees could not bring private suits for monetary damages against states under the age discrimination and employment act. As you know the ADA has a federal ***law*** that prohibit employees, including states to refuse to hire, to discharge or to otherwise discriminate against an employee based on an employee's age.

The majority of the court found that while Congress intended to abrogate states' immunity, that abrogation exceeded Congress's authority under Section 5 of the Fourteenth Amendment.

Do you believe that older workers who are employed by private businesses are entitled to protection under federal civil ***rights*** ***laws*** like the Age Discrimination and Employment Act?

SUTTON: I'd like to talk about that case, but of course the ADA requires that very thing. The brief for the State of Florida made it quite clear that the ADA did protect all state employees and federal employees and private employees when it comes to relief like getting your job back, in some cases, back pay. The underlying issue in that case which divided the court along the five four grounds to which you're referring was not the question of Section 5 power, all ***right***, that the question of whether Congress had permissibly used its Section 5 power in passing the ADA.

The question that divided the court along five four grounds was the issue of whether commerce cause legislation, because everyone agrees the ADEA was also commerce clause legislation, whether that type of legislation, that source of constitutional authority could give Congress the ***right*** to create money damages action. I should tell you that was not something we briefed in that case. The Seminole Tribe (ph) issue did not come up either oral argument or in the briefing. But, it was how the court broke down. Not one justice, not one of nine, wrote an opinion disagreeing with the Section 5 interpretation we advanced.

FEINGOLD: Well, let me ask you this, do you believe it was wrong for Congress to enact the ADEA in the first place?

SUTTON: Of course not.

FEINGOLD: Confirmed the Sixth Circuit and legislation restoring the ***right*** of older state workers to ***sue*** their state employees were enacted and became the ***law*** of the land. How would you treat a claim of age discrimination against a state before you? Would you uphold the new federal ***law***?

SUTTON: I mean I would do exactly what, you know, the U.S. Supreme Court required in that area. And the notion that the ADEA could be struck is borderline laughable. I mean there's a case, I think Wisconsin -- Wyoming, excuse me, wrong state. I can see why I said Wisconsin. Wyoming versus the EOC in which the court specifically upheld the ADEA under Congress's commerce clause powers. So, of course, a Court of Appeals judge would be obligated to follow that ***law*** and enforce it.

FEINGOLD: Thank you very much. I'll wait for further rounds for other questions so that people can take a break.

HATCH: Well, thank you, Senator Feingold.

We're going to give you until 1:30, which is almost 45 minutes. So we'll recess for 45 minutes and I'm going to start precisely at 1:30. With that we'll recess until 1:30.

(RECESS)

HATCH: We'll call this meeting to order again.

HATCH: I don't see any other senators here at this time, so I'll just start it off with you, Mr. Roberts. I want to ask a few questions with you, and then, hopefully, if I have enough time, Justice Cook, I'll ask a few of you as well.

And we now have this timer, so that poor guy doesn't have to stand there with a little slip of paper. I felt sorry for him.

It seems to me that both Mr. Roberts and Mr. Sutton are being criticized for positions they have taken as attorneys representing clients. Now, this is patently unfair, and it's inappropriate, because attorneys do represent clients, and they shouldn't be judged by who their clients are. Any of us who have tried cases know that sometimes our clients may not be savory, but their case may be a good case. Who knows?

Attorneys are required to represent their clients, and this is the case whether their client is the United States government, a state government, a private citizen, or a corporation. And this fact is so fundamental that it should go beyond reproach.

In any legal matter, the arguments a lawyer makes in the role of a zealous advocate on behalf of a client are no measure of how that lawyer would rule if he were handling the same matter as a neutral and detached judge. And I think it's very unfair to imply that such a nominee would not follow the ***law***.

Now, this is because lawyers have an ethical obligation to make all reasonable arguments that will advance their client's interest. According to Rule 3.1 of the ABA's model rules of professional conduct, a lawyer may make any argument if, quote, "there is a basis in ***law*** and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing ***law***," unquote. Now, lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they the judge, or a judge.

Now, Mr. Roberts, although my Democratic colleagues and some in the Senate and elsewhere have tried to paint you as an extremist, the truth is that you are a well respected appellate lawyer who has represented an extremely diverse ***group*** of clients before the courts. In fact, you have often represented clients in what is considered to be the so-called, quote, "liberal," unquote, position on issues, and I'd just like to ask you about a few of these cases.

In the case of Berry (ph) v. Little, you represented welfare recipients in the District of Columbia, ***right***?

ROBERTS: That's correct, Mr. Chairman.

HATCH: You took this case on a pro bono basis. Is that correct?

ROBERTS: Yes.

HATCH: Pro bono means that you didn't get paid for it.

ROBERTS: No, I did not.

HATCH: You voluntarily represented these people and gave services to them.

ROBERTS: Yes.

HATCH: Now, in another case, Hudson v. McMillian (ph), you successfully argued before the Supreme Court the claims of a prison inmate who alleged cruel and unusual punishment, didn't you?

ROBERTS: Yes. I was representing the United States in that case. We filed a brief supporting the prisoner's claim that his 8th Amendment ***rights*** had been violated by a beating.

HATCH: In Rice v. Kiatonna (ph), you argued on behalf of Hawaii's Democratic attorney general and governor, both Democrats, in favor of a race conscious program to benefit native Hawaiians, ***right***?

ROBERTS: That's correct, Mr. Chairman. It's one of several cases that I found particularly gratifying where Democratic state attorneys general have retained me to represent their state in the Supreme Court. It's happened on several other occasions as well.

And a ***group*** of Democratic attorneys general, as well as a couple of Republican attorneys general, retained me to argue the Microsoft anti-trust case in the D.C. Circuit. I found that particularly gratifying, because it indicated that they thought my abilities were such that I would be able to represent them effectively and certainly wouldn't be dissuaded in any way by any political considerations.

HATCH: Let's talk about the Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency. In that case, you represented a state regulatory agency before the Supreme Court, arguing in favor of limits on property development and in support of protection of the Lake Tahoe area. Is that correct?

ROBERTS: That's correct, Mr. Chairman.

HATCH: Finally, in the 2001 landmark Microsoft anti-trust case, you argued on behalf of the Clinton Justice Department. Who asked you to do that?

ROBERTS: It was the ***group*** of states that had jointly pursued the litigation with the federal government. So it was actually the Democratic and Republican attorneys general representing their states that retained me to argue for them.

HATCH: So you argued primarily on behalf of Democratic state attorneys. Is that ***right***?

ROBERTS: This is true.

HATCH: Well, Mr. Roberts, a Legal Times article that ran last May described you as, quote, "someone who has represented clients on both the conservative side and the liberal side of ideologically charged cases, and who has encountered no plausible criticism of his fitness to serve," unquote. I think these cases that I've just mentioned, that I've asked you about, illustrate this point perfectly, and I completely agree. I have yet to hear any plausible criticism of your fitness to serve in this very important position.

Now, let me turn to you, Justice Cook, because I think it's important that we at least look at some of the things that have been said about you. It's been alleged by a few trial attorney interest ***groups*** that you dissent too much, that you have written too many dissenting opinions, or that you have a, quote, "troubling pattern," unquote, of dissenting.

Of course, this charge is easy to make, and it seems compelling on its face. However, out of basic fairness to you, Justice Cook, we should all recognize that these allegations do the work of implying that you regularly disregard precedent or favor certain parties without necessarily demonstrating that you do anything but conscientiously abide by precedent and faithfully interpret and apply the ***law***.

Since the charge has been made, however, Justice Cook, let me ask you a few questions about your record as an Ohio state judge or justice. In general, Justice Cook, what would you say compels you to write or join in a dissent?

COOK: On those occasions, Mr. Chairman, where -- and the number has been cited -- there are occasions in my seven years where I write dissents, and, more often than others on the court, I'm quite often the one who writes for the court in dissents. But the dissenting -- the importance of dissent in any court is to further the ***law***. It's a matter of fairness.

On occasions, my dissents result from a disagreement about the text at hand, a fair reading of the text, procedural matters, sometimes a disagreement on the statute of limitations. It's not often a matter of -- as has been implied, it's not a matter of my particular bent or preference for any side of a case. It's simply really the reasoned elaboration of principle is the reason why any judge is moved to dissent.

HATCH: So I understand that you also served as a judge for the Ohio Court of Appeals for -- was it four years?

COOK: Yes.

HATCH: I also understand that as a member of the Court of Appeals, you decided ***over*** 1,000 cases.

COOK: That's correct.

HATCH: How many times were you reversed by the Ohio Supreme Court?

COOK: What's been cited here -- it's less than 1 percent of my decisions were ever reversed.

HATCH: Do you know how many times the Ohio Supreme Court reversed an opinion in which you joined?

COOK: It was fewer than 10 cases. The stats are fairly low. As a percentage…

HATCH: It's about a 1 percent reversal.

COOK: Yes. The percentage is less than 1 percent.

HATCH: I understand that the United States Supreme Court has granted certiorari in three cases the Ohio Supreme Court has decided, and in all three cases, the Supreme Court reversed -- in all three cases, Justice Cook, I understand that the U.S. Supreme Court agreed with your dissent, and that you were the only one of the seven justices who ruled correctly in accordance with the U.S. Supreme Court's ultimate resolution of the federal constitutional issues in all three cases. Is that correct?

COOK: That's correct.

HATCH: In State v. Robinette, Justice Cook, you joined the dissent, arguing that the court majority has developed a rule that was contrary to the Supreme Court precedent. The U.S. Supreme Court agreed and reversed the ruling. Is that ***right***?

COOK: Yes.

HATCH: Agreed with you.

COOK: Yes, they did.

HATCH: In American Association of University Professors, Central State University Chapter v. Central State University, you wrote the dissenting opinion, and the U.S. Supreme Court again agreed with you.

COOK: Not only did it agree, we were pretty excited about the fact that they quoted the language of the dissent.

HATCH: That's great.

COOK: That doesn't happen often.

HATCH: In other words, they even quoted from your dissent.

COOK: Yes.

HATCH: That's kind of a badge of honor to…

COOK: It was relished in my chambers.

HATCH: I see. Well, in State v. Riner (ph), the Ohio court reversed the conviction of manslaughter against a father who killed his two-month-old infant son on the grounds that the babysitter, who refused to testify but denied involvement in the infant's death, did not have a valid Fifth Amendment ***right*** against self-incrimination and was, therefore, improperly denied transactional immunity. You dissented in that, ***right***?

COOK: I did. I was the sole dissenter.

HATCH: Could you tell us why?

COOK: Well, my dissent essentially set forth a fundamental principle that the guilty and the innocent enjoy a ***right*** against self- incrimination. And so the fact that she denied -- this particular witness was granted transactional immunity because she denied all culpability did not deny her the ***right*** to invoke her Fifth Amendment privilege, as she did.

HATCH: Well, you, in dissent, then, to use my terms, argued that the immunity was proper because the babysitter had reasonable cause to believe that her answers could put her in danger.

COOK: That's ***right***. She could provide a link. In fact, the father's defense was that, indeed, it was the babysitter who had shaken this infant and killed the infant.

HATCH: I see. The Supreme Court again of the United States of America agreed with a dissent -- with your dissent -- and you were the sole dissenter, ***right***?

COOK: That's ***right***.

HATCH: And ruled that the babysitter was entitled to immunity, because despite her claim of innocence, she had reasonable cause to apprehend danger from her answers at trial.

COOK: Yes. And, happily, that decision by the U.S. Supreme Court was nine to nothing. So it was unanimous.

HATCH: Justice Cook, a few others have charged that the so- called objective observers view the Ohio Supreme Court as a moderate one, and that your dissenting opinions put you outside the mainstream, and I think that's a pretty strange charge, between you and me. The allegation that the court is seen by most objective observers as moderate and bipartisan belies the facts.

Let me quote what Ohio newspaper editorials have said -- and I'll put all these editorials in the record, without objection. The Plain Dealer said in endorsing Justice Cook and Terrence O'Donnell in the 2000 judicial election, quote, "Both are Republican nominees, but their party labels are not nearly as critical as their shared philosophy of judicial restraint. By contrast, success for their opponents would enhance the prospect that a majority of the seven-member court would continue on a controversial course of judicial activism best illustrated in 4-3 decisions," unquote.

The Columbus Dispatch wrote "A majority on the Ohio Supreme Court has confused its role of checking the powers of the General Assembly. The court instead has turned into a legislative bulldozer upending whatever ***law*** conflicts with the ideological bent of the majority, legal and constitutional principles be damned," unquote.

Are you familiar with those?

COOK: Yes, I am.

HATCH: The Ohio Beacon Journal editorialized "Those who watch the Ohio high court know Cook is no ideologue. She has been a voice of restraint in opposition to a court majority determined to chart an aggressive course, acting as a problem solver, as (OFF-MIKE), more than jurists."

COOK: That's a common,,,

HATCH: Now, it appears to me, Justice Cook, that you possess an excellent understanding of your role as a judge charged with faithfully and conscientiously following precedent and upholding the Constitution, even if that means that, occasionally, you have to dissent, or even more than occasionally, you have to dissent. And that's the point I think I'd like to make.

My time is just about up. I'll turn to the distinguished senator from New York.

SCHUMER: Thank you, Mr. Chairman.

LEAHY: Before you do -- just one number, and i wasn't quite sure of it, because it's been mentioned by Senator DeWine and yourself and Senator Hatch. The reversals by the Ohio Supreme Court -- that was 1 percent of all your cases that were appealed to the…

COOK: That's ***right***. I think the numbers are something like in six of the cases out of 1,000 that I wrote.

LEAHY: How many were appealed to the…

COOK: Oh, gee. I'm afraid I don't know that.

LEAHY: Most of them?

COOK: No, I wouldn't say that. The Ohio Supreme Court is a certiorari court, so they choose their cases and…

LEAHY: Do you know how many of your cases went up offhand?

COOK: I'm afraid I don't, Senator Leahy.

LEAHY: About 500, 200?

COOK: In fact, I really wouldn't have any idea, because that's not -- I never did pay attention and keep track of the ones that were appealed. I knew the ones that were accepted, and those are the statistics we have. But how many were appealed, I actually don't know.

LEAHY: You know how many were accepted. That's really what I mean.

COOK: Yes.

LEAHY: How many were accepted on appeal, 200?

COOK: I could get that for you. I would be making a wild guess, and a wild guess might be 50.

LEAHY: And if it was 50 -- so it's six out of 50 that were reversed.

HATCH: Well, she doesn't know.

LEAHY: That's okay. Well, if you could get me the number for the record, please -- I just -- because, obviously, you have a lot of cases that were never appealed or never -- or cert was never granted.

COOK: That's ***right***.

LEAHY: Thank you.

Thank you, Mr. Chairman.

HATCH: Senator Schumer?

SCHUMER: Thank you, Mr. Chairman. First, I want to make a couple more comments just about the procedures here, and then I'll get into questions. I'll start with Professor Sutton.

But first, I want to thank you, Mr. Chairman. You did re-notice -- after I brought up the hearing, you re-noticed it from Tuesday to Wednesday, so that'll comply with the committee rule that we have one week's notice, and I want to thank you for that. And, as well, originally, we were going to have five-minute periods, I was told, and we asked you to move it up to 15, and 15 is adequate, and we appreciate that.

You know, what we're trying to do here is get a feeling that this is real, that these are real -- you know, for us, for many of us, this is really significant, but we worry about the others. One thing I would ask you, Mr. Chairman -- could we get notification by today as to which judges or which nominees we're going to have before us next Wednesday?

HATCH: I think so. I've already told staff to try and -- our obligation is to give notice of the hearing, but I would like to give you as much -- I had told Senator Leahy at least two weeks ago who was going to be on this…

LEAHY: Maybe my memory has…

HATCH: Senator Leahy's memory once again is faulty?

LEAHY: … has slipped.

HATCH: Well, whatever. I did tell you.

LEAHY: I know that you want to give us enough time to look at them, because to quote a distinguished chairman of this committee, "The chairman will schedule a hearing for a nominee only after thorough review of the nominee's preliminary information. Obviously, that's a long process, as it should -- as it must be. After all, these are lifetime appointments," so said Senator Orrin Hatch, my dear friend, the former chairman.

HATCH: Oh, my goodness.

LEAHY: You never know that -- that's when I come back to haunt you, Orrin.

HATCH: Well, let me…

SCHUMER: I guess the point I want to make is that having three substantially controversial nominees to important courts of appeal is brand new. The notice, as I say, has not been thorough, and we don't even have committee rules yet. We don't. We haven't discussed what's happening with the blue slip. We haven't discussed any of the other kinds of rules that this committee has always prided itself on having.

And then to boot today, there were so few questions asked by people on the minority side, it just almost seemed like a rush to judgment. Let's just get this -- I mean, majority side -- minority side, we're going to ask plenty of questions. It's wishful thinking that we were the majority side, at least for me.

But no questions asked, and it almost seems like, you know, that it's a done deal to too many people on this committee. The White House says put them in, get them done as fast as you can, as few questions as possible, and we'll just move them, and I worry about that.

I worry about it from a constitutional perspective, because there should be real advise and consent, whether you agree, whether you're the same party or the different party, in terms of who's in the White House, and I would just hope we could go back to some of that. I think even during the worst of times, when we were in charge, we were never accused of rushing through people and…

HATCH: I think that's a fair characterization by itself. Let me just say 630 days, it seems to me, is enough notice, and it certainly is enough time to evaluate these people.

SCHUMER: Well, you know, you say that, but, officially, we didn't receive notice until last night, and…

HATCH: We will try to remedy that.

SCHUMER: … and there are reasons for that, and we ought to have them. I mean, let's hope this is all on the level, and, certainly, at least fair process would help give it at least the appearance that that is the case.

I now want to direct some of my questions at Professor Sutton. Professor, you've probably been advised by those who have prepped you for this confirmation that I have three criteria I use when I weigh nominees, whether in

helping choose them in New York, which I used to do -- maybe still will do a little bit -- but also in who I judge. It's excellence, moderation, diversity.

Excellence, legal excellence -- these are such vital positions that you don't want some political hack or somebody who's somebody's friend to occupy them. I have no doubt you'll meet that criterion. You're a legally excellent mind.

The second criterion I have is moderation. I don't like judges too far left or too far ***right***. And, in fact, in my own judicial review committee, when people have come to me with some very liberal judges, well known liberals on the New York bench, I've not chosen to select them, because I think judges who are too far left and too far ***right*** want to make ***law*** themselves.

They have such a passion for what is ***right*** and what is wrong that instead of interpreting the ***law***, which is what the Constitution says they should do, they end up making the ***law***. And, in fact, a lot of the conservative critique of the liberal courts of the '60s and '70s was shaped by that notion, and I find it ironic that the conservative movement is doing the same exact thing now that they criticized people for.

It's a little bit of a mirror image of telling us that now we ought to move judges on, say, the Court of Appeals, when we were constantly told when President Clinton was president we don't need any more judges. The caseload is the same, and yet all of a sudden, we have -- we're pushing judges through, and that's, again, what we have to live with here. But the lack of consistency in all of this is mind bogging and, again, makes you think that this is not on the level, which would be a shame for the Constitution and for the judiciary. So that's my second criterion.

And the third one is diversity. I don't think the judge should -- that the bench should be white males. You don't meet the diversity criterion, but you can't judge it by one person, and that's not a problem for me here.

But the moderation is. And, frankly, by your record, to me, you're hardly a moderate. You have pointed views that are way beyond, I think, what most people would consider the mainstream, and you've helped shape and change the courts.

Let me just go ***over*** a little history. ***Over*** the past several years, the Rehnquist Supreme Court has slowly and steadily effected a revolution, and they've engaged, in my judgment, at least, in startling acts of judicial activism, reaching out to strike down ***law*** after ***law*** that Congress has passed to protect women and workers, the environment, the disabled, children, and senior citizens. And this court is leading the country down a dangerous path where it seems states' ***rights*** predominate ***over*** people's ***rights***.

They call it federalism, or they call it something else, but it's really just that. We almost want to go back, where there would be the Eleventh Amendment or the commerce clause, to the 1890s, because there's such anger and hatred for the federal government. And so I worry about that.

And you, Professor Sutton, you're a primary engineer of the road that court is traveling. We all know that. This is not just you happening to be plucked out as one of a thousand lawyers and say please represent us on this case.

When you look at cases that make up the Rehnquist court's revolution, Sandoval, Garrett, Kimel, City of Burney (ph), have particular meaning, and those are the cases that comprise the most significant parts of your impressive resume.

SCHUMER: I've been struck by the comments that you're nothing but a -- you didn't say a country lawyer, but you might as well -- a lawyer just representing your clients, that you don't really believe in the arguments you've made, or your beliefs were irrelevant and you were just doing your job.

But I think anyone who's reviewed your record can see that's not the case. You weren't just sort of like a corporate attorney who was picked to work for one corporation or then another. You've taken a leadership role in the federalist society which has pushed this line of reasoning and the states' ***rights*** agenda. You've made public comments that you love the states' ***rights*** movement. You advance your agenda with a genuine ardor and passion, advocating positions that go even beyond where Justices Scalia and Rehnquist and Thomas have been willing to go.

I'm just going to read, and then ask that they be inserted in the record, a number of quotes from you. At least they're all footnoted, and I would ask unanimous consent that the whole statement be added to the record with the footnotes.

HATCH: Without objection.

SCHUMER: "Talking about this federalism, this states' ***rights***, it doesn't just get me invited to cocktail parties" -- these are your quotes -- "but I love these issues. I believe in this federalism stuff."

Here's another one: "First, the public has to understand that the charges of judicial activism that have been raised, particularly in the most recent term, are simply inaccurate. The charge goes like this: How is it that justices who believe in judicial restraints are now striking down all these federal ***laws***? The argument, however, rests on a false premise" -- these are your words. These are not quoted in a case. This is from an article that you wrote.

"In a federalism case" -- again your words -- "there is invariably a battle between the states and the federal government ***over*** a legislative prerogative. The result is a zero sum gain in which one or the other ***law***-making power must fall."

Here's another one: "The public needs to understand that federalism is ultimately a neutral principle." Many of us would disagree with that. That's in the mind of the beholder, but it's certainly a view of yours, not who you're representing, but you. "Federalism merely determines the allocation of power. It says nothing about what particular policies should be adopted by those who have power."

And it goes on and on and on. You discuss the Morrison case, quote, "Unexamined deference to VAWA -- Violence Against Women Act -- findings would have created another problem as well. It would give to any congressional staffer with a laptop the ultimate marbery (ph) power to have final say ***over*** what amounts to interstate commerce and thus what represents the limits on Congress' commerce clause powers."

I'm not -- ***right*** now, I disagree with these, but that's not my point here. My point is you're not simply a lawyer who is chosen to represent cases. You have been a passionate advocate for this point of view, and you state it not only when you represent a client before a court, but you state it in articles, you state it in conversation, et cetera.

Let me just say to you that -- and this is the same question I asked Attorney General Ashcroft when he was here, although that was different, because he's in the same branch of government as the president, and we give the president a little more deference in that regard than we do with Article 3. You are passionate, you have strong beliefs that most objective observers would say -- whether you think they're ***right*** or wrong -- is way out beyond the mainstream. Many of the things you've said, as I said, neither Scalia nor Thomas nor Rehnquist has said in opinions.

So how can we believe that you, when you've been such an impassioned and zealous advocate for so long, can just turn it off? How do you abandon all that you have fought for -- you've been a seminal voice in all of this for so long -- given the fact that we all know that corporate lawyers, looking at the same fact case, don't always come under 100 judges with the same answer.

SUTTON: May I?

SCHUMER: Please.

SUTTON: Thank you, Senator. You've raised several issues, and I'll do my best to get to as many of them as possible.

First and foremost, someone who has the good fortune, first, of being nominated and then the good fortune of being confirmed by the Senate takes an oath. And when you take an oath, the whole point at that stage in your career is that your client is no longer your personal views, no longer a person for whom you advocated, that your client is the rule of ***law***.

As a Court of Appeals judge, your objective, of course, is to do whatever the U.S. Supreme Court has required in that area, and if they haven't provided guidance, follow what your Court of Appeals has required in that particular area. And I can assure you that's exactly what I would do as a lower court judge.

I would respectfully disagree with your comments, and I…

SCHUMER: We should have an open and fair debate here, not just go through the motions and, as Senator Leahy said, rubber stamp whoever the administration puts forward. I won't characterize interest ***groups*** the way my good friend, the chairman, does, but it seems that almost any time someone disagrees with what the nominee thinks, there are certain editorial pages, certain ***groups*** that say, "Oh, they have an agenda." I mean, we should have an open discussion here. That's the whole point of advise and consent, not simply to find out if someone's of good moral character.

SUTTON: And I appreciate the opportunity to have the honor of having this discussion with the committee and with you directly. And I know you've been an impassioned speaker on these federalism decisions in critiquing them, and I do want to turn to those.

But before I do that, the one -- I guess I could fairly call it a premise of your question -- was that one can line up a series of cases, take five or six controversial cases, and say, "Oh, anyone that could have advocated those positions must have a viewpoint that is just inconsistent with anything I think is good and ***right*** about what federal judges do and about what the Constitution means," and I respectfully disagree that that can fairly be said about me.

I think there are many cases, representations I've handled, that I think you would applaud, and if you wouldn't applaud, would at least respect my role as a lawyer. And I hope, in thinking about the federalism decisions, you will keep in mind cases I did before I worked for the state, whether it's writing a brief for the Senate for the prevention of handgun violence in the Sixth Circuit, as in the amicus brief, whether it's defending Ohio's hate crime statute on behalf of several branches of the NAACP and the Anti-Defamation League, and every other civil ***rights group*** affected by that ***law*** in Ohio, or whether it's the work I did as state solicitor.

Keep in mind, while the states have done unfortunate things at times in our history, the states today are doing some good things. At Ohio, I twice defended Ohio's set-aside statute. I was, I think one can fairly say, very passionately involved in defending Cheryl Fisher in trying to get into Case Western Reserve with her disability of blindness.

Since leaving the solicitor's office, while in private practice, I've continued to handle those kinds of representations. I sought out and was hired to represent an indigent inmate in a civil ***rights*** case in the U.S. Supreme Court. That's one of the U.S. Supreme Court cases I did.

In terms of Sandoval, I've been on the other side of Sandoval. I've done a case involving implied ***right*** of actions on behalf of Indian tribes for the National Congress of American Indians, and I was approached by them and hired by them to handle that case. That case is the mirror image of Sandoval. I've handled two death penalty cases which, of course, are about as much against states as one can ever be.

Now, when it comes to your perspective that when I've spoken to the press in the articles you referred to or when I've written articles…

SCHUMER: You don't express the sentiments of the people you represented in some of those cases in your private articles, only the ones on the other side.

SUTTON: I don't think that's true. If you look at…

SCHUMER: Well, you can submit to the record…

SUTTON: Justice -- the tribute I did to Justice Powell -- your second criterion, looking for moderates -- I mean, if Justice Powell is not a moderate, then maybe I am wrong, and maybe I'm not qualified. But I do think he was a moderate justice. He hired me. I wouldn't be sitting here but for Justice Powell hiring me back in whenever it was, 1989, 1990. And I think my tribute to him, you know, suggests that very point.

I wrote another article for the Federalist Society in the Curious Joel (ph) decision criticizing the U.S. Supreme Court majority for not allowing the Satmar Hesedam (ph) to develop a district -- why did they want to develop that district? Precisely so handicapped citizens in that district could go to their own school and not have to go to the local public school, which was the only way they could get disability services. People that were not disabled in that district went to private Hassidic schools. So I think…

SCHUMER: Well, let me say this, sir. Just with the Sandoval case -- you could do 10,000 pro bono cases for individuals, and the Sandoval case takes away ***rights*** of individuals to pursue the ***rights*** you were pursuing in those pro bono cases in one fell swoop. And I don't think some cases where you were pro bono undoes what Sandoval did. I mean, you're saying treat each case equally. I can't.

SUTTON: I perfectly understand that point…

SCHUMER: Sandoval took away ***rights*** of lots of individuals to be able to ***sue*** for just the things you were representing the pro bono individuals to be able to do, ***right***?

SUTTON: Sandoval, keep in mind, is a case -- I've never written about it, never spoken about it. That's a case where the client position of the state in that case was developed long before I was involved. The constitutional -- well, it wasn't a constitutional case -- the statutory interpretation argument was developed long before I was involved.

When I was hired by that state to handle the case in the U.S. Supreme Court, as a lawyer upholding my oath to represent my client as best I possible can, I had an obligation to make those arguments. But, of course, Sandoval is a statutory case. That can be corrected by this body tomorrow. I was simply representing them, and I would point out the Navajo case, where I represented these American Indian tribes, is the mirror image. It's an implied ***right*** of action case, and those briefs, I think, show anything but hostility to implied ***rights*** of action.

As a judge -- the reason I want to be a judge, Senator, is precisely so my client is a different client. The client is the rule of ***law***, and that's the great honor of it.

SCHUMER: But your view of what the rule of ***law*** is based on these quotes is far different than what most American judges, lawyers, students of juris prudence believe it is.

SUTTON: Well, if I could respond to that, the question was -- a similar question was asked earlier this morning. And the quote simply indicates that, of course, I believe in federalism as a principle. Federalism is a principle Court of Appeals judges have to follow in the same way they have to follow stereopsisis (ph). The problem where people disagree, quite reasonably, is the application of that principle in given cases.

SCHUMER: ***Right***. Well, let's talk about one given case. I understand your point. I want to talk about Burney (ph), the City of Burney (ph). In that one, as you know, the Supreme Court held 5-4 that Congress had exceeded its power under Section 5 of the 14th Amendment, when it passed the Religious Freedom Restoration Act.

HATCH: Senator Schumer, you're five minutes ***over*** your time, but you can continue a reasonable…

SCHUMER: Let me just ask this one, and then I'll ask for a second round…

HATCH: Sure.

SCHUMER: … because I have a bunch, and I very much appreciate that, Senator, and I'll try to sum it up quickly.

Anyway, you filed an amicus brief on behalf of the State of Ohio, and you argued the case in the Supreme Court. In that brief, you pushed an argument that went even further than the five justice majority on the court was willing to go. You argued that Congress has no power under Section 5 of the 14th Amendment to enact any ***law*** to enforce religious freedom, free speech, or any other provision of the Bill of ***Rights***. That strikes me as a pretty radical argument.

Now, I understand you've been saying today you were just representing the State of Ohio, where my good friend is from. First, it is true, of course, that many other states -- it's not inexorably that that's what Ohio had to believe -- other states, including my state of New York, came to the opposite conclusion that you came to and they filed an amicus brief on the other side. So it was hardly a neutral interpretation of ***law*** that all states would agree with here. It's not so cut and dried, and it's not so obvious where the states' interest should be.

But what I'm wondering here is who decided it was in Ohio's interest to advance such a radical proposition? Did the governor direct you to file the brief and go that far? Did the attorney general? Or did you decide to go on your own to take that extra step that no ***law*** could be passed in this regard?

SUTTON: Yes, Senator, I think there's a -- I may be miscomprehending your question, but I'm pretty sure I'm…

SCHUMER: I'm asking you did the governor or the attorney general say, "Make the argument that we should go further," or was that your argument?

SUTTON: No one made the argument. That's the false premise. The argument you're referring to was made by the party, by the City of Burney (ph), represented by another lawyer. This is quite critical, because…

SCHUMER: You didn't argue in that case that the Congress has no power under Section 5 to enact any ***law*** to enforce religious freedom?

SUTTON: In the oral argument itself, Justice Scalia asked me the very question you're raising, because he noted that the city had said Section 5 of the 14th Amendment only allows Congress to correct equal protection ***rights*** and principally about race and voting. We did not make that affirmative argument in our brief.

During the oral argument, I went second, after the City of Burney (ph) lawyer. I specifically got up and said, "That is where we disagree with the party. Section 5 by its terms covers everything in Section 1, and Section 1 includes the due process clause. The due process clause includes by incorporation free speech, free exercise of religion, all of these Bill of ***Rights*** provisions that have been incorporated." Justice Scalia looked at me incredulously saying, "That can't be ***right***." And we said, "No. By its terms, Section 5 covers all of these ***rights***."

SUTTON: So we not only didn't make that argument, but we argued exactly the opposite, that there was such a power. The question…

SCHUMER: That was in the brief? I haven't seen the oral argument, but the brief didn't say what you're saying to me now, did it?

SUTTON: Exactly. It didn't -- we didn't take a position on it, and during the oral argument -- we were an amicus. During the oral argument, I specifically contradicted this point, even though the party on our side of the case…

SCHUMER: But here's what I want to ask you. Did you -- when you filed this brief, was it on direction from the attorney general or from the governor or one of the elected officials? I don't know if the attorney general is elected in Ohio.

(UNKNOWN): He is, or she is.

SCHUMER: Did they tell you to make this argument, or did you come up with it? Just answer that yes or no, if you could.

SUTTON: The attorney general decides what arguments to make, and the attorney general had the final decision on whether that brief could be filed…

SCHUMER: Did you suggest to him that the brief be filed the way it was before he said fine? Who came up with…

SUTTON: She -- Montgomery.

SCHUMER: Excuse me. Who came up with the idea to file the brief, the amicus brief, and -- however far -- we can dispute how far it goes. But who came up with that idea? Was it their idea, and you just followed what they said, or did you come up with the idea and suggest it to them?

SUTTON: Neither of us, Senator.

SCHUMER: Well, tell me how it came about.

SUTTON: What happened was…

SCHUMER: It wasn't spontaneous generation. We…

HATCH: Senator, why don't you give him a chance to answer?

SCHUMER: I will.

HATCH: You're 10 minutes ***over*** already.

SUTTON: Senator, what happened in the case was Ohio, like many other states, after RFRA was passed, had many lawsuits filed against them by prison inmates claiming that under RFRA, they could have accommodations -- and it led to lots of litigation, some of which, I think you would agree, is somewhat frivolous -- but lots of inmate litigation.

There's a corrections section of the AG's office -- I was not involved in this decision, so I don't know if it was the correction official or Attorney General Montgomery -- I suspect Attorney General Montgomery would have been involved -- they decided in those cases to raise the defense that RFRA could not be used to bring these prisoner claims because it exceeded Congress' power. I was not involved in that decision. When the City of Burney (ph) case made its way to the courts, by that time, the office and the state -- the correction officers of the state -- had an interest in this litigation, and that's exactly what happened.

SCHUMER: I can come back to this if I'm taking too much time. I just want to go ***over*** -- I have the brief here, and I wanted to go ***over*** a few of the points here. But I'll wait.

HATCH: No, if it's on the same line of questioning, and you want to continue, go ***right*** ahead.

SCHUMER: OK. So here is the brief that you filed. This is the brief for the amici states of Ohio and the others, and it says, "Betty Montgomery, attorney general of Ohio; Jeffrey S. Sutton, state solicitor, counsel." And this is on page -- well, this is Westlaw, so I don't have the page. But it says, "Point Number 1-B. The debates ***over*** the 14th Amendment confirm that the words mean what they say. When Congress had an opportunity to adapt a broader version of Section 5, which was offered in February, 1866, it rejected the proposal. To the amici states' knowledge, moreover, no participant in the debates embraced the interpretation of the 14th Amendment offered here, namely, that Section 1 incorporates most of the first eight amendments, and that Section 5 allows Congress to enforce both the meaning of the amendments and any values underlying them."

SUTTON: That's exactly correct, Senator, and the reason it's correct is the "and." The "and" point we were making in the brief was that no one in the Congress at that point in proposing the 14th Amendment said simultaneously that Congress would have the final say ***over*** what the U.S. Constitution means, which is to say overrule Marbury v. Madison, and simultaneously say anything covered in Section 1, even incorporated ***rights*** in the other Bill of ***Rights***, would be included.

