

those arguments and do your best job to get it right, and getting it right, 9 out of 10 times, if not 100 percent of the times, turns on understanding what U.S. Supreme Court precedent is and adhering to it.

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

Mr. SUTTON. Absolutely, Your Honor, absolutely.

Senator LEAHY. You do not have to call me "Your Honor." I have not quite made that—

Mr. SUTTON. Old habits die slowly.

Senator LEAHY. If it is any consolation—then I will yield—if it is 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—because I was junior most member of the Senate—I found myself referring to the Chairman as His Honor so many times I—the inside of my mouth was sore from the number of times I bit my tongue or the inside of my mouth on that.

Mr. SUTTON. Forgive me. I'll do my best not to do it again.

Senator LEAHY. No, no, forget it.

Thank you.

Senator DEWINE. [Presiding] I always thought you liked to be called "Your Honor."

[Laughter.]

Senator LEAHY. Excellency, excellency.

Senator DEWINE. Excellency, that is right. I keep getting it wrong.

Senator Chambliss.

Senator CHAMBLISS. I was instructed to refer to Mr. Leahy as His Honor, so do not worry, we all do that.

[Laughter.]

STATEMENT OF HON. SAXBY CHAMBLISS, A U.S. SENATOR FROM THE STATE OF GEORGIA

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

I am a little bit disconcerted by some of the criticism that I have heard today and that I have read about with respect to our nominees. Having practiced law for 26 years, I have argued both sides of cases. Particularly early in my career I was appointed to criminal cases that I did not 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, understand that there are positions which we have to take that are in the best interest of our clients, regardless of what our personal feelings are. It is pretty obvious that all six of our nominees have been in that same position. You have done a heck of a job of representing your client, whatever their po-

sition. So I think that kind of criticism really does not do justice to you.

I want to first of all, Judge Cook, ask you about some of this criticism that has been directed at you. It has been said that you dissent a great deal in opinions that are rendered by the Ohio Supreme Court. Well, again, having argued a large number of cases on appeal, and having lost some of those cases, I was kind of glad to see that there were some dissenting opinions. I want to ask you about one case in particular though, *State ex rel Bray v. Russell*. In that case 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."

In this particular case, your 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? Also tell us 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.

Judge 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 just differing views on the interpretation of the statute. In that case, one of my colleagues who is—if you look at percentages, typically is on the other side that I'm on; he's typically not with me—did join the dissent. And the standard of review that you mentioned, that it has to be 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 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 inasmuch as the statute at hand, allowed bad time as part of the original judicially imposed sentence. It 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.

Senator CHAMBLISS. Thank you. Mr. Sutton, it appears that a lot of your criticism, or a lot of criticism that is 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. I say you handled it, I should say you were involved with it. Before I ask you a question about it, I want to set the stage for my colleagues.

In 1978, the State of Georgia adopted a program for treating mentally disabled citizens. The program placed the mentally disabled citizens in community placements instead of institutions. Due

to limited resources the State of Georgia resisted assigning a group of people, who later became the plaintiffs in this case, to a community placement. The State of Georgia was sued by these plaintiffs. The actual person sued was the Director of Department of Human Resources (DHR), Mr. Tommy Olmstead, so the case has been referred to as the Olmstead case, which I know you remember very clearly. The plaintiffs claimed that the State of Georgia discriminated against them under the Americans with Disabilities Act. The case revolved around an issue that all of us are extremely sensitive to, and that is 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 you at least participated in preparing the young lady who did argue that case before the Supreme Court. And the basic argument was that the Americans with Disabilities Act (ADA) did not require states to transfer individuals with mental disabilities into community settings rather than institutions. Would you please tell me a little bit about your involvement in that case, the argument you put forth and the actual outcome of that case?

Mr. SUTTON. Yes, thank you, Senator. The *Olmstead* case I think went to the District Courts. Yes, it did, a District Court in Georgia than the Eleventh Circuit. And I did not have any involvement in the case at that point, but when the U.S. Supreme Court decided to review the Eleventh 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 Tricia Downing for the oral argument. And as you acknowledged, it's a very—the institutionalization is 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 1970's and early 1980's, that everyone, 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.

