

**STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR
FROM THE STATE OF MASSACHUSETTS**

Senator 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 am troubled like other members of the Committee of having three nominees who are controversial, and having one hearing that is going to do this. I, out of necessity and desire, will attend a memorial 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 am glad to stay here whatever time, but I think there is—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 the scheduling of three nominees and others here, suggests a policy to try and jam those that have serious questions, and I resent it, and I find that it is not a particularly good way to expect that we are going to have a wide cooperation. If we have to exercise all of our rights in order to protect them, so be it. And if that is the desire to do so, so be it as well.

We have three nominees here for the Circuit Court. Mr. Sutton is a nominee for the Court of Appeals for the Sixth Circuit, has actively sought to weaken Congress's ability to protect the civil rights and the ability of the 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's organizations 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 of bias in favor of business and corporation over the interest of injured individuals, workers, consumers and women. Numerous Ohio citizens and groups have raised strong concerns about her nomination, including the National Organization of Women, Ohioans with Disabilities.

And finally, 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, environmental, 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 Environmental Protection Laws in his efforts to shield states from individual suits, and to limit Congress's ability to pass legislation regulating state conduct in the name of the states' 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. I will move towards questioning the nominees.

Mr. Sutton, I happened to be here, Professor Sutton, during the enactment of virtually all of these pieces of legislation like 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 Disabilities Act. We had to meet after the sessions for the Senate well into the evening until it was actually filibustered to 1 or 2 in the morning.

And then we saw those in the disability community in wheelchairs come on into the hearing room, first of all 5, 10, eventually about 100, 150, and suddenly, television cameras 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 spent weeks and months I building a record because the Americans With Disabilities Act follows a very important movement in this country to knock down walls of discrimination, which you are 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 Disabilities Act, and we still have, I think, work to do in terms of sexual orientation, but the Americans with Disabilities 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 limiting the discriminatory provisions of the Immigration Act, national origin quotas in the Asian-Pacific triangle, saw this progress made.

Then we passed that Americans with Disabilities 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 we, under arguments that you made very effectively, it does not apply to the state employees, and it means that state employees cannot get protection of that.

We also had the Age Discrimination Act, and we find out under your arguments on the reaches of the Constitution, that we cannot apply that to state employees.

The Title VI and the Disparate Impact regulations, cannot be privately enforced, positions that you presented to the Court, supported. Those that find out that there are sitings of toxic dumps in minority communities that are resulting in the poor children suffering and contracting asthma, 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, those kinds of remedies are not going to be able to be out there.

Title IX regulations. 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 IX, and we find out it cannot be privately enforced because of the *Sandoval* decision; and the Religious Restoration Act that the Chairman has referenced, all extremely important kinds of progress over the period of these past years.

You have supported viewpoint that has effectively dismantled many of these protections, and it is one that has been embraced in some instances by 5–4 decisions of these courts, virtually divided by the Supreme Court in terms of these protections which affect millions of fellow citizens, those that have been left out and left behind, those that are getting the short stick in our society. I am impressed, deeply impressed by your own personal kinds of involvement, reaching out with the works that you have done privately. But there is very legitimate kind of questions about your being on the Court and whether you are going to take this position with you in terms of continuing dismantlement of the works of Congress and the remedies, the remedies. We will come to that in just a moment, which you have also questioned 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 challenge this particularly, go out of your way in terms of amicus brief, go out of your way. We will hear, well, this is a very important constitutional issue which I affirm, but you go out of your way in the amicus brief in the *West Side* issue to try and diminish I think.

I am 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, 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.

Mr. SUTTON. Thank you, Senator Kennedy, for an opportunity to address those issues and to discuss them with you and other members of the committee. I do appreciate this opportunity, and am an admirer of your work in all of those areas, and I hope there's nothing about 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 will be able to explore this with some other questioners as well, but I guess the first point I would make is that in all the cases you referenced, I was of course an advocate. I'm not a sitting judge and not a scholar. 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 basis, have covered the spectrum of issues of 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 representing a disabled individual than the opposite. In fact there's only 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 1990’s.

Ms. Fischer, as you may know, is blind, and was denied admission to Case Western’s 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 Commission 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 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 want to—

Senator KENNEDY. No, no. I am just watching that clock. I do not want to interrupt you, but 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 could.

Mr. SUTTON. Well, I’ll be brief. Just on the advocacy point, I’ve represented several other clients with disabilities. In all of those cases, as the ABA rules make clear, the client’s position can’t be ascribed to the lawyer. It’s quite dangerous. In fact, my risk in this hearing is not the failure to win a vote of a Democrat, I may lose everybody if one looks at all of my representations.