SCHUMER: But what you say here would exactly buttress -- I mean, I'll let you have the last word here -- exactly what I said, that there could be no -- it's not just some -- this is broad and sweeping, even with your "and" argument -- that Congress would have no power under Section 5 to enact any ***law*** to enforce religious freedom. Isn't that correct?

SUTTON: With all respect, Senator, I couldn't disagree more, and I think it would have been poor advocacy to say nothing was wrong to make that argument. But the proof is not only the "and" that I referred to, but the proof is to read -- is the transcript. The transcript doesn't indicate who the justice is. It's Justice Scalia. This was the exact point I made. I was challenged very hard by him on it, and I pushed back on it, and we won on that issue, on an issue I think you applaud, based on your questions. We won on that point. That's good.

SCHUMER: Well, I'm going to come back to it. I'm going to go read the brief -- I mean, the oral argument, and we'll come back to it.

We will have a second round, I presume, Mr. Chairman. Is that correct?

HATCH: Sure.

SCHUMER: Thank you. I appreciate the committee -- that I went on for a while.

HATCH: I would at this point ask unanimous consent that an article written by Jeffrey S. Sutton entitled "Justice Powell's Path We're Following" that appeared in the Columbus Dispatch be submitted for the record and made a part of the record.

(UNKNOWN): We have no objection.

HATCH: Without objection.

At this point, Senator Cornyn -- yes?

(UNKNOWN): I would just ask unanimous consent -- there are a whole bunch of letters of opposition to the nominee's…

HATCH: They can be made a part of the record, absolutely.

(UNKNOWN): … and I'd ask that they be made a part of the record. Thank you.

CORNYN: Thank you, Mr. Chairman. I'm honored to be sitting here today. This is my first hearing where the president's judicial nominees have come before the committee and put their qualifications up for evaluation by the Senate in its constitutional role of advice and consent.

Since I'm a new member of the committee, perhaps you'll indulge me for a moment just to talk a second about the timing, the unfortunate timing sequence since the president first nominated these two men and Justice Cook. It was May, 2001, that the president first proposed these judicial nominees, and yes, it has been an inordinate amount of time leading up to today's hearing before they've had an opportunity to defend themselves and to present their record and to answer questions this committee has about their qualifications to serve in the important positions to which the president has chosen them.

I know that during the opening statements, there were statements made by Senator Leahy about the past. And I want to tell Senator Leahy and those on the other side of the aisle on the committee that I -- as a new member of the committee, you'll perhaps allow me to say that I hope that the committee can have a fresh start.

I don't think it serves the interest of the American people for us to point the finger across the aisle and say because Republicans did not act on a timely basis on appointees of President Clinton that perhaps the same ought to be done in retribution when there is a Republican in the White House and when Democrats are in the majority. While I have reservations under the separation of powers provision of our Constitution about the president's proposal for a time table -- I don't believe that should be imposed -- indeed, it can't be imposed by the executive branch on the legislative branch.

But I do think that it would be worthwhile for this committee to consider on a bipartisan basis trying to come up with some rule that would guide the committee in terms of the manner in which we consider the president's nominees,

regardless of who happens to be in power, a Republican president or a Democratic president, so that we can have a timely consideration of these nominees' qualifications and an up or down vote by the members of this committee, and then, if it passes out of this committee, by the entire Senate.

I think we not only owe the men and women who are appointed, or nominated, excuse me, by the president the courtesy of that, but I believe we owe the American people and the people we serve that same thing, because, in fact, of course, for all of the vacancies that have existed as a result of the failure to act on the president's judicial nominees, there are very real human beings whose cases are not being heard in our courts. And, of course, as we all know, justice delayed is justice denied.

So I just want to say here in my maiden voyage on this committee that I would hope that we would try to work in a bipartisan way toward a fresh start and a time table that would allow timely consideration of all the president's nominees. No one's going to say a senator has to vote one way or another. That's our prerogative as members of the Senate, and we will, indeed, be held accountable to our constituencies who sent us here.

But I think that the president is entitled to his choices, subject to an up or down vote by the Senate, and that should be done on a timely basis.

LEAHY: If the senator would yield without losing any of his time on this -- he mentioned me…

CORNYN: I'd be glad to turn it ***over*** to you in a minute, but if you'd let me -- I've waited a long time to have my spot, so if you'll give me a chance just to say a couple of things, I'll then be glad to turn it ***over***.

I also come to this job representing the state of Texas in the United States Senate with the background of having served in virtually all three branches of government, as a judge, as a member of the executive branch as attorney general, and now in the legislative branch, albeit on the federal level. And, of course, I think a lot of the debate that we're hearing today has to do with what is the appropriate role of not only the legislative branch versus the judicial branch, but, indeed, what is the proper role of a lawyer in our adversary system, and whether the positions that a lawyer advocates on behalf of a client are somehow attributable to the personal beliefs and convictions of that lawyer when they argue a point of ***law***, which they're obligated to do under the code of conduct, which they may or may not agree with but which they're duty bound to propose to the court and let the court make that decision.

And so I think the debate we're having today, in many ways, is nothing new. It's a debate on the subject matter touched upon by the founding fathers, including, of course, Alexander Hamilton in Federalist Number 78, when he talked about the different roles of the branches of government.

So what I would like to maybe ask -- and I just have very few questions for Justice Cook and Mr. Roberts and Mr. Sutton -- is, first of all, Mr. Roberts, I wonder if you would please address the obligation of a lawyer, ethical obligation, to advance a legal argument on behalf of a client, even though a court may ultimately disagree with you or agree with you. What is the lawyer's obligation as you understand it under the code of legal responsibility?

ROBERTS: Well, I think the standard phrase is zealous advocacy on behalf of a client. You don't make any conceivable argument. The argument has to have a reasonable basis in ***law***, but it certainly doesn't have to be a winner. I've lost enough cases that I would hate to be held to that standard.

But if it's an argument that has a reasonable basis in the ***law***, including arguments concerning the extension of precedent and the reversal of precedent -- I think Chairman Hatch quoted the pertinent standard from the American Bar Association -- the lawyer is ethically bound to present that argument on behalf of the client. And there is a longstanding tradition in our country -- dating back to one of the more famous episodes, of course, which was John Adams' representation of the British soldiers involved in the Boston Massacre -- that the positions a lawyer presents on behalf of a client should not be ascribed to that lawyer as his personal beliefs or his personal positions.

CORNYN: And, Justice Cook, if you do have a -- as a judge, of course, your responsibilities are different under our adversary system from those of an advocate like Mr. Roberts or Mr. Sutton. What do you do as a judge when you

may have personal feelings about an argument, but where the legislature had spoken, or where there is precedent by a higher court on that very point? How do you address that as a judge?

COOK: One of the more important things for a judge to have in mind is the importance of -- or to note the humility of function that is really asked of a judge. Judges need to exercise restraint and to put aside any personal convictions or preferences.

The essential democracy of judging is that the judge will be above the fray, that the judge will consider the cases impartially and certainly objectively and conscientiously. And that's the method that I've employed as a judge for the past dozen years, and I know that to be the fairest way to judge.

CORNYN: Justice Cook, have you ever made a legal decision in your capacity as a member of an appellate court or the Ohio Supreme Court that you knew was going to be politically unpopular?

COOK: Oh, yes, I have.

CORNYN: And how do you address that in terms of what you view to be your obligation as a judge?

COOK: It's absolutely -- you know, sometimes it's hard to swallow, but it certainly is not one of my concerns that drives my function, my work. It's -- as we say, it goes with the territory, and sometimes you're called upon in doing your best work and in your faithful application of the ***law*** -- it will produce what could be, or what would be viewed as an unpopular result, and certainly that's just a part of your duties.

CORNYN: Well, having been in a similar position to you when I served as a member of the Texas Supreme Court, do you hope that the people evaluating your performance, whether you're an elected judge or an appointed judge, will understand that your judgment as a member of a court is not an expression of political opinion?

COOK: That's the whole -- some of the criticism that I have seen launched with regard to this nomination process seems to be that very thing to which you refer, Senator. It's a result oriented view of cases, which I hope would not be any indication of my qualifications as a jurist.

CORNYN: And how do you feel about result oriented decision making by a judge?

COOK: Oh, I very much -- I would never -- I don't participate in it, and I suppose we see it happen, but it's an affront, really, to democracy and to the oath that we take. To judge cases without regard to persons is the oath we take in Ohio, to administer justice without regard to persons, and, therefore, I would see it as an affront to that oath to look at the results.

CORNYN: Mr. Sutton, during some of the questioning, I think you alluded to the notion that if a court made a decision on a statutory basis, perhaps applying a statute in a particular way or that the legislature disagreed with, that the legislature would have an opportunity to come back and correct that error. I've read scholars talking about that process between the legislature and the judicial branch as a conversation between branches of government. I wonder if you would tell me your thoughts on that.

SUTTON: Well, that's very well put, Senator. I'm not sure I could put it any better, but I think you are ***right***. On statutory interpretation cases, particularly very important federal statutes that reach the U.S. Supreme Court, there is an ongoing dialog between one side of the street and the other -- across this very street is the U.S. Supreme Court -- and I think that's appropriate.

You know, sometimes courts do get it wrong. Sometimes courts aren't -- they don't figure out exactly what Congress had in mind or exactly what it wanted, and, happily, the way this process works is that Congress can come back the very next day and get it ***right***. Usually, the U.S. Supreme Court does get it ***right*** and you don't need that, but that is an answer in all situations involving statutory interpretation cases.

CORNYN: I know that during the course of this hearing and in press accounts that I've read about the qualifications and credentials of each of the three of you that there's been a suggestion made that each of you have somehow participated in decision making or advocacy, as the case may be, outside the judicial mainstream.

Mr. Sutton, have you ever argued a case that you've lost?

SUTTON: Unfortunately, all too often, yes.

CORNYN: Have you won more than you've lost?

SUTTON: At the U.S. Supreme Court, I have been fortunate. I have a 9 and 3 record there. But even then, I would echo what Mr. Roberts said earlier, that while the lawyer's duty, ethically, is to make every reasonable argument to advance your client's cause, sometimes that doesn't work, and there's nothing you can do about that.

CORNYN: Well, on those occasions when you've made an argument to the United States Supreme Court and you've lost, have you concluded that your argument was outside of the legal mainstream? Is that the necessary conclusion that you would draw?

SUTTON: My first reaction is usually that they're the ones outside the mainstream, but, happily, that lasts about an hour, and I realize that their job is to figure out what the ***right*** decision is here. And no, I don't reach that conclusion, and I don't think it's the ***right*** one. I think it's a very dangerous one to the bar, because there are a lot of clients, particularly criminal defendants, who need lawyers to really push hard on their behalf.

The system doesn't work if you don't have an adversarial process that is effective. And I do think it would be quite hurtful to think that a member of a bar, in advocating a case, whether on behalf of a state or a criminal defendant, could be told that if they lost that case or if an argument that they made wasn't successful, they'd have to hear about it if they ever tried to become a judge. That strikes me as very dangerous.

CORNYN: Mr. Roberts, if you have made an argument that someone might characterize as outside of the mainstream of the ***law***, but let's say the United States Supreme Court happens to agree with you, and you win that case, would you consider those to -- that you were outside the mainstream in making the argument, but the fact that the Supreme Court agreed with you -- what conclusion would you draw about whether that is outside the legal mainstream of American jurisprudence?

ROBERTS: Well, I would say that it is not. I mean, if you're making an argument before the Supreme Court and you prevail, you should be criticized if you, for whatever reason, declined to make that argument. That's not to say that the Supreme Court is above criticism, and it's certainly appropriate and healthy to scrutinize and, when appropriate, to criticize the Supreme Court's decisions.

But I don't think it's appropriate to criticize a lawyer for making an argument that the Supreme Court accepts. That's the lawyer's job, and he wouldn't be doing his job if he hadn't made that argument.

CORNYN: Well, let me ask you, Mr. Roberts, and I'll ask the same question of Mr. Sutton, because you are not judges…

HATCH: Senator, last question.

CORNYN: You are not judges now, but advocates under this adversary system we've been discussing. Are you willing to commit to assuming a new role and a different role, and that is as an impartial umpire of the ***law***, legal arguments, and leave your role as an advocate behind where you represented one particular view or another, but now to take on that disinterested impartial adjudicatory role?

ROBERTS: Yes, I am, Senator. There's no role for advocacy with respect to personal beliefs or views on the part of a judge. The judge is bound to follow the Supreme Court precedent, whether he agrees with it or disagrees with it, and bound to apply the rule of ***law*** in cases, whether there's applicable Supreme Court precedent or not. Personal views, personal ideology -- those have no role to play whatever.

CORNYN: Mr. Sutton?

SUTTON: Yes, Senator. You know, where one stands on an issue often depends on where one sits, and if one is fortunate enough to be confirmed to be an Article 3 judge, you sit in a position where the whole reason for being is to be fair, open minded, do everything you can to make sure you appreciate every perspective that is brought before you, whether it is an amicus brief or a party argument, and look for guidance from the U.S. Supreme Court if not controlling guidance, look for guidance from your circuit, and do your best to get it ***right***.

CORNYN: Thank you, Mr. Chairman.

HATCH: Senator Leahy wants a point of personal privilege here.

LEAHY: Just following our usual practice, once I've been mentioned by another senator…

HATCH: Go ahead.

LEAHY: … and I realize he did not want to yield for a response at that time. I would note, one, I absolutely agree that these -- the judges should be moved as rapidly as possible, and that is why in the 17 months that I was chairman, we moved more of President Bush's judges than the Republicans had in 30 months with President Clinton's. That was 100 judges.

I mention that number because even members of your party, both in the Senate and at the White House, keep referring to it as being 20 or 25. They're probably not aware -- and I'm sure the president wouldn't intentionally mislead the public, but his staff probably gave him the wrong numbers. It was 100.

I also note that these three nominees -- the Republicans were in charge of the Senate for a number of weeks after they were nominated. They did not call a hearing on them.

HATCH: Senator Kohl?

CORNYN: Mr. Chairman, may I just briefly respond? I just want to make clear to Senator Leahy I meant certainly no disrespect or intent to…

LEAHY: None taken.

CORNYN: … to somehow mischaracterize the record. All I was saying is that I hope the committee would look forward rather than backward, because I don't view that as being conducive to doing the job that I feel like we are elected to do, and that is to move these nominees on a timely basis in fairness to them and in fairness to the people we represent. And so I would hope that, together, working across the aisle, we could perhaps come up with some kind of framework that would eliminate the need for the sort of finger pointing and recriminations that I think are unfortunate, because I don't think anyone is without blame. That is my only point, and I hope I've made it clearly.

LEAHY: I felt no disrespect, and the senator from Texas has a distinguished record in public service and in all the branches, and I'd be more than happy to work with him on just the thing we both agree with.

HATCH: Senator Kohl?

KOHL: Mr. Chairman, I appreciate the opportunity to be here today. A vital element of our constitutional duty to advise and consent to judicial nominees, nominees who, once confirmed, will serve lifetime appointments, is an opportunity to examine their records, their outlook, and judicial philosophies at these confirmation hearings.

These hearings, as you know, are our only opportunity to evaluate a nominee's qualifications before casting our final vote. If confirmed, these hearings are likely to be the last time any of these individuals ever speak in a public forum regarding their views before assuming their lifetime appointments to positions that may effect the liberties and constitutional ***rights*** of every American.

So I'm somewhat disappointed that the majority has scheduled today's hearings with three appellate court nominees. To conduct confirmation hearings in such a manner is contrary, I believe, to the interest of giving senators, as well as the American people, a fair opportunity to examine and evaluate the qualifications, credentials, and judicial temperaments of these nominees. I believe it's difficult to fulfill our obligations to carefully consider the merits of these nominees in a hearing that is somewhat crowded.

I have several questions. The first is for you, Mr. Sutton. Throughout our nation's history, citizens have relied on our federal courts to protect their civil liberties and constitutional ***rights*** against the actions of states and local governments in cases involving everything from employment discrimination, school desegregation, and free speech.

However, you've spent much of your career arguing that individuals have no ***right*** to see redress in federal court for civil ***rights*** violations committed by state and local governments under the doctrine of federalism. Then why shouldn't we be concerned that your interpretation of federalism will seriously harm the ability of ordinary citizens seeking relief against violation of their civil and constitutional ***rights*** in your court should you be confirmed?

SUTTON: Yes, Senator. Thanks for an opportunity to address that. When I became involved in what we'll call federalism cases or cases representing states, I did that starting in 1995 when I was appointed to be the state solicitor of Ohio and was honored to have that job for three and a half years, And I did what all state assistant AGs or state solicitors do and did my best, as a lawyer, an advocate on behalf of the state, to defend the state in litigation.

SUTTON. As lawyers, obviously we weren't involved in the underlying policy decisions that led to the litigation. It was just our job and my job at the appellate court to defend the state's position.

It is true during that time I did get involved in the City of Boerne case, which is a federalism case. And I did work on behalf of the states during that period of time. But it's well to note that Ohio, like many other states, has passed a lot of ***laws*** that are very protective of civil liberty and I was active in those cases.

I helped defend Ohio's set-aside statute from equal protection challenges twice. The only case I had while I was working in that office, the only case I can ever remember where I had an opportunity to represent either side, was the Cheryl Fischer case involving a blind woman who had been denied admission to medical school. And I picked her side of the case to work on.

So I think the notion that because I've represented states, either the State of Ohio or other states, in cases where an individual disagreed with something a state was doing shows some bias, I guess I respectfully disagree with, one, because I was representing my client as best I could.

But, two, even if one were to assess a nominee based on their advocacy and the clients' positions they represented, there are many of them that are on the other side of these issues that I think you'd be very comfortable with and would have encouraged me.

So I do think that is an answer to the criticism that if confirmed I wouldn't be able to judge these things fair. I think it's just the opposite. I would look at what the U.S. Supreme Court has done. I'd follow it carefully. I'd look at Sixth Circuit precedent, and if it's binding, we'd obviously follow that.

KOHL: Mr. Sutton, how do you respond to those who argue that your record in private practice demonstrates certain hostility to the civil ***rights*** of people who are disabled?

SUTTON: Well, most of the representations I've done involving, let's say, civil ***rights*** on the pro-civil ***rights*** part of the equation were in private practice. And I defended Ohio's hate crime statute through an amicus brief on a pro bono effort on behalf of the NAACP, the Anti-Defamation League, and several other civil ***rights groups*** affected by hate crime legislation. We were successful in upholding that.

I represented the Center for the Prevention of Handgun Violence in defending against the constitutional challenge a Columbus assault weapon ordinance, which was preventing assault weapons in the Columbus region.

Since being state solicitor, I've continued. I've represented a prisoner inmate in a civil ***rights*** case at the U.S. Supreme Court. I've defended two death penalty inmates.

And I'm a member of the Equal Justice Foundation. I was asked to be a member of that foundation before I was nominated. And the purpose of the Equal Justice Foundation, which of course was a pro bono effort, is to provide legal services to all manner of indigent claimants, first and foremost the disabled, but those based on race and many others.

And that ***group*** has done a lot of very good things in Ohio. They've led the effort to, you know, put curbside ramps in Ohio cities successfully under the ADA.

So I do understand the question. And I understand why someone could look at the Garrett case or the Kimel case and say, "Boy, you know, how could someone take that case?" And my answer, to the extent there's a sin here, it's that I really wanted to develop a U.S. Supreme Court practice. And I was very eager to do so. And it was easier to get those cases on that side, having worked for the state before I went back to private practice.

But it didn't reflect any bias at all. In fact, it's quite the opposite.

KOHL: I appreciate that answer. I'm not as fully convinced as you would wish me to be with respect to your predilection. But clearly you are a trying to present your position as well as you can. And I do respect that.

SUTTON: Thank you.

KOHL: Mr. Sutton -- and I'd like to also ask opinions from the other two nominees -- in the past few years there's been a growth in the use of so-called protective orders in product liability cases. We saw this, for example, in the settlements arising from the Bridgestone/Firestone lawsuits.

Critics say that those protective orders oftentimes prevent the public from learning about the health and safety hazards in the products that they use. In fact, the U.S. District Court for the District of South Carolina recently passed a local rule banning the use of sealed settlements altogether.

So I'd like to ask you, Mr. Sutton, and then the other two nominees, should a judge be required to balance the public's ***right*** to know against a litigant's ***right*** to privacy when the information sought to be sealed could keep secret a public health and safety hazard?

And what would be your views regarding the new local rule of the District of South Carolina on this issue, which is, as I said, banning the use of sealed settlements altogether?

Mr. Sutton, you first.

SUTTON: Yes, Senator, I have to confess this is not an area in which I've practiced. And I can't think of a case where I've actually had to deal with this issue. So as a court of appeals judge, I would do what all court of appeals judges are obligated to do and look very carefully at U.S. Supreme Court precedent on these types of issues.

I suspect you're ***right***, that what U.S. Supreme Court precedent requires is exactly the balance you're talking about, a balance between the public's ***right*** to know and the privacy ***rights*** of whatever that particular defendant might be.

But I can't say I know that for sure. What I can tell you is that I would discern what that precedent requires. I'd look at what Sixth Circuit precedent requires. I'd look very carefully and open- mindedly at the argument of either party on this kind of issue -- and I certainly appreciate the perspective you have on it -- and do my best, having done all that, to decide it correctly.

KOHL: Well, you're aware of some of these secret settlements that have in effect prevented vital information from being passed on to people still using defective products who are unaware of that because a secret settlement was made in a court. You're aware that these things have happened.

SUTTON: Not that aware, I have to tell you.

KOHL: Really? You don't know that at all?

SUTTON: Well, I'm just saying I haven't worked in one of these areas. I understand what you're saying. I've read news reports along those lines.

KOHL: ***Right***.

SUTTON: But I'm just making the point it's not something I know very much about at all. In fact it's the opposite. I know very little about it legally. And as a court of appeals judge…

KOHL: It's such an important issue, without trying to be unduly difficult with you, that it would seem to me you would have a pretty strong opinion on it. But I appreciate that.

Mr. Roberts, how do you feel about the validity of maintaining or throwing out secret settlements that are made which prevent other people who may be using these defective products from knowing that they are defective, like defective tires, for example, defective medical devices, for example?

ROBERTS: It's not an area that I have litigated in either. I certainly am aware of the cases as they've come up. Although I don't think it's an issue that the D.C. Circuit has addressed. At least I'm not aware that it's done so.

And I hesitate to opine on it without having studied the ***law***. I certainly would obviously follow the Supreme Court precedent and the precedent of the circuit if I were to be confirmed.

I suspect that you're correct that the applicable ***law*** would involve some balancing. There are some interests in sealing settlement in some cases. But I'd be very surprised if that required or permitted sealing in a case where that actively concealed a harmful condition on an ongoing basis that was continuing to present a danger.

But again, I'm just surmising at this point. And as a judge I would apply the ***law*** in the circuit or in the Supreme Court.

KOHL: OK.

Ms. Cook?

COOK: I agree with Messrs. Sutton and Robertson (sic), of course balancing judges do. Balancing is one of our regularly engaged-in endeavors. So this certainly sounds -- the issue would demand balancing if there is danger and harm to others, potential danger, in the absence of disclosure. I understand that balancing would be important.

KOHL: I asked the question because there have been ***over*** the years and recent years cases where judges have approved these kinds of settlements between a company and a litigant. And that precluded in many cases thousands and thousands of people who were using defective products from knowing that these products were defective.

Now, in this simplistic kind of a presentation that I'm trying to put before you, which is fairly black and white, while I'm not sure whether you're going to answer, I would hope as a judge -- I would hope -- that you would not allow any settlement that endangered the health and safety of the users of products to be made simply to benefit a corporation who wanted to keep that knowledge from the users of that defective product.

Where you'll come out on these issues in the event you're confirmed I don't know. But obviously you know where I'm coming from. And I think you know where most Americans would be coming from.

Last question. One of my priorities on this committee is my role on the Antitrust Subcommittee. Strong antitrust enforcement is essential to ensuring that competition flourishes throughout our country, which benefits consumers through lower prices and better quality products and services.

Federal courts are essential to the firm enforcement of our antitrust ***laws*** and to ensuring that anticompetitive conduct is sanctioned.

Many antitrust questions are decided under what is known as the rule of reason, in which the harm caused by the business conduct at issue is balanced against full competitive justifications. This doctrine gives a great deal of discretion to the courts to determine whether or not the antitrust ***laws*** have been violated.

What would be your approach to deciding antitrust issues under the rule of reason? More generally, please give us your views regarding the role of the judiciary with respect to the enforcement of antitrust ***law***.

Mr. Sutton?

SUTTON: Yes, Senator, this too is an area where I have not had an active litigation practice. In fact, just sitting here I can't actually think of one case I've been involved in when I was working for the State of Ohio. Ohio's one of the states that ***sued*** Microsoft, so I have some familiarity with that case and some peripheral involvement with that one.

But clearly, in terms of your question, the federal courts have a critical role in enforcing the antitrust acts and antitrust ***laws***. And that's what the U.S. Supreme Court has said. And I can't imagine a court of appeals judge not following the precedents to that exact effect.

KOHL: Mr. Roberts?

ROBERTS: As a private lawyer, I have actually represented probably more plaintiff's and enforcement interests in antitrust actions than defendants. I represented the state attorneys general in the Microsoft case. I represented several private plaintiffs in antitrust appeals as well. Handled some antitrust cases when I was in the solicitor general's office.

I've also represented corporations accused of antitrust violations. And I think that balanced perspective is something that's valuable for a judge. I certainly think a lawyer coming into court, if I were to be confirmed, representing a plaintiff in an antitrust action should take some comfort in the fact that I've done that. And a lawyer representing a defendant should take some comfort in the fact that I've done that as well and I have the perspective of the issue from both sides.

So again, obviously as a judge I'd follow the binding Supreme Court precedent and the precedent in my circuit. But I would hope that in doing so I would have some added perspective from having been on both sides, both the plaintiff's side and the defendant's side, in antitrust enforcement actions.

KOHL: Thank you.

And, Ms. Cook?

COOK: And as in all the issues that a judge must consider I think the importance would be the conscientious weighing and balancing and understanding the rule of reason within the confines of the existing ***law*** and that certainly other decisions in that area would inform the decision that I might be called upon to make. So I would apply the structured, principled decisional process.

KOHL: I thank you.

Thank you, Mr. Chairman.

HATCH: Well, thank you, Senator.

We'll turn to Senator Sessions now.

Senator Sessions, you're up.

SESSIONS: I'd like to ask the three of you one question. You've had great experience and you're lawyers of integrity and ability.

Do you believe that a conscientious judge can read the Constitution, read statutes, and prior case authority and render and be able to interpret a statute? Do you believe that you're capable of that? I'd like to hear your answer to that.

SUTTON: Senator, you're looking at me, so I'll take that as a…

SESSIONS: (inaudible) yes. We'll take you first.

SUTTON: … I should start. Yes, thank you.

SESSIONS: You're smiling, I thought.

SUTTON: Absolutely. I do. There's no doubt there are difficult cases. There are cases at the margin where text gets difficult to interpret. But yes, I do think what lawyers do is at the end of the day what judges do, which is read constitutions, read statutes to determine what the framers or that legislative body meant. Those words have meaning. There are statutes, rules of construction that give guidance to the meaning of those words. And judges have an obligation to follow those rules and to follow the text of the statute or in some cases the text of the Constitution in cases before them.

And happily, as a court of appeals judge, court of appeals judges have a lot of guidance from the U.S. Supreme Court on those very things. And a court of appeals judge would of course follow that.

SESSIONS: Mr. Roberts, do you agree?

ROBERTS: Yes, I do. In other words, I do think there is a ***right*** answer in a case.

ROBERTS: And I think if judges do the work and work hard at it, they're likely to come up with the ***right*** answer.

I think that's why, for example, in the D.C. Circuit 97 percent of the panel decisions are unanimous, because they are hardworking judges and they come up with the same answer in a vast majority of the cases.

There's certainly going to be disagreements. That's why we have courts of appeals, because we think district courts are not always going to get it ***right***. But I do think that there is a ***right*** answer and, if the judge and lawyers would just work hard enough, they'd come up with it.

SESSIONS: Judge Cook, do you agree?

COOK: Yes, I do. I think that judges search -- I think it's great when judges search for objectified meaning, that is, the meaning that a reasonable person would gather from the text that a judge is called upon to interpret.

And certainly I really think in good faith judges working conscientiously can come to different conclusions sometimes. But I really think that there are objective boundaries within which most cases are really decided, within those boundaries.

SESSIONS: Well, I agree. I spent 15 years in federal court every day as a federal prosecutor. If I had a case that answered the question, almost invariably the judge ruled that way. If the ***law*** was against me, you could expect the judge to rule against me.

But we have a theory, a foot, in America, sort of a postmodernism illness, deconstructionism critical legal studies that all ***law*** is politics and that you are being asked about your political views about matters. And that's being promoted to a large degree, I think, by people who don't really understand that in every court in America all ***over*** this country, day after day after day, judges are reading statutes and rendering sound rulings that never get appealed. If they do, they get affirmed unanimously, as you mentioned.

Because I believe we can ascertain the plain meaning of words and can render consistent verdicts. And to me that's what justice is.

And I am troubled by the idea that you'd be brought up and you'd be challenged on your personal political views, when I know you as professionals know that it makes no difference what your personal view is. If the Supreme Court has held otherwise or a statute is the other way or the Constitution is the other way, you'll follow that.

Am I correct in that?

SUTTON: Absolutely, Senator. I mean, that is the whole privilege of being a judge, that your client is the rule of ***law***. And the only way the rule of ***law*** has meaning is if judges determine the meaning of statutes and constitution based first on what the words say and suggest and then based on other indicators of legislative or constitutional meaning. I agree with you.

SESSIONS: Mr. Roberts?

ROBERTS: Yes, you know, if it all came down to just politics in the judicial branch, that would be very frustrating for lawyers who work very hard to try to advocate their position and present the precedents and present the argument. They expect the judges to work justified (ph). And if the judge is going to rule one way or the other, regardless of the arguments, well, he could save everybody a lot of work. But the rule of ***law*** would suffer.

And I know that's of particular concern in the D.C. Circuit. I know one of the things that frustrates very much the judges who are on that court, all of whom are very hardworking, is when they announce a decision and they're identified in the press as a Democratic appointee or a Republican appointee.

That makes such -- it gives so little credit to the work that they put into the case. And they work very hard. And all of a sudden the report is, well, they just decided that way because of politics. That is a disservice to them.

And I know as an advocate I never liked it when I had a political judge, when I was in front of a political judge. Because, again, you put a lot of work into presenting the case and you want to see that same work returned. And the theory is that that will help everybody reach the ***right*** result. And I think that's correct.

SESSIONS: Ms. Cook?

COOK: Likewise.

Senator, I can't tell you who's quote this is, but I ascribe to the view that this quote is, the rule of ***law*** should be a ***law*** of rules. And I think that's somewhat the view you take. And certainly it is my experience that the cases are decidable and usually are decided based on rules.

SESSIONS: I just think that's so important. And I think it's dangerous for us to say we're going to determine people's ideology and then we're going to vote to confirm them or not.

And to our friends in the disability movement, let me say to you, as I read these cases, they have nothing whatsoever to do with the policy of providing protections for people with disabilities. It's a matter of constitutional questions such as sovereign immunity.

I know that Senator Robert Byrd and other senators in our body defend tenaciously the prerogative of the United States Senate. And if a coequal branch does not defend its prerogatives, it will lose those privileges.

And attorney generals are that way, aren't they, Mr. Sutton? I know Attorney General Corning (ph) is here. But I was attorney general, and I did not feel that I would have done my job if on my watch the legal prerogatives of the State of Alabama were eroded by my failure to defend those ***rights***.

And you've worked for the state attorney general's office. Isn't that true of any attorney general?

SUTTON: I think it's true not only for state attorney generals; it's true for the U.S. solicitor general and the U.S. attorney general, that just as if a state is ***sued*** in any case, their lawyers have an obligation to do their best to represent the client. The lawyers aren't involved in the underlying policy decision that leads to the dispute that leads to the lawsuit.

The lawyers come in once that dispute can't be resolved outside of court. And at that point, whether it's a state AG or the United States solicitor general, you know, whether it's a claim of racial discrimination, disability discrimination, those lawyers have in the past and do continue to represent the governmental body, which is publicly elected.

And that's, I think, an honor for people who have had the chance to represent the people by working in an attorney general office. And I'm sure people that have worked in the U.S. solicitor general's office would say the same thing.

SESSIONS: Even if the immediate short-term effect may be to undermine some social policy that is maybe popular at the moment or ***right*** even, if it's not done in a proper legal way or it's done in a way that undermines the long-term prerogative of a state, you would expect a state to defend against that, would you not?

SUTTON: Well, I think every state has to make a decision what it's going to do in a given case. But it is true, and my understanding -- I don't know all state constitutions, but I'm familiar with many of them -- that the state attorney generals don't have choices in these matters.

And that's particularly true in sovereign immunity cases, where at the end of the day there's a claim of -- an individual's claim, but there's also a claim for money. And the AGs -- it's the same with the U.S. solicitor general -- they don't have the keys to the vault. The keys to the vault are with the legislature and the executive branch. And the lawyers have an obligation to defend as long as the executive branch tells them to defend.

SESSIONS: Well, as a former attorney general and former United States attorney representing the United States in court, I can tell you an attorney general that allows a state's sovereign immunity to be eroded I think is going to have a difficult time justifying that position.

And so with regard to the Alabama case, you not only filed a brief on behalf of the State of Alabama, but you also gained support from a number of other attorneys general, including a democratic attorney general Mark Pryor, who's now a member of this Senate. Is that not correct?

SUTTON: I think that is true. There was an amicus brief of states. And I'm fairly confident that Arkansas joined that brief. In fact, I thought that brief was balanced half Democratic AGs and half Republican AGs, is my rough recollection.

SESSIONS: And they saw the issue not as a disability issue but as a question of state power and sovereign immunity; is that correct?

SUTTON: That's my understanding. I haven't read that brief in a while. But I think it did make the point that just as the United States has a sovereign immunity power, so do the states, at least as U.S. Supreme Court has construed it to date.

SESSIONS: Well, I think that's important for us to think about.

You defended criminals, have you not, and advocated? Any legal, justifiable position that they were entitled to you were prepared to defend?

SUTTON: I know you're a former prosecutor, but yes, I have on several occasions. And I think members of the bar -- these are pro bono efforts, and I think members of the bar not only should but have a duty to do those kinds of representations.

SESSIONS: And so I don't think there's anything wrong with you defending states who feel they're wronged and their ***rights*** are not being upheld. And in fact that case you took to the United States Supreme Court, the Supreme Court agreed with you.

SUTTON: It turns out they agreed with the University of Alabama, yes, they did. Yes.

SESSIONS: And in that case you never argued against the ***rights*** of the disabled but against the ***rights*** of Congress to abrogate a state's constitutional ***right*** to sovereign immunity. I mean, that was the question, was it not?

SUTTON: That is the question. And it is an important point. Because even after the Garrett case, every state in the country is entitled to waive its immunity from ADA lawsuits for money damages. In fact, many states do that to the extent their legislature permits it. And just as Congress can do it when federal employees are ***sued*** for disability discrimination. Sometimes there's a waiver, sometimes there's not. But nothing about either the brief we argued or the decision of the case bars a state from waiving its immunity from suit in federal court. That could obviously happen.

SESSIONS: And the United States Government can intervene and ***sue*** a state for money damages for disability violation, can it not?

SUTTON: That's also true.