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 cost, 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 9 members of the Court agreed there was a reasonableness component. 8 members of the Court said it needed to be sent back to the Court of Appeals, and eventually a District Court to determine whether in fact the State had acted

reasonably in not moving these two plaintiffs into community settings. And I did my best to help the client.

Senator 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. 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.

Obviously we know your 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 regarding your nomination. And 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.

Chairman HATCH. Without objection, it will be part of the record.

Senator CHAMBLISS. Mrs. Long is the immediate past president of the World Federation for Mental Health. She has 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 is 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 is familiar with the lobbying against Mr. Sutton by various persons who advocate on behalf of the disabled. Her comment is, "This effort is unfortunate and I am convinced is misguided."

Again, I think that is 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.

Chairman HATCH. 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.

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Good morning, Dr. Sutton. I have 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 have 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 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 did not really take very seriously the warning she got from

a colleague, that her supervisor did not 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 a computer and by beginning recruitment for the 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 tend 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 with 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?

Mr. 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.

Senator FEINSTEIN. This is about the sterilization of mental patients.

Mr. 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 forced 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 is unusual for any State to do. We said that case was wrongly decided and quote Justice Souter for the excellent point that when Justice Holmes errs, he errs 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.

Senator FEINSTEIN. But that is not my point in reading the two of them. You are arguing in this case that State law offers sufficient protection; therefore the Americans for Disabilities Act is really not necessary, that State law actually over protects individuals with disabilities.

Mr. SUTTON. Right. I don't—

Senator FEINSTEIN. It seems to me is not correct.

Mr. 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.

Senator FEINSTEIN. You did not make this statement in your brief?

Mr. SUTTON. I made that statement, but I want to put it in context. 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* 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 *City of Berne*, 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 this Senate and Congress could certainly be frustrated with is the *City of Berne* 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 Mrs. *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 maybe we didn't do as well as we could have, and the statement 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.

Senator FEINSTEIN. 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 am puzzled what you mean by treating the competent differently from the incompetent with respect to civil rights.

Mr. 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* 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 of the time in an equal protection setting, what courts are doing is they're saying it's not ever—it's rarely if ever appropriate to make a distinction based on someone's status, their age, their race, their 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 to 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 the point that's a good thing, and that's exactly why this constitutional issue is so difficult, makes one wonder whether the due process clause isn't a better vehicle for bringing these arguments, but the distinction is a happy one.

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

Mr. 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 substantive due process and the 14th Amendment. They said that in many areas. And I can assure, it's not an area where I've done a lot of litigation, so it's not something 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.

Senator FEINSTEIN. Does that apply to *Roe v. Wade*?

Mr. SUTTON. Absolutely.

Senator FEINSTEIN. So what are your feelings about the *Roe* case?

Mr. SUTTON. Well, you know, like many a law student and many 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 has required lower court judges to do, both in *Roe* and then later in the *Casey* decisions, and that's exactly what I would do.

Senator FEINSTEIN. So do you believe that *Roe* is a settled case?

Mr. 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 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.

Senator 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?

Mr. SUTTON. I would absolutely follow that decision and *Casey* and every case before me that implicated it.

Senator FEINSTEIN. Thank you very much.

Thank you, Mr. Chairman.

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

**STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR
FROM THE STATE OF WISCONSIN**

Senator FEINGOLD. Thank you very much, Mr. Chairman. My apologies, Professor Sutton.

Chairman HATCH. Do any of you need a break right now? Because if we can just wait for another 15 minutes, we will break.

Senator FEINGOLD. Perhaps this will shorten the afternoon. 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.

Chairman HATCH. That is very much appreciated.

Senator FEINGOLD. Mr. Chairman, I have just been so impressed with the way that you have run this Committee in the past and in your role as ranking member, 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 on the same day is not the way that you have done things in the past, and I note your letter where you suggest in response to us that these nominees are not controversial. Well, the fact is they are extremely qualified people, but I do not think it is in the eyes of the Chairman to determine whether they are controversial or not. That is sort of our job. And these are controversial people.

Chairman HATCH. I will tell you, that is the first time that a poor Chairman has been taken over the coals like that, is all I can say.

[Laughter.]

Senator FEINGOLD. Oh, it is brutal.

Chairman HATCH. That is all right.