Chairman Hatch said unfortunately that I never represented murderers. 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.

Senator KENNEDY. Could I just—

Chairman HATCH. Your time is up, Senator, but I am going to give you additional time.

Senator KENNEDY. Just on this. The fact is it just is not in the cases themselves, Professor Sutton. You have, in your writings, in your speeches, in your talks, you have been very eloquent, and have been, continue to be very supportive of this concept. I think we ought to disabuse ourselves that this is not something that is just you are representing a client, because I have the examples in your statements, in your writings, in the speeches, where there are positions where you took in there, any, I think, fair-minded person would read those, would find that they are 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 the *West Side* filed a friend of the court. You did not have to do that. There was no obligation. This was not a client. 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 under 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 3-1/2 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 Medicaid Act requires the states to cover the services, or families in Arizona who are not receiving notices of impartial hearings when their Medicaid HMOs denied or delayed needed treatments, even though the Medicaid Act requires states to provide those rates to such persons.

You went into the court effectively to have them overturn 65 years of rights of individuals pursuant to try to get a remedy. What do you think of those again that are the least able to protect themselves when you are on that court, if you are on the court, and look at you, how do you think they are going to view your views about their rights and being able to ensure that they are 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 at 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 statutes.

I thank the Chair for the additional time.

Mr. SUTTON. Thank you, Senator Kennedy. I think the case you're referring to is the *West Side Mothers* case, a District Court case in Michigan.

Senator KENNEDY. Yes.

Mr. SUTTON. And I respectfully disagree with one component of your question, and that's the indication that I volunteered to take that case or I wrote the brief on my own behalf, and that 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 once invite me to brief an issue

that the advocates had not briefed, or that one advocate was not willing to brief. They asked me to brief it and I—you know, it's not a call you—

Senator KENNEDY. This was an amicus brief.

Mr. SUTTON. Yes. It's not a call you choose not to return. Exactly, that's the *Hohn* case where I wrote an amicus brief for the U.S. Supreme Court. In the *West Side*—

Senator KENNEDY. Excuse me. Who asked you to file this?

Mr. SUTTON. In the *Hohn* case it was—

Senator KENNEDY. No, in the *West Side*.

Mr. 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 ultimately turned out in the case, two competing lines of U.S. Supreme Court authority. It wasn't—unlike the *Hohn* 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 *Hohn* case when the U.S. Supreme Court called me, which is brief the issue that I was asked to brief. And it's very important to me to explain it. 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 pull my punches and not explain 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 decision, 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 has not been accurate in the sense that it was something I suggested he do.

Senator KENNEDY. Well, but the only point—and I know that time is going on—is that you are argued. It is not that they did not accept it, because it would have basically overturned, I believe, a fair reading of 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 are not going to continue this agenda should you get on the court? If you could just give us a brief comment on that.

Mr. SUTTON. I really hope I can do my best to give you that assurance. Again, I would point out I had never heard of this case until I got a call from a Federal District Court Judge asking me to brief that side of it. So there's nothing willful about that case and my involvement in it. I was invited by an Article III 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 issues 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 in many other cases that I am sure you would be quite supportive of, whether it was defending Ohio set-aside statute in two different cases; whether it was defending Ohio's

Hate Crime 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 civil rights case in the U.S. Supreme Court, where again one could not criticize that as states' rights. I was representing Dale Becker, 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 looked at these other representations where I was acting as an advocate.

Senator KENNEDY. I thank the Chair for the extra time.

Chairman HATCH. Thank you, Senator Kennedy.

Let me ask a couple questions for you. You have argued three very important but controversial cases, among others, in front of the U.S. Supreme Court concerning the scope of Congress's power, under Section 5 of the 14th Amendment, to regulate state governments. Some of your critics suggest that your involvement in those cases somehow disqualify you from this position on the bench, so just let me ask you a few questions about those cases. And I am 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 Berne* case. And of course I was one of the principal sponsors, as was Senator Kennedy, of the Americans with Disabilities Act, which was limited in scope by the *University of Alabama v. 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 with whom I worked and who worked with me, to see these struck down after we had put so much time and energy into their enactment. 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 you are acting as a lawyer for your clients in those cases by itself should by any means disqualify you from the bench.

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

Mr. 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 would do with those difficult issues except to say follow whatever U.S. Supreme Court precedent was at the time.