SESSIONS: And a private person can ***sue*** the state for injunctive relief to get the state enjoined from unfairly treating them due to a disability; is that not correct?

SUTTON: In fact, get their job back, exactly. Yes.

SESSIONS: And private persons can ***sue*** under a state's own ***laws*** to enforce money damages or other relief.

SUTTON: That's true, yes.

SESSIONS: So it's just this narrow point of sovereign immunity on which the Congress up and took it upon itself to limit the state's sovereign immunity that this case turned on.

SUTTON: That's true. And even then Congress can still do the same thing either by passing new legislation with different fact findings or by enacting spending clause legislation. As I'm sure you know, Congress has already done that under Section 504 of the Rehabilitation Act. In the Garrett case Ms. Garrett has a claim which is still pending under that very ***law***.

So it was just about Section 5. And of course it had nothing to do with the spending clause, where Congress has conspicuously broad powers.

SESSIONS: Well, I just would say in conclusion how much I appreciate the three of you. You're outstanding nominees with terrific records, unsurpassed experience handling some of our country's most difficult cases in ways that I think have shown your mettle and your ability.

I congratulate you on the nominations to these important offices. I feel like it's good for us to go through this process so that we confront the issue that just because a lawyer takes a position in a case does not mean that they are against the policy involved in the case. It does not mean, if you defend a criminal, that you are for criminals or you're for ***law*** breakers. It means that criminals have certain ***rights*** and the ***law*** has to be carried out in certain proper ways.

And I believe that's your record in all of these cases. And I thank you for that. And I believe the president has done an outstanding job in these nominations.

HATCH: Well, thank you, Senator Sessions.

We'll turn to Senator Durbin now.

DURBIN: Thank you, Mr. Chairman.

I want to thank the nominees who are here before us today for your patience. And I hope that you understand that it is an unusual circumstance when we have three judges at this level being considered at the same time this early in the session, particularly when there are many questions to be asked of each of them. That is meant that this hearing has gone on much longer than usual, and it's likely to continue for some period of time.

I know the chairman of the committee. And we've worked together in past years. And I'm sure we will in the future. I just hope that the pace of the hearings is not such that this will appear to be a receiving line at an Irish wedding in terms of the nominees. I think we need to take time and deliberate, to ask important questions so that the people of this country know a little bit more about those who seek lifetime appointments to the second highest court of the land.

I would like to ask my questions of Professor Sutton because I have in this first round tried to focus on his activity and his career. And I will return to the other nominees in another round.

Professor Sutton, I've listened to some of your early testimony before this committee. It is interesting, as I reflect on it, if you accept the premise that was recently stated by my colleague from Alabama that this is a somewhat mechanical and automatic process, that a judge seeks the circuit court, for example, simply to read past cases, apply them to current cases, and move on, then it would strike me as odd that we don't have more nominees who are Democrats before us from the Bush White House.

DURBIN: Apparently there is a belief in the White House that even though it's a fairly automatic and mechanical process, they want to make sure that if they're going to err, they're going to err on the side of people who have similar political views to the president.

That suggests to me that this is not an automatic process. And I think, I hope that you would concede that many close cases give judges at every level a chance to see a new facet of the ***law*** that hasn't been seen before and perhaps in seeing it and ruling on it to change the course of that ***law*** in its future. Would you concede that point?

SUTTON: There's no doubt even court of appeals judges deal with difficult issues.

But I do think a point that was raised earlier is a good one, that whether it's the Sixth Circuit, other courts of appeals, or even the U.S. Supreme Court, a high percentage of cases are either unanimous or fairly unanimous, if it's at the U.S. Supreme Court, precisely because there usually are ***right*** answers.

But I couldn't agree with you more that every now and then you do get very difficult cases. Of course the more difficult the case, and particularly if they involve the constitutionality of a federal ***law***, the more likely the U.S. Supreme Court would review it.

But I think your point is a very good and a fair one.

DURBIN: I think it's an important one. Vast majority of bills and resolutions in the House and Senate never get any attention, nor should they. A handful of important bills come before us, and we have to make a decision as to whether they should be the ***law*** of the land.

And that really goes to the point that's been made ***over*** and ***over*** as to your values, who you are, what you're going to do in those close calls when you have a case that truly is going to set a new precedent that is really going to open up the new line of thinking. And I think the fact that the reaction to your nomination has been so heated is an indication that many people are concerned that when it comes down to those close cases, when the issue before the court is an issue of civil ***rights*** or human ***rights***, the ***rights*** of minorities or women or the disabled in America, that you have shown a pattern of conduct of insensitivity by virtue of your advocacy in the past.

I've never seen a hearing where we've had so many disabled Americans come forward, frankly, to protest your nomination. It tells me that they're concerned about you and what really is in your heart.

Now, in the past in our history it's seldom do people announce publicly that they're prejudiced. They don't say that. It's rare. The primacy of states' ***rights*** has historically been the beard for discrimination in America. Only a few

people are bold enough to just state forthright that they oppose civil ***rights***, the ***rights*** of women, minorities, and the disabled.

Instead, most have argued that they were not opposed to civil ***rights*** but only the power of the federal government to protect them. History has not been kind to those who concealed their sentiments in this legal distinction.

Mr. Sutton, Professor Sutton, your legal career has been spent practicing time and again in the shadows of state ***rights***. You've said in publications that have been quoted ***over*** and ***over*** again how much you value federalism and this whole issue where time and again you've found yourself in key cases, like Garrett, on the side of states' ***rights*** as opposed to individual ***rights***. You have become a predictable, reliable legal voice for entities seeking to limit the ***rights*** of Americans in the name of states' ***rights***.

Do you believe that the Garrett case, despite what Senator Sessions has said, and its conclusion expanded or restricted the ***rights*** of disabled Americans?

SUTTON: Well, there's no doubt that restriction in the sense that in that particular case someone was seeking relief and they didn't get it. But in that particular case, as I think I pointed out earlier, Ms. Garrett's Section 504 Rehabilitation Act claim is still pending, so she still may get relief, would be the first point. The second point is what the court did -- and I would point out that is not a case I have spoken publicly about. That's not a case I've written about. It was a case I was arguing on behalf of a client. I think the state did deserve representation at the U.S. Supreme Court. I think it would have been quite unusual had they not had it.

But even in that case with all of that, all it said was that the state at the end of the day was in charge of deciding when they could waive their sovereign union, the same way the U.S. Supreme Court has said the same thing about the United States government. It doesn't mean in future cases claims can't be brought in federal court if states waive them. And many states have waived them.

But there's one point, though, that I -- some of the charges are -- they're, first of all, charges. And you asked about my values. And I think that is a fair question. It's an important question. And I do want to respond to that.

There's no doubt this country's history, when it comes to states' ***rights***, is despicable. There's no room for argument about that. And I think you know that's exactly how I feel. The worst violations, the most egregious violations when it comes to states' ***rights*** of course came in the area of race discrimination. And there, if people are going to look at my advocacy, I hope they would appreciate that on a pro bono basis before I was state solicitor I defended Ohio's hate crime statute on behalf of every civil ***rights group*** with an interest in that type of legislation -- I know the federal government is thinking of doing the same thing -- on behalf of local chapters of the NAACP, the Columbus Urban League, several others.

And while state solicitor, I helped defend Ohio's set-aside statutes. So I do -- I know it's very important in this process for you to raise those questions, and I assume you want me to answer them. And that's -- but they're (inaudible)…

DURBIN: But there had to be this moment of truth for you as an attorney when you were asked to represent the board of trustees at the University of Alabama, when you knew that your success in that case would restrict the ***rights*** of disabled Americans, which you've conceded here, and you decided, not because you were assigned or required to, that you were going to go forward in that role of advocate. Now, there are many other examples that are exceptions to this rule, but the one that troubles the people who have gathered here in the disability community is that conscious of what you were seeking, you went forward and said, "I'll be the advocate of the cause that will restrict the ***rights*** of disabled Americans."

Did that ever give you pause as to whether or not that was the just thing to do?

SUTTON: Sure, the case was an excruciatingly difficult case, and it did give me pause. But first of all, I did not pursue the case. I was approached by the state and was hired by the state.

And I did have the option, you're ***right***. I had the option of saying no. But remember, that's the exact same choice that the U.S. solicitor general's office has been faced in 88 cases where they have said a claim cannot be brought by a federal employee…

DURBIN: (inaudible) solicitor general is not seeking appointment here today or our approval. It's you.

SUTTON: No, I'm not saying -- I'm not making that point. I'm making the point that this is the job of an advocate. And the job of an advocate is not to decide, as in an exercise of vanity, what would I do? What could I do? It was long too late for that. I was not involved in the underlying decisions of the University of Alabama in terms of what to do with Ms. Garrett. I wasn't involved in the development of their constitutional arguments in the district court and in the court of appeals.

I became involved when they asked me to represent them in the U.S. Supreme Court. And I think if I have a sin here, the sin was that I did want to develop a U.S. Supreme Court practice. There's no doubt about that. And maybe that's what led me to take the case.

But, Senators, I've done several cases, in fact more cases, on the disability ***rights*** side of the equation.

DURBIN: Do you think there would have been a time when you would have had that chance to argue before the Supreme Court and would have said to yourself, "Rather than get another notch in my gun to go up to the Supreme Court, I just don't want to be identified with a case that restricts human ***rights***, civil ***rights***, the ***rights*** of the disabled"?

(APPLAUSE)

HATCH: Let's -- let's have order.

SUTTON: Senator, I respectfully -- and you know this is a difficult place to make this point in this forum. But I couldn't disagree with you more. I think it is exceedingly wrong to ascribe the views of the client to the lawyer. That's exactly what the ABA Code says. It's exactly what would prevent any criminal defense lawyer.

I mean, I've represented two capital inmates. It doesn't mean I agree with their underlying acts or what happened. They deserved a representation. I've provided that representation.

The one case -- and this is I think the fair response to your question and your concern -- I've only had one case that I can think of where I was given an opportunity to represent either side of a civil ***rights*** case. That's the Cheryl Fischer case. When that came up to the Ohio Supreme Court, I was given the opportunity to represent Cheryl Fischer, help her get into Case Western University as a blind medical student, or represent the side of the state universities who wanted to deny her that ***right***.

I recommended to the attorney general -- it was her choice of course -- that the state solicitor ought to argue that case. And I thought she had the better side of the argument. I did everything I can or could to make that argument.

I've represented the National Coalition for Students with Disability in applying federal ***law***, the Motor Voter ***Law***, so that students with disabilities have access to the ***right*** to the vote.

In a case pending in the Ohio supreme court, the Gobo (ph) case, I inserted an argument not made below that an application of Ohio insurance ***law*** would violate the ADA.

My father, you know, ran a school cerebral palsy children. I mean, I wouldn't say this is a perspective that is lost on me. But I did feel at that time my higher obligation was to the client and that they did deserve a ***right*** to representation before the court.

DURBIN: Well, I'll concede that you have represented many different clients. But when it comes to the cases that you've been involved in that had the broadest impact on the greatest number of Americans and their ***rights***, it is hard to find a case that really in your career that matches the Garrett case.

What was decided by the court by virtue of your argument has denied ***rights*** disabled people across America. It has restricted their ***rights*** to recover under the ***law***.

And as Senator Schumer said earlier, you can represent a lot of individual defendants before you make up for the loss of ***rights*** to a class of individuals, disabled individuals, because of that decision.

May I ask another question?

As we've tried to monitor the legal DNA of President Bush's nominees, we find repeatedly the Federalist Society chromosome. And I would like to ask you as an officer of the Federalist Society -- and I know every time I raise this at a hearing the ***right*** wing press screams bloody murder that this is dirty politics, but you have represented that you're an officer of the Federalist Society -- where is it that membership in the Federalist Society has become the secret handshake of the Bush nominees for the federal court?

SUTTON: Well, I don't know that that's true. I don't have any idea whether it is true.

The one point I would make is while I am a member of the Federalist Society, I'm also a member of the Equal Justice Foundation. And I hope in thinking about my nomination -- I know how important it is to realize who this person is and what kind of judge they would be -- you will keep in mind that while I have been a member of the Federalist Society, I was asked separately to join the Equal Justice Foundation, whose whole purpose is to provide legal service to the indigent. That of course is a pro bono effort. It takes more time than anything I do for the Federalist Society.

And as to the rest of the your question, I don't know the answer. But I hope you…

DURBIN: Let me just ask you your impression. What in your mind is the Federalist Society philosophy that draws so many Bush nominees to the federal bench to its membership?

SUTTON: Well, I have no idea of what their philosophy is. In fact my understanding is they don't take --

DURBIN: Are you an officer? Are you not an officer?

SUTTON: I'm an officer of the separation of powers working ***group***, that's true. But that doesn't mean there is a philosophy. In fact my understanding of the society is they don't take positions on cases.

The one point I would make is my understanding of the purpose of the Federalist Society and the reason I was attracted to joining it was that they've tried to sponsor forums to discuss important legal issues. And most of my involvement has been in the Columbus chapter to that end.

And I think the Federalist Society has done a very good job having presentations that involve speakers on both sides of the issue. In fact, most of the criticism I have heard of the federalism decisions all came from Federalist Society publications. First time I saw anyone criticize Lawrence Tribe was in a Federalist Society publication.

My article about the City of Boerne decision was a point- counterpoint piece next to Judge McConnell's, Judge McConnell saying it was wrongly decided, my thing was rightly decided.

So I do think they tried hard to do that. I can understand someone having a different perspective on that.

DURBIN: Let me ask you about your representation of tobacco companies in your private practice. You represented Lorillard Tobacco in challenging a Massachusetts regulation regarding the sale and promotion of tobacco products. In that case you argued these regulations violated the free speech clause of the First Amendment.

In addition, you've been critical of the $145 billion tobacco judgment in Florida. Although you're an advocate of states' ***rights*** in some contexts, you don't seem to like what they've done to tobacco companies.

What is your view generally about the efficacy of tobacco litigation? And do you feel that's ever justifiable?

SUTTON: Well, the -- RJR is a Jones Day client. And that's how I became involved in that case. I was not involved in that case in the lower courts. I became involved in it when they tried to seek certiorari before the U.S. Supreme Court.

And at the time I had a U.S. Supreme Court practice. And I was asked by the firm to become involved in the case. And I did. I mean it was a firm client. And I think it would have been a rather unusual decision on my part to not represent them, be unwilling to represent a client of the firm.

DURBIN: Did you say RJR and Lorillard are clients of the firm?

SUTTON: No. RJR -- all of the -- the name of the case goes by Lorillard, but it had several tobacco companies in it.

DURBIN: And RJR was your client.

SUTTON: Exactly. Exactly.

And in terms of the case itself, under the free speech clause -- that was the main issue in the case -- it's no surprise in most of the biggest U.S. Supreme Court cases the free speech argument is not on behalf of a popular client. I mean that's often -- or for that matter, popular speech. That's exactly the way it traditionally goes.

And I think if you looked at the 20 biggest free speech cases in the country, I suspect you'd disagree with the underlying speech in every single one of them.

DURBIN: I understand that. And historically…

SUTTON: But it's a constitutional ***right***. And even though they may be -- you know, it's a company with which people can disagree with the work they're doing, their products are legal. They've not been outlawed. And I think they do have a ***right*** to raise a constitutional defense.

DURBIN: I don't argue with that premise at all. Again, it's a question about that moment in time when the senior partner came in and said, "Jeff, want you to take up the cause of RJR. Somebody's trying to restrict their advertising that's appealing to children."

DURBIN: And you said, "I'll take it." That's a tough call.

And lawyers in their profession make those difficult calls. But I'm again trying to find out what is driving you and motivating you in terms of your legal values.

And as you said, it was one of the clients of the firm.

I don't know how much time I have left here.

HATCH: Your time has been up.

DURBIN: All ***right***. Thank you very much, Mr. Chairman.

Thank you, Professor Sutton.

HATCH: Well, we'll begin our second round then.

DEWINE: No. I haven't gone yet.

HATCH: Well, could I ask one question before you do, and then I'll turn to you?

DEWINE: But I haven't done anything on my first round.

HATCH: OK. Well, I didn't know whether you…

DEWINE: No. We haven't completed this round.

LEAHY (?): I thought you did a second round.

DEWINE: No. I haven't done a second. I haven't done a first round.

HATCH: Well, let's turn to Senator DeWine.

DEWINE: You can go ahead, Mr. Chairman.

HATCH: No. No. You go ahead. That's OK.

DEWINE: Mr. Sutton, good afternoon. I know it's been a long day already for all of you. And we appreciate you all hanging with us.

HATCH: Excuse me just one second.

If you need a break, just raise your hand and I'll be glad to --

SUTTON: I'm proving I'm older than I look. I'm getting there. But I'll go another half-hour.

HATCH: Why don't we go another half-hour, and then we'll -- let's go another 15 minutes with Senator DeWine. And then we'll break…

DEWINE: See who has the guts to raise their hand, ***right***?

HATCH: We'll break for five minutes and then come back.

DEWINE: The good news for all of you, it is a lifetime appointment, so…

LEAHY (?): You probably feel like today's been a lifetime.

DEWINE: Probably is ***right***. Absolutely.

Mr. Sutton, I don't pretend to be a legal scholar. But I did have the opportunity to look at a lot of the cases that have gotten the bulk of the publicity in regard to the cases that you've argued before the Supreme Court. And I was here in the Congress when we passed the ADA.

And I must be candid and tell you that I think if I was on the Supreme Court I would have decided these cases differently. I don't agree with the decisions. I don't agree with the bulk of the decisions that you argued in front of the Supreme Court, at least on the controversial ones.

But I'm not sure how relevant that is. In fact, I don't think it's relevant at all.

I want to follow up the line of questioning from my good friend Senator Durbin. I wish he was here. I know he had to go to another meeting.

But I think as we go down and start down a very dangerous path when we probe deeply into the clients and the causes that nominees have either advocated or represented. I think it's legitimate. I think we look at them. But I think when we start down that path it is rather dangerous.

It's dangerous if we conclude that a person cannot go on the federal bench because of certain clients that they have represented or because of certain positions they may have taken in arguing a case before the Supreme Court of the United States or any other court. If we follow that position, it would be many principled lawyers in our history who never would have served on the federal bench.

But more importantly, if this committee would be saying that and if this Senate would be saying that, I think it would have a chilling effect in the practice of ***law*** as we know it in this country. How many young lawyers would say to

themself, "I can't take this case. I can't represent this client. I can't advocate this position because, you know, someday I may want to serve as a judge. Someday I may want to be on the federal bench"? And all the young lawyers I think at one point in time think that they would like to be a judge. Some of them get ***over*** it. But many of them feel that way at some point.

So I think it's a mistake. I don't fault any of my colleagues for engaging in that conversation, that give-and-take and trying to find out what is in Mr. Sutton or Mr. Roberts' or Justice Cook's heart and soul. I think that's legitimate.

But if we extend it to the natural consequence of that discussion and really say, "No, we can't put that person on the bench because they advocated that position," I think that is a very, very serious mistake. And whether it is, you look back in history and whether it's John Adams and the Boston Massacre or whether Thurgood Marshall representing rapists or whoever, whatever the case might be -- and we can go back in history. I think it would be a very, very serious mistake. And if we had applied that ***law***, we would have been denied some very great people on the federal bench and in politics and in government. And I think it would have been a mistake.

I think ultimately, Mr. Sutton and all of you, the question is, will you follow the ***law***? Will you follow the Constitution? And will you follow the precedent? I assume from each one of you the answer is yes.

Mr. Roberts?

ROBERTS: Yes, Senator.

COOK: Yes, Senator.

DEWINE: Mrs. Cook?

COOK: Yes, indeed.

DEWINE: Mr. Sutton?

SUTTON: Yes, Senator.

DEWINE: Mr. Sutton, let me read you the entire section of the 1990 Legal Times article that was quoted to you. It's only a part of the article, but I think it was excerpted a little bit and I want to read it to you.

Quote, "Sutton says he and his staff are always on the lookout for cases coming before the court that raise issues of federalism or will affect local and state government interests," end of quote.

What position did you hold at that point in time? And who was your staff? What were you talking about?

SUTTON: Yes, Senator, I was the state solicitor at that point.

DEWINE: At that time you were a state solicitor.

SUTTON: I was state solicitor.

DEWINE: Why were you looking for these cases?

SUTTON: Because Betty Montgomery, the attorney general, correctly realized -- I think she had some vision in this area -- that just because a case comes from another state, another set of courts, and goes to the U.S. Supreme Court doesn't mean it's not going to affect them. In fact, it's just the opposite. You could have a case coming from Arkansas, Alabama, California, and it will -- once the U.S. Supreme Court decides that issue of federal statutory ***law***, U.S. constitutional ***law***, that decision is binding on every state, including Ohio.

And what the article was pointing out and what Betty Montgomery asked me to do and we did do was to look for cases principally in her area of interest. Her area of interest was of course criminal ***law***. She's a former prosecutor. And we must have sought out and written -- you know, I don't want to exaggerate -- I'm sure it's several dozen, if

not considerably more, briefs in U.S. Supreme Court cases generally advancing her perspective on criminal ***law*** issues, which was her interest and what she asked us to do.

And those were the types of case -- in fact, I think the article was about one of those cases. It was not about a Section 5 case about City of West Covina v. Perkins, which involved the due process clause and return of property that was seized in a Fourth Amendment seizure and the procedural protections individuals have and their ***rights*** in getting it back.

DEWINE: Mr. Sutton, I'd like to clarify one point. And we've had a little discussion about this. Your name plate says "Professor Jeffrey Sutton." I think you're listed that way maybe because the committee put it down that way because you're an adjunct professor. This is a little different than a full-time professor.

I just state that because the articles you've written were written by you really, though, in your role as a lawyer, not as an academic; is that correct?

SUTTON: Oh, absolutely. In fact, the first articles that I mentioned were articles written while I was state solicitor and of course pursuing the job I was asked to do representing the state. I think one or two of them were written after I was state solicitor, but the commentary was principally about cases I argued.

And of course a lawyer would have an ethical obligation not to say publicly that his or her client in a given case had urged a position that was ultimately incorrectly decided by the U.S. Supreme Court. I mean, in those cases my clients happened to win. And it would have been not only unusual but I think ethically barred for me to publicly say the U.S. Supreme Court was wrong in those decisions.

And I was -- if one reads those articles, one would see pretty quickly that they were simply recycling the briefs that I had written in those very cases, in fact, I hate to say it, word for word. I don't think one can plagiarize oneself. But if one can, I've just made an awful admission. But that's what you would see if you read those articles and compared them to the briefs.

DEWINE: I want to go back to the City of Boerne case and the discussion you had with Senate Schumer a few minutes ago. In that exchange he asked you about a supposed position that you took during oral argument. And I would like to clarify it. As I understand it, you argue that Congress does have the authority to enforce the Bill of ***Rights*** using Section 5 of the Fourteenth Amendment as those ***rights*** are incorporated in Section 1 of the Fourteenth Amendment.

So as I understand it, you argued that federal authority was broader and that the federal government has the authority to protect more ***rights*** than some of the other parties in the case did. So in that case with regard to your position Senator Schumer's concerns were unfounded.

SUTTON: I think that's ***right***, Senator. It was a very important issue in City of Boerne because until that decision U.S. Supreme Court had not clarified that critical point. If one looked at all of the Section 5 ***laws*** that had been reviewed for a hundred-plus years by the U.S. Supreme Court, you would have seen that they all involve, at least the ones that were upheld, racial discrimination remediation or voting ***rights*** remediation. They hadn't extended to the other Bill of ***Rights*** protections, whether it's free speech, criminal ***rights*** protections, or in the case of City of Boerne, free exercise of religion.

And the state was in a difficult position in that case because the party in the case, City of Boerne, had taken the position, because no case had held otherwise, that Section 5 only allowed Congress to correct race discrimination and voting ***rights*** discrimination. And we were in a difficult position.

Usually an amicus tends to agree with the party that you're supporting. But at the same time -- not that reasonable minds couldn't disagree with this point. And Justice Scalia also gave me a very hard time on this -- but took the view that by its terms the Constitution said Section 5 enforces the provisions of Section 1. Section 1 says due process. The U.S. Supreme Court had construed the due process clause to incorporate many, if not all of -- well, most of the provisions of the Bill of ***Rights***. And so we made that argument.

And Justice Scalia gave me a very difficult time. I mean, if you've ever seen him ask a question, my knees clearly quivered. But I mean my backbone did stiffen on this point. And we said, "That's wrong, Justice Scalia, by its terms. And you know, as a textualist, I have to -- you should agree with this. By its terms it covers all ***rights*** protected by Section 1."

So while, you know, there's parts of that outcome of that case that one could be unhappy with and certainly reasonable minds could disagree with, we feel good about that part. The court did agree with us on this.

DEWINE: Good.

Justice Cook, you have been making appellate court decisions now for well ***over*** a decade. Obviously in that time you've developed a style and a way of making decisions, an approach to that job. Tell us how you approach the job, how you do that, and how you would approach the job as a circuit court judge.

COOK: I…

DEWINE: Got to be a technique. There's got to be a way of doing it. Everyone's got their own style. How would you do it? How do you do it now?

COOK: My process is structured, and I hope you would find it principled. And it's the process I think most appellate judges engage in. It's first a review of the record of proceedings, a reading, a thorough reading and studying of the contesting briefs, then a review of the existing ***law***, and then the application of logic, sometimes custom, and generally rules.

And this is done -- you know, I give some credit to my counsel because every judge has talented ***law*** clerks and in my chambers -- actually some of my clerks are still here, I think -- in my chambers my clerks do serve as my counsel. And so I think with that process generally and with the inclusion of bright young minds to challenge any decisions that I come to, I think we achieve the impartiality and really the objective approach that fairness dictates.

And any good jurist engages in pretty much that same decisional process, I would say, Senator.

DEWINE: Do you go through a few drafts?

COOK: Oh, yes.

And then we exchange the drafts among the members of the court. And in that process we are also able to learn, you know, if any other member of the court writes a concurrence or a dissent that helps in our decision-making to double-check our reasoning, to double-check our research. And so it's a process. It's a learning process at its base.

And that's our job.

DEWINE: Good. Thank you very much.

Thank you, Mr. Chairman.

HATCH: Well, thank you, Senator.

Let's take a five-minute break. And we'll come ***right*** back, OK.

(RECESS)

HATCH: OK, we'll start this second round of questions. And maybe I can start it off, or if -- would Senator Leahy prefer?

LEAHY: No, go ahead.

HATCH: Well, I'll start it off. And we'll turn to Senator Leahy as soon as I'm through.

And hopefully this is all the round we need. But I want my colleagues to feel like they've been treated fairly. And I want them to be able to ask what questions they have in mind.

But there has to be a reasonable time. And we'll call this at a reasonable time. And this is their chance to question the three of you. And we'll just have to see what happens.

Well, let me just go back to you, Mr. Sutton. As a matter of fact, I understand that you came to represent the University of Alabama in the Garrett case because the Alabama attorney general's office called you up and asked you to take the case; is that ***right***?

SUTTON: That's correct.

HATCH: OK. So you were asked by the attorney general of the state of Alabama.

What if it had been the other way around? I mean what would you have done if Mrs. Garrett or the United States had called you up and asked you to represent their side in the Garrett case? Would you have done it?

SUTTON: Yes, your Honor, absolutely. And I would have been very eager to represent that side of the case, either for Ms. Garrett or, if I'd been fortunate enough to be in the solicitor general's office.

HATCH: So when you represented your clients you were doing what attorneys do, represent clients.

SUTTON: Yes, I was.

HATCH: I have to admit I'm absolutely nonplused that some of my colleagues seem to think that you should only represent the people who agree with them. Now, I don't know any attorney who does that who's worth his salt, who really has any real broad experience.

You're not going to please everybody by the people you represent. But to ascribe to you the negative aspects of your clients, I think it the height of sophistry. And it's really bothering me that on this committee with the sophistication of this committee that we've had those type of indications.

Let me just ask you this. Now, I get so sick and tired of the Federalist Society, they beat up on the Federalist Society on that. I happen to be a member. I'm on the board of advisers. I know what they do. I know what they don't do.

Now, since your membership on the Federalist Society has been raised here today and since various ***groups***, such as the People for the American Way and NARAL, the National Abortion ***Rights*** Action League, have also expressed concern ***over*** your involvement with that ***group***, just let me ask you a few questions about it.

You are indeed a member of the Federalist Society, are you not?

SUTTON: Yes, I am.

HATCH: OK. Well, I am too. And I happen to think that it's one of the best organizations in the whole country. And I've found, frankly, that the Federalist Society encourages open and honest discussion from all points of view from a variety of perspectives on a multitude of current issues.

Have you found the same thing?

SUTTON: I have, your honor. In the cases I argued on behalf of several clients, I've seen as much criticism of those cases in Federalist Society publications as I've seen anywhere.

HATCH: I have never known the Federalist Society to take a position on any issue.

Do you know whether they have?

SUTTON: I'm not aware of that, no.

HATCH: Well, I don't think I've ever seen it. So I'm getting a little tired of this beating up on the Federalist Society as though they're some sort of a secret society. It's the most open society in our country ***right*** now from a legal standpoint.

In fact Federalist Society events are known for their intellectual vigor and open debate.

Do you differ with that statement?

SUTTON: I don't to the extent I've been to them, yes.

HATCH: Leading liberal academics and government officials regularly participate in the organization's events; isn't that correct?

SUTTON: That is correct.

HATCH: From all points of view.

SUTTON: That's very correct.

HATCH: From the ***right*** to the left, ***right***?

SUTTON: Yes, exactly.

HATCH: Regular participants include Walter Dellinger. Walter Dellinger was President Clinton's acting solicitor general. Very, very intelligent, interesting and good man. But very liberal.

Steven Reinhardt. You've got to be pretty liberal to be to the left of Reinhardt, from the Ninth Circuit Court of Appeals, but one of the really brilliant people in our society. He really believes in what he does. Even though I think many justly criticize some of his activist approaches.

How about Nadine Strossen? She's the president of the ACLU. She's no shrinking violet. Yet she participates in the seminars, in the conferences. Professor Lawrence Tribe of Harvard. Now, no one would say that Lawrence Tribe is an insidious conservative. How about Cass Sunstein of the University of Chicago? He's regular. They, I think enjoy these give-and-take sessions. And they should.

Do these sound like a gang of ***right***-wing participants to you?

SUTTON: No.

HATCH: You know, for some reason I knew what your answer was going to be.

LEAHY: I even figured that out.

HATCH: Even Leahy had figured that out. That's ***right***. I'm so happy for that.

LEAHY: I'm glad to see you so supportive of Walter Dellinger, insofar as when he was chairman we couldn't get him through the committee. That's why he was acting solicitor general.

(APPLAUSE)

HATCH: Well, I have to say that I do have a lot of respect for Walter. I do.

LEAHY: You should.

HATCH: I even have respect for you, Senator Leahy, quite a bit. And I've earned it ***over*** the years, I'll tell you.

Now, Mr. Roberts, one of my Democratic colleagues has criticized you, albeit rather regularly, for cases that you worked on in your official capacity as principal deputy solicitor general at the Yost (ph) Department of Justice.

The positions you took in these cases represented the position of the United States government, ***right***?

ROBERTS: That's correct.

HATCH: The U.S. government was your client, ***right***?

ROBERTS: That's ***right***.

HATCH: You didn't necessarily choose these cases, ***right***?

ROBERTS: No.

HATCH: You had supervisors who worked with you?

ROBERTS: Yes.

HATCH: Suggestions were made to you?

ROBERTS: Yes.

HATCH: And you followed the suggestions?

ROBERTS: Yes.

And quite often of course we were in a defensive position defending federal agencies that were ***sued*** in court.

HATCH: Sure. And as I.

Am I correct that the government's position in these cases was often arrived at as a result of a collaborative process in which many different persons aired and debated different views?

ROBERTS: It's a very broad collaborative process. I don't think everyone's familiar with it. But when a case reaches the Supreme Court that might affect the federal government or in which a federal agency has been a party, you canvass the whole scope of the federal government. And in a typical case you'll get responses from 10 different agencies, sometimes all ***over*** the map, sometimes, you know, consistent in the position, a number of different divisions within the department, different offices all weighing in on what the position of the United States should be.

HATCH: Well, and as a lawyer in the solicitor general's office, you were dutybound to represent the official position of the United States, even if it conflicted with your own personal beliefs, ***right***?

ROBERTS: Certainly.

HATCH: That's what attorneys do.

ROBERTS: Not only in the public sector but I think in the private sector as well that that's the highest tradition of the American bar.

HATCH: Well, I have to again caution my Democratic colleagues about the danger in inferring that government lawyers' personal views from the position he or she takes as an attorney for the United States.

I think of Walter Dellinger who, as we all know, served as solicitor general during the Clinton administration said it best. He said that it is, quote, "very risky," unquote, to judge judicial nominees by the positions they have taken as

government lawyers and that such judgments may lead to a rejection of, quote, "the most qualified of the nominees," those who, like Mr. Roberts, have been out and have had a "major lifetime of accomplishment," unquote. One of the leading Democrat legal thinkers in the country.

Now, specifically, with regard to Mr. Roberts, Mr. Dellinger said this. Quote, "The kind of arguments that John Roberts was making in the position of deputy solicitor general were the type of argument that a professional is expected to make when his client, the chief executive of which is the president of the United States, has run on those positions," unquote.

Now, Mr. Roberts, I want the persons who have made predictions about how you will rule as a judge to listen to some of the things your colleagues, the persons who know you best, have said about you.

Shortly after your nomination in 2001, the committee received a letter from 13 of your former colleagues at the solicitor general's office. Now, I want to read a portion of this letter because I think it will help my colleagues in evaluating your nomination.

The letter says, quote, "Although we are of diverse political parties and persuasions, each of us is firmly convinced that Mr. Roberts would be a truly superb addition to the federal court of appeals. Mr. Roberts was attentive and respectful of all views. And he represented the United States zealously but fairly. He had the deepest respect for legal principles and legal precedent, instincts that will serve him well as a court of appeals judge," unquote.

In recent days the suggestion has surfaced in press accounts that Mr. Roberts, meaning you, may be expected to vote along the lines intimated in briefs you filed while in the office of solicitor general. In fact this is their quote. Let me just quote it.

These are your colleagues from diverse political views, Democrats, Republican's, maybe some who aren't either. They say, quote, "In recent days the suggestion has surfaced in press accounts that Mr. Roberts may be expected to vote in particular cases along the lines intimated in briefs he filed while in the office of the solicitor general. As lawyers who served in that office, we emphatically dispute that assumption.

"Perhaps uniquely in our society, lawyers are called upon to advance legal arguments for clients with whom they may in their private capacities disagree. It is not unusual for an individual lawyer to disagree with a client while at the same time fulfilling the ethical duty to provide zealous representation within the bounds of ***law***.

"And government lawyers, including those who serve in the solicitor general's office, are no different. They too have clients, federal agencies and officers with a broad and diverse array of policies and interests.

"Moreover, the solicitor general, unlike a private lawyer, does not have the option of declining a representation and telling a federal agency to find another lawyer."

And they go on again, "We hope the foregoing is of assistance to the committee and its consideration of Mr. Roberts' nomination. He is a superbly qualified nominee." I'll submit it. Unquote.

I will submit a copy of that letter for the record along with copies of several other letters echoing support for your nomination.

Now, the resounding theme of these letters is that you will be a fair and impartial judge whose deep respect for ***law*** and the principle of stare decisis, combined with your brilliance, will make you one of the greatest federal judges ever confirmed.

Now, people who know you, that's the way they feel, regardless of their political beliefs or their ideological beliefs, that you're a great lawyer, as are the other two on this panel.