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

Chairman 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 am going to try and accommodate you, but I cannot limit it to just one. We held I think 11 with two last time. Senator Biden held one with three. This is my one with three. Now, I cannot guarantee you I will never do it again, but I think we ought to be able to move ahead, and I am prepared

to do what we have to do, but I will certainly take all of my colleagues' advice into great consideration.

Senator 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 v. United States Army Corps of Engineers*. In the brief you argued that in passing the Clean Water Act, if Congress delegated authority to the Corps, allowing the promulgation of the migratory bird rule, such a delegation represented, in your words, "every measure of constitutional excess in full force," under the Commerce Clause. As you know, the Court, by a 5 to 4 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-navigable 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 for my home State of Wisconsin suggested that 60 percent of the wetlands lost Federal protection in my State. Wisconsin is not alone. There is 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 suit. So last Congress I introduced the 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 stems solely from the Commerce Clause or might one find reason for Congressional authority over protection of wetlands in not just the Commerce Clause, but perhaps the Property Clause, the Treaty Clause or the Necessary and Proper Clause?

Mr. 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 on them and imposes cost on 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 aware statutory interpretation case. It as 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 water there is anywhere in the country. It has to be

water connected to something that's quote, "navigable." And we advanced that position in the brief on behalf of that client.

The second argument that was 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 a—it's a backup to a statutory interpretation argument. And what lawyers are trying to do there—and I do feel I had an obligation to make this argument. I think it would have been malpractice—

Senator FEINGOLD. But in answer to my question, you do not rule out the possibility of Congressional authority over protection of wetlands based on the other clause in the Constitution?

Mr. SUTTON. Oh, of course not, of course not.

Senator 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 resources we seek to protect and economic activities conducted in or affecting 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?

Mr. SUTTON. Well, I have to acknowledge, it's not something I know a lot about, I mean the laws you're referring to. It's just 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 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 environmental law on the ground that it exceeded Congress's Commerce Clause power, so it seems to me those precedents support what you're suggesting. And if that's true, Court of Appeals judges would have to follow them.

Senator FEINGOLD. Then let's turn to a better decision of Justice Holmes, who we 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 while a food supply I cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States, Justice Holmes wrote.

Your brief in the *Swank* 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?

Mr. SUTTON. Yes. It's been a while. I think the case you're referring to may be *Missouri v. Holland*. It's been a while since I've read it. I'm not sure if I've got the right case, but 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 statutory interpretation grounds, and that's what the Court ultimately did.

Senator FEINGOLD. Fair enough. In the amicus brief you also argue 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 spent \$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 it has hurt our economy. Can you explain why you consider these activities to be non-economic?

Mr. SUTTON. Well, I am not a hunter. I have 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.

Senator FEINGOLD. Let me ask you finally 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 uniform standard of clean water in this country?

Mr. SUTTON. Well, I think that point goes exactly to what you were saying Justice Holmes said in the case. I may be misremembering, but at least what you were reading from the case makes clear the point I said at the outset, that in 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 reasons 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 costs, 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 decision, and I certainly would be happy to.

Senator 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 v. Florida Board of Regents*, again the Supreme Court ruled 5 to 4 that State employees could not bring private suits for monetary damages against States under the Age Discrimination and Employment Act. As you know, the ADEA is a Federal law that prohibits employers, including States to refuse to hire, to discharge or 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 14th 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?

Mr. SUTTON. I'd like to talk about that case, but of course the ADEA requires that very thing. The brief for the State of Florida made it quite clear that the ADEA 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 5-4 grounds to which you're referring was not the question of Section 5 power, all right, but the question of whether Congress had permissibly used its Section 5 power in passing the ADEA. The question that divided the Court along 5-4 grounds was the issue of whether Commerce Clause 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 actions. I should tell you that was not something we briefed in that case. The *Seminole Tribe* issue did not come up either oral argument or in the briefing, but it was how the Court broke down. Not 1 of 9 wrote an opinion disagreeing with the Section 5 interpretation we—

Senator FEINGOLD. Let me ask you this. Do you believe it was wrong for Congress to enact the ADEA in the first place?

Mr. SUTTON. Of course not.

Senator FEINGOLD. If confirmed to 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?