I've had Supreme Court justices say you are one of the two greatest appellate lawyers living today, to me personally. Now, they don't do that very easily. And I think everybody who knows you knows that that's how good you are.

This is not your first appointment to the courts, is it?

ROBERTS: No, Mr. Chairman, it's not.

HATCH: When were you nominated before and by whom?

ROBERTS: I was nominated 11 years ago last Monday to the same court by the first President Bush.

HATCH: So basically it's taken you 11 years to get to this particular position.

ROBERTS: Well, I like to think I haven't been just treading water in the meantime. But it has been 11 years.

HATCH: There has been an expiration of 11 years since your first appointment. And then you've had to be -- you were appointed on May 9th of 2001.

ROBERTS: This third round, yes.

HATCH: And then this is the third time you've been reappointed this January by current President Bush.

ROBERTS: Correct.

HATCH: Well, I'll reserve the balance of my time.

But I just wanted to get those points out because, for the life of me, I can't understand why anybody who loves the ***law*** and who respects great lawyers would not want any of the three of you to serve in our federal courts.

I know one thing, I'd sure want to be able to argue cases in front of you. I know one thing. I know I'd be treated fairly.

And you and I both know another thing. When we tried cases, I didn't want a judge on my side. I didn't want him against me. I wanted the judge, regardless of who it was, to be fair down the middle, to apply the ***law***. If they did, I was going to win that case. And I could lose a case by the judge favoring me just because the jury would get mad. Or I could lose a case by a judge not favoring me just because the judge was so respected.

And we want judges who are going to be down the middle, who are going to -- that doesn't mean you have to be down the middle in ideology and everything else. Just on the ***law*** they're going to be down the middle and do what's ***right*** and honest and legally sound.

Well, I have every confidence that the three of you, each of you, will be exactly that type of a judge. And I commend you for these nominations, for your nominations. And I look forward to seeing you confirmed. And I hope we can do that relatively soon.

Senator Leahy? I'll reserve my other five minutes.

LEAHY: Thank you, Mr. Chairman.

I don't know where this pesky idea of the Federalist Society came from. Probably because one of the nominees testified here under oath that he was told if he wanted to be a federal judge appointed in the Bush administration, he should join the Federalist Society. I mean, that may have stuck in people's mind, I don't know.

You know how those little things are.

HATCH: I doubt anybody of any intelligent mind would worry about that.

LEAHY: Well, I would hope you wouldn't suggest that President Bush's nominee who we confirmed as a federal judge would be lying under oath.

HATCH: Of course not.

LEAHY: Am I down to only four minutes, that quickly?

HATCH: Oh, no. Put this up. That was my five minutes that was left.

LEAHY: Goodness gracious. Man, I never should have let you have that big gavel.

But the Federalist Society's membership certainly hasn't stopped people. Paul Cassell was confirmed, a member confirmed to Utah District Court. Karen Caldwell, Edith Brown Clement, Harris Hartz, Lance Africk, Morrison Cohen England, they're all Federalist members all confirmed. Michael McConnell to the Tenth Circuit, John Rogers to the Sixth Circuit, both members. And Kent Jordan and Arthur Schwab, and Larry Block -- I mean, I could go on and on. In fact, it seems a lot of them were.

With this maybe it's coincidence, the statement of one who says that they had to (inaudible) going to be maybe the judge or maybe it's coincidence so many have gone through. But be it as it may, it hasn't been held against them.

LEAHY: Certainly, I would not do as some of my colleagues have on the other side, vote against a nominee as they have a Clinton nominee because she had dared in her private practice to represent a labor union. That's why they voted against her because of that and I having listened to your testimony, all of you, and Chairman Hatch's testimony, that lawyers take their clients and represent them.

Although, I would note just so that it doesn't seem totally one- sided, we had one vote against for defending labor unions. We had another one for taking a couple pro bono cases for the ACLU and so on.

HATCH: Was that Marsha Brazone (ph) who now sits on the Ninth Circuit Court of appeals.

LEAHY: That's ***right*** she waited four or five years.

HATCH: Well, I was chairman, I don't…

LEAHY: You were not the one that voted against her.

HATCH: I know, neither were most everybody else. I'm condemning both sides if they're going to do that type of reasoning.

LEAHY: So, I have -- we won't go through a number of the ones that were never given a hearing because their clients weren't liked. But let's talk about stare decisis and I'm sure that every one of you would, of course, agree that you would follow stare decisis.

I've never known a judicial nominee to say otherwise and even including some within -- after getting on the bench or reverse because they did not follow stare decisis. But it is a hornbook ***law*** that you have to.

Now, (inaudible) Sutton in a Federalist Society paper in 1994, and I realize they don't take any positions on the Federalist Society, but you praised the analysis in Justice Clarence Thomas' incurring opinion in Holder v. Hall (ph), a case that considers Section 2 of the Voting ***Rights*** Act.

And you specifically praised Justice Thomas for providing persuasive, important regents to reconsider an overrule prior court precedent broadly interpreting the Voting ***Rights*** Act, and you told the Federalist Society that Justice Thomas' approach goes a long way to developing a conservative theory for doing an un-conservative thing, overruling precedent. Why wouldn't this just be conservative judicial activism, and I know you were expecting the questions? I'd like to hear your answer.

SUTTON: No, I wasn't expecting the question. Why wouldn't in Justice Thomas' position be conservative judicial activism, is that question?

LEAHY: Yes.

SUTTON: Well, I think the point the article made was that the Section 2 cases have a very difficult set of interpretations for the court in the voting ***rights*** area and it's important to remember that in that Holder v. Hall case, Justice Thomas' vote was concurrence, the majority. I don't know exactly what the vote was but I think it was pretty overwhelming, ultimately said that you couldn't bring this type of vote dilution claim under Section 2.

Justice Thomas took the view that while that was an application of several cases of the court, including a case called Allen (ph) I think from the 1960s, that the Allen case and the case after it hadn't been correctly decided and that the court shouldn't have gone down this road trying to determine as a matter of political theory what size a voting ***group*** should be in locality, city, number of members.

The opinion Justice Thomas relied upon was Justice Harlan's opinion in that. I don't remember if he was concurring or dissenting. Justice Harlan, of course, is one of the course moderates or at least he's perceived as a moderate, not unlike Justice Powell. So, I don't think the perspective Justice Thomas had on the case was, you know, out of the mainstream. He was following Justice Harlan.

But I guess more importantly, as a Court of Appeals judge, one would not have any option of doing anything of the kind. I mean whatever the court does with…

LEAHY: Not exactly, within your circuit, within your circuit you could overrule stare decisis.

SUTTON: Oh, not -- I understand what you're saying, in other words circuit precedent.

LEAHY: ***Right***, you would not have to -- you would not have to follow, I mean you're presumed that you will follow it but you're not required to follow the precedents of your own circuit and circuits do change, not often, but circuits either reverse themselves or circuit judges dissent from positions. It is not unheard of for a circuit to reverse itself in a subsequent case.

SUTTON: That's true, although in a panel decision, a three-judge panel doesn't have that option.

LEAHY: I agree.

SUTTON: So, the panel no matter what the prior precedent, no matter how much a judge disagreed with it, they have to follow it, and then and only then, if the…

LEAHY: It goes up (inaudible).

SUTTON: The losing party chooses to ask the entire court, however many members, to decide whether they should review that prior precedent but, of course, that's not one judge's vote. That's the majority vote of the entire circuit.

LEAHY: That's true.

SUTTON: And I guess the thing that Justice Thomas I thought was trying to do was determine what is the hardest thing in this area of neutral principles for not following a precedent, and, to me that was admirable. The great risk when it comes to stare decisis is that it becomes results oriented that someone is simply deciding they personally didn't like something and so they vote to overrule it.

The very point of the article or this section of the article, this was the same article I should point out that was criticizing the court for a ruling that hurt disability ***rights***, but in this part of the article I was simply making the point that neutral principles for determining when stare decisis ought to apply and shouldn't apply are to be applauded, a good idea.

LEAHY: Well, what you said actually there about Justice Thomas was on the one hand adherence to precedent is an ostensibly conservative notion, one consistent with a protective alliance interests in particular and furthering judicial restraint in general.

On the other hand, it can't be that all liberal victories become insulated by stare decisis while all conservative ones remain open to question, and I worry that what you're doing is suggesting a blueprint for overturning court decisions that maybe some of your friends don't like on civil ***rights*** but here your strong adherence, which is a conservative principle to stare decisis, or am I reading too much into your comments?

SUTTON: Well, I think perhaps a little bit, Senator. The point I think I was making one I would assume everyone would agree with. It would not be a very coherent or fair principle of stare decisis that said we only stick with certain types of precedential rulings and not with others, and simply making the point it is a conservative doctrine to stick with stare decisis.

But it wouldn't be a legitimate application of stare decisis to not apply it neutrally to all precedents that according -- you know and the U.S. Supreme Court has many cases that have given instruction, not just to the justices, but to the lower courts as to when one would decide.

I mean you know the Buck case that we just talked about earlier forced sterilization handicaps. I mean if ever there were a case calling for an overruling it would be that case and there are principles, whether the underlying reasoning…

LEAHY: We're also not going to have too many Dred Scott or Plessy v. Ferguson or cases like that. What we're going to find are some very specific cases following congressional action within the last five years, ten years, or a year, and what I'm trying to determine your full sense of stare decisis. Let me tell you why some of this comes. You read the book or are aware of the book Judge Noonan wrote narrowing the nation's power.

SUTTON: I have read the book.

LEAHY: It's a short but really powerful book. I picked it up one day flying back here from Vermont and decided to read it on the plane and was still reading at two o'clock in the morning. I felt like I was back in ***law*** school cramming, but I found it difficult to put down.

And, he was talking about a number of the reasons why states in effect don't enjoy the sovereign immunity that the, what I consider a very activist Supreme Court has been giving them in the last few years. I was persuaded by the conclusion the best reason a state should not enjoy immunity from suit is that such treatment is simply unjust.

Why shouldn't a state pay its just debts? Why shouldn't it compensate victims for the harm it wrongly causes? Or, why should states be subject to federal patent ***law*** and federal copyright ***law*** and federal prohibition or discrimination from our employment but not be accountable if it invades somebody else's patent or copyrights or accountable for discriminatory acts as the employer.

I mean has the Supreme Court in these areas, copyright, patent ***law*** and others, have they been as some have said a very activist court, or do you agree, are you very comfortable with the decision they've made?

SUTTON: Well, I can't say I read Judge Noonan's book as quickly as you did but I…

LEAHY: No, no, no. Wait, I don't want to -- I read it until two o'clock in the morning. That doesn't mean that I would want to do my third year ***law*** exam on the book, but these are some of the things that I got out of it.

SUTTON: No, I did read the book. I enjoyed the book. I think he makes a forceful case for that position and I actually think that's the most difficult position the court has taken in all of these, we'll call them "federalism cases."

LEAHY: Are you comfortable with those -- with the direction of the Supreme Court?

SUTTON: Well, the point that I was going to make is I wasn't involved. That's the Seminole Tribe case that makes that ruling that made that decision that the eleventh amendment does apply to states and that the only way Congress can alter that immunity is through Section 5 legislation or spending clause legislation. I was not involved in arguing Seminole Tribe. The cases I have done have been principally…

LEAHY: Are you comfortable with the decisions the Supreme Court has followed?

SUTTON: Well, I'm comfortable that I would follow them as a Court of Appeals judge. Would I have done that as a -- you know would I have done that as a Court of Appeals judge had that case faced me? Would I have done that in any other position? I don't know. I've never been in the position where I had a chance to do what a good judge should do and ask yourself, OK, you know what does one side have to say about this? What precedent do they think supports them? What would another side say?

I guess the one part of the decisions that, you know, it's the one part Judge Noonan doesn't deal with is his point that, you know, the doctrine that the king can do no wrong is a bad doctrine. I think everyone would agree and that's exactly why most democratically elected legislatures have allowed suits against states and the federal government.

And, the one point I would make to be consistent with him, and he doesn't make it, is that if you're going to say the king can do no wrong and there's no such thing as sovereign immunity because the term doesn't appear in the U.S. Constitution, it seems to me appropriate that that be true with the United States government because it doesn't apply there either and, I think that's what the court has done.

Now maybe the U.S. Supreme Court is wrong in these cases but I think they have seen some symmetry in money damages cases being brought against elected, Congress elected (inaudible).

LEAHY: But you understand some of the concerns that many of us up here are suggesting that the states are suddenly being protected from taking responsibility for discrimination, for example, they or their agencies decide to do, or violating other people's copyrights they or their agencies do, that they're protected. I mean I have to ask myself weren't the civil war veterans, including the fourteenth, designed as an expansion of federal power and actually an intrusion into state sovereignty?

SUTTON: Oh, absolutely, and that's exactly why the City of Burnie decision and these other cases allow individuals to bring money damages actions against states under the fourteenth amendment because of Section 5 legislation, so I agree entirely with that.

LEAHY: But then if that's the case we have also a problem. I realize you didn't decide the cases but here in the Congress where we might have weeks or months of hearings (inaudible) the ADA and RIFRA and ADA bringing in evidence not only in hearings here in Washington but appealed hearings around the country and isn't Congress in a better position to determine facts relevant to the exercise of its Section 5 authority after all those hearings than the court is after an hour's hearing ***over*** in the marble hall across the street?

SUTTON: Absolutely and the U.S. Supreme Court has said that you're in a better position to make those findings. You're better equipped to gather that kind of evidence.

SUTTON: The thing that the U.S. Supreme Court has found to be tricky in this area, and I think it's another area Judge Noonan criticized, and reasonable minds can differ on this point, is the question of is it complete deference or virtually complete deference to congressional fact findings and, I think the point the U.S. Supreme Court has made and on this point I don't think there is disagreement. I think all nine justices, not applying it in a given case, but I think all nine justices would agree that one can't decide that a congressional fact finding is binding on the determination of the validity of Section 5 ***law*** because that would be to delegate the ultimate Marbury power to this branch of government. So what -- so I think that that principle is a difficult one.

LEAHY: On that, on the general principle, I would agree with you but I believe we also have a court that is totally ignoring the legislative record or saying that it's virtually irrelevant. That's what I mean by a very, very activist Supreme Court.

SUTTON: Well, the part that I, you know, I certainly sympathize if not empathize with you on is these decisions are recent rulings. City of Burnie is 1997 or so and many of these ***laws*** that were reviewed were enacted before the City of Burnie decision.

Now, the City of Burnie relies on many existing precedents but it had not dealt with non-voting ***rights***, non-race discrimination cases, the court had not, and so I certainly understand your position and I think that's what Judge Noonan was saying is that it doesn't seem fair to suddenly judge these ***laws*** based on a standard that was developed after the ***law***. I think you're ***right*** to be skeptical of that.

LEAHY: I look at Justice Breyer's dissent in Garrett. Things like that I find very compelling. But my time is up, Mr. Chairman, and I'll wait for my next round.

HATCH: Senator Schumer, I'll turn to you.

U.S. SENATOR CHARLES E. SCHUMER (D-NY): Thank you, Mr. Chairman, and I want to thank everybody. I know it's been a long day but I think it's an important day as well, so I'm going to ask a few more questions of Professor Sutton.

Now, a few years back, as you well know, the court, the Supreme Court invalidated part of the Violence Against Women Act holding that Congress did not adequately establish that violence against women had an impact on interstate commerce, and the decision was criticized by many as an incredible incident of judicial activism.

Justice Breyer, one of the four who dissented wrote: "Since judges can not change the world, it means that within the bounds of the rational Congress not the courts must remain primarily responsible for striking the appropriate state/federal balance."

That to me sounds ***right***. It seems to me that's exactly what the founders intended. For better or worse, we're charged with making policy, and the judiciary's role, while just as important, is quite different and yet it appears to me that with increasing frequency the courts have tried to become policymaking bodies supplanting court made judgments for hours.

They're the un-elected branch of government. The founding fathers set them up to interpret, not make the ***laws***, for a reason and it's not good for our government and it's not good for our country.

Now, I want to read back to you a quote I read earlier, something you said regarding Morrison, which was the case in which the court invalidated part of the Violence Against Women Act.

You said: "Unexamined deference to the VAWA fact findings would have created another problem as well. It would give to any congressional staffer with a laptop the ultimate Marbury power, to have the final say ***over*** what amounts to interstate commerce and thus to what represents the limits on Congress' commerce clause powers."

I have to tell you I'm troubled by that statement, very troubled. Senator Biden and I can both tell you a little bit about the record Congress created on VAWA because he was the author in the Senate and I pushed it in the House. It's not as if we had our counsel sit down at their computers with a couple of beers and make up some congressional findings.

It's not as if we called our legislative directors and said hey, could you make up some stuff about how when violent acts are perpetrated against women it affects their ability to participate in interstate commerce. You seem, you know, almost contemptuous of the legislative process in your comments. I think you can make a pretty compelling case without actual studies and testimony simply by using logic that violence against women has a real effect on interstate commerce but that's not just what we did.

In passing many of the ***laws*** the court has struck down, but in particular in passing VAWA. Because I was involved minute-to-minute, you can imagine when I read something like this and see the court saying we didn't have a basis for making the ***law*** how infuriating it is because they weren't there. We were and we took testimony from citizens, from academics, from state lawmakers, from state attorneys general, and an array of other interested parties.

It took us years to formulate it, to change it, to test it, to see where it was ***right*** and where it was wrong in the legislative process. We solicited input and received a green light from states on the question of whether there was

a need for the national legislature to act. The VAWA findings, as I presume you know, were voluminous. I'm not sure what more the five justices on the Supreme Court thought we needed to do.

So, I wanted to ask you this. Why did you think that the findings underlying VAWA were not enough? What more did Congress need to do to make the record that violence against women has an impact on interstate commerce? And, if the courts should not give unexamined deference to Congress' findings, what should the standard be?

SUTTON: Thank you, Senator. I do appreciate having a chance to talk about that case and that brief. The first point I would make, which I hope you'll respect my making it is it wasn't a brief on my behalf. It was a brief on behalf of a client and I was doing my best to represent them and I can assure you I would have been happy to represent the other side in that case and, as a Court of Appeals judge, I would of course follow the U.S. Supreme Court whether it's the Morrison case as is or the case is reversed.

Now, in terms of that statement, I agree with your criticism of it in part and then I disagree with it in part. The part with which I agree is the line is too rhetorical. I don't think it actually did advance my client's cause and I regret that. I do think it's a little too rhetorical for good advocacy.

The part with which I disagree in terms of it being a reasonable position for the state in that case to argue was this underlying issue I was just discussing with Senator Leahy, and that's the issue of the court has said, and they said it again in Morrison and they've said it forever that, of course there's a great presumption of constitutionality to federal statutes, and even more to the fact finding capacity of this body when it comes to determining whether there's a social problem, whether that problem relates to interstate commerce, whether that problem relates to underlying constitutional violations or discrimination, and I think the court has correctly said that throughout.

I think the part that I slightly disagree with in the suggestion of your question though is that it's somehow wrong to suggest that there's some limit to that deference, that the deference in other words is complete. I think in the Morrison case, Justice Souter, he was the primary dissenter and Justice Breyer joined this part of his dissent, I can't tell you the footnote number but there is a footnote where Chief Justice Rehnquist, who wrote the majority opinion, and Justice Souter are discussing this deference point, and Justice Souter concedes that the U.S. Supreme Court does have a role.

All nine members are agreeing they do have a role in ensuring that the evidence that this body gathered did, in fact, concern interstate commerce and so I think that principal is now within the mainstream. I'm not aware of a single justice that has disagreed with it, and then I think what you're stuck with in Morrison is a terribly challenging, excruciatingly difficult application of that principle.

SCHUMER: Can I just -- I want to let you finish but did you disagree that the evidence we found was dispositive, you may disagree with it but was directed at interstate commerce? We didn't say count the number of trees in Montana and that justifies. I mean it was all directed at interstate commerce. We made a case about interstate commerce.

SUTTON: I couldn't agree more that that's what you were trying to do. I agree.

SCHUMER: Well, then continue. You just said that there are limits but here there's no dispute that we addressed the issue of interstate commerce.

SUTTON: I'm -- I'm…

SCHUMER: So, explain the ruling to me. Explain what you think here. Did you disagree with how we did it? Did we not do it enough? Was it or is it really that somehow, and this would be different I think than the holding in Morrison, that you just didn't think this affected interstate commerce period and it didn't matter if we found that it did? Your view would supplant ours.

SUTTON: When writing this brief for this client, again as an advocate, I didn't -- the issue for me wasn't agreeing or disagreeing. That wasn't why I was hired to tell them.

SCHUMER: I want to know what you think.

SUTTON: Well, that was not an exercise I went through and I have no idea, Senator, what I would have done had that been a case I had been a Court of Appeals judge on.

SCHUMER: But do you think we tried to address interstate commerce when we made the findings in terms of VAWA or not?

SUTTON: Oh, of course you were. I repeat what I said earlier. You were trying to reach, you were trying to establish a factual record that established that the terrible results of gender related crimes, gender violence related crimes have impacts on interstate commerce and nothing in that brief said Congress wasn't trying to do that.

What the brief made the point, again on behalf of a client, was that the theory of the Congress' views that it was related to interstate commerce was a theory that would apply to the regulation of all matters, family ***law*** matters, all criminal ***law*** issues. And, while someone could disagree with that, in fact I'm sure reasonable minds would disagree with it, I can't imagine not making that argument as an advocate on behalf of that client. I mean the client was entitled to the best representation.

SCHUMER: Sir, in all due respect, aside from advocating for the client, what you're seeming, you know, you're sort of you're saying all this work I did and everyone you know, it's almost like we're in 1984 here because your views on federalism are not just advocating for clients. You've become a leading -- you write articles. The things you advocate, the pro bono cases are not in keeping with what your general activities and beliefs are, most, many of them.

This is -- I want to read from an article you wrote, not advocating for a client, advocating for yourself. This is from the Review of Federalism and Separation of Powers ***Law***, and let me read it because it says the exact same thing, and these are your views signed by you, and I think you're hiding behind the client thing and we're not having a real debate on the issue here.

(APPLAUSE)

Please, that's not fair because everyone knows how you feel on this and you know how you feel on this. That doesn't mean as a judge maybe you couldn't change but these are not just views you advocated for a client. These are deeply held views by you, I would believe, from looking at the whole record and it would be awfully hard to disprove it.

Here's what you wrote. "The necessary stacking of one inference on top of another required to connect an interstate rate to an active interstate commerce had no fathomable limit the court held. Once accepted, only the most unimaginative lawyer would lack the resources to contend that all manner of in state activities will have the rippling effects that ultimately affect commerce.

Such an approach would have a disfiguring effect on the constitutional balance between states and national government, and would indeed make the tenth amendment but a truism, and would ultimately make irrelevant every other delegation of power to act under Article 1. Unexamined deference to the VAWA fact findings would have created another problem as well."

And, here's the regretful phrase. "It would give to any congressional staffer with a laptop the ultimate Marbury power, to have a final say ***over*** what amounts to interstate commerce." You may have said that in the brief, I don't know, but you said it separately under your own ten, under your own articles, so you can't say well you were saying that just on behalf of a client. Those at one point, I don't know if they still are, are your views. Are they still?

SUTTON: Senator, I do think a lawyer who is representing a client does have a prerogative to write an article. This actually was not an article about this case. It was an article about several decisions saying that the court got it ***right*** when it ruled on (inaudible).

Obviously, the opposite was not true. I did not have the alternative to say publicly that the court got it wrong after arguing on behalf of the state in that particular case. I mean my ethical duty would have precluded that. But I want to go back to what I was trying to say earlier. No one disagrees on the Supreme Court anyway…

SCHUMER: So wait, can I just again because there's a lot of sophistry here, do you believe that unexamined deference to VAWA would give any congressional staffer with a laptop the ultimate Marbury power? Do you, Jeffrey Sutton?

SUTTON: I have not…

SCHUMER: Not as a representative, not as a lawyer representing someone, but as a professor, as somebody who has written articles, as somebody who is well known to have a strong view on these issues?

SUTTON: Well, as I said earlier, I have no idea what I would do as a judge because I have no idea what a judge…

SCHUMER: (inaudible).

SUTTON: Well, you asked what I believed and I'm telling you.

SCHUMER: I didn't ask what you'd do as a judge. I asked what you as Professor Jeffrey Sutton not representing a client, do you believe this phrase or not, this -- I mean, you know, I've written things. I've changed my mind later.

SUTTON: ***Right***.

SCHUMER: So, I'm not…

SUTTON: Actually, I think it's very consistent with something I said earlier today. I'm not sure if you were here at the time. Yes, I do believe in the principle of federalism in the sense that there is a principal that says on a separation of powers basis.

SUTTON: There are checks and balances, horizontally among the federal branch of the government, this body, the U.S. Supreme Court and the president and vertically between the national government and the states. That's a principal that's embedded in the constitution and there are countless U.S. Supreme Court cases that recognize it.

And, the statement that you have just quoted makes the point, and this is what I perceive the court is trying to do. Now maybe one could disagree that this is what they did, but is making the point that as long as that court has the Marbury power, and perhaps people could disagree with it, but as long as they have that power they have not just the power but a duty to review even the most exhaustive fact findings of this body.

And, the reason I'm not comfortable telling you my view on whether those findings related to interstate commerce or not is I just am not familiar enough to say that. That's just not something I could tell you.

SCHUMER: Would you say that again? You're not familiar enough with what?

SUTTON: With all of the issues in the case to make that point. I was hired by a client to make one side of the argument. I've never had the opportunity to sit back and say objectively what would you do, Jeff, with this particular issue.

SCHUMER: You wrote this in an article professing a viewpoint, your viewpoint.

SUTTON: And I'm just telling you that stands for the principle that the national government, as broad as its powers are, they do have limitations, and I would say but the broader point, Senator, is had I been asked by the other side in that case to argue that case, I can assure you I would have done it.

SCHUMER: That's not what I'm asking and please don't keep bringing that up. We know that you're a very successful, persuasive advocate, and we know you've advocated in different positions. You wrote an article where

you said the exact same thing as in brief. You first told me it's just because you were advocating for a client. Now, I have an article here where you wrote it again.

You didn't say, as I argued in, or as was argued in. You professed the belief as yours and now you're saying, you're not giving me an answer whether you believed it at the time and still believe it now.

SUTTON: But I do think I did answer.

SCHUMER: I didn't ask you what you'd do as a judge. I know as a judge you would have to examine both sides. I understand that. My knowledge isn't as great as yours in terms of jurisprudence but I know that much.

SUTTON: I'm sorry.

SCHUMER: But I also know that I feel very strongly that it's my obligation and your responsibility to let people know your views because they will influence how you are as a judge. I know that there are a lot of people who say, oh no, every judge will make the same decision, but then we would have all 9-0 decisions and every one of the circuits would be the same.

And, in terms of studies, those appointed by Democratic presidents and those appointed by Republican presidents would come out the same - not the same way but in the same percentage way and we all know that's not true.

And, if I've tried to do anything in the last year it's to break through this (inaudible) that philosophy doesn't matter. And, by the way, if philosophy didn't matter, the White House would send us a far broader panoply of judges in terms of their views than they do without any question.

And so, we should be discussing this. We should be discussing this issue honestly not hiding behind representation, not hiding and saying well I don't know what I think. Most of us on this panel, I believe, know you know what you think on this but you refuse to discuss it, even though you wrote an article saying it.

SUTTON: Well, again, first of all Senator I respect your views on this and I've been paying attention to them the last couple of years and I certainly understand the seriousness of the issue. I guess I feel I disagree with what you're saying in terms of my refusing to answer the question about this article. I did write the article. It was obviously a recycling of the brief as proved by the fact it quotes the exact language of the brief. I do think there is a lawyer's prerogative…

SCHUMER: Quoted it as your own, not representing a client.

SUTTON: Exactly and I'm making the point, a lawyer has a prerogative having argued a case to say that the court got it ***right***. That's exactly what I did and I can't tell you that that's the ***right*** decision. How could I possibly say that to you given how much respect I have for the role of a Court of Appeals judge and what their job is when it comes to deciding what they would do with a given case? And, I think it would be just the opposite of what that judge's role is to say oh, I could tell you what I'd do with that kind of a case. I couldn't tell you that.

SCHUMER: Could I ask you to do this within the week? Could I ask you to review the Congress' findings in VAWA and tell us whether you agree, you personally, not representing anyone, whether you agree with the majority or minority's findings or someplace in between?

HATCH: Well, let me just interrupt. I also was a prime sponsor in the Senate. It was the Biden-Hatch Bill. Those materials are so voluminous. No, come on let's quit asking what he is going to do as a judge or what he believes. Let's talk in terms of…

SCHUMER: Well, Mr. Chairman, in all due respect of course I want to know what he's going to do as a judge. So does everybody.

HATCH: OK, well I agree with that.

SCHUMER: It's not some kind of mathematical formula that every judge, just depending on their intellectual power of…

HATCH: But you're seeming to want a foregone conclusion from him.

SCHUMER: No, I don't. I want…

HATCH: And he's not willing to give that to you.

SCHUMER: I want to know his views, not what his client's views are, and not how persuasive an advocate he is.

HATCH: But he's making the point that his views are irrelevant when he becomes a judge.

SCHUMER: And I don't think anyone really believes that.

HATCH: That may be but that's what…

SCHUMER: Or (inaudible)…

(APPLAUSE)

HATCH: Now, let's understand something.

SCHUMER: ***Right***.

HATCH: I'm going to clear this room.

SCHUMER: Please.

HATCH: Something that I've made possible for everybody if we continue to have these outbursts. First of all, it's not fair to anybody. It's not fair to the witness. It's not fair to the Senators up here. We're supposed to have some decorum here and I expect this proceeding to be treated with dignity. Now, let's just remember that. I respect all of you but I want no more outbursts.

SCHUMER: And I'd say in all due respect it doesn't help my case when you… If I might on that, Mr. Chairman, I've served as chairman of numerous committees and subcommittees as have you.

HATCH: ***Right***.

LEAHY: And we must have decorum. I know that feelings are very strong here. I agree with the feelings of many who have expressed it here, but we also have three witnesses who are answering questions under oath, Senators who are working to ask them, and the only way we're going to do this is through decorum. So, I will support the chairman and maintain the decorum, and especially as I said before, I appreciate the chairman taking the recommendation of myself and others to move down here so that everybody could be accommodated.

HATCH: Thank you, I appreciate that.

SCHUMER: Mr. Chairman, my time, you've been very generous in time and I would still ask, if he decides he wishes to, to ask Professor Sutton to let me know his views on whether the majority was correct in finding that Congress in its findings didn't really justify a reach into interstate commerce in Morrison. You don't have to do that now. I'll ask you to do it in a written question.

Before I conclude, Mr. Chairman, I have some more questions and I know it's been a long day, and I do want to thank you Mr. Sutton. My questions are strong but they're not personal and they're heartfelt as your answers are and I respect that.

SUTTON: I can believe that.

SCHUMER: And I guess, Mr. Chairman, I have to go to two other places. I have more questions of Mr. Sutton and I haven't even begun to ask questions of either Mr. Roberts or Judge Cook (ph). And so, I would simply ask that we at least come back at another point in time and be able to ask. I think it would not be fair to us if we didn't get a chance to ask Mr. Roberts and Judge Cook questions at another time.

HATCH: Well, unfortunately I can't do that. In other words, this is the hearing and frankly we'll keep the record open for questions, and Senator Leahy has already asked that we make sure we get a transcript of the record so that more questions could be asked. But no, we're going to finish the hearing today. Now, I hope that we can accommodate you to come back and ask any further questions you'd like.

SCHUMER: You know, Mr… I'm going to appeal the ruling of the chair. I don't think it's fair. These questions are not frivolous.

HATCH: No, they're not.

SCHUMER: And I would appeal the ruling of the chair and ask for a roll call vote that we finish with Professor Sutton today as long as it takes but we come back and ask both Mr. Roberts and Judge Cook questions.

HATCH: Not fair to them. I'm prepared to sit here as long as it takes within reason. I mean I think there's a point where you have to call the end of the hearing. But this is today's hearing. These people have sat here patiently now for how many hours is it, since 9:30 this morning, and we're going to finish this today.

And I notice that Mr. Sutton's three kids, they're the best kids I've ever seen and they haven't raised a fuss here at all. I just want to compliment your wife and you for the wonderful children you have. But I want to be fair but, on the other hand, Mr. Roberts has been waiting 11 years.

SCHUMER: In all due respect, Mr. Chairman.

HATCH: The other two have been waiting almost two years. I think it's up to us to ask the questions here today and I'm providing the time to do so, and I'm also providing an additional time to ask written questions, a reasonable time, but not an unreasonable time. We're going to finish this today.

SCHUMER: In all due respect, we're having a third hearing on Pickering. We're having a second hearing on Owens.

HATCH: I don't know what I'm going to do about it.

SCHUMER: The ones who we defeated, they get all the hearing time you want to change the record but we don't have a full opportunity with Mr. Roberts to the second most important court in the land, with Judge Cook in terms of a circuit, the Sixth Circuit.

HATCH: But you do.

SCHUMER: That we kept open for a long period of time.

HATCH: I'm not prepared to leave.

SCHUMER: It is not fair. Well, it is not fair.

HATCH: When can you come back, Senator, for your further questions? I'll be happy to be here.

SCHUMER: I can come back later this evening.

HATCH: Great.

SCHUMER: But I don't know if my colleagues can and I've never seen this kind of thing happen.

HATCH: Well, it's going to happen.

SCHUMER: We have never had three Court of Appeals judges on one panel. We knew that Professor Sutton in particular would take a great deal of questioning.

HATCH: And he has.

SCHUMER: And I don't think it's ***right***. I don't think it's fair.

HATCH: Senator, if you need more time take it ***right*** now. I'll be glad to give it to you but the point is I'm not going to mistreat these people either.

SCHUMER: Well.

HATCH: I mean, my gosh, they've been waiting for two years, Mr. Roberts 11 years. We've made them available. They've been here since 9:30 this morning and I think it's only fair that if you have questions you ask them.

SCHUMER: OK.

HATCH: Now you might have a schedule that's different. I can't help that.

SCHUMER: Well.

HATCH: I mean there's a lot of things I've had to forego today and some I've just had to do, but the fact of the matter is, is that that's what we have those hearings for.

SCHUMER: I appeal the ruling of the chair and ask for a roll call.

HATCH: Well, I reject the appeal.

SCHUMER: I ask for a vote.

HATCH: Well, this isn't a formal committee markup. You can bring it up tomorrow in a vote and I'll be happy to have you appeal the ruling of the chair and we'll vote on it tomorrow. I don't know what rule you're talking about.

SCHUMER: I thought that, Mr. Chairman, when the chair rules this way you can appeal the ruling of the chair at a hearing as well as at a markup.

HATCH: Not that I know of.

SCHUMER: Well, could we ask counsel to rule on that?

HATCH: Well.

SCHUMER: Parliamentarian.

HATCH: We'll check with the parliamentarian but I will defer that ruling in any event as chairman until tomorrow and we'll have the vote tomorrow, and if you win, I guess I'll have to come back. The fact of the matter is…

SCHUMER: So, in other words, if you want to ask questions you can stay all night but you can defer a vote of the people who don't want to ask questions?

HATCH: No, no Senator Schumer. There's a reasonable time that is given for hearings. I am prepared to sit here. I will give you more time ***right*** now. I will give you more time within a reasonable time after ***right*** now. But this is the time to ask your questions, and I would like you to do it.

If you don't want to that's your privilege. If you don't want to ask oral questions, then submit written questions and we'll have them answer them within reason. But these folks have been under the impression that this is their

hearing and it is, and it's been a long, lengthy one, and I expect it's going to still be fairly lengthy. But I'll be happy to give you more time ***right*** now, Senator Schumer. I have no problem with that.

SCHUMER: Mr. Chairman, this is one of the reasons that…

HATCH: And I've already given you 21 minutes.

SCHUMER: Oh, you've been generous each time I've been here.

HATCH: Well, and I'll continue to be.

SCHUMER: Let me say this. We don't even have rules in this committee yet. We haven't passed rules of how the committee works. We're already rushing to do three Court of Appeals justices at once, and I just don't think it's the fair way to run this committee.

HATCH: Well, I apologize to you because I do think it's a fair way and I think it has to be done and I don't think we can keep delaying these people and putting it off. They're making themselves available. I'm giving you more time if you need it.

SCHUMER: Mr. Chairman, in all due respect, this is a lifetime appointment, a very important court…

HATCH: Well, it doesn't have to be a lifetime hearing, I'll tell you that.

SCHUMER: And if nominees are not willing to wait an extra day or two to be questioned openly and fairly, I wonder about that.

HATCH: I'm not willing to put them through that. We're here. Let's have the hearing and let's finish.

LEAHY: Mr. Chairman. Several of us have spoken prior to this hearing of concern of having three controversial Courts of Appeals judges all in the same day rather than having day-by-day or however you might want to do it. You've spoken of Mr. Roberts waiting for 11 years. Looking at Mr. Roberts, he must have been about 20 years old at the time he was first nominated.

But, you also recall that Mr. Roberts was with a number of people who were nominated within the so-called Strom Thurmond rule, which means that most nominations after a certain period of time in a presidential election year are not heard. This is an extraordinary circumstance.

And you'll also recall, and I was here at the time, that there was no really great push by the White House or other Republican leadership to make an exception for Mr. Roberts, partly because they were convinced that President Bush was going to get reelected easily and they'd bring him up the following January.

LEAHY: I see Mr. Roberts smiling. He probably heard some of that at the time. I'm not putting you on the spot but just so everybody understands that the Strom Thurmond rule which has been followed in this for the nearly 30 years I've been here is that the president, Republican or Democrat, except for extraordinary circumstances, we have made some exceptions, does not get a nominee through after about July or so in a presidential election year.

Senator Biden did put through a number for President Bush that year but they were the ones that the White House really pushed very hard for. Professor Sutton, Mr. Roberts, and Judge Cook, were first nominated while you were chairman of this committee and were there for a couple months before the control of the Senate and nobody brought them up at that time.

So, this is not a case, I mean I just want to get all the facts on the table. Another day or so to be able to complete an adequate hearing and have an adequate hearing record for the Senate does not do the nominees bad nor does it hurt the Senate.

HATCH: Well, I've been prepared to finish the hearing today. I'm prepared to do it. I'm prepared to give you more time, Senator Schumer, and I'd be glad to do it out of order or any way you'd like to have it, but we're going to finish

the hearing tonight and go from there and, I think it's only fair to the nominees. I think it's fair to Senators. We have to adjust our schedules to be able to be here and participate. It certainly would be fair to the chairman too who's had a whole raft of things I've had to ignore all day long, some of them very, very important as well.

LEAHY: Even I've had important…

HATCH: And even the ranking member has had to do that. So, I apologize. I hate to have you feel badly about it but that's the way it's going to be.

Senator Feingold?

U.S. SENATOR RUSSELL D. FEINGOLD (D-WI): Thank you, Mr. Chairman. Obviously, I've been following this discussion and I just have to add before I start my round that this highlights exactly the problem that we pointed out at the outset of the hearing. This isn't one day long enough to question three controversial nominees, and obviously we shouldn't forget that we have three District Court nominees on the agenda.

HATCH: Senator, would you yield for just a second. I feel badly about this but I've asked for a little bit of leeway by my colleagues because I think it's time that we bite the bullet and do what's ***right*** with regard to at least these three nominees. I've been listening to my colleagues all day. I don't think there's been an unfair thing. I certainly made myself available. We've certainly allowed all the questions. We're prepared to sit for longer within a reasonable time.

But I do think there has to be some consideration to the people who are nominated too. It's now been 630 days since they were nominated, and in the case of Mr. Roberts, 11 years, and three times. Now, I think there comes a time when we've got to put partisan politics aside, and I haven't seen a glove laid on these people all day long for all of the desire to question them, and I've seen tremendous answers and tremendous abilities displayed here. And there comes a time we've got to say hey look, it's the end of the hearing.

UNIDENTIFIED MALE: Mr. Chairman…

HATCH: I think today is the day and I've made that clear from the beginning. I've asked for some help from the minority. I've asked for some leeway here and I hope that you'll give it. If you don't, we're going to end this today.

UNIDENTIFIED MALE: Mr. Chairman, I regret that… Mr. Chairman…

UNIDENTIFIED MALE: Mr. Chairman, I would like to raise a question. I thought it might have been my time next. Senator Schumer had 20 minutes. I kept my time within my limit. Others on the other side have gone ***over***. I think you've bent ***over*** backwards beyond belief to be fair. If Senator Feingold is ready to go now I'll wait, but I just think you've been as fair as can possibly be, and if you want to let the other side have their say ***right*** now, I'm willing to yield.

HATCH: Well, our side has been willing to defer so that the Democrat side can ask the questions that they want to, and I want to be fair. Everybody knows that I am and frankly that's why we have a hearing. Usually these hearings go for about two hours.

UNIDENTIFIED MALE: Well, Mr. Chairman…

HATCH: We've been here since 9:30. It's now 5:30 almost. Go ahead, Senator. I'm sorry to interrupt.

UNIDENTIFIED MALE: I regret the fact that these three nominees have to sit all day through this but, you know, frankly the problem is, and I've been on this committee only for eight years. That doesn't compare to you, Mr. Chairman, but I've never seen this done. I've never seen - and the idea that the hearings on controversial Court of Appeals judges are only two hours, that is not the case. That is now what I've witnessed here.

The serious hearings about very important appointments like this take much longer. They usually take all day, and frankly Mr. Sutton should have been the one for all day today, and I don't think people have been dilatory. These

questions are reasonable and I'll just say it one more time that, you know, I do have tremendous respect for you. This procedure today really does trouble me.

HATCH: If the Senator would yield. I remember a time and I have been on this committee, this is my 27th year, I remember a time when Senator Biden had three and I don't remember any griping about it because we want to fill these benches. These are emergency positions, and frankly I'm willing to be here, and I think it's incumbent upon our colleagues to be here and ask their questions. And like I say, my side is deferring so that you can, and…

UNIDENTIFIED MALE: Mr. Chairman…

HATCH: Now, look let me say one other thing. I really respect you. You've always been honest. You've always been straightforward. You're very intelligent. You're a great lawyer and I respect your feelings but respect mine too.

UNIDENTIFIED MALE: I do.

HATCH: I'm just trying to do my job as the chairman. I'm trying to fill these courts and I haven't seen anything wrong here today. These three nominees have been excellent. But in any event you have to make up your own mind but there has to be a time when you bring these things to conclusion.

Today is the day we bring this hearing to conclusion and everybody knew that before we started, and if people just want to ask questions of Mr. Sutton, although we've had questions of all three, then that's your privilege, but my gosh, I'm providing means whereby you can ask questions of others. Please start his clock ***over*** because I've used his time.

LEAHY: Mr. Chairman, could I make a suggestion before you start the clock?'

HATCH: Yes.

LEAHY: Usually you and I have been able to find a rational way out of such impasses. Could I suggest that we, and the members who are here, could we recess for about five minutes and we talk privately? You lose nothing by that nor do we.

HATCH: All we lose is time, ***right***.

LEAHY: And, it's been a long day. It's going to be a long evening. Why don't we just talk privately out of the hearing of the room? I mean you're the chairman. It's whatever you want, but I would suggest we do that. You and I have almost always been able to work things out.

HATCH: I think that's a reasonable request. We'll recess for five minutes and then we'll resume, but we're going to finish this today.

(RECESS)

HATCH: OK, we'll turn to Senator Feingold.

FEINGOLD: Mr. Chairman, again I very much enjoy working with you.

HATCH: Likewise.

FEINGOLD: But the record does need to reflect my concern, the concern of many members that this process today really was not a fair process, although you are generally very fair in your leadership of this committee. I just want the record to reflect that many of us believe that these nominees are controversial and to be sure that there's not a precedent for the future based on the claim that Senator Biden had done this in the past.

The fact is when Senator Biden had three Court of Appeals nominees at the same hearing, they were as a courtesy to the previous Bush administration and they were non-controversial. So, let the record reflect that this should not

be a precedent for future attempts to have three significant, controversial, Court of Appeals nominations put forward at the same time.

HATCH: Will the Senator yield?

FEINGOLD: I think it's a very bad process and precedent for this committee.

HATCH: Will the Senator yield on that point? I agree that it is extraordinary to have three Circuit Court nominees. It's been done before. Senator Biden did it and I think it's not a precedent we should avoid, but it has caused a great deal of concern among my colleagues and I will certainly try to be more considerate in the future but I would like to finish this tonight if we can, and I believe we can, in fact we're going to.

And, I appreciate my fair colleague. You've always been fair. You've always been decent to me and I think you're being decent again, and we respectfully disagree on this, but I will try to take your feelings very deeply into consideration in the future.

FEINGOLD: Thank you, Mr. Chairman. I'll go to Mr. Sutton again. In response to my earlier question about the Swank case, you told me that you hadn't really made a direct argument that the migratory bird rule violated the Constitution.

SUTTON: No, I don't think I did. I said we made a constitutional avoidance argument and then raised the constitutional issues that would be implicated if the court couldn't deal with this on statutory construction grounds.

FEINGOLD: ***Right***, you said you'd only made an argument on what you called constitutional avoidance, and we actually looked up the amicus brief here filed on behalf of the State of Alabama. The entire second half of the brief, six pages out of a total of ten pages of argument, is an argument with the following heading: The regulation exceeds Congress' commerce clause powers.

In other words, you made a constitutional argument, not simply a statutory interpretation argument, based on the Doctrine of Constitutional Avoidance, is that correct?

SUTTON: It is correct, Senator, but maybe my earlier testimony was misapprehended or maybe I misspoke. I'm sure the odds are better that I misspoke. One can't make a constitutional avoidance argument without making a constitutional argument. I mean in other words it's not - if one said to a court that you want to construe a statute in this way to avoid a constitutional issue, I can't imagine a lawyer not then arguing the constitutional issue (inaudible).

FEINGOLD: I don't think that's the point that I'm trying to raise. I appreciate that. I do understand that yours was the only amicus brief that took this position, so I want to get directly to the constitutional issue.

I wanted to give you an opportunity to supplement your answer to my earlier question, and so let me add the following direct question before you respond. Do you personally believe the assertion in the State of Alabama's amicus brief that the migratory bird rule exceeds Congress' commerce clause power? Do you personally believe it does?

SUTTON: I have no idea. You know I obviously was not involved in the underlying litigation that generated the Swank case that ultimately went to the U.S. Supreme Court. I wasn't involved in it in the lower court, and I simply had a client who was interested in making that argument and I helped them make that argument. I was never - I can't imagine working for a client and assuming my job was to tell them first what the ***right*** answer was, and then acting as their lawyer.

The way I saw my job, and still see my job as a lawyer, is if a client asks me to do something, find all reasonable arguments that can be made to support their position. I've done that. You should know this is not the only environmental case. I've helped environmental cases on the other side of the issues.

There's a case that came out of Ohio, the Sierra Club case, which dealt with logging and timberlands, and while I didn't argue the case for the lawyer, I wasn't even a lawyer in the case, I did help the lawyer who argued on behalf

of the Sierra Club in that case in getting ready for the U.S. Supreme Court argument and participated in the moot court with him.

So, this is another situation where I've been on both sides of these issues as a lawyer, and it wasn't a question of personal views. I didn't decide in the Sierra Club case this is something I'm going to do because I have personal views. This is something I'm going to do to help someone arguing a case and likewise with the Swank case.

FEINGOLD: All ***right***, well let me move on to a different area then. You filed an amicus brief on behalf of Los Angeles County in the California State Association of Counties in the Buchanan, Border and Keerhall Mink v. West Virginia Department of Health and Human Resources (ph). Do you recall that case?

SUTTON: I do.

FEINGOLD: As you will recall, the Buchanan facility ***sued*** the state alleging a violation of the Fair Housing Amendments Act and the Americans with Disabilities Act, after being forced to close for not meeting a self preservation requirement of its residents as defined in state ***law***.

In response to the suit but before the court ruled, the state legislature illuminated the self preservation requirement. That gave Buchanan all the relief it sought. The District Court dismissed the case as moot, but then ruled that Buchanan could not be considered a prevailing party in the case, and therefore could not recover its attorneys' fees.

The Fourth Circuit, contrary to the rulings of every other circuit that addressed the issue affirmed. The Supreme Court ruled 5- 4 that under the various attorneys' fee statutes, plaintiffs may recover attorneys' fees from defendants only if they have been awarded relief by a court, not if they prevailed through a voluntary change in the defendant's behavior or a private settlement.

So, this is a narrow interpretation of the definition of prevailing party, which I think has potentially disastrous implications for people whose civil ***rights*** have been violated but who can not afford to hire a lawyer. In calculating whether to take the case, an attorney for a plaintiff will have to consider not only the chances of losing, but the chances of winning too easily.

Even if a plaintiff secures a complete victory by getting a defendant to admit to wrongdoing or prompting a change in the statute, the attorney who labored for years to bring about such a victory would not be paid at all.

In the amicus brief you filed in Buchanan, you argued in your words that as a "matter of mundane litigation realities" a narrow definition of prevailing party would prevent parties from "commencing time consuming satellite litigation ***over*** fee awards."

I want you to know I agree that litigation ***over*** fees is something to be minimized, but I would argue that a much more important interest to be furthered is the ability of aggrieved parties to find attorneys who will take their cases. The court's interpretation of prevailing party potentially prevents people from seeking protection guaranteed to them under existing civil ***rights laws***, and the mundane litigation realities might actually point in the other direction.

A decision could, in fact, force attorneys to drag out lawsuits to keep going, to make sure that they get a judicial order rather than accepting a non-judicial settlement that give their clients everything they seek.

So, let me ask you, do you believe that a person who has a legitimate claim of civil ***rights*** violations should be able to seek redress in court?

SUTTON: Of course.

FEINGOLD: Do you believe that people's legitimate civil ***rights*** claims should have the ability to secure adequate counsel to pursue those claims?

SUTTON: Of course.

FEINGOLD: Isn't that why Congress enacted statutes giving successful plaintiffs the ***rights*** to collect attorneys' fees?

SUTTON: I think that is -- I think it's 42 USC 1998, I think that is the purpose of it. I agree with you.

FEINGOLD: Then how will a person with a legitimate claim be able to get adequate counsel in a case that could take months or even years to resolve when defendants can avoid the possibility of paying attorneys' fees by simply offering the plaintiff everything they want before trial?

In other words, explain to me how the Buchanan decision, which you argued for in your amicus brief, can be squared with a desire to encourage the enforcement of the civil ***rights*** ***laws*** and other statutes in which Congress has made a judgment that attorneys' fees should be available?

SUTTON: Yes. Well, first of all, you know, I think this is an important issue and I'd like to think the brief I wrote on behalf of the client Los Angeles County is a longstanding Jones Day client. They obviously get ***sued*** a lot so that's why we wrote the brief on their behalf.

And, you know, as a board member of the Equal Justice Foundation, who's, you know, 90 percent of their revenue comes from attorneys' fees, I can tell you that I am sensitive to this issue and hope, I think the legislation you've proposed to correct the Buchanan decision is correct, is successful, because it will certainly help EJF when it comes to raising funds.

The issue in that case was a statutory one of whether the term prevailing, prevailing was the key word, and the difficulty which led the Fourth Circuit to go one way and the other Courts of Appeals to rule the other way was whether someone had prevailed, when in fact there wasn't a court judgment indicating this but simply a change in conduct.

And, I fully appreciate your point, which is my lord, if that's the rule then a litigant, a recalcitrant state or city engaging in civil ***rights*** violations can simply stop their conduct after litigating for many years, change their rule, and not only have the case dismissed but not owe any attorney fee awards. Precisely because I was -- I appreciated the very point you've raised at the end of the brief that we offered for Los Angeles County, we dealt with this issue.

FEINGOLD: Then why in your Buchanan brief you asserted that "precedent confirms" your interpretation of the attorneys' fees statute, yet you failed to bring to the attention of the court the decisions of nine Court of Appeals that contradicted your position?

SUTTON: Well…

FEINGOLD: Didn't you have an obligation to make the court aware of these decisions, especially in light of the fact that you indicated that you believe that the ***law*** should allow a litigant to be able to settle a case at an appropriate time and still get attorneys' fees?

SUTTON: It's very rare in U.S. Supreme Court briefs that I have relied on Court of Appeals decisions in general, so that I would say that's just typical of me and cuts across cases and issues. But the point I wanted to address, which you raised, and I think it's a critical one is what about the recalcitrant city or state that suddenly stops their conduct? Are they now scott free from liability, attorney fee liability? And, I think your concern is a valid one.

And, we indicated in the brief, we raised this very point. In fact, I think it's in the last couple pages of the brief, and said that's not necessarily true. We made the point of concession for a county, which is ***sued*** all the time, that if there's a case -- gosh it's a Justice Ginsburg decision. It may be Laidlaw. We cite it in the back of our brief.

It makes the point that just because a litigant, a city or state, stops its conduct that doesn't necessarily moot the case because of the possibility they may do it again, or as you're suggesting the possibility they're just trying to hide from attorney fees.

So, I'd like to think -- I obviously had a client's perspective to represent. I did my best to represent it but I felt like we were actually trying to address that very important consideration in the brief and I do think it was within the mainstream to argue the point on behalf of them as a client. And, as you well know, it can be -- this ambiguity can quickly be clarified by legislation.

FEINGOLD: I thank you, Mr. Sutton. I thank you, Mr. Chairman.

HATCH: Do you need more time, Senator Feingold? Okay, thank you. Senator Leahy.

LEAHY: Professor Sutton, I would suggest, I would urge you to go back and re-read Judge Noonan's book. I have no question that with your mental ability you probably can recite most of it verbatim.

But I think that again I can't tell you how much many of us are concerned that we have a very activist Supreme Court that determined that the Congress is basically irrelevant and our feelings are basically irrelevant, and you're going to have a number of cases, they're going to come to you as a first impression if you're confirmed to this position. Well, obviously I can't tell you how one would rule, but I would like you to at least consider that.

SUTTON: Could I respond to that?

LEAHY: Of course, of course.

SUTTON: I can assure you ***over*** the last two years, I have thought a lot about the very perspective all of you have. This is obviously not a Democratic/Republican issue. This is an institutional issue and, you know, when one is criticized, as I have been for advocating those cases, you know I really have thought a lot about the other perspective, and I do think there are very recent criticisms of those decision but I do think they're difficult decisions.

They always are when the court is asked to referee boundary disputes between branches of government. And so, I can assure that if I were fortunate enough to be confirmed, I really would consider the perspective this body has when it comes to passing ***laws*** in the first instance, when it comes to gathering evidence establishing whether there's a policy issue to be addressed, or when it comes to determining whether there are underlying constitutional issues that need to be remedied.

LEAHY: Thank you. Mr. Chairman, I just started my time. I have other questions but Senator Durbin has been in and out of the Intelligence Committee. I'd rather -- I'm going to be here anyway and I'm just wondering if Senator Durbin…

HATCH: We'll be happy to (inaudible). Senator Durbin, go ahead.

LEAHY: I guess I'm going to…

HATCH: Go ahead.

U.S. SENATOR RICHARD J. DURBIN (D-IL): Justice Cook, let me -- I don't want you to feel that you've been neglected here and that Professor Sutton has been hogging all the time.

COOK: I said oh yes, I was feeling that.

DURBIN: Yes, I know you were (inaudible). But I understand you're the most frequent dissenter on the Supreme Court of Ohio. You have well ***over*** 300 dissents in your eight years on the court.

I'm told you once joked that the female justices on your court have three names, Alice Robie Resnick, Evelyn Lundberg Stratton, and Deborah Cook dissenting. Should I have a concern about your judicial temperament, an inability to reach consensus if you have that many dissents?

And I ask the question not in a frivolous fashion because the Sixth Circuit is a fairly polarized court and if anything we'd like to see the Sixth Circuit help the people within its circuit to reach more consensus opinions and not polarized. Should I be worrying about your judicial temperament?

COOK: I should think not, Senator. Dissenting is really, as I said before in answer to some other question, it really is a learning process. Many times I am somehow designated to write the dissent for other members of the court and, therefore, my numbers look rather high.

But dissents are offered as -- for the benefit of other side who offer the first opinion. It's a method to reach consensus sometimes and in our court it's actually a matter of logistics. The members of the court lives in various parts of the state so consensus is the first objective, and unfortunately it's not always reached, but certainly that's the first goal. But I don't really think you can take anything from the fact that I write dissents, other than I am attempting to do a precise reading of the ***law***.

DURBIN: You may think the Democratic Senator would take comfort in the fact that often when you've dissented the Republican majority in your own court though has been quite critical of your view of ***law***. In Bunger v. Lawson, the majority called your interpretation of the ***law*** nonsensical. They said it leaves an untenable position. It's unfair to employees. They said your opinion would be "an absurd interpretation that seems borrowed from the pages of 'Catch 22.'"

In, Russell v. Industrial Commission of Ohio, they stated your dissent lacked statutory support for its position, that you were unable to cite even the slightest dictum from any case to support your view and your argument, which has not been raised by the commission, the bureau, the claimant's employer, any of this (inaudible) is entirely without merit.

In Ohio Academy v. Sheward (ph) the majority held that tort reform ***law*** is unconstitutional because it severely limited an injured party's ability to recover from wrongdoers no matter the type of injury.

And then, they responded to a dissent to join stating that "the dissenting judges mischaracterized our findings, misconstrued prior decisions of this court, selectively extrapolated portions of the legislation at issue while ignoring its overall tenor and content, disassociate themselves from a decision in which one of them concurred, suggested we create a new theory of standing, minimizing the magnitude and scope of the legislation, and the importance of separation of powers, accused us of language unbecoming a judicial opinion, questioned our faith in our courts of record, all in an obvious effort to distort our opinion into a form susceptible to (inaudible) criticism and protect this legislation (inaudible), meaningful and inclusive judicial review."

I don't know about Ohio, but in Vermont that would go beyond understated New England criticism. It's pretty strong criticism and I read this because I worry one, as I said will polarize Sixth Circuit, whether you would be not one to help bring people together but one to further polarize it, that you overwhelmingly favor employers in complaints brought by workers. In fact, I haven't found a case where you dissented in favor of an injured employee in a claim brought against his or her employer.

So, I raise this, Justice Cook. These are all things you've heard.

LEAHY: I mean, you read the opinions. Please help us here. Why such strong words by the majority, mainly Republicans, for your dissents?

COOK: The court is nominally 5-2 Republican but as you'll note from some of the newspaper stories there are a number of Republicans on the court who are labeled as everyone is labeled. They are labeled as liberal and I'm so-called conservative. But the -- so, I'm not sure we can draw too much from the conservative (inaudible).

LEAHY: Is this a liberal vendetta against you?

COOK: No, not at all. I think it was -- you know I'm sorry for the tone. It does appear to be a tone of a little beyond what we expect but it was a reasonable difference in Sheward (ph). That's the case where you find that language. I'm not -- I think it might be stirred somewhat by the fact that this case was very unusual. In fact it was exceedingly unprecedented and really an untenable procedural posture by which the case came to us.

It wasn't an individual bringing a case to ***right*** a wrong or to achieve a remedy. In fact it was an organization, the Ohio Academy of Trial Lawyers, so that's where the standing issue came in. That's not typically what we see. And

beyond that, the case was brought as an effort to get a writ, to ask the court to issue a writ to tell the judges in the state to not enforce this newly enacted legislation on tort reform.

And my dissent, frankly, was only on the issues of standing and the procedural posture that simply wasn't tenable, and nevertheless the court did issue a writ even though the standard for issuing a writ couldn't possibly have been met in this case. But so, I'm…

LEAHY: But they were pretty…

COOK: I can't really defend the language in the majority.

LEAHY: But they were pretty strong in more than one case. I mean they were pretty strong in their criticism of your dissent and when you've had well ***over*** 300 dissents in eight years, you know, I assume you could pick and choose where they were critical, but in the areas that I've read, the criticism seems to go way beyond the collegiality one normally sees in a court, and the numbers of your dissent, of course, go way beyond anybody else in the court.

It is one thing to joke that your name is Deborah Cook dissenting but again in a polarized Sixth Circuit it creates a problem to me. I'm concerned that as an appellate judge you've repeatedly voted to overturn a jury's determination that the employees before them were victims of discrimination.

Now, I've tried an awful lot of jury cases. I know all the effort that goes into getting a jury verdict and I know the courts are very reluctant to overturn a jury verdict. They've only got a cold record. They haven't seen the witnesses. They haven't heard them.

But I think your dissent in Leonard v. St. Govain (ph) that's troubling. Four women ***sued*** their employer for gender discrimination. They received a jury verdict. It was overturned by the appellate court and in a majority the Supreme Court of Ohio ruled that the appellate court erred in overturning the jury verdict, none of the proper legal standards, they could not uphold the appellate court's ruling unless reasonable minds could come to only one conclusion, the employer was not liable.

COOK: I think that's the case…

LEAHY: ***Right***.

COOK: If I may, Senator.

LEAHY: Sure.

COOK: I believe that's the case where the Court of Appeals initially ruled that the verdict should be overturned in insufficiency and, in fact, wrote a 97-page very detailed opinion, and when the case reached our court it actually was a very short decision that said there was some evidence, and it seemed to me, and I voiced this in my dissent that the tort had really not applied any analytical rigor, nor applied the standard set forth in Civil Rule 50 for directed verdict and that was the basis for that dissent.

And, I don't -- I think collegiality is very important on the court. I have had a very good reputation for improving the collegiality of the Court of Appeals where I formerly served.

LEAHY: But collegiality aside, Justice Cook, it seems that time and time again if somebody has ***sued*** an employer and they've gotten a jury verdict, you seem very comfortable in overturning that jury verdict. Now, I've seen runaway juries where the appellate court should overturn it, but it's rare. It's extraordinarily rare. You seem to find them a lot but I think in most states that's pretty rare that a jury that was a finder of fact gets overturned.

COOK: Yes, I don't know if we went through all the cases. I don't know that we'd find that it's done a lot. I know a case that's been cited is the Burns (ph) case but that was a majority opinion that overturned that verdict in an employment case.

LEAHY: The Reeves (ph) case, the Burns case, the St. Govain case.

COOK: I can tell you, Senator, I've been on the receiving end of that and I know it's no fun. I actually made some ***law*** in Ohio on discrimination representing a woman in an age discrimination case, Jean Barker (ph), and it's the Jean Barker case that is cited as authority in the Burns decision. As I say, I didn't write that decision but Jean Barker -- we had a verdict at the trial level and it was overturned by the Supreme Court. So, it's precedent that pops up in some of these cases.

So, I certainly don't take it lightly and verdicts are not to be overturned unless there is, in some of these cases, insufficiency of the evidence. We all know the standards where a verdict can be overturned and it's not done without the ***right*** facts or the absence of facts that warrant reversing a decision.

But in a lot of these cases, I think you'll find that if I were the dissenter, I wasn't writing just for myself and moreover quite often you'll find that it's the Court of Appeals, a unanimous Court of Appeals that felt likewise. So, I'm not sure I can easily be said to have missed the boat inasmuch as sometimes at least three other judges and perhaps as many as five agreed, six agreed.

LEAHY: Justice Cook, my time is up but we'll come back to this. I did not want you feeling neglected.

COOK: I appreciate that.

LEAHY: And feel that Professor Sutton was hogging all the questions.

HATCH: How considerate of you, Senator.

LEAHY: I try.

HATCH: Senator DeWine for just a few minutes, Senator.

DEWINE: Thank you. Justice Cook, Senator Leahy has indicated that you seem to always rule in favor of the employer. I've got at least 23 cases here where you've ruled in favor of the employee in employment cases, Ahern v. Tactical Construction, Browder v. Narvis Construction (ph), Voy v. Chippewa Local School District (ph), Connolly v. Brown (ph), Douglas v. Administration. I'll go on and on. I would submit these for the record, Mr. Chairman.

HATCH: Without objection we'll put those in the record.

DEWINE: Justice Cook, I want to discuss with you for a moment Senator Leahy's comments about you being labeled a dissenter, and you certainly have dissented in a number of cases.

Let's first start with the cases that -- five cases that were appealed from the Ohio Supreme Court to the United States Supreme Court. One of the cases was simply a unanimous Ohio Supreme Court decision which was, in fact, affirmed by the U.S. Supreme Court. But in the other four cases, you disagreed with the majority of your colleagues.

COOK: That's correct.

DEWINE: You dissented. You dissented. Your colleagues were on the other side. In each one of those cases, the United States Supreme Court said you, Justice Cook, were ***right*** and your colleagues were wrong, is that correct?

COOK: Yes, it is.

DEWINE: So, being a dissenter in that case may not have been ***right*** but at least it's what the United States Supreme Court thought was ***right***.

COOK: That's ***right***. That was good enough for me.

DEWINE: So, being a dissenter is not always the worst thing in the world. In the State of Ohio, Mr. Chairman and members of the committee, we do have ***right*** or wrong, ***right*** or wrong we do have what at least the Ohio newspapers, and as I said earlier this morning, it seems like it's been a long, long time ago. I guess it was a long time ago.

What the Ohio newspapers have labeled to be a very activist Ohio Supreme Court, and whether you think that's a good idea or not a good idea that's not what we're debating today. But the Ohio newspapers, which run the gamut in the political spectrum, and I can say this as someone whose run for political office in Ohio for a long, long, time, we have everything from the liberal to the conservative in the state of Ohio as far as the newspapers.

But each newspaper, major newspaper in the state of Ohio has labeled the Ohio Supreme Court as being a very, very activist Supreme Court. I will not take the time of the committee at this point to read the different editorials that make this point, but I am going to hand out to the different members of the committee, and also ask the chairman to make a part of the record…

HATCH: Without objection.

DEWINE: ...this document which basically talks -- these are different quotes from the different editorials which talks about how active the Supreme Court is, and I would tell the members of the committee that it is on a bipartisan basis that it is active. This activist, very sweeping activist opinions, and I'm just going to read a couple of the -- it will take just a moment to read a couple of the comments from the court -- excuse me, from the newspapers.

The Ohio Supreme Court, this is from the "Toledo Blade." The Ohio Supreme Court simply is not well regarded around the country and it's the meddling tendencies of this four-judge super legislature that deserves most of the blame. The people of Ohio elected legislators are governed to make ***laws*** and govern but their intent has been thwarted by this activist court.

HATCH (?): Excuse me, Senator I didn't hear what he's quoting from.

DEWINE: This is the "Toledo Blade" editorial.

HATCH: OK, thank you.

DEWINE: The point is that I think you will find, again, whatever way you come down on these issues that the disputes on the court and the disagreement that Senator Leahy was quoting from in these cases pretty much comes down to where Justice Cook was dissenting based on her strict interpretation of the ***law*** versus the court's more activist interpretation of the ***law***, and I will reserve the balance of my time, Mr. Chairman. I'll reserve the balance of my time.

HATCH: Thank you. Senator Biden has not had his first round, so if it's all ***right*** with everybody (inaudible).

U.S. SENATOR JOSEPH R. BIDEN, JR. (D-DE): Thank you, Mr. Chairman. I apologize to the committee and the witnesses. This has been a pretty busy day and I've been spending my whole day dealing with issues relating to Iraq, and I have a lot of questions. I hope we're going to have a chance to have this panel ***over*** because I, for one, have not a lot. I have about a half hour's, an hour's worth of questions that I am because of the schedule today not able to do and (inaudible).

HATCH: We're happy to give you the time now, Senator Biden (inaudible).

BIDEN: Let me -- I won't take that time now because in large part I can't. I have another commitment relating to the Foreign Relations Committee I have to do at 6:18. But let me start off by just asking one or two questions in the few minutes here.

Professor Sutton, I'm a little concerned with the nature and the way in which the Supreme Court necessarily has cut back significantly the number of cases it reviews.

BIDEN: There are about 80 cases a year and that most of the significant cases, whether we're talking about the decisions relating to Roe v. Wade or any other case, there is enough ambiguity and significantly less review that the Circuit Court of Appeals has, in every circuit, has a significant impact beyond what they had 20 years ago in making ***law***.

And so, I have a number of questions for you, Professor, relating to your notion of the role of the court and your assertion, I'm told and correct me if I'm wrong, that you've indicated, and I quote that "federalism is a zero sum situation in which either the state or the federal lawmaking prerogative must fall."

That is a constitutional view that I have an overwhelming disagreement with, and I suffer from the fact that I spend a lot of time teaching the Separation of Power Doctrine and I think it's not inconsistent with where the majority of the Supreme Court has gone, but I think it's -- I think it's fundamentally flawed constitutional methodology.

And, that's not to say that it is not intellectually defensible. It's to say that I have fundamental disagreement with it and, I want to be straight up with you.

I know this is not for the Supreme Court but based on what I've read, assuming it's consistent with what you would respond to, if you were a nominee for the Supreme Court, I would not, even though you're intellectually and morally and in every way capable of sitting on the court, I would do all of my power to keep you off the court because it appears as though we have such a fundamentally divergent view of the Tenth Amendment, the Eleventh Amendment, and the role of federalism that I just want to be up front with you about that.

And so, for me, I will not get an opportunity to go into any great detail tonight obviously but I have some questions I would like you to respond to. And, let me begin by suggesting that, and I do not ask this out of parochial interest although I have great pride in being the person who drafted the Violence Against Women Act.

But, I'd like to understand your reasoning beyond the fact that you were an advocate here if there is a reason beyond your advocacy representing a client. And you filed a brief in the Supreme Court on behalf of the State of Alabama arguing against the constitutionality of the federal civil remedy of victim sexual assault and violence.

Now, this is not a question of whether or not you were confirmed or not confirmed by the court, whether your view prevailed or not. It's a question of my trying to figure out how you approach these issues.

Among other things, your brief in Morrison stated that gender- based violence does not substantially affect interstate commerce. Now, prior to the Violence Against Women Act, I literally held nine hearings and received testimony for ***over*** 100 witnesses, at the end of which those long and thorough explorations, the Congress concluded, not just me, that gender-based violent crimes in fear of these -- I must leave in one minute, wonderful.

I'm going to have to submit this question to you in writing, but the bottom line is what I'm trying to get a sense of is how you approach what you consider to be the prerogatives of the Congress, Section 5 of the Fourteenth Amendment, the significant change in the way in which this court, which I think is a bright court but is the most activist court in the history of the United States of America.

No court has overruled as many national pieces of legislation, including the New Deal Era as this court has, and I want you to know to be blunt with you, I come from sort of the Souter of it in the sense in the Florida prepaid cases and their progeny where Souter said, "The fact of such a substantial effect is not the issue of the courts in the first instance, but for the Congress' institutional capacity for gathering evidence and taking testimony far exceeds ours.

Going on, Souter says, "I'm left wondering where does the Court's decision leave Congress' former plenary power to remove serious obstructions to interstate commerce by whatever source? It is reminiscent of the Lockner Era when they said, by the way, you have those labor standards having to do with mining. Mining is not interstate commerce.

Then they came along and said production is not interstate commerce. Then they said manufacturing is not interstate commerce, until midway in the New Deal with the end of the Lockner Era they said whoa, whoa, whoa, wait a minute, wait a minute."