Mr. SUTTON. I mean I would do exactly what 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 it's Wisconsin—Wyoming—excuse me, wrong state. I can see why I said Wisconsin. *Wyoming v. EEOC* in which the Court specifically upheld the ADEA under Congress's Commerce Clause power, so of course a Court of Appeals judge would be obligated to follow that law and enforce it.

Senator FEINGOLD. Thank you very much. I will wait for further rounds for other questions, so that people can take a break.

Chairman HATCH. Thank you, Senator Feingold. We are going to give you until 1:30 which is almost 45 minutes. So we will recess

for 45 minutes, and I am going to start precisely at 1:30. With that, we will recess until 1:30.

[Luncheon recess taken at 12:49 p.m.] AFTERNOON SESSION
[1:39 p.m.]

Chairman HATCH. We will call this meeting to order again. I do not see any other Senators here at this time, so I will just start it off with you, Mr. Roberts. I want to ask a few questions of you, and then hopefully, if I have enough time, Justice Cook, I will ask a few of you as well.

We now have this timer, so our poor guy does not 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 is inappropriate because attorneys do represent clients, and they should not be judged by who our clients are. Any of us who have tried cases know that sometimes our clients may not be savory, but the case may be a good case, who knows?

Now, attorneys are required to represent their clients, and this is the case whether their client is the U.S. 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 is very unfair to imply that the judgeship nominee would not follow the law.

Now, this is because lawyers have an ethical obligation to make all reasonable arguments that will advance their clients interests. According to Rule 3.1 of the ABA's model rules of professional conduct, a lawyer may make any argument if, "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."

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 are, and some in the Senate and elsewhere, have tried to paint you as an extremist, the truth is, 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 and what is considered to be the so-called "liberal" position on issues. I would just like to ask you about a few of these cases.

In the case of *Barry v. Little*, you represented welfare recipients in the District of Columbia, right?

Mr. ROBERTS. That is correct, Mr. Chairman.

Chairman HATCH. You took this case on a pro bono basis; is that correct?

Mr. ROBERTS. Yes.

Chairman HATCH. Pro bono means that you did not get paid for it.

Mr. ROBERTS. No, I did not.

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

Mr. ROBERTS. Yes.

Chairman HATCH. Now, in another case, *Hudson v. McMillian*, you successfully argued before the Supreme Court the claims of a prison inmate who alleged cruel and unusual punishment, did you not?

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

Chairman HATCH. In *Rice v. Kayatama*, you argued on behalf of a wise Democratic attorney general and Governor, both Democrats, in favor of a race-conscious program to benefit Native Hawaiians, right?

Mr. ROBERTS. That's correct, Mr. Chairman. It is one of several cases that I have found particularly gratifying, where Democratic State attorneys general have retained me to represent their State in the Supreme Court. That has 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 antitrust 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.

Chairman HATCH. Let us 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?

Mr. ROBERTS. That is correct.

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

Mr. 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.

Chairman HATCH. So you argued on behalf of primarily Democratic State attorneys; is that right?

Mr. ROBERTS. Yes, Mr. Chairman.

Chairman HATCH. Well, Mr. Roberts, in a Legal Times article that ran last May described you as "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."

I think these cases that I have just mentioned there, I have 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 is important that we at least look at some of the things that have been said about you. Now, it has 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 “troubling pattern” 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 and interpret and apply the law.

Now, 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?

Justice COOK. On those occasions, Mr. Chairman, where, and the number has been cited, there are occasions in my 7 years where I write dissents, and more often than others on the court, I am quite often the one who writes for the court in dissent, 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 results from a disagreement about the text at hand, a fair reading of the text, a procedural matter, sometimes a disagreement on the statute of limitations. You know it is not often a matter of, as has been implied, it is not a matter of my particular bent or preference for any side of a case, it is simply really the reasoned elaboration of principle is the reason why any judge is moved to dissent.

Chairman HATCH. It is my understanding you also served as a judge for the Ohio Court of Appeals for was it 4 years?

Justice COOK. Yes.

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

Justice COOK. That is correct.

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

Justice COOK. What’s been cited here, it is less than 1 percent of my decisions were ever reversed.

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

Justice COOK. It was fewer than 10 cases. The stats are fairly low as a percentage.