What I'm really trying to get at, and I'll submit these questions in writing, is at what point does the court decide to become the federal traffic cop? At what point does the court's authority to intervene in what I believe constitutionally has been left to the Congress under the Constitution to make judgments about? And, you seem to have an incredibly restrictive view of the Congress' prerogatives.

This is not Lopez, where the court did not have sufficient findings, where the court did not find sufficient findings. Even this court said there is no question that there was an extensive record, but we as they did in Alton (ph) Railroad in years earlier said, but we don't think that's sufficient, and I wondered who the hell the court is to make that judgment that we don't think the remedy you chose is effective.

That's a very rapid attempt to summarize my concerns, so you have a context in which to understand the questions, why I'm asking the questions straightforwardly?

SUTTON: No. I appreciate that. I appreciate your being straightforward. There's no doubt the criticism you just levied against the Morrison decision is the strongest criticism and is clearly the most difficult part of the case for the court in exactly where the 5/4 line was, and that line was how much deference to give to these findings.

And, you know, you were kind enough to mention I was involved in that case on behalf of a client. I was working as an advocate and I was doing my best by them, and I, you know, what I would have done in that case God only knows. The one thing I would say though about your concern about the Court of Appeals judges, I agree with you. I wish the U.S. Supreme Court would take more cases. It made my U.S. Supreme Court practice very difficult to sustain. They take so few cases.

But, I'm not aware of too many, in fact none, Court of Appeals decisions that struck a federal ***law***, in other words your handiwork, that weren't eventually, and usually quite promptly reviewed by the U.S. Supreme Court.

BIDEN: I think that's true. Most have been, but there are cases, and I'm compiling this. I think we'll be able to show there are roughly, there are ***over*** 200 cases in the Circuit Court of Appeals has found enough leeway in the existing ***law*** where they have changed basic ***law*** without any review by the Supreme Court because the Supreme Court never took the cases.

And, I've had my staff in the process of preparing for some time now, which is quite frankly unrelated to you or any one of you, is beginning to make me review my standard for review of nominees. I have a very different standard for 30 years of reviewing Supreme Court nominees because they're not bound by stare decisis, than I do reviewing district and circuit court judges.

But I'm moving to the view that there should be in effect, to steal a phrase from the court, an intermediate standard for Circuit Court of Appeal judges because they have become so much more significant in being the final arbiters. They are not legally, the Supreme Court is, but because of the review process, they have become the final arbiters in areas where I used to be able to say I know the court will review this.

If you are bound by stare decisis, you will, and I trust your judicial temperament that you mean that, then in fact I'll take a chance on you even though I fundamentally disagree with your constitutional methodology because you'll abide by the decisions. But there are enough discrepancies or differences or holes in the reasoning.

I mean look at all the cases that have flown, and this is not my major concern but look at all the cases that have been the progeny of Roe v. Wade. They're very, very, very complicated, whether it's (inaudible) or whether it's the issue of parental notification, all these issues.

And, in the past, I never doubted that the court would review those. But now what's happening is the court's in a position where it does not review a significant portion of the Circuit Court of Appeals decisions that change state ***law*** or uphold state ***law*** that are never reviewed and that's the only generic point I wish to make with you.

And, one of the questions is going to be you as an advocate, I assume it's your answer but I'd appreciate an honest answer if it's not, you argued in your brief that even the Congress did not show that sexual violence, violence

against women had no impact in their state Congress. Whether or not we get into the question of what constitutes commerce, that it had no impact by the old standard of what constituted commerce as I read your brief.

SUTTON: Well, maybe I'm not understanding the question but the point I think we were trying to make was in all of the commerce clause cases, high watermark cases, Worker v. Filburn (ph), Jones & Laughlin, Lopez even, there's been a consensus that the court does have a role in determining whether something does…

BIDEN: Is interstate commerce.

SUTTON: … impact interstate commerce and I thought that was meant to be the main theme of the brief that the court did have a role here whether it decides to uphold (inaudible) or not.

BIDEN: But did not you argue that it does have a role in making a judgment whether it impacts. But in order for you to reach the conclusion that it did not impact interstate commerce, you had to fundamentally disregard the 100 hours of hearings that the Congress held and concluded that it did, correct?

SUTTON: I can certainly understand someone taking that view but I would say it is directed…

BIDEN: Is there any other view to take?

SUTTON: ...at my client. The client is the one that took that position and I did everything I could to advocate that position, and I do…

BIDEN: Do you believe that? Do you believe that? I'm not suggesting it was inappropriate for you to -- for example, if you were teaching it, would you teach that the Congress, the facts presented in the case in the congressional record did not warrant, did not warrant the court's concurrence because as my good friend Justice Scalia says everybody knows they never read this stuff and they never write this stuff those Senators. It's done by staff. So, dismissively it's taken out of the record. I mean is that a view you share?

SUTTON: No, it is not a view I share. I guess the point I would make is that there was a voluminous record, no doubt about it in the battle and of course there was just one provision of that ***law*** at issue.

BIDEN: I know that.

SUTTON: (inaudible) implicated, much less attacked, and I think the issue in the case is such a difficult one is whether there are sufficient amount of findings that no matter how much they are, no matter how much better equipped this body is to make these findings than the court is, whether there's still a role and the responsibility of the court to examine them to determine whether they do constitute under the Constitution interstate commerce.

What would I have done? I have no idea as a Court of Appeals judge. I just, I'm sorry I can't tell you that. I'm not looking at the issues that way.

BIDEN: No, I'm not asking you what you would have done but I do want to explore these issues with you and I have questions as well for the other nominees. Like I said, I hope we have more time.

I understand my name was invoked when someone raised the issue of whether or not we had three not unqualified but controversial nominees all in one hear, and Biden did it. The three that Biden put together had a vote of I think 98-0, so they were not controversial. I thank you all. I apologize for having to leave.

HATCH: We have to stand corrected.

BIDEN: Thank you, Mr. Chairman.

HATCH: OK, Senator Kennedy.

U.S. SENATOR EDWARD KENNEDY (D-MA): Thank you, Mr. Chairman, and I thank our witnesses. It's been a long day for all of you and we appreciate your patience as well. I regret that I was unable to be here earlier today.

This afternoon I attended a memorial for a former Congressman Wayne Owens, who was a Congressman from the State of Utah, and I had thought that perhaps we could have had a brief recess where several of us who know Wayne Owens and had a lot of respect for him. He actually worked for me, worked for my brother. Bob had a chance to go there.

So, unlike most of the other hearings where members are able to stay and go through it, we come in here not sure whether some of these areas have been covered in the past or not. But nonetheless, I will move ahead and we'll do the best we can. I must say I just again want to register with the chairman at the opening of the session if this is the way the committee is going to be conducted.

I'm not sure that this accelerates the good will of the committee or the action of the committee in the long term or even in the short term, but that's an issue for another time.

KENNEDY: Justice Cook, I want to come back to this issue in terms of your dissents, and who you've been finding for. I picked up a little bit of the comments that my friend Senator DeWine raised in response to some of Leahy's questions but I'd like to come back to this issue with you if I could please, and that is there is at least -- there is at least an argument that is made that your decisions come down in protecting the more powerful against the weak, that you've worked hard to make it more difficult, for example, for those that are injured in the workplace to get rightful compensation.

You've made it more difficult for victims of discrimination to get justice. You've made it easier for large corporations to avoid paying for the harms that their defective products have caused.

I know these are not new to you but I want to hear from you. In fact, some have said that your views have marginalized you, even on a conservative court, that you authored at least 313 dissents, many of them loan dissents. This number is extraordinary, is in fact more than any other justice on your court. What's more, even with all of these dissents, you have never dissented from any decision of the court that was favorable to the employer.

You stand up for the big business all the time. You've never stood up for the ***rights*** of the individual. To the contrary, you've descended 23 times in cases in which the court ruled in favor of the employee. That's 79 percent of the time. You've only voted for an employee six times, and in five of those cases, the court was unanimous. In the other case the court voted 6-1 in favor of the employee.

All of this is why your rating by the Ohio Chamber of Commerce is not surprising. They say you rank first in voting for the employer in employment cases. You also rank first in voting with the defendant in product liability cases. You even scored a perfect 100 percent in insurance cases on issues affecting the environment voting with the corporate defendant 100 percent of the time.

Now, all of us are aware about these percentages and I want to give you an opportunity to respond to those and to the other observations that I made about your holdings. It seems that you're in dissent so often because you are consistently and knowingly pro- business, anti-workers, anti-civil ***rights***.

And I want to hear from you what conclusions you think we ought to draw from those percentages and from that record about how balanced that you could be and how either workers or those people again who are left behind those that care about the environment, other issues that are in conflict between employer and employee, how they could look to you in your court and feel they're going to get a fair shake.

COOK: Thanks, Senator. I'll address that. First of all, I think to say, as you acknowledge, these percentages are nothing I can ever check or know how they arrive at those so I sure don't vouch for those sort of things. But if you will, you know, I tried to just gather cases.

I think Senator DeWine put out a listing of the cases that show that frankly I'm not a reliable vote for anyone, that my decision- making, and I hope you'll find this if you actually read the cases and read the dissents, you'll find I hope that it's a matter more of my precise reading of the ***law***, looking for the actual text of the statute, and when the

cases, the results of the cases go against an employee or, you know, in the general civil ***rights*** kind of ideas, I frankly don't -- I don't think I deserve any blame for the legislation that I am asked to construe or interpret.

And so, as in many of the cases there's a Doe case which involved allowing insurance for negligent hiring in molestation cases. In Hanes v. City of Franklin (ph) there was an edge drop off a road and though the majority of the case thought that the city was immune and not liable for damages in that case, I dissented and said indeed the city was because the city created a nuisance.

In Richey Produce (ph) I upheld a minority business set aside. In Makoff v. Fairview General Hospital (ph) it was a tragic case of medical malpractice where an individual came in with a fracture of the leg. In the setting of that leg, the circulation was cut off which ultimately resulted in amputation. I upheld the verdict of $2.4 million.

In Buckeye Hope case, I dissented from the court's decision that a referendum could deny minority housing in a city in Ohio. Ultimately, the court reconsidered that case and my dissent then became part of the majority. In Vallish v. Copley Board of Education (ph), I upheld a verdict for a teacher or a parent who came on school property. Again, the majority found that that individual, that the school was immune under our sovereign immunity ***law*** and I ruled the other way.

In Rice v. (inaudible), there's a case about whether or not punitive damages can be awarded in discrimination cases, and in that case I interpreted the language of the statute. The word "damages" I found was not limited by context or any modifiers and therefore allowed, ruled that that word included the whole panoply of pecuniary remedies. In Wallace v. Ohio Department, Gibson v. Meadow Gold (ph), I have -- I don't want to bore the committee but I have more Senator.

KENNEDY: Well, I, the reason I raise this. You mentioned some and I'll review those cases. I was thinking of some of those the, I guess the Sponger v. Lawson (ph), and in that case called -- the court -- as I understand it, called Cook's interpretation of the ***law*** nonsensical, said that it leads to an untenable position, unfair to employees, adopting the lower court's interpretation.

Or taking the position adopted by Justice Cook in her dissent would be as the majority clearly stated an absurd interpretation that seems to borrow from the pages of "Catch 22."

COOK: And actually, Senator, in that case, it was interpreting the statute in the usual mode but what the majority really was concerned about was that the ***law*** in Ohio is pretty plainly expressed that someone who is injured in the course of employment, they can -- the compensability can be narrower than the immunity. Employers are immune from suit and therefore there are occasions where someone can be injured but their injuries not compensable and that's exactly how the ***law*** is written and that's my job to read it precisely.

KENNEDY: In the Russell v. Industrial Commission, the court stated that your dissent lacks statutory support for its position and has been unable to cite even the slightest dictum from any case to support its review.

COOK: Like so many dissents (inaudible).

KENNEDY: I didn't have an opportunity to give these cases to you before, so I…

COOK: I know that, sir.

KENNEDY: I'll be glad to let you give whatever response or the time to do it because it's…

COOK: In that case there was, number one a statutory, a new enactment, so a statutory change in the language. My dissent was joined by the chief justice, and so I think it's well reasoned. I think it's based on the statutory text (inaudible).

KENNEDY: Well now in the Russell case, as I understand it, you argued that the workman's compensation benefits should terminate without a hearing as soon as the non-attending physician says the benefit should stop. You argued that in spite of the statutory language, that could not be, that couldn't be more clear.

It says that benefits, this is what the statutory language says. "Payments shall be for a duration based upon the medical reports of the attending physician. If the employer disputes the attending physician's report, payments may be terminated only upon application and hearing by a district hearing officer."

COOK: That's ***right***.

KENNEDY: And you interpret that statute entirely differently. You argue that the compensation base should be terminated without a hearing as soon as the non-attending physician said the benefits should stop.

COOK: Actually…

KENNEDY: Now if as I understand it the employer disputes the attending physician's payment may be terminated only, as I said, upon the hearing officer. The majority stated your dissent lacked statutory support, unable to cite even the dictum for the case.

COOK: ***Right*** and we really disagreed in that case as people in good faith can always disagree about the meaning of words. But, in that case, the majority and the dissent disagreed about which statute to read. So, I was construing, my dissent construed an analogous statute and a parallel statute that had to be read in conjunction with the one that the majority was relying upon.

KENNEDY: I'm not an expert on the Ohio ***law***, but it seems that in the citation it's fairly clear that payment shall be for a duration based on the medical reports of the attending physician.

COOK: That's ***right***.

KENNEDY: If the employer disputes the physician, payments may be terminated only upon application and hearing by a district hearing officer.

COOK: (inaudible).

KENNEDY: And you made the judgment that it could be terminated without a hearing.

COOK: Yes. The issue…

KENNEDY: And you have another statute.

COOK: Yes. The issue really surrounded…

KENNEDY: Could you reference that? I won't -- the other statute?

COOK: Yes, I will.

KENNEDY: This is the concern about in light of the persistent dissents and your consistent siding with the large corporations against the individuals and departures from the clear language of the ***law***, how are we going to be assured that you won't overreach in order to reach a conservative result?

Now, let me give you another example. As you know, one of the real best weapons that we have in the struggle to improve the lives of those who are left behind in our society is education, and when we educate our children well, we give them an opportunity to take part of the American dream.

You, however, have taken the Ohio Constitution's provisions guaranteeing the thorough and efficient public education and voted to basically interpret it out of existence. This is the (inaudible) v. Ohio case. You were confronted with overwhelming evidence that state funding of public schools was woefully inadequate. In fact, much of the evidence in that case showed that children were attending schools that were in dangerous repair with poor sanitation and few, if any, resources for education.

The majority of the court followed Ohio Supreme Court precedent and said where a school district is starved for funds or lacks teachers, buildings, or equipment, the ***right*** to an education is violated. It found that the woefully under funding of such important state funds should say education violated the Ohio Constitution. You dissented.

You would have denied the ***right*** of the children of Ohio the ***right*** to a thorough and efficient state education. In fact, your dissent was harshly criticized, particularly said that if your position prevailed it would have turned 200 years of the constitutional jurisprudence on its head.

I understand in your personal life you acknowledge that education is important but we're talking about this particular case. How do you explain your decision on this issue that is so important and is an issue that is common to my state and states across the country and in which there is such a challenge in order to try to provide some quality of funding for children? And Ohio has such a very strong statute. I find it very difficult to understand your dissent.

COOK: My dissent was first of all grounded on no member of the court and there were three members of the -- or two other members of the court who joined me in dissent about the constitutional bases that the majority was using to order a co-equal branch of government to enact new funding statutes.

So, actually I never did in any way vote to reduce educational spending or in any way voted to say that the sorry state of some schools in Ohio was OK. Instead, I had a limited role as was assigned.

The court has an assigned limited role and I exercised my role appropriately, I think, in saying that the phrase that the court was hanging its hat on did not justify its ordering a co-equal branch to enact new funding ***laws*** because the Department of Education had certified that every county in the state had met the minimum standards for providing an education.

COOK: So my view was beyond the minimums, it was the General Assembly's role to decide what level of funding should be allocated to schools versus every other required funding -- every other aspect of state government that required funding was a policy decision to be made by the legislative branch.

But I must say that that case has a fairly sorry history. It lasted some six years and the court never, though it had some I think very well intentioned -- it was a well intentioned effort but it actually -- the court never was able to continue to order the General Assembly to do more and do more and frankly it's finally just the case faded away.

KENNEDY: Well, that's the sad conclusion that's happened in some states. States have different, in their constitutions, different errs. Massachusetts, John Adams drafted our constitution in Massachusetts and made it very specific with regards actually to -- on the responsibility of the state in education. It is interesting that every state constitution has a guarantee on education. They're interpreted in different ways.

But let me come back to the Ohio, the Ohio Constitution requires a thorough and efficient education. These words have meaning. They can be interpreted and forced by a court willing to take its responsibilities seriously. In fact, a number of the states have found that similar causes in their constitutions enforceable.

Your unwillingness to interpret and enforce this clause of the constitution I find disturbing. I understand you believe the clause is too vague for traditional enforcement. In your dissent you analyzed -- compared it to another provision of the Ohio Constitution that says that all citizens possess inalienable ***rights*** to life, liberty, property happiness and safety.

But even that clause has much the same language of the Fifth and Fourteenth Amendments of the Constitution clauses, which have been analyzed and enforced for many years. And, I'm just wondering how much assurance that we can have here that you're going to interpret these statutes in ways that were intended and that reasonable people would feel that they should be intended?

COOK: That would be my goal, Senator. That would be my effort.

KENNEDY: If I could, Mr. Chairman, I have one additional period.

HATCH: That will be fine, Senator Kennedy. We'll give you the additional time.

KENNEDY: Thank you. Much of the last two years have been spent recovering from corporate malfeasance that has hurt our economy, our national, I'm talking about our country. It undermined the public's trust in big business. The ***laws*** play an important role in restoring the confidence of the American people of preventing this abuse in the future.

Unfortunately, in looking ***over*** your record, and I want to give you a chance to respond, one could conclude that you have consistently voted to shield corporation from the legal consequences of their actions.

In the Davis v. Wal-Mart, Mrs. Davis alleged that Wal-Mart instructed its employees to lie to her after her husband was killed while working for Wal-Mart. Wal-Mart allegedly told its employees to lie about the way in which Mr. Davis had been killed in order to encourage Mrs. Davis to settle out of court. The majority understandably found this sort of deception reprehensible and allowed Mrs. Davis to ***sue*** Wal-Mart.

You would have prevented her from doing that, thereby allowing Wal-Mart to reap from the benefit of the lies and encouraging other corporations to do the same thing.

COOK: My decision in that case does not suggest that I too don't find that behavior reprehensible. My dissent actually was based on a fundamental principle of jurisprudence and that is res judicata, and it was based on really well settled ***law*** that the fact that Mrs. Davis ***sued*** Wal-Mart, got a judgment for negligence and then years later came back with a spoliation case I found -- my view was that it was res judicata and in favor of finality of judgments. As we all know that's why that principle is there and why it's accorded importance by judges.

KENNEDY: But the majority didn't find that.

COOK: No, they did not.

KENNEDY: They reached a different conclusion.

COOK: Yes, that's ***right***.

KENNEDY: In Norgard v. Brush Wellman (ph), the defendant corporation withheld information concerning how much it was exposing its employees to beryllium, including withholding the fact that it knew its air sampling were flawed and that it had ventilation problems.

And, it gave the plaintiffs in this case a skin disorder so severe he had ulcers. He suffered from protracted periods of dizziness, coughing, had difficulty breathing. The company just told him not to worry and continued to withhold the information about the problems with beryllium.

The majority found that the employee's time to file a suit started running from the time he found out about the information his employer had been withholding, but you would have allowed the corporation again to reap the benefits by barring this suit.

COOK: And actually…

KENNEDY: You know how can -- what can we draw from that?

COOK: I hope that the only thing that you'll draw from that is that I look at the ***law*** on statute of limitations and the particular -- my decision was simply a statute of limitations decision. What -- as a lawyer.

KENNEDY: That's the…

COOK: May I finish? As a lawyer, Senator, and so many people on the committee are, this individual had knowledge of his injury and the expected cause but didn't file suit until some five years later when the statute of limitations in Ohio is two years.

So, what I just viewed and perhaps I was the one who was mistaken, but I viewed the majority decision as contorting the ***law*** of statute of limitations beyond the scope of its justification there.

KENNEDY: Well, you're ***right*** the majority differed with you. I mean the corporation withheld information concerning how much it was exposing the employees and that it -- and so, since the defendant didn't know about this effectively by the time they found out and brought the case you ruled that they really didn't have -- the statute had run on it and they were denied any opportunity.

This is enormously important. We have a lot of workers, miners. We have a lot of occupational health and safety issues involving lung damage, and increasingly so with regards to the dangers of toxic substances that are being used in industry all of the time on this. It's a very serious, serious kind of matter I know for great numbers of workers.

COOK: I think so too, Senator.

KENNEDY: I'm concerned that if the employer is not -- is denying them the information about the dangers of this and then they only find out about it later, to have their opportunity to get some kind of remedy of this is being denied to them, I mean I have difficulty understanding how you reach the conclusion that the statute ran.

COOK: Actually, the plaintiff admits that he knew that he was and that he knew it probably was the beryllium from the plant. I mean he was inhaling gross amounts of this, and of course it is a horrible scenario, but it wasn't my personal view about whether this individual deserved to recover. It was simply an application of the well settled ***law*** that it's not all the elements of a claim, which is what the majority held here.

Until this individual knew all the elements of their claim, they couldn't bring the case. But indeed this gentleman unfortunately both knew that he had an injury and he knew the likely cause. It was later when he saw a web site some five years later that he chose to bring the action, and I -- my considered judgment and I think reasoned judgment was that that was beyond the discovery rule and the particular statute of limitations here.

On the other hand, I can tell you of another case on the discovery rule involving NCR where I wrote the majority opinion that extended the discovery rule in that case and it was I think the first time in the country. So, there are occasions -- there are always occasions where cases are decided differently based on the facts presented, and if you're a jurist who attends to the ***law*** and tries to be diligent and conscientious about that, I think that you'll find the decisions -- I can't do anything about which person wins and loses because I must be impartial.

KENNEDY: Well, I agree that that has to be the desired standard. The majority, of course, found that the employees' time to file suit started running from the time he found out the information his company had been withholding and that the company doctors were misleading the worker.

So, you were in the dissent in making the judgment and the matter is that there's a pattern. I mentioned several -- my time is just expiring. I mentioned several of these cases. There are many others and, you know, when it comes out to the bottom line, it has virtually 100 percent on the one side.

I agree that, you know, those aren't -- figures aren't always necessarily absolutely accurate but what we have is a pretty significant pattern on here where in these cases involving workers in the cases that I've mentioned here, others that your dissent always seemed to be at the expense of individual workers, in these cases workers' ***rights***, and it's troubling. My time is up.

I want to thank you and I want to say to you, Ms. Cook, that if you want to provide other kinds of, you know, cases that show a different side I'd welcome them. I always try if I'm going to ask a nominee about cases, indicate what they're going to be before hand. I didn't have the chance just because of the way this was sort of working on this. So, if there are other cases that sustain, support yours, I'm more than glad to take a look at them.

COOK: Thank you.

KENNEDY: Thank you.

HATCH: Thank you, Senator Kennedy. Here's what we're going to do. Senator Schumer wants to ask some questions and he will be here at eight o'clock, so we're going to -- I apologize to you that this is taking so long but I do want to get this completed today because of -- for a variety of reasons but especially for you. And, I want you to be treated fairly and this committee I think is attempting to do that.

So what we're going to do is we're going to discontinue this part of the hearing until eight o'clock and that will give you a chance. By the way, I've ordered some food. If you can stick around I'd like to chat with you for a minute. And, what we'd like to do at this point is to proceed to the three district court nominees and see if we can resolve them at this point and then we'll resolve you after eight o'clock.

KENNEDY: Can I just, Mr. Chairman, just again how we proceed is not up to all of you. You've been gallant witnesses today. Mr. Roberts, I have not had a chance to question you. We have other, I guess, Senator Schumer and others. I will submit questions to you.

I appreciate your patience, all of our nominees, their patience with us. It's been a long day for you and these are complicated and very important issues and I thank them.

HATCH: Thank you, Senator Kennedy, for your kind remarks and (inaudible).

(UNKNOWN): I just wanted to say I think you have been generous. I notice you did something very unusual in having 15 minute rounds. I'm not sure we've ever done that before.

LEAHY: We've had a lot.

HATCH: It's gone more than 15 minutes.

(UNKNOWN): Senator Kennedy, I just noticed he was 13 minutes past his 15, which is all ***right***. You've been generous on that and I would just say this, that when President Clinton's nominees were coming by and there was a hearing set, if I had other committees or other responsibilities, I knew I had to either be there or not. I didn't come in and expect, you know, the committee to adjust itself totally to my schedule. But you've been generous and fair I believe and I wanted to say that for the record.

HATCH: Well, thank you Senator. Let's take five minutes.

LEAHY: Mr. Chairman.

HATCH: Excuse me. I'm sorry Senator Leahy.

LEAHY: Mr. Chairman, you and I discussed this procedure and I think it is a wise way to do it. I'm going to put it in. We have some other letters. I know Mr. Sutton will be happy to know they're regarding him and we'll put those in the record.

HATCH: Without objection, we'll put those in the record.

LEAHY: I would also note, Mr. Chairman, that you have been very fair on the clock. I would also, I think that the Senator from Alabama and others would agree that President Bush's nominees during the time I was chairman if any one of them had any questions at any time on either side of the aisle they got whatever time they wanted, more time to introduce or anything else, and several times we arranged the schedule so that all the state Senators could introduce President Bush's nominees.

(UNKNOWN): I think there's a lot of truth and sometimes we just had to resort to written questions because they work too.

HATCH: There were many times we did written questions because of the time constraints. We've tried to be fair here and I think we have been and you folks have been more than stalwart in being with us this long. You're going to have to be here a little longer.

HATCH: I apologize to you but this is an important hearing and my colleagues have felt like all three of you are quote controversial unquote. So I don't agree with that assessment, but some feel that way and they have a ***right*** to feel that way if they want to. So what we're going to do is we'll recess for just five minutes. I want everybody back in five minutes and we'll start with the three district court nominees and we want you to here promptly at 8.

(UNKNOWN): Court of appeals nominees can take off if they want, ***right***?

HATCH: Yeah, until 8 o'clock, but I'd like to see the three of you just for a minute (inaudible). Thank you. With that we're recessed for five minutes.

(RECESS)

HATCH: OK, we're going to reconvene. If I can have you stand and hold up your ***right*** hands. Do you solemnly swear to tell the truth, the whole truth and nothing but the truth so help you God?

(UNKNOWN): I do.

HATCH: Thank you. I'd like to welcome to the committee our three district nominees, Judge John Adams who has been nominated for the northern district of Ohio, Robert Junell (ph), who has been nominated for the western district of Texas and Judge James Otero, who's been nominated for the central district of California. It's been a long day so far and you've been very, very patient and I'm very appreciative of you so in the interest of time, I'm going to enter my statement in the record and I'm going to enter my statement in the record and as soon as Senator Leahy gets here, we'll have him give any statement he cares to give. But until then, maybe I can start with questions. Well, first of all, let me say it a little more courteously than that. Why don't we start -- let's say, we had, we had (inaudible) and we'll go with Judge Adams and Judge Otero and then Mr. Junell. If you'd care to make a statement and introduce anybody who is here from your family. They're probably all gone by now and perhaps before we begin maybe I'd like to turn to Senator DeWine to introduce Judge Adams.

DEWINE: Thank you very much. I deferred this morning Mr. Chairman introducing Judge Adams and it is my pleasure to introduce really another fine Ohio nominee appearing before the committee today, Judge John Adams. Judge Adams, we welcome you to the committee and we thank all of our nominees for their patience. I know it's been a very, very long day. Judge Adams from Akron has been nominated to be U.S. district judge for the northern district of Ohio. He currently serves as a judge on the court of common pleas in Summit County. I'm pleased to welcome Judge Adams' former ***law*** partner Philip Kaufman (ph) to the committee as well.

Judge Adams is a 1978 graduate of Bowling Green State University where he earned a bachelor of science degree in education. In 1983 he received his ***law*** degree from the University of Akron School of ***Law***. While a student at Akron, Judge Adams clerked for Judge Spicer (ph) with the Summit County court of common pleas. Following this position, Judge Adams spent five years in private practice, during this time also served as assistant Summit County prosecutor. In 1989, Judge Adams returned to private practice as an associate and then a partner at the firm of Kaufman and Kaufman (ph) in Akron. Since 1999, Judge Adams has served as a judge on the court of common pleas for Summit County. In this position, Judge Adams has demonstrated that he's an intelligent, hard working and dedicated jurist.

He's well respected, both inside the courtroom and out and exhibits an excellent judicial temperament. He's shown that he has what it takes to be an excellent district court judge. In endorsing his reelection effort just this last November, the "Akron Beacon Journal" stated that Judge Adams and I quote, has the potential to be a distinguished Federal judge, building on the record of fairness and thoughtfulness that has marked his three years on the county bench. I agree completely, Mr. Chairman, with that sentiment.

While Judge Adams' professional accomplishments are impressive by any measure, I would also like to take this opportunity to highlight his involvement in the Akron community. Judge Adams has been a lifelong member of the NAACP. He's also been active in the Summit County Mental Health Association and the Summit County Civil Justice Commission.

In summary, Mr. Chairman, I urge my colleagues on the committee to join me in support of these fine nominee -- of this fine nominee (inaudible) from the state of Ohio. I thank the chairman.

HATCH: Well, thank you Senator DeWine and that's high praise Judge Adams. We'll turn to Senator Cornyn for his comments for Mr. Junell.

CORNYN: Mr. Chairman, I just want to add my brief comments to those made by Senator Hutchison this morning in introducing Mr. Rob Junell, the nominee for the United States district court for the western district of Texas. She talked, Senator Hutchison talked primarily about Mr. Junell's legislative accomplishments and his personal background. But just for the committee's information I first met Mr. Junell about 20 years ago when I was a young lawyer and he and I happened to be on the opposite side of a lawsuit.

You learn a lot about the character and the competence of your adversary in those circumstances and I wanted the committee to know and the record reflect the high regard in which I personally hold Mr. Junell as a lawyer, as a person and a person who has devoted many years of his life to public service already who I know will do an outstanding job on the Federal bench and also his wife Beverly who's here with him today. It seems like Mr. Junell you were introduced a long time ago but just for a refresher and to add my comments and congratulations to you. And thank you Mr. Chairman for that opportunity.

HATCH: Thank you Senator. Now we'll begin with Mr. Adams, then Mr. Otero and then Judge Adams, Judge Otero and then Mr. Junell. And if you have any statements to make, we'd be happy to take them and if you would introduce anyone who is accompanying you here.

ADAMS: Senator, first of all, I'd like to thank the committee for allowing us this hearing, this late day. I know it's been a long day for you. We greatly appreciate it. I greatly appreciate the courtesy in being permitted to be heard today. I want to acknowledge my former ***law*** partner who is here today Mr. Philip Kaufman, as Senator DeWine as acknowledged him. Additionally, would like to acknowledge my father who could not be here today due to his age and somewhat age and somewhat unwillingness to travel here today and acknowledge the memory of my mother who passed away some time ago and could not be here. I'm sure she would be quite proud (inaudible) thank you Senator.

HATCH: Thank you Judge, appreciate it. Judge Otero.

OTERO: Thank you Senator. I just want to thank the committee for having me here. I'm very honored. I'd like to thank Senator Leahy and Senator Feinstein for the gracious statements made earlier today and also to Senator Boxer for her written statement provided to the committee. I'd like to thank my family, who's back there for being here and also my parents who could not be here today because of health concerns.

HATCH: Introduce your family to us.

OTERO: We have my wife Jill is here.

HATCH: Jill.

OTERO: And my daughter Lauren (ph) and my son Evan.

HATCH: Evan, happy to have you with us as well.

OTERO: Thank you.

HATCH: Thank you sir. Mr. Junell.

JUNELL: Thank you Mr. Chairman. It is indeed an honor to be here today. I want to thank both you and Senator Leahy for allowing us to be here for this hearing and I want to thank Senator Hutchison and Senator Cornyn, the two senators from Texas that said such nice things. My wife Beverly is here with a crutch from knee surgery. She hurt the other one, Senator at Snowbird about 10 years ago.

HATCH: Oh my goodness (inaudible)

JUNELL: … in your state and this time it was in New Mexico so she's recently had surgery. My…

(UNKNOWN): Should have skied in Vermont.

HATCH: No, no that's worse there, just plain ice there. We've had powder snow.

JUNELL: My son Ryan, who is in California, could not be with us. My daughter Keith (ph) is in the Peace Corps in Bolivia and my son Clay is a student at Angelo State University in San Angelo.

HATCH: Well, we're honored to have all of you with us and we again apologize for this taking so long, but it's the nature of this place that every once in a while it does take a little bit of time, so please forgive us. I think we'll begin with Senator Leahy. He has been so patient all day. I'm going to turn to him first and then whatever questions he doesn't ask, maybe the rest of us can.

LEAHY: Well, thank you Mr. Chairman. I would try to brief with each, however the level of controversy is a lot different here. Judge Adams, you've been actively involved in partisan politics on behalf of your fellow Republicans. You've served as elected official. You've contributed to Republican campaigns. You've volunteered campaigns. You've run for city council, all of which is perfectly appropriate, but when you go to the Federal bench, you have no problem with the fact that partisan activity then is -- it's gone, is that correct?

ADAMS: Absolutely Senator and I think as a common pleas court judge, my record will establish that that's certainly been the case while on the bench.

LEAHY: And can you assure us that if somebody walked into your court if you're confirmed, that they would not have to worry about whether they were the ***right*** political party, the wrong political party. They would just have to worry that Judge Adams reads the ***law*** correctly.

ADAMS: Absolutely Senator. You can rest assured in that regard.

LEAHY: You, in private practice you specialized estate planning and trusts and probate ***law***. You had a special emphasis on providing service to senior citizens and people with mental and physical disabilities. I commend you for that. What do you bring from that, the work you did with people with disabilities? What do you bring from that as you go into a Federal bench?

ADAMS: Well, I think I bring a couple things that I've learned from my representation of seniors and folks with disabilities. I've learned how important it is to listen. I think as a judge one of the most important things that we overlook is how important it is to take time to listen to the litigants, to the parties, their attorneys. Sometimes I think we as judges overstate our own importance and I think I've learned a great deal in representing seniors. In my life I have always enjoyed listening to their life experiences and I think I've learned a lot from them and gleaned a lot from them and from their life experiences and it's given me balance in my life, in my views from the bench.

LEAHY: Thank you. And I think you're ***right***. It's very easy for a judge who sits there -- you know, it's all rise and all that kind of thing that I think the judges are best when they hear the all rise they almost have to stop themselves to see who it is they're doing that for and not take it for granted and the judge that keep themselves fairly grounded in their community end up being the best judges. I mean there are a lot of things you have to give up as a judge. I love politics and I'm sure you do too, giving up some of those things. You have to be careful of your associations, like any member of the bar, a lot of your friends are going to be lawyers. You have to be -- pick and choose there. But you're not really in a monastery. I mean you're still a human being and the most important thing is that the people who are in front of the bench are also human beings and so I appreciate that.

Judge Otero, you've served as judge for the last 14 years and correct me if I'm wrong in this, first in the Los Angeles municipal court and then on the Los Angeles superior court.