Chairman HATCH. It’s about a 1-percent reversal rate.

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

Chairman HATCH. Now, I understand the United States Supreme Court has granted certiorari in three cases the Ohio Supreme Court has decided. In all three cases, the Supreme Court reversed. In all these 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?

Justice COOK. That’s correct.

Chairman HATCH. In *State v. Robinette*, Justice Cook, you joined the dissent, arguing that the court majority had developed a rule

that was contrary to the Supreme Court precedent. The U.S. Supreme Court agreed and reversed the ruling; is that right?

Justice COOK. Yes.

Chairman HATCH. Agreed with you.

Justice COOK. Yes, they did.

Chairman 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.

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

Chairman HATCH. That is great.

Justice COOK. That doesn't happen often. It was a big day.

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

Justice COOK. Yes.

Chairman HATCH. That is kind of a badge of honor to—

Justice COOK. It was relished in my chambers.

Chairman HATCH. I see. Well, in *State v. Reiner*, the Ohio court reversed the conviction of manslaughter against a father who killed his two-month infant son on the grounds that the baby sitter, 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?

Justice COOK. I did. I was the sole dissenter.

Chairman HATCH. Could you tell us why?

Justice 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.

Chairman HATCH. Well, you in dissent, to use my terms, argued that the immunity was property because the sitter, baby sitter, had reasonable cause to believe that her answers could put her in danger.

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

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

Justice COOK. That's right.

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

Justice COOK. Yes. And, happily, that decision by the U.S. Supreme Court was 9 to nothing, so it was unanimous.

Chairman 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. Now, I think that is 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 will put all of these editorials in the record, without objection.

The Plain Dealer said, in endorsing Justice Cook and Terrence O'Donnell in the 2000 judicial election, "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."

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, up-ending whatever law conflicts with the ideological bent of the majority, legal and constitutional principles be damned."

Are you familiar with those?

Justice COOK. Yes, I am aware of those.

Chairman 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 ward polls, more than problem jurists."

Justice COOK. That is a common—

Chairman 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 in upholding the Constitution, even if that means that occasionally you have to dissent.

Justice COOK. That is right.

Chairman HATCH. Or even more than occasionally you have to dissent, and that is the point I think I would like to make.

My time is just about up. I will turn to the distinguished Senator from New York.

Senator SCHUMER. Thank you, Mr. Chairman.

Senator LEAHY. Before you do, just one number, and I was not quite sure of it, because it has been mentioned by Senator DeWine, yourself and Senator Hatch, the reversals by the Ohio Supreme Court, that was 1 percent of all of your cases that were appealed to the—

Justice COOK. That's right. I think that it is 7 in 6—the numbers are something like in 6 of the cases out of 1,000 that I wrote, the Ohio—

Senator LEAHY. But how many were appealed to the—

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

Senator LEAHY. Most of them?

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

Senator LEAHY. But do you know how many of your cases went up offhand?

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

Senator LEAHY. Five hundred? Two hundred?

Justice COOK. In fact, I really wouldn't have any idea because that is 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.

Senator LEAHY. Do you know how many were accepted? That is really what I mean.

Justice COOK. Yes.

Senator LEAHY. How many were accepted on appeal?

Justice COOK. I could get that for you.

Senator LEAHY. Two hundred?

Justice COOK. I would be making a wild guess, and the wild guess might be 50.

Senator LEAHY. Okay, and if it was 50, so 6 out of 50 that were reversed.

Chairman HATCH. Well, she does not know.

Senator LEAHY. No, that is okay. If you could get me the number for the record, please.

Justice COOK. Yes, sir.

Senator LEAHY. I just—because, obviously, you have a lot of cases that were never appealed or a cert was never granted.

Justice COOK. That's right.

Senator LEAHY. Thank you.

Thank you, Mr. Chairman.

Chairman HATCH. Senator Schumer?

**STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR
FROM THE STATE OF NEW YORK**

Senator SCHUMER. Thank you, Mr. Chairman.

First, I want to make a couple of more comments just about the procedures here, and then I will get into questions. I will start with Professor Sutton.

But, first, I want to thank you, Mr. Chairman. You did renotece, after I brought up the hearing, you have renoteiced it from Tuesday to Wednesday, so that will comply with the Committee rule that we have one week's notice, and I want to thank you for that as well.