OTERO: (inaudible)

LEAHY: I spent -- years ago in the superior court when I was a prosecutor and one of my fellow board members, the national DAs was the district attorney of Los Angeles and (inaudible) go into some of those courts and realize that Los Angeles is larger than my jurisdiction in Vermont or what was my jurisdiction. I do get out there now and then. I have a son, a former Marine and his wife who live in Los Angeles in the Los Pelos (ph) area and I don't think there's just about any kind of case anybody's ever going to see that hasn't been in the Los Angeles superior court at one time or another.

OTERO: That's correct. We may be the largest court system in the United States if not the world.

LEAHY: I think it's an extraordinary court system. I know a lot of the people I see who come here from other countries to study our judicial system, that's one of the places they want to go to and you've probably seen a lot of foreign representatives come to your court to see it.

OTERO: From China recently and from Japan also.

LEAHY: One thing that we talk about, the impartiality of our Federal judiciary, one thing I think might interest you. When the Soviet Union broke up, a ***group*** of Soviet or now Russian lawmakers came here to meet with me, with Senator Hatch, others and I remember one question one of them asked, almost incredulously. He said we've heard that in the United States there have been times when the government has been ***sued*** and the government actually lost. I mean didn't you quickly replace the judge? And we had to explain to him, no, we have a certain independence here and yes, the government does lose on occasions and I think this was probably as big an eye opener as ever. But what I've always encouraged these people to go out to Los Angeles and watch your court system.

Now a number of issues of the death penalty have come up. Justice O'Connor said there were serious questions about whether the death penalty is fairly administered in the U.S. She added the system may well be allowing some innocent defendants to be executed. Now you've presided ***over*** a capital murder case. One case you presided ***over***, People vs. Chante (ph) Beasley (ph) (inaudible) jury returned a guilty verdict against the three defendants, recommended death. You had the sentencing hearing. You sentenced two of the defendants to death. You rejected the jury's recommendation of death for the third defendant. You sentenced him to life without possibility of parole.

And I'm not asking you what was your reasoning in that case, but you've obviously had to look at the question of the death penalty. Do you think there are changes that are warranted in the way the death penalty is administered? None of us are questioning that it's constitutional. The Supreme Court's held so. But are there changes that should be made in capital cases or are they are all in your experience, always fairly handled?

OTERO: I would hesitate to comment about the particular case that was just before the California supreme court.

LEAHY: I don't want you to comment about that one, but I mentioned it only because you've obviously focused your attention here.

OTERO: I think as judges we have to be very concerned about the ***rights*** of defendants, especially in capital cases. I think the entire issue is probably better handled by the legislature. As judges it's our duty to follow the ***law*** and interpret the ***law*** to the best of our abilities. In California, we have a system that allows the trial judge to conduct an independent review of the aggravated and mitigating factors to sit as a 13th juror on the penalty phase and I think that's a very good system.

LEAHY: Do you feel that it's an absolute that in a -- especially in a capital case, that a judge should make sure that there is adequate counsel, I mean real counsel for the defense?

OTERO: Well, absolutely, absolutely Senator.

LEAHY: We can assume the state ***law*** (INAUDIBLE) in a capital case, but and that if there is evidence available, incriminating or exculpatory, that is be available to both sides.

OTERO: Absolutely. One of the fundamentals of our system is to make sure that all evidence is turned ***over*** to both sides.

LEAHY: The reason I say that, there have been some states and some jurisdictions that has not happened or where the least competent counsel has been appointed and a small flat fee in a capital case and that's where we have problems. You have probably found, as certainly has been my experience, I think Senator Hatch's experience and Senator DeWine's in trying cases, you actually have a far easier time of it if you have good counsel on both sides.

OTERO: Good lawyers make for a better trial judge, absolutely.

LEAHY: Mr. Junell, we were chatting earlier and I repeated the call I received from Congressman Stenholm who assured me in his estimation you would be a fair judge no matter who was before you. I want to ask for a moment about your work as a state legislator, a claim (ph) a whistleblower named George Green (ph). In August of '89, he was employed at the Texas Department of Human Services. He reported what he thought was corruption among his superiors and others. The state of Texas responded by investigating him and firing him. Then they indicted him and the indictment was the charge eventually dropped. He ***sued*** under the Texas whistleblower statute. A jury awarded him $13.6 million. In February '94, the Texas supreme court affirmed that judgment saying the state did not have immunity because of the Texas whistleblower ***law***. Under state ***law***, to collect the jury award, Mr. Green was required to get his claim approved by the state legislature. He tried to do that. You were chairman of the Texas House appropriations committee. You refused to approve the full amount which had grown to around $19 million with interest and offered him 25 percent or 25 cents on the dollar. You were quoted as saying that the state of Texas doesn't owe him this money under the ***law*** of sovereign immunity. We don't have to pay. The Texas legislature eventually gave him a substantial portion of that.

I raise this because this committee has heard from people like Sharon Watkins (ph) who opted to expose many of the misdeeds of Enron (INAUDIBLE) FBI Special Agent Colette (ph) Riley brought public attention to some of the shortcomings in the Department of Justice prior to 9/11. Senator Grassley and I have worked on this, been very much of a bipartisan thing on whistleblowers. A lot of people will risk everything to point out waste or corruption and so on.

So one, why did you want to deny Mr. Green his full award. Do you think it deterred other whistleblowers?

OTERO: No Senator and I appreciate you asking that question. No it didn't. Texas ***law*** at that time for the state of Texas ran ***over*** somebody in a truck out on the highway. The amount of damages that could be recovered for someone who has perished or who was made a quadriplegic is $250,000. In the case of the whistleblower act which was passed before I came to the legislature, there was not a cap on the damages, but it did require a review by the legislature, somewhat like this process of presidential appointees being reviewed with the advice and consent of the Senate and of this committee.

LEAHY: Well, we're written into the Constitution, the U.S. Constitution.

OTERO: We're written into the statute in the same manner. We're written into statute that all awards of that nature, if there was not a permission to ***sue*** prior to the time the suit was brought, had to come to the legislature to apply for money. We held hearings on Mr. Green's case. I don't want to -- spent a lot of time reading trial testimony and reviewing all of his case, ultimately participated in the amount and Senator I don't remember the amount that it was ultimately settled for. It was in the millions of dollars though. The legislature either that session or the next session revised the statute to put the cap the same that we have on our tort claim act as well.

LEAHY: So now you can only return a quarter of a million?

OTERO: Yes sir. But I can tell you that we have active, not only at the state level, but at the county level and at the city level and any political subdivision is covered by that and it has not deterred anyone to my knowledge. I've never heard that anyone's been deterred of reporting wrongdoing in government.

LEAHY: You have a -- there you got a specific statute to review. A trial judge can review the question of damages, the juror awards. Is that something a trial judge should eagerly jump in to do or should he be reluctant to overturn or change a jury verdict?

OTERO: I think they should be very reluctant to overturn a jury verdict.

LEAHY: I do too. If I have other questions I will submit them for the record. You've been patient. Your family has been patient. Senator Hatch has the patience of Job sometimes.

HATCH: Sometimes, that's for sure. And today is one of them, that's all I can say. And you've had patience and we've been very grateful to have here (ph). I know all three of you, how good you are. I know your reputations. I have no real desire to put you through any more questions. All I can say is that just one little thought and Mr. Junell, I understand that you're quite well read and that you have excellent taste in books. I'd just like to know the last book that you've read.

JUNELL: You know, one of my favorite books Mr. Chairman is "The Square Peg."

(UNKNOWN): Oh my God.

(UNKNOWN): Hold that man ***over***.

HATCH: I think everybody should read that, including Senator Leahy.

LEAHY: I'm halfway through it.

JUNELL: I understand they're going to make a movie by the way.

(UNKNOWN): Oh yeah, I imagine.

JUNELL: Tom Cruise is looking to play…

HATCH: I see, I should be so lucky, but thank you.

(UNKNOWN): I would have been able to finish the book today if you hadn't kept us here so long. That's one of my greatest disappointments.

HATCH: I have a feeling I'm going to support you Mr. Junell. I'm going to support all three of you. We're grateful that you're willing to take these jobs. We know that it's really a sacrifice for people like yourselves that take these jobs. But yet they're extremely important for our society. Without these Federal district court judges, our society wouldn't exist nearly as well as it does.

Let me just say that, one thing that I caution you on as an attorney who tried a lot in Federal courts, there seems to be a little syndrome that happens sometimes when Federal district judges and circuit judges, well frankly all the way to the top. Once they're on the court for just a little while, they seem to begin to think they have elements of deity and we just want to make sure that you three don't get that attitude. Just remember -- and don't try cases for the other attorneys. When a young attorney's there and he or she might not understand the evidence as well, you can help them. But don't try their cases for them. And be patient and don't let being a Federal judge go to your head. That's one bit of caution that I'd tell you. And I've seen it happen in some many cases, even with really dear friends of mine that -- where they just. And part of it is because you have to make decisions all the time and you have to sometimes draw a line and sometimes you get so that you get used to that. But I think it's very important that you help everybody concerned and do justice in the courts and I have a great feeling that all three of you will. So with that…

(UNKNOWN): May I note for the record, deification never happens at the 100 members of the U.S. Senate, you'll understand.

HATCH: That's ***right***. What we're going to do is we will probably put you on the next markup Thursday after this one and hopefully, anybody on the committee has a ***right*** to put people ***over*** or put any item on the markup agenda ***over*** for a week. It's an automatic ***right*** on the committee and it's a very important rule. But hopefully no one will put you ***over*** for a week. But with that, if they do put you ***over*** for a week in about two weeks, we hopefully will have you out of committee. Then we have to get you on the floor and we'll work on that as well.

So we'll do our very best to push this process along and to -- and I intend to do that and when there's a Democrat present as well. I tried to do it and I think we did do it to a large degree with President Clinton. It wasn't perfect but we did move a lot of judges for him. He became second only to Reagan, the all time champion and only five less than Reagan. But nevertheless, I wish we could have done better and both Senator Leahy and I are committed to trying to change this atmosphere to where we can -- however is president, will be given tremendous consideration on his or her selection of judges.

So with that, we're grateful for your patience. Because of it, you really haven't had to spend any awful lot of time with us and that's a great blessing. Think about it. With that we'll recess.

LEAHY: And I have heard of absolutely no objection on our side of the aisle to these three so I suspect you're going to be able to keep to that schedule without people putting them ***over***.

HATCH: We're going to try and then we'll try and get you up on the floor immediately thereafter. I just want to thank Senator DeWine for his leadership on this committee and he hasn't asked any questions anymore than the rest of us and frankly, he plays a great role on this committee and Mr. Adams, you're lucky to have him as your senator, as well as Senator Voinovich.

With that, we're going to recess until 8 o'clock. I do have pizza back here for everybody who's concerned so please drop in and have some if you can, OK. With that we'll recess until 8 o'clock.

(UNKNOWN): Thank you.

(RECESS)

HATCH: OK, it's 8 o'clock. We're ready to go again and hopefully we won't be too long but it's just whatever time it takes. I want to be fair to the other side and I know this an ordeal for the three of you to be here this long. You've been here almost 12 hours, so 10 1/2 hours and we'll hopefully finish within the near future. We'll do our best.

Senator Leahy, do you have any more questions you want to ask?

LEAHY: Chairman, I understand Senator Durbin was here just a moment ago and I just don't want to start into his time.

HATCH: OK, all ***right***.

LEAHY: Dick, why don't you come on up here?

HATCH: We'll turn to Senator Durbin now for any questions he might have.

DURBIN: Thank you very much. I'd like to ask this question of the three of you. It's an observation which was made several years ago relative to the issue of racial profiling. I know if I ask you what your position is on racial profiling what you'd say, what we'd all say. We're opposed to it. It's not just. It's not fair. We certainly don't want it in America. But I came across some statistics which trouble me and I have asked virtually every nominee at all sorts of levels, Department of Justice and Judiciary for a reaction and what they think we should do about the following.

I want to make sure I get these numbers ***right*** as I give them to you. I'm just trying to remember them off the top of my head. But we have a situation in America today where 12 percent of our population are African-Americans. The Drug Enforcement Administration believes that 11 percent of the drug users in America are African-American. But

35 percent of those arrested for drug violations are African- American, 53 percent of those convicted in state courts for drug felonies are African-American and 58 percent of those currently incarcerated in state prison for drug felony are African-Americans. I'd like your reaction to that. You are asking for a major position in the administration of justice and if we are honest about our opposition to racial profiling, what do these numbers mean in terms of our system of justice and in general terms and in specific terms, the whole question of minimum mandatory sentencing and Justice Cook, you've been on the Supreme Court in Ohio. I'd like to hear your reaction.

COOK: I've not heard those statistics but that's -- I suppose like anyone that's disturbing and what it tells me is that what I already knew primarily is that we have to be vigilant in reviewing cases for the typical issues that would go with profiling, be the probable cause and the suppression issues and to see if there's anything in the work that we're doing that would contribute to those statistics if indeed that folks by their race are being targeted for ***law*** enforcement without justification. I think that's the only role that I play in that problem with the Supreme Court, but certainly, even just as a citizen I think anybody would be upset to hear those numbers and to be concerned if there is something that we could be doing and as I say, I only know that I can be looking carefully at my cases which I actually hope that I already do. But that is, I guess I find those numbers a lot higher than I would have thought.

DURBIN: Mr. Roberts.

ROBERTS: I think that sort of statistical disparity ought to spark further inquiry. I mean it sort of points out we have a potential problem here and I think you want to find out what's behind the numbers because any statistical ***grouping*** that shows that kind of disparity would suggest that there may be a problem not treating people as individuals and that's sort of at the core of our constitutional liberties, that we don't ***group*** people according to characteristics and say well, you share this characteristic and so you must be like this, this and this. We treat people as individuals, no matter how compelling the statistical evidence may be, shows that whatever ***group*** it is and 99 whatever percent here is, that's not what due process means. That's not what liberty means. That's not what the various protections of the Bill of ***Rights*** mean, that you're part of a ***group*** that more often than not is subject to this or does this and therefore we're going to treat you as a member of the ***group*** rather than an individual. So it's -- that type of disparity I think is one that ought to concern people and spark interest and cause people to look and see what's behind the numbers and why that's the case.

DURBIN: Professor Sutton, would you like to comment?

SUTTON: Well, I agree with all of those comments. They are disturbing statistics and they do deserve inquiry to find out what's behind them and I just think it's a very important subject for inquiry. From my own personal experience, my uncle is Lebanese and lives in this country and his kids of course are part Lebanese and the issue of racial profiling is not lost on them. I know it does relate directly to the issue you raised but it does relate to the underlying point of potentially making assessments about someone based solely on their background and their appearance and that deserves a lot of inquiry.

DURBIN: I mentioned minimum mandatory sentences and there's a lot to be said and Senator Sessions for example has some views on it. We have -- may differ a little bit. But I wonder, I'll just tell you my experience. In going to a women, a Federal women's prison in Pekin (ph), Illinois and looking at the prison population. It is an eye opener. You will find in that prison women who are generally in their 40s and 50s sitting around knitting afghans, serving 12-to-20-year mandatory sentences because they were ratted out by boyfriends who were trying to find some way to reduce their own culpability for drug crimes. And when you talk to judges about this, they say, why do you do this to us? Why do you put us in this position where the prosecutor, doing their job, ends up with charging a crime that puts a person in prison at the expense of taxpayers for an incredible period of time. That person being no threat, really no threat to society. Professor Sutton, what do you think of minimum mandatory sentencing?

SUTTON: Well, I think that for quite a few reasons states among others are reconsidering them because of the problem of overflows in prisons and state budgets that are preventing the very thing that you're suggesting is happening, of some form of mandatory minimum, whether it's Federal or state ***law*** and the prison population that as you suggest may involve a lot of people that don't belong in prison anymore. I think from the perspective of a judge, it's not as easy to solve that problem as one might like. I do think there's a lot that the legislature, whether it's the

national legislature, Congress or state legislatures. But I do agree with you that it's hard to imagine anything worse than someone in prison who really doesn't belong there, could be serving society well, contributing to society and yet still in prison. That's quite sad.

DURBIN: Mr. Roberts.

ROBERTS: I guess my first comment would be, it strikes me as a general matter a quintessential legislative policy judgment, what the sentence for a crime is going to be and whether a judge is going to have discretion in sentencing or whether there's going to be a mandatory minimum. I know there are constitutional issues at the margin and those have been addressed in some cases. But it's a policy judgment. I guess my own reading in the area has led me to think that it's one of those areas where the consequences of the policy judgments are not always apparent.

For example, I do know that in many areas it has had an enormous impact on prosecutorial decisions. It gives great leverage and you find one constant, a lot of people are pleading to different offensive and so when you look at someone's record and you say, well, you've never done this before. It turns out he in fact has been arrested for it probably four times, but he's not prosecuted because it's easy for the prosecutor to leverage the mandatory minimum to a different plea. And the situation you discussed as well where you have codefendants. I just think the policy consequences are often pretty far downstream and as Mr. Sutton mentioned, we're beginning to see some of those play out and some people, some legislatures are revisiting the question.

DURBIN: Justice Cook, instead of asking you that question, I'm going to run out of time and I'd like to direct one question to you as I did to Professor Sutton that really goes to the heart of many of the objections to your nomination. When I was a practicing attorney as fresh out of ***law*** school and our little firm in a downstate town in Illinois represented a railroad and we had a Federal judge in our home town who was a railroad dream come true. We would go into his courtroom. He would suck on lemon drops, stare at the ceiling and rule on us in our favor on everything. This was perfect and we made sure that we removed everything to Federal court and we did a great job representing our railroad.

So there's some judges who come to this with certain feelings and certain inclinations which become very obvious in the way they do their business every single day. When I take a look at Professor Sutton and the disability community coming out today, I take a look at the letters that we've received and you've seen them, from women's ***groups*** and employee-sponsored ***groups*** who in looking at the totality of your record, think they have detected a disturbing trend, that when it comes to cases that compensate people injured or cases involving employee discrimination, that more often than not, you will be staring at the ceiling and ruling against them.

Now my friend Senator DeWine has pointed out the exceptions to that rule, but clearly there are a lot of cases we have gathered here which prove the case. I'd like to give you a chance and you've probably had that chance before, but at this moment, to express your defense of your record as the dissenting justice on the Ohio supreme court.

COOK: My defense Senator is that I -- it's a simple defense and it's an honest one. I take each case and look at the factors that I need to review and I said, obviously I look at the record. I look at the briefs, study them. I look at the ***law*** and particularly the text and using logic and rules and custom, I come to the conclusion that the ***law*** dictates. I rule as the ***law*** is and I think sometimes that is viewed as I'm ruling how I would like to rule or how I would like the ***law*** to be and it's just not the case. I follow the statutes in Ohio and in honesty anybody who thoroughly reviews the record would find that the statutes in Ohio in the general assembly in Ohio is a conservative legislature and I follow the ***law*** that they set forth and I don't know about any patterns. I know that I've read those web sites and I just think, because I think, I can tell you chapter and verse about each and every one of those cases and it's some principle of ***law*** that dictated where I went, not any antipathy for any party nor any favoring. And I hope that a thorough review of the record would actually show you that that's the case.

DURBIN: Thank you very much. Thank you Mr. Chairman.

HATCH: Thank you Senator Durbin. Senator Leahy.

LEAHY: Mr. Roberts, we had last year, we had White House counsel Fred Fielding (ph) testify here and (INAUDIBLE) hoped that the administration nominate any liberals to the court. I suspect that you would not have to stay awake nights worrying about that. That's why when you worked at in President Reagan's White House on judicial selection, did you ever ask potential nominees about his or her views on any issue such as political or ideological views?

ROBERTS: No, Senator, not at all. If I remember, I'm trying to remember specific questions. One thing we tried to do was pose hypotheticals, the purpose of which was to put a situation where the legal answer was A, but what this candidate might think we would regard as the politically more appealing result was B. And if that candidate said B, that's how, that would raise concerns with us because we'd think somebody wouldn't follow the ***law***, but would instead follow politics.

Sometimes we would tend to -- at least I did, when I would sit down with the folks, focus on particular things in their resume. If they'd written an article or a book, we'd say tell us about that. What's that about, really just to see how their way of reasoning went. But I at least never asked about particular cases or issues that might come before the court.

LEAHY: Did you have any candidates give you the political versus the legal answer?

ROBERTS: Some, yes.

LEAHY: Did they make it through?

ROBERTS: No, I don't know of a single case where they did and you know, it wasn't -- a number of people would do -- I obviously was fairly junior and I don't know that my views were regarded as determinative, but we would meet and discuss it and we would say, this is what he did and he said he'd do this and that would raise concerns because at least at that, in that situation, we weren't looking for people who were going to follow politics. We were looking for judges who were going to follow the rule of ***law***.

LEAHY: If the political result might be something that the Reagan White House might have liked.

ROBERTS: Well, that's what we tried to come up with in the hypothetical so that they would think…

LEAHY: It's a good way…

ROBERTS: They want me to say this and…

LEAHY: It's an impressive way of doing it.

ROBERTS: Well, I don't know how effective it was, but it was I think effective in weeding some people out.

LEAHY: That's very interesting. When you returned to private practice, you took on the United Mine Workers vs. Bagwell (ph) case. That's where if I recall ***right***, the union had contempt fines for ***over*** 60 million, 64 million, something like that for strike activities. You were on the side opposed to them and -- opposed to the union. I've been told that your fellow D.C. circuit court nominee, your former colleague in the solicitor general's office, Miguel Estrada, sought out the opportunity for the Justice Department to intervene on the same side as yours as I recall and correct me if I'm wrong in these facts. The supreme court rule against your side and said that fines of that magnitude could not constitutionally be imposed by a judge without a jury trial. Was that sort of the crux of their…

ROBERTS: My recollection of that case, I recall cases I won a lot more clearly than cases that I lost, but if…

LEAHY: We all (inaudible)

ROBERTS: If I'm remembering it correctly, I think the fundamental issue was whether the contempt citations in that case were properly characterized as civil contempt or it should be regarded as criminal contempt, which would carry

with it the additional protections and the court -- I think we were arguing for civil and the court ruled in favor of criminal.

LEAHY: Is that 64 million was, they'd better get a jury in there to…

ROBERTS: Well, it was, it was the type of civil contempt sanction judges often impose which was, it's going to be 1,000 or whatever…

LEAHY: X number of dollars per day.

ROBERTS: (inaudible) a day until you come into compliance and it added up and I was defending I believe at that time, I don't remember exactly what the office was, but whoever it was that was enforcing the contempt for the court and…

LEAHY: (inaudible)

ROBERTS: a good a job as we could and…

LEAHY: You were on the Bagwell side.

ROBERTS: I was trying to remember what his office was. I think he was appointed to enforce the contempt citation that the court issued.

LEAHY: What was Mr. Estrada's involvement?

ROBERTS: He if I recall, he was in the solicitor general's office at the time and the question -- they were participating as an amicus I think in the case, along with the deputy solicitor general Paul Bender (ph). I remember Mr. Bender argued the -- for the Federal government.

LEAHY: And do you feel he was active in getting the government to get involved on your side of the case?

ROBERTS: Well, I don't remember any meetings. I certainly would have. I don't actually remember. I would have contacted the Justice Department and said this is something you should be in our -- for the legal principle, you should be arguing on our side. But I don't remember any particular involvement by Mr. Estrada.

LEAHY: You've told NPR you support an originalist (ph) approach to constitutional interpretation, saying the reason that that's the way it was in 1789 is not a bad one when you're talking about construing the Constitution. Of course the Constitution in 1789 did not have the Bill of ***Rights***. We would not -- to get it ratified, you couldn't get it ratified, the states wouldn't have ratified it without that. It allow African-Americans to be enslaved back then. We had the civil war amendments like the 14th, which limited state power to make or enforce ***laws*** to deny equal protection to people. So the originalist's concept can't be an exact one, can it?

ROBERTS: No. And I don't remember exactly what the issue was, what they were discussing at that point. And I…

LEAHY: Why don't you (ph) just tell me what your philosophy is on that.

ROBERTS: Well, I think I'd have to say that I don't have an overarching uniform philosophy. To take a very simple example to make the point, I think we are all literal texturalists when it comes to a provision in the Constitution that says it takes a 2/3 vote to do something. You don't look at what was the intent behind that and you know, given that intent, one half ought to be enough. On the other hand, there are certain areas where literalism along those lines obviously doesn't work. If you're dealing with the 4th amendment, is something an unreasonable search and seizure. The text is only going to get you so far and in those situations…

LEAHY: There aren't too many wiretaps in 1789.

ROBERTS: Exactly and even basic concepts like commerce didn't have to deal with air travel and things of that sort. That doesn't mean they're not covered by the commerce clause. Our Constitution is flexible enough to

accommodate technological changes of that sort. And I think in some areas, for example, the Supreme Court's jurisprudence on the jury trial ***right***.

I argued a case in favor of the jury trial ***right*** in the Supreme Court and I learned more history than I thought I'd ever see again after being a history major in college, because what the Supreme Court has said is you look at what happened at common ***law*** at the point in time when the 7th amendment was adopted and if it was on the equity side, you don't get the jury. If it was on the ***law*** side you do. So you read a lot of old history. That doesn't mean that that same approach is going to make sense when you're dealing with other provisions of the Constitution. So I think I'd have to say that I don't have an overarching guiding way of reading the Constitution. I think different approaches are appropriate in different types of constitutional provisions.

LEAHY: Mr. Chairman, I -- you know I'm very concerned having three nominees of this nature that as controversial however defined all at once. We saw what happened with the three district court judges. It took us about 20 minutes to hear them where there was controversy. By having the three on a day where there's other things going on for all of us, I think has created a problem. Obviously we're going to want time to get the transcript and to submit written questions. I assume you have no objection to that.

HATCH: Well…

LEAHY: How are they going to get the transcript ***over*** night?

HATCH: Do you think you will? We'll have the transcript -- if we can have the transcript by 4 o'clock tomorrow, I'd feel good about it.

LEAHY: And again, a week to…

HATCH: Well not if you can do it, but I don't want you to kill yourself. Four o'clock is fine and then see that would be Thursday and we certainly, we'd have Friday, Monday…

LEAHY: Tuesday.

HATCH: I think if we can have…

LEAHY: I think because it's already extremely important (inaudible) we ought to have time at least to get the questions out.

HATCH: Well, I think…

LEAHY: I'm going to urge our side not to be dilatory in any way. I don't think anybody will but we…

HATCH: Well, if we can have the transcript by tomorrow at 4, then that would give the rest of the day, then Friday, then Monday and if we can have the questions in by Tuesday at 5 o'clock, then I'd hope you could get some answer ***right*** back, because I would like to put you on the next Thursday after tomorrow markup. Now it's very likely that somebody on the committee would put all three of you ***over*** (inaudible) to give even additional time to our colleagues, but that's what I have in mind and I hope -- I think it's fair and I hope it will work well for you. And we've been chatting about the reasonable time here and what -- we'll work on that basis.

LEAHY: And Mr. Sutton, earlier today you said that if you were confirmed as a judge, you'd probably see the world through other peoples' eyes. Try and imagine what it would be like to be on the other side of the case that came before you. So think, imagine you're Pat Garrett (ph) or J. Daniel Kimel (ph) from (inaudible) west side mother, any disabled person, senior citizen, women or low-income child. They're coming in knowing that you've been involved in court decisions which denied (inaudible) individual remedies for their claims. Can they walk or their counterparts walk into a court but not Professor Jeffrey Sutton argue the case as a litigant, but Judge Jeffrey Sutton sitting on a three-judge panel or en banc and they look at you and say, are they going to say, I'm dead or are they going to say, I got a chance.

SUTTON: Well, I can promise you that if I were fortunate to be confirmed, I would do everything I could to become the kind of judge that I want to become and that's a judge that is not thought of as a Republican appointee, a Democratic appointee, someone who works for a state government, someone who worked private practice on this or that side of the case. That's the whole objective. That's exactly why one would want to seek the honor of this particular position.

I would hope if someone chose to look at some of my representation, that they perhaps didn't care for, that they would look at the rest of my representations and I think if they looked at all of them, by the time they walked into my courtroom, even if I were lucky enough to be confirmed the very first day, I think if they looked at all of those, looked at all the briefs I've worked on, looked at all of my associations, my role in the Equal Justice Foundation, I'm quite confident that they would be comfortable and I can assure you that this is exactly the task I would want to take on.

As an appellate advocate, it is true you've got a client to represent and you're obligated to further their interest in every way you can, but even while you're beholding to them, and to seeking relief for that particular side of the case, one cannot be an effective advocate if one is a true believer. Those are the worst advocates.

The best advocates and I'm not saying I'm one. I've just tried to be like the best advocates, are the advocates that in arguing a case to the court, can show that they do appreciate both sides of the case, do appreciate the way nine different justices might look at an issue. While I'm sure I've failed at times, I've really worked hard in the cases I've done at the U.S. Supreme Court and in other courts to do that very thing so I actually think in some ways appellate advocacy has been helpful training for this very type of job and learning how to see the world through other peoples' perspectives.

LEAHY: Well if somebody is coming in there seeking compensation under a ***law*** the Congress has passed that allows compensation, their ***rights*** are violated, assuming all the things, jury agrees and so on. Are they going to have to worry based on as you said, positions you've advocated for and so on, that they're going to have somebody who's going to have a view the Congress didn't have that authority in the first place?

SUTTON: Absolutely not and you know, maybe one day if I'm lucky enough to get to the court of appeals, I'll prove it and we'll see a dissenting opinion from something I've written and the dissenting opinion cites an article or a brief I've advocated. I hope I'll be able to prove that one day.

LEAHY: Thank you. Mr. Chairman, I understand that Mr. Schumer is coming down the hall.

HATCH: We'll be glad to wait until he gets here.

LEAHY: And I'll submit my other questions for the record and I appreciate not only the witnesses' time but their families' patience throughout this and that little jolt of nutritional pizza provided by the chairman. If there's ever a time we needed something to clog our arteries it was tonight.

HATCH: That wasn't what I…

LEAHY: But I noticed you ate an equal amount and so I knew it was safe.

SESSIONS? : Mr. Chairman, we'll have to get Senator Durbin and Senator Leahy on our bill to reform the minimum mandatory sentences for crack cocaine and provide some better balance that we've worked on that would reduce in a number of ways the severity of the penalties and balance some other equities in that manner and I hope that pretty soon we'll bring it up (inaudible) and if we can get some co-sponsors. If not, we'll have a vote on it I hope.

LEAHY: I have no question that there's the disparity between crack and powder cocaine. It's unjustified. I might be thinking of moving inside a different direction than where the senator from Alabama is. I would note and Professor Sutton noted this, should pick up "The Wall Street Journal" and "The New York Times" or even your local papers and you see article after article of how state after state facing real budgetary problems where it was easy to be tough on crime and just have mandatory minimums, suddenly have prisons they can't afford, a prison population they cannot afford and I voted for some of these mandatory minimums and I think now in retrospect we hampered the judges too much but perhaps the states too much and the -- when you get somebody that goes in there at a

high school age and they get out 15 years later, and I'll go get gainfully employed. You know that's not going to happen. And I think…

SESSIONS: At the time it did something about it and expressed concern, we've got good legislation I think that's…

LEAHY: I think what you do is raise the floor, more than lower the floor.

SESSIONS: We have a concern that the powder cocaine yuppies are not getting enough sentence so they have a modest increase in powder and a significant decrease in crack sentences as some equities that deal with the girlfriend situation that Senator Durbin mentioned and all in all, it received very good reviews and quite consistently what the sentencing commission has asked us to do so if I think, Senator Hatch and I have stepped up to the plate. People have been talking about it. It's a problem. Federal sentences as you mentioned, Mr. Roberts, are set by this Congress and there's no need for the senators up here to blame you about Federal sentences. We mandate them and if they're not precisely correct, we ought to alter them and amend them and fix them and I think it's time to get moving on it. And every year that goes by.

LEAHY: I think we -- I definitely agree and I'll look at your legislation.

SESSIONS: I think you'll like it.

LEAHY: We should also look at some point and this is going to be something where it will work only if Democrats and Republicans work together, at some point we got to look at a basic overhaul. We have Federalized far too many crimes. We ought to trust our local state police…

SESSIONS: ...Federalize violence against women. You want to Federalize taking guns on state school grounds, prosecute our witnesses who (inaudible) legal briefs that question some of that.

LEAHY: We Federalize, we Federalize carjacking. We Federalize so many things we don't really need to. We have -- actually you'd like the gun ***laws*** we have in Vermont. Anybody unless you have a felony background can not carry a loaded concealed weapon in Vermont with no permit required. Very high incidence of gun ownership. Anybody, you don't need to register it or anything else. You need no permit to own or carry a weapon, concealed or otherwise. We also have the lowest crime rate in the country. Maybe it's because they figure that everybody's armed.

HATCH: I think that has something to do with it. Don't you just love this? I mean this philosophical…

LEAHY: We also have, we also have and there's something else we have. We have the lowest, the second lowest death rate from drunk drivers in Vermont. The lowest is in Utah, but then they don't drink and…

HATCH: Once again, one of our quirks.

LEAHY: I'll take some credit for that for having established the toughest drunk driving program in the state when I was a prosecutor. OK, we filibustered long enough Schumer. It's good for you to get back here.

HATCH: We're happy to have…

LEAHY: We're glad to have you here at 8 o'clock just as you said.

HATCH: We're happy to have Senator Schumer here. Before I turn the microphone ***over*** to him, let me just put into the record a letter from Russell G. Redenbaugh (ph) who himself is blind and he's a member of the United States Commission on Civil ***Rights***, re the nomination of Jeff Sutton.

Now this is today's date. Dear Senator Hatch, as a three-term member of the United States Civil ***Rights*** Commission and the commission's first and only representative of disabled Americans, I am writing to express my strong support for the nomination of Judge Sutton to serve on the United States court of appeals for the sixth circuit. I am familiar with Mr. Sutton's accomplishments and many of the landmark cases he has argued in the highest

courts. I agree with some outcomes. I disagree with others. But it is clear to me that those of us who are disabled in America and those of us who seek to protect equal opportunity and equal access for all Americans, will be well served by having in the Federal judiciary someone who is so intellectually active on the issues that concern disabled Americans.

I am also impressed by Jeff Sutton's personal background which shows heartfelt sympathy for ordinary people and the disabled in particular. The interests of the disabled are not easily pursued by partisan tactics and loud noise. The issues are complex. We are not benefited by the mere continuation of past policies or the fighting of old battles. I am well satisfied that Jeff Sutton will make a fine judge and that he will bring to the job of judge the fine mind he has applied as an advocate and the compassionate heart that is so evidenced. Sincerely, Russell G. Redenbaugh.

Just thought I'd put that in the record and we'll turn now to my dear friend and colleague from New York, Senator Schumer.

SCHUMER: Thank you Mr. Chairman. I very much appreciate all the committee being here for a long time and I apologize for being later than the 8 o'clock that I expected to be here. Hopefully, we won't have to have meetings like this on into the night in the future and that's a hope, a sincere hope that we can work together on those issues to prevent this from happening again.

SESSIONS: With all due respect, if the Senator had been here this morning and had his questions, we would be in…

(UNKNOWN): That's not true.

LEAHY: He was here this morning.

SESSIONS: We've been here all day.

HATCH: Enough is enough. We're going to with Senator Schumer ***right*** now. Senator Schumer.

SCHUMER: You weren't here to hear my brilliant questioning this morning.

SESSION: I heard one round.

HATCH: Senator Schumer…

SCHUMER: And then you forgot.

HATCH: Senator Schumer, Senator Schumer, the time is yours.

SCHUMER: Thank you. So one of the things, just more questioning of Professor Sutton, that I appreciate here is that you haven't done what some of our witnesses have done in the case of hear no evil, see no evil, do no evil. You haven't said, you haven't shied away from being critical of all Supreme Court jurisprudence. We've had other nominees who have refused to criticize any Supreme Court case ever. I asked Mr. Estrada name a past case but he kept saying, he kept saying well, he might come before them in the future. He doesn't want to, so name a past case he was critical of and he didn't want to even do that. So you're not -- I think you've won some points from some of my colleagues I've talked to by not being so sphinx-like.

But you did mention for instance, earlier in our dialogue, that you disagreed with the (inaudible) Joel (ph) case where you were critical of the Supreme Court's decision not to take cert. Could you point to one other Supreme Court case you're critical of?

SUTTON: (inaudible) Joel just to be clear, I wasn't critical of the not to take cert, critical of the outcome in the case and specifically the decision not to allow handicapped individuals to obtain an education in a setting where they could be with other members of their religious sect.

SCHUMER: How about another case you're critical of?

SUTTON: Well, earlier in the day, it came up that there was a discussion about the ADA and specifically the question was raised by Senator Feinstein about whether, what my reaction was to the horrendous and egregious history of forced sterilization of those with mental disabilities. And I made the point that there was a rather embarrassing U.S. Supreme Court case by the name of Buck (ph) remarkably written by Justice Holmes, remarkably, because he was otherwise a fairly distinguished jurist and I made the point that in the Garrett (ph) brief that has received some criticism and I understand your perspective and other members of the committee's perspective on the position my client in that case. But even in that particular case, where the Buck case remarkably still on the books, of the state of Alabama agreed to take the position in the courts to say well, we don't think that's correctly decided. And you know, it's a sad, sad chapter. Happily, it would be very difficult to overrule Buck now because every…

SCHUMER: (inaudible) You were representing Alabama.

SUTTON: Exactly. And all those ***laws*** are…

SCHUMER: (inaudible) could be a decided case did you disagree with, that you weren't representing anybody, that you as a…

SUTTON: Well, I didn't represent anybody in Buck. Buck's a 1927 decision.

SCHUMER: I see.

SUTTON: It's an infamous decision of the U.S. Supreme Court. It's been criticized in every quarter that's ever…

SCHUMER: And you represented Alabama later on when they challenged Buck or no?

SUTTON: No, I'm making, I didn't do a good job explaining that. I was making the point that in the Garrett brief, which is the case about the ADA…

SCHUMER: Oh, I see.

SUTTON: We acknowledged this -- it's called the eugenics movement and that it was very unfortunate, sad chapter in American history. Happily it's a closed chapter in American history and if it weren't closed the ADA would require it.

SCHUMER: How about any others?

SUTTON: I can't think of any others offhand. I didn't come…

SCHUMER: Koramatsu (ph)?

SUTTON: Well, I mean anyone who's read Koramatsu would obviously be very uncomfortable with the results. I've made another point in the very brief I'm talking about.

SCHUMER: I'm just trying to get an idea of your thinking when you're not representing a client and I don't want to get you into the issue of prospective cases so I'm just asking some cases that you disagreed with. I mean I'm sure you disagreed with Plessy v. Ferguson, ***right***?

SUTTON: ***Right***. The point I wanted to make though and it's actually the same point we made in the Garrett brief, that you know, while it's easy today to look back on a case like Buck, look back on a case like Koramatsu and say boy, you know, how could that have happened? Time has a way of making yesterday's progressive look like today's Neanderthal. I mean there's just no doubt that that's true. The thing I'm a little reluctant to do is to second guess courts in saying boy, had I been the judge on that particular case back in that period of time, I would never have fallen into that trap. I think that's Monday morning quarterbacking and unfair.

SCHUMER: Well, that's a different issue. It's a different issue to say at the time I would have ruled differently than times have changed and things have changed and I would now disagree with that holding, ***right***?

SUTTON: That's true, although I must say, you know, unfortunately as a court of appeals judge, I can't imagine it coming up with these particular cases. But a court of appeals judge is obligated to follow U.S. Supreme Court precedence for better or worse and that's -- and I of course would do that for better or worse.

SCHUMER: But you would dis -- OK, any others you'd want to mention?

SUTTON: No.

SCHUMER: Is it that you can't think of any or you don't want to mention it? Well, I'm going to submit that question in writing, OK. I'm going to ask you just so you can think about it for a while, of cases that you already decided Supreme Court cases that you might disagree with and I'll assume if you don't submit any, that you agree with every one of them that's been decided already.

SUTTON: That's a big task, but thank you for the opportunity to put it in writing.

SCHUMER: Well, just give a few, that's all. I'm not asking you to go through every Supreme Court case. I am asking that we try to stop this sort of sphinx-like behavior we've had with witnesses who don't say anything about anything. I'm not saying you've done that. You've done more than some. I think that's a good question to ask.

SUTTON: I understand.

SCHUMER: (inaudible) getting their thinking. OK, next question is, I want to talk a little bit about Sandoval (ph) because this one I think had really far reaching opinions, far reaching effect and I believe that you, more than most lawyers, have been quite successful in persuading the Supreme Court to adopt your ideas. Five justices on the court have basically bought into the states' ***rights*** jurisprudence that you've been one of the leading advocates of and creators of really. The ripple effect of that jurisprudence in my judgment has been very powerful.

And perhaps the most striking example is Sandoval, where the court was dealing with Title VI of the Civil ***Rights*** Act of 1964 which prohibits discrimination based on race, color or national origin in Federally funded programs. The Sandoval decision reversed an understanding of ***law*** that had been in place for nearly three decades and it limited private citizens' power to enforce ***rights*** protected by Federal ***laws***.

The ruling makes it nearly impossible to challenge a range of state practices with an unjustified disparate impact such as for instance, disproportionate toxic dumping in minority neighborhoods or the use of educationally unjustified testing of tracking procedures that harm minority students, the failure to apply appropriate language services in health facilities.

But I believe your arguments in Sandoval went even further than the court went. You argued that neither private citizens, nor Federal, nor the Federal government has the power to enforce disparate impact regulations. If the court had adopted your position in my judgment, it would have gutted the ***laws*** and regulations that protect millions of Americans. You would rendered enforcement of these ***laws*** entirely effective. That's why I said earlier this afternoon that you could do a thousand pro bono cases and it wouldn't undo the damage in my judgment that Sandoval has done to individual ***rights*** and to the ability of this country to be as colorblind as we possibly can.

SCHUMER: So I'm for one grateful that the court refused to go as far as you argued that they ought to go, but I worry about what would happen if you were wearing the judicial robes and had the power to make your ideas ***law***, into ***law***, and I worry about frankly, what Professor Jeffrey Sutton's America would look like if you had the power conferred by a lifetime seat on the Federal bench.

I worry that in that America, poor parents couldn't go to court to ensure that their children get basic medical care. I worry that disabled children couldn't go before a judge and ask that she or he enforce the ***rights*** of equal educational opportunities. I worry that in that America senior citizens wouldn't have the ***right*** to go to court and seek protection from employment discrimination. Women would have no power to go to court to find gender

discrimination. I fear that in the America that you see from your reasoning and your jurisprudence, states have ***rights***, but people really don't, because your argument in Sandoval went really far, again, way beyond what even most would concede is a rather conservative court, conservative majority went with.

So I'd just like to know how you allay my concerns about that. I mean the courts have been a place that individuals seek justice and I think one of the great things about our jurisprudence ***over*** 200 years is they've enabled more and more individuals to seek that type of justice when it's either state governments or some other entity stopping them from gaining that justice.

We have a philosophy that seems to be governing here that government regulation is bad. And if the government isn't going to protect people, then you at least want to see individuals be able to protect themselves through the ***rights*** that have been granted through our judicial process ***over*** centuries. So how would you allay my concerns about that, individuals particularly at a time when government is doing less to protect them, don't have the basic ability as a result of your arguments if it were to become ***law***, your arguments in Sandoval to seek justice, seek, well in this case, to seek freedom from discrimination?

SUTTON: I know we would discuss this a little earlier and I appreciate your perspective on this and I think I'm gaining a greater appreciation as time goes on and I think it's obviously a very important perspective on this. I would like to say something. I hope this doesn't irritate you, but I would like to point out that again this is not a case I've written about. This was a case where I was an advocate and I really do feel strongly. I mean maybe I'm misguided in this, but do feel strongly that I had an obligation to make all reasonable arguments that I thought would advance my client's cause. I don't think the Sandoval decision or brief in any way indicates what I would do as a court of appeals judge and…

SCHUMER: Did your clients in that case urge you to take the argument that individuals, to take that extra step in the argument that said individuals couldn't ***sue*** or did you suggest it to your clients? I mean where does the -- Sandoval was a state case basically. You went further.

SUTTON: This may show that I'm not as sensitive as I should be, but I actually thought I was advocating the moderate position. Let me explain what I mean by that. You said that we challenged the validity of the regs in that we said that the Federal government could not enforce the disparate impact regulations against states that it violated the ***rights*** of individuals within that state. There was a big debate about whether to challenge the regs. We could have challenged the regs. As the opinion for the court indicates, we did not challenge the validity of the regs.

I think the reason someone might say that we did, I mean the opinion of the court makes it quite clear. They say the validity of the regs is not in front of us because the state has not challenged it. So even though we could have challenged them, gone that extra step, we did not challenge them. But you might say, OK, so what was -- why is there anything in the brief at all about the regs?

Well, the part of Sandoval that was difficult was the fact that Section 601, that's part of -- that's Title VI, Section 601 was a provision that the U.S. Supreme Court in Bakke (ph), you remember the affirmative action case, where Justice Powell, Justice Brennan, Justice Marshall and I'm not sure about this, but I think it was also Justice Blackmun and Justice White, but I know it was Justice Brennan, Justice Marshall and Justice Powell, concluded that Section 601 did not allow for claims for disparate impact but only for claims for intentional discrimination.

You might, as you're hearing me say that, well, that seems a little counterintuitive, why in the world were Justice Marshall and Justice Brennan saying 601 didn't reach disparate impact discrimination? It seems like an awfully good idea and something in other cases they might have supported. Well, I don't know why they didn't do that obviously. One can speculate and the speculation makes a little sense to me and that's that -- and this gets to the whole complexity of disparate impact litigation. An interpretation of the Civil ***Rights*** Act, Section 601, that allowed that kind of disparate impact claim, could have doomed the Bakke affirmative action position that Justice Powell, Justice Brennan, Justice Marshall carved out, because of various obvious points that affirmative action could have disparate impacts on other people based on race. Who knows why they did that, but the fact of the matter is, those

SCHUMER: I'm not following you. What I was focusing on is that the brief went beyond what the Federal government can do and talked about individual citizens ***rights*** to deal with disparate impact, not the disparate impact itself, not the argument the regulations -- I don't know why…

SUTTON: If your question had said that we challenged the validity of the regulation and we didn't challenge the validity of the regulations and the Federal government can enforce them against individuals, in terms of the brief arguing that private individuals could not ***sue*** for disparate impact under…

SCHUMER: You've just argued that they could not ***sue*** for disparate impact or did you argue that they couldn't ***sue*** for a broader range of issues under Title VI? I don't know the answer to it. I'm just asking.

SUTTON: Well, the only thing in the case was the regulations because under the -- this part of the brief I don't recall, but I'd be surprised if we didn't concede this point, our client didn't concede this point, that the point was, there's a case called Canon (ph) which deals with Title IX and Canon says that there is an implied ***right*** of action for claims -- there is an implied ***right*** of action for claims for intentional discrimination. So we would have conceded that point.

I think what you might be -- the reason you might be asking this question and I -- someone could disagree with this, is the notion that there's a case called Penhearst (ph) and a case called South Dakota v. Dole which say before spending clause legislation or other legislation is going to create cause of action against states, you need a clear statement and that the argument in Sandoval, someone might have construed to mean even Canon wasn't rightly decided. And that's a pretty good objection. That's of course exactly what the Supreme Court said. That's exactly what the Federal government argued in opposition and it didn't prevail.

SCHUMER: What you're saying here is in Sandoval, your arguments were simply related to the disparate impact regulations, not a general view that individuals didn't have the ***right*** to ***sue***.

SUTTON: No, yes, no, it was all -- the disparate impact regulations were all that were at issue. I'm sorry if I didn't get to that more quickly.

SCHUMER: Let me -- OK. I just wanted to go back to City of Bernie (ph) again. I don't even know where it is. Where is the city of Bernie?

SUTTON: It's in Texas.

SCHUMER: Texas. What I asked you there is and we didn't get a clear answer. Did you -- I just want to get an answer, the underlying question, all ***right***, which is, did you, the attorney general or the governor decide what position to take in that case? I mean you were trying to think back, but maybe you've had a chance to think about it.

SUTTON: Well, when you say position, the decision whether to file an amicus brief in the U.S. Supreme Court in the City of Bernie?

SCHUMER: And the arguments that were made.

SUTTON: Well, I guess in the first part of it, clearly it's the attorney general in Ohio (inaudible) appointed position, one reports to the attorney general. The attorney general's an elected office holder in Ohio and very…

SCHUMER: So did they contact you and say we want to argue this case or did you contact them initially to file the brief?

SUTTON: Well, the point I was making was the attorney general or people in her corrections staff had already decided to challenge…

SCHUMER: I didn't ask you that. I asked you did they contact you initially? Did they reach out to you or did you call them up and say, hey, this would be a good idea and I want to help you with this?

SUTTON: In terms of our involvement in the City of Bernie itself, I understand. I think my recollection's correct. I think the state of Ohio filed an amicus brief on behalf of states, both at the cert stage, which is to say, encouraging the court to take the case. I think the city had lost at the fifth circuit if my memory's correct and then filed a brief at the merit stage. So the important point would have been the cert stage because once you file an amicus brief for states at the cert stage, generally you'll follow…

SCHUMER: Your involvement didn't come in until the highest level, ***right***?

SUTTON: Exactly.

SCHUMER: And I'm just asking you, I'm not asking you how Ohio came up with its position. I'm asking did you -- initially there had to be some hook up between Professor Sutton and the state of Ohio at this level.

SUTTON: ***Right***.

SCHUMER: Did you contact them and say, I'd like to be involved in this, I'm an expert or did they contact you?

SUTTON: I honestly don't remember. If I were to guess what would have happened, because I

SCHUMER: You remember or you don't remember.

SUTTON: Well, I don't, but if I could take an educated guess, because I think it's mostly likely the case. The educated guess is that what would have happened is, as I said before, the corrections lawyers were challenging (inaudible) the lower courts. The corrections lawyers like all lawyers in the AG office work together on consumer affairs, environmental, they coordinate work and they tell each other what they're doing. And my suspicion is that what happened is that the corrections officials in our office would have known about the City of Bernie litigation. Why, because they were challenging the same ***law*** in their cases and again, educated guess is they came to me saying, Jeff, this is something we ought to try to get involved in.

SCHUMER: How many of the cases were you argued on the significant cases I mentioned four or five before. Are there any where you reached out to the client and said, I'd like to make this argument? I'd like to get involved as opposed to them asking you?

SUTTON: ***Right***, well, the one that I know I reached out in, is the Dale Becker (ph) case and Dale Becker was the prisoner ***rights*** case where an inmate in Ohio filed a pro se cert petition. The reason I know I reached out for that one is because when the U.S. Supreme Court granted cert petition, when the U.S. Supreme Court granted a cert petition for a pro se inmate, for obvious reasons that inmate is not going to be able to argue the case in the U.S. Supreme Court.

SCHUMER: You have to give me the whole -- so in that one you reached out.

SUTTON: I did.

SCHUMER: I'm going to ask you to respond in writing. Did you reach out and make the initial contact in Sand -- you don't have to answer me now. I'll do it in writing. But I'd like in Sandoval, Garrett, Kimel (ph) and I asked about City of Bernie already.

SUTTON: OK.

SCHUMER: Because in each of these cases your argument is you were just following what the client wanted. Well, it would be a little different if you reached out to them and said hey, this is a good argument. Let's make it. That would be before representing the client.

Let me give you one other follow up question. I want to follow up here on something Senator Durbin asked. You said you decided to take the Garrett because you wanted to argue before the Supreme Court. That was in

reference to what Senator Durbin had asked you. Is there any case you would refuse to take because the potential client's desired outcome was too wrong or too offensive to you?

SUTTON: Well, that's a difficult question. I mean I would say the Garrett case. I want to make sure I'm correct on that. I mean I was trying to develop a U.S. Supreme Court practice and it's obviously an honor to be asked to argue a case in the U.S. Supreme Court and it's just an easy opportunity to accept and that's certainly what I did. And I was happy to be litigating there.

HATCH: Will the Senator yield on that? I have a letter from Bill Pryor (ph) attorney general of the state of Alabama. Dear Chairman Hatch. I'm writing the correct the record concerning Jeffrey Sutton, a nominee to the court of appeals for the sixth circuit. I understand that it has been reported that Mr. Sutton aggressively pursued the opportunity to work on Garrett v. Alabama, a case in which the state of Alabama defended itself against a lawsuit brought under the Americans with Disabilities Act.

I am the person who hired Mr. Sutton to represent Alabama before the Supreme Court of the United States and I did so solely on the basis that I hold his legal abilities in the highest esteem. Mr. Sutton never solicited this representation. I sought his representation for the state of Alabama. I hope this clears up any confusion in this matter. I thought that would be something that would help here at this point for both Senator Schumer and you.

SCHUMER: Did somebody reach out to him since Senator Durbin asked the question?

HATCH: Excuse me. I'm not sure what you're saying. He said that…

SCHUMER: No, that letter is pretty timely in terms of Senator Durbin's question. Did we get that letter this afternoon?

HATCH: No, it's dated January 23rd.

SCHUMER: Thanks. Mr. Chairman, I have some more questions for Mr. Sutton. The hour is late. I'm going to submit them in writing…

HATCH: Appreciate it.

SCHUMER: … because I won't have any other chance to question either Judge Cook or Judge, Mr. Roberts. I'd like to ask each of them one question tonight.

HATCH: Sure. Now we've reserved this time for you and we're grateful that you came back to do this.

SCHUMER: Well, thank you. I'll do it again if you'd like me to be more grateful to you.

HATCH: I think once is enough. You're just so accommodating.

UNKNOWN: There's only so much gratitude to go around.

SCHUMER: OK, this is for Mr. Roberts and I'm sure sorry, it's a long day for you and I'm sorry that you've had to sit here through all of this. I know Senator Hatch has argued we're inconveniencing you and I apologize for that. I do think -- I mean I've made my point clear, that I wish we had had better time, more time, not at 9 o'clock to question you and I don't think asking people to come back for such an important appointment is anything undue. Judges ask you to come back and argue cases all the time and that's less significant than this and every lawyer has sat around and waited in the court for the calendar to clear.

So, but here we are and I've made my argument and not succeeded so let's -- let me ask each of these questions, one question to each of you. You've come very highly recommended. You're obviously one of the great legal minds in a city full of great legal minds and for me, with your situation, just as with Professor Sutton, excellence is not the issue. But I do want to ask you something about these state ***rights*** issues we've been discussing all day.

And as with Professor Sutton, I'm not going to ask you questions based on briefs you wrote for your clients. I want to ask you about some of the things you've said in your personal capacity.

I want to read to you an excerpt from an interview you did with Nina Totenberg, I guess well known to this committee before I got on it, discussing several states' ***rights*** cases from the 1999 Supreme Court term. I think we have a fair excerpt from that interview but I'll give you a full chance to explain your thoughts if it's out of context at all. But here is what was said.

Quote, Mr. Roberts, well, I think the three decisions taken as a ***group*** are a big deal. You'll probably (inaudible) you know it better than I do, that's for sure. It's a healthy reminder that we're a country that was formed by states and that we still live under a Federal system. It's the United States of America and what these cases say is just because Congress has the power to tell individuals and companies that this is what you're going to do and if you don't do it, people can ***sue*** you, that doesn't mean they can treat the states the same way. But the states, as co-equal sovereigns, have their own sovereign powers and that includes, as everyone at the time of the constitutional convention understood sovereign immunity.

You went on to say regarding the Congress' exercise of the spending clause power, well, quote, these are all quotes, well, so much of what we, what our restrictions are based on, the spending power. You know, even for private citizens, if you accept Federal money, you're covered by Title IX and Title VI and the basic principle is, if you pay the piper, you get to call the tune. And I think the Federal government could say, if we're giving you money and it's related to the area in which we're trying to get you to waive sovereign immunity, we can require you to consent to suit as a condition of getting those funds.

The example you gave is a good one. This is you still speaking. If they get Federal funds for your probation department, they can say, we're not going to give you those unless you waive sovereign immunity. And that's quite common. The Federal government for example has sovereign immunity as well. It has waived it. Then Nina Totenberg says and supposing the Federal government said, if you accept any Federal money, states, you have to abide by the Federal provisions that we enact for everybody.

Mr. Roberts, I think that would go too far. The jargon is that the waiver has to be germane to what funds, to what the funds are for. You may remember a while back the Federal government said, if we give you highway funds, you've got to raise your drinking age to 21, because we think that, we think having these teenagers, teenage drinkers causes accidents. The court held that that was germane to that purpose, but there has to be a connection. It can't just be if you take a penny of Federal funds, you've got to waive your sovereign immunity across the board. It's the end of the quote.

What I'm trying to figure out here is where all of this appears in the constitution. For the life of me, I can't figure it out. I keep going back to this document and looking for the words like sovereign immunity and congruent and proportional and germane to the purpose and I don't see any of it. We keep hearing that the justices who are advocating these things are strict constructionists, but as far as I can tell, they mostly strictly construe the ***law*** in favor of states and big businesses against the interests of average people.

Can you help me understand this? It appears from this interview you agree with the court's jurisprudence in this area, the court's majority, the majority of recent jurisprudence here. Do you and if so, why when the plain language of the constitution is either silent or to the contrary?

ROBERTS: If I'm remembering the radio show, I think it was sort of a wrap up of the Supreme Court's term and I think she may have had other people on as well. They're talking about what's significant and I thought that the Supreme Court's immunity cases involving the states were indeed significant. That was I think the question before you got to the part you were quoting, is this a big deal? And I thought it was and I said that and then part of the rejoinder was, well, can't we use the spending power to get around this? In other words if we're serious about it, let's use the spending power.

And what I was articulating there was what I understood the stage of the ***law*** to be, which is, as a general matter, the answer is yes. South Dakota v. Dole, the highway funds case. But again, I'm stating what I understood the ***law*** to be that there is this so called germaneness requirement. That's what the Supreme Court's…

SCHUMER: Where did it come from? Where in the constitution did it come from? Let us say the Federal government made a more sweeping ***law*** and said, if you accept any Federal money, not just highway money, you have to have a 21-year old drinking age. Now that may be very broad power of the Federal government, but I'd like to know where in the constitution I solicit or derive, it says that the Federal government can't do that.

ROBERTS: I don't know what the Supreme Court precedence hold. My familiarity with the requirement really was with the South Dakota case where they articulated it and they explained ***over*** for example, ***over*** the dissent of Justice Brennan and Justice O'Connor, that this requirement was met. I haven't gone back and read the trial case. I don't know the answer, what the analysis was. I was just articulating what I understood the ***law*** to be for the purposes of the interview.

SCHUMER: But do you have any further thoughts on -- to me it's an important question. You know the ***laws*** much better than I do, but it would seem to me when you're making such a -- you're making a dramatic change. We've had basically relates to expanded Federal government power versus reducing Federal government power and that's been the trend in this court and there's got to be a basis for it.

ROBERTS: Well, Senator, I was listening as you were (inaudible) with some trepidation when someone says, this is what you said. You're waiting for -- not only the nongrammatical part but the part that sounds ludicrous and I have to say…

SCHUMER: ...when I'm used to nongrammatical parts.

ROBERTS: I have to say, I didn't hear anything I would say, gosh, you know, I wish I hadn't said that. I think it is the case that we do have a Federal system that states have powers and responsibilities and the Federal government does as well. Certainly under the supremacy clause the legislation that you enact is the supreme ***law*** of the land, consistent with the constitution.

I appreciate the concern about the sovereign immunity cases. You're quite ***right***. There is no sovereign immunity clause in the constitution. On the other hand, the court's cases have been fairly consistent that the Federal government enjoys sovereign immunity. This body has done much ***over*** the years to waive that, Federal tort claims act, a variety of things. But that basic recognition of Federal sovereign immunity has always held firm. And I think it is hard for to explain to state government, why do they have it and we don't. And if we had it at the time of the founding, when did we give it up? And the Supreme Court has given some answers. Well, part of it you gave up in the 14th amendment in Section 5. But I do appreciate that it is a difficult area, because you're not dealing with the textual provision in the constitution.

SCHUMER: Any other, either of the other two witnesses want to comment on that? Not on Mr. Robert grammar, but rather just on the general question I asked. Where (inaudible)

SUTTON? : I don't know why I'm reengaging.

SCHUMER: I don't know why either.

SUTTON: I'm a fool. But the one point I just wanted to make. There's no spending clause either for what it's worth. This comes from Article I, Section 8 and it says Congress can provide for the general welfare and the court sensibly, atexturally (ph) but sensibly has said, hey, if it's Congress' money, they can tell the states how they want it spent and if they want to attach conditions, they can. So…

SCHUMER: Well, where does this one come from?

SUTTON: That's my point. There isn't a spending clause.

SCHUMER: (inaudible) but you said it sprung from the clause to protect for the general welfare, ***right***?

SUTTON: Exactly. No, I'm just saying there isn't a spending clause so there's not a textual basis for it, just making the point that the Supreme Court decision sensibly has said, if Congress raises money to provide for the general welfare, they can attach conditions to how it's spent.

SCHUMER: Only certain conditions.

SUTTON: Well, that's what South Dakota…

SCHUMER: Jeffrey Roberts was talking about in his interview. He was saying there has to be garmaneness. There has to be proportionality.

SUTTON: I don't think he was saying proportionality. I think germaneness.

SCHUMER: He didn't say proportionality. I stand corrected. He was saying, let me try to correct the grammar here, although I don't know where you would make such egregious mistakes. But anyway…

UNKNOWN: I would just note for the record that Professor Sutton did not serve in the military. Otherwise he'd no better than to volunteer at this point.

SUTTON: I deserve that.

SCHUMER: It was brave. Do you have anything you'd like to say, Judge Cook on this?

COOK: I don't.

SCHUMER: Just let me say that I was trying to be Dean Martin to your Jerry Lewis on that one. Let me ask you a question. OK.

SESSIONS: Senator Schumer on that subject, Blackstone Commentaries says that no suit or action can be brought against the king even in civil matters because no court can have jurisdiction ***over*** him. Then it goes on, for the same reason, no action lies under a republican form of government against the state or nation unless the legislature have authorized it, a principle recognized in the jurisprudence of the United States and of individual states. So that was the classic…

SCHUMER: Sovereign immunity.

SESSION: Attorney general. I mean I've relied on every attorney general who relies on it. It's not explicitly stated in the constitution directly but there is a sense in which if the state can be ***sued*** or the Federal government can be ***sued***, it can be destroyed. So you have to

SCHUMER: I understand but that's where we pass from strict constructionism to judicial activism in a certain way and…

SESSION: I don't think the constitution ever covered everything and this was existing principle at the time.

SCHUMER: Look, I've made that argument for a long time as you know. Let me go to Justice Cook.

HATCH: One last question…

SCHUMER: Justice Cook, it's a very long one (inaudible) OK, Justice Cook, it's my understanding that you previously discussed a decision in Davis v. Wal-Mart with Senator Kennedy. I'd like to return to the case. I'm troubled by your dissent. In that case, a widow, whose husband had been killed on the job, settled a lawsuit against the employer. She then attempted to file a second lawsuit after learning that the employer had instructed employees to lie about how her husband had been killed. The employer apparently did this in order to wrangle a settlement out of her. Your colleagues found that this evidence was not only enough to permit the suit to go

forward, but that it actually might support punitive damages. Punitive damages are usually reserved for cases where the wrong doing is blatant. It seems kind of blatant here.

It's my understanding that you explained to Senator Kennedy that your dissent in this case was based on your view that (inaudible) prevented the widow from filing the suit. Is that correct?

COOK: Only because she had previously litigated this matter. She filed a negligence -- yes, so she had a negligence action that was concluded.

SCHUMER: ***Right***.

COOK: And that this claim was sufficiently related and could have been brought…

SCHUMER: So you're relying on (inaudible)

COOK: That's ***right***.

SCHUMER: Once an issue is decided, it's final and to reach the conclusion that the widow couldn't refile her suit, once, even after she learned after the company's quite horrible deception. Another fundamental principle however of our legal system is that juries find facts based on the evidence presented. And judges and appellate courts give a great deal of deference to those jury determinations, it's my understanding, that to overturn a jury verdict an appellate court must find that the jury's decision was quote, against the manifest weight of the evidence. And that's as we all know, rather high standard.

In Burns v. LCI Communications, a jury found that employees had suffered age discrimination and the evidence at trial included statements by the employer that quote, wanted to bring in young, aggressive staff members and change out the old folks, unquote and that he did not want, that he did not, quote, want old marathoners in my sales organization. I want young sprinters. This man was not in charge of the Senate.

Despite this evidence which was enough to convince a jury of age discrimination, you voted to overturn the jury's verdict for the employees. It appears that you substituted your views for those of the jury who actually heard the testimony and saw the evidence of discrimination. I find it troubling that legal principles constrained you in this case where you're vindicating an employer. How do you explain the deference to legal principles in the one case, Davis v. Wal-Mart, you denied the widow's ***right*** to her day in court, but you're willingness to disregard other important legal principles when a jury has found evidence of discrimination?

COOK: In the…

SCHUMER: You can just pull the mike a little closer.

COOK: I'm sorry. In the Burns case that you -- the verdict was overturned by the court of appeals unanimously and then five of the seven members of the Ohio supreme court agreed that the plaintiff had not shown that she had been discriminated against. So we were -- they agreed that there was a disagreement among us but at least all five members agreed that she had not shown discrimination and the facts you're mentioning, the sprinters, etcetera. I have not a great recollection of it, but I think the point was that those comments were made years before so the effort, the plaintiff's effort which garnered a verdict did not use evidence of, that was not related to her and so I mean a good majority of the supreme court agreed that actually discrimination had not been shown even though when you cite it, it all sounds pretty awful. But the three judges of the court of appeals and five of the supreme court agreed.

SCHUMER: In Burns?

COOK: Yes.

SCHUMER: OK, just explain the first case, your ruling in…

COOK: Wal-Mart?

SCHUMER: Wal-Mart, yes.

COOK: I'm getting tired. In Wal-Mart I think we just talked about it was a (inaudible) was the basis for my dissent and that's a dissent in Wal-Mart. And it was the second matter after the negligence claim, the widow had the information. She said that she then learned later that the employer…

SCHUMER: Say that again, it was after the second, she didn't get the information until…

COOK: She didn't -- no, the record actually showed that she had that information but and then didn't bring it. I mean had it within time to bring it as part of the original negligence claim and failed to do so.

SCHUMER: I see.

COOK: And so we determined that it was waived.

SCHUMER: (inaudible) Don't remember, OK. Well, I don't quite -- you know it better than me again but I think the second case, the Burns case, at least from what my cursory knowledge is a little different. So I'm going to just ask Mr. Chairman in the interest of time, that I be -- submit some questions about these two issues and maybe some others to Judge Cook in writing.

HATCH: Well, thank you Senator. I would senators to submit as many questions as they -- submit their questions now. We won't have the transcript by tomorrow at 4 and any additional questions, have them submitted by 5 o'clock on Tuesday and then I would like your answers back by Wednesday evening because I intend to put you on the markup for the Thursday from tomorrow.

SCHUMER: Chairman, we have a -- I mean I have a bunch…

HATCH: We've already agreed on this.

SCHUMER: A week to…

HATCH: Well, it amounts to a week, really. I mean we're -- and nobody's going to press you on this. If we have to put them ***over*** a week we will do so. But that's what we're going to do and I just have to say, you've been very patient today and this has been a tough day for you. I apologize that it's taken so long. You've been here really for 12 hours. And really the equivalent of two days and you've been patient with us and we appreciate it and hopefully we can move ahead with your nominations and do so in an expeditious, yet fair to all sides fashion.

And I just caution you, when you get these questions, answer them as quickly as you can, but I'm hopeful that you'll have all these questions answered by next Wednesday. Now Senator Leahy.

LEAHY: First I want to reiterate I appreciate your moving down here to accommodate, especially the disabled people earlier and I appreciate you accepting our recommendation for that. I also not that you've been very fair with the clock on giving senators on both sides whatever about time (ph) they needed. I would hope -- I understand the pressures the chairman was under from his side of the aisle on this but I would hope that this would not be necessary to have -- I don't mind having hearings every day if you want. But not to have three nominees where there will be extensive questions on like this at the same time.

Again, we show what happened to the three district court judges. There were not extensive questions. We passed that in 45 minutes or so. Again I appreciate having been there. I appreciate the pressures the chairman was under under this, but I would hope that those pressures would lessen as the year goes on and we might work out something because I think it is important when all senators were going to have to vote initially in the committee and actually have the time to be here to hear the candidates.

HATCH: Well, thank you Senator and we'll certainly take that into heavy consideration. In fact I already have. Next week's hearing will involve only one circuit court of appeals nominee and I don't know how many district court. We'll decide that, I think three or four district court nominees. And I just want to thank everybody for their cooperation, the distinguished senator from New York. I know he's been upset at me but I care a great deal for him and he's one of the astute people, one of the most astute people on this panel and I just appreciate his forbearance with me.

SCHUMER: I'm not upset at you. I mean I'm just upset at the situation.

HATCH: I understand and we're going to…

SCHUMER: ...justice to the importance of what we're doing here.

HATCH: Well, I appreciate that. With that I just want to compliment each of you. I don't know when we've had a panel that has been as articulate on some of these constitutional issues as the three of you have been.

Mr. Sutton, you've born the brunt of most of the questions today. I know that you're probably worn out, but you've done a terrific job in my opinion and deserve a lot of credit for your astuteness. I think everybody here acknowledges you're a fine lawyer if not one of the best in the whole country.

And Mr. Roberts, no question about your abilities. I think everybody here has basically acknowledged that today as one of the great appellate advocates in our country, both of you are, among the greatest appellate advocates we have in this country.

And Justice Cook, it's very apparent that you're a very good person, that you understand what the role of a judge really is and we expect you to abide by that understanding as you serve on the court, on the Federal court. So with that, we'll recess until further notice and thank you all for being here and I'll move as fast as I can on this nominations.

Thanks so much.

END

Notes

[????] - Indicates Speaker Unknown

[--] - Indicates could not make out what was being said.[off mike] - Indicates could not make out what was being said.

Classification

Language: ENGLISH

Subject: US CONGRESS (93%); US REPUBLICAN PARTY (90%); LEGISLATIVE BODIES (90%); US DEMOCRATIC PARTY (90%); DISABLED PERSONS (86%); ***LAW*** COURTS & TRIBUNALS (78%); DEAFNESS (78%); POLITICS (78%); US PRESIDENTIAL CANDIDATES 2008 (75%); US AMERICANS WITH DISABILITIES ACT (72%)

Person: RUSS FEINGOLD (89%); ORRIN HATCH (79%); JEFF SESSIONS (79%); CHARLES SCHUMER (78%); PATRICK LEAHY (74%); CHUCK GRASSLEY (73%); MITCH MCCONNELL (59%); ARLEN SPECTER (59%); JOE BIDEN (59%); DIANNE FEINSTEIN (59%); TED KENNEDY (58%); SAMUEL BROWNBACK (58%); JOHN EDWARDS (58%); JON KYL (58%); HERB KOHL (58%); RICHARD DURBIN (58%)

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