Originally, we were going to have 5-minute periods, I was told, and we asked you to move it up to 15, and 15 is adequate, and we appreciate that.

What we are 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 are going to have before us next Wednesday?

Chairman HATCH. I think so. I have already told staff to try and—our obligation is give notice of the hearing.

Senator SCHUMER. Right.

Chairman HATCH. 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.

Senator LEAHY. Maybe my memory—

Chairman HATCH. Senator Leahy's memory what?

Senator LEAHY. Maybe my memory is—

Chairman HATCH. His memory, once again, is faulty?

[Laughter.]

Senator LEAHY. —has slipped.

Chairman HATCH. Well, whatever. I did tell him.

Senator 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 a nominee’s preliminary information. Obviously, this is a long process, as it must be. After all, these are lifetime appointments,” so said Senator Orrin Hatch, my dear friend and former chairman.

Chairman HATCH. Oh, my goodness.

[Laughter.]

Senator LEAHY. You never know when that stuff is going to come back to haunt you, Orrin.

Chairman HATCH. Well, let me—

Senator SCHUMER. I guess the point I want to make is having three substantial, controversial nominees to the court, to important Courts of Appeals is brand new. The notice, as I say, has not been thorough, and we do not even have Committee rules yet. We have not discussed what is happening with the “blue slip.”

We have not 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 us just get this—I mean, majority side. The minority side we are going to ask plenty of questions. It is wishful thinking that we were the majority side, at least for me—but no questions asked, and it almost seems like, you know, this is 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 will 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 are the same party or the different party, in terms of who is in the White House, and I would just hope we could 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—

Chairman HATCH. I think that is a fair characterization myself, but let me just say 630 days, it seems to me, is enough notice, and it certainly is enough time to evaluate people.

Senator SCHUMER. Well, you know, you say that, but officially we did not receive notice until last night, and—

Chairman HATCH. We will try to remedy that.

Senator SCHUMER. And there are reasons for that.

Chairman HATCH. We will try and remedy that.

Senator SCHUMER. And we ought to have them. I mean, let us 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 have 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, do a little bit—but also in who I judge. It is excellence, moderation, diversity.

Excellence, legal excellence. These are such vital positions that you do not want some political hack or somebody who is somebody's friend to occupy them. I have no doubt you meet that criteria. You are a legally excellent mind.

The second criteria I have is moderation. I do not like judges too far left or too far right. 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 have 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 sixties and seventies 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 is a little bit of a mirror image of telling us now we ought to move judges on, say, the Court of Appeals, when we were constantly told when President Clinton was President, we do not need any more judges. The caseload is the same, and yet all of a sudden we are pushing judges through, and that is, again, what we have to live with here, but the lack of consistency in all of this is mind-boggling, 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 is my second criteria.

My third one is diversity. I do not think the bench should be white males. You do not meet the diversity criteria, but you cannot judge it by one person, and that is not a problem for me here, but the moderation is.

And, frankly, by your record, to me, you are hardly a moderate. You have pointed views that are way beyond, I think, what most people would consider the mainstream, and you have helped shape and change the courts. Let me just go over a little history.

I mean, over the past several years, the Rehnquist Supreme Court has slowly and steadily affected a revolution, and they have 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, 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 is really just that, and we almost want to go back, whether it be the Eleventh Amendment or the Commerce Clause, to the 1890's because there is such anger and hatred for the Federal Government. So I worry about that.

And you, Mr. Sutton—Professor Sutton—you are 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 a 1 of 1,000 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 Berne*, have particular meaning, and those are the

cases that comprise the most significant parts of your impressive resume.

I have been struck by the comments that you are nothing but a, you did not say a country lawyer, but you might as well, a lawyer just representing your clients; that you do not really believe in the arguments you have made or your beliefs are irrelevant, you were just doing your job, but I think anyone who has reviewed your record can see that is not the case.

You were not just sort of like a corporate attorney who was picked to work for one corporation and then another. You have taken a leadership role in the Federalist Society, which has pushed this line of reasoning and the States' rights agenda. You have 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, Rehnquist and Thomas have been willing to go.

I am just going to read, and then ask be inserted in the record, a number of quotes from you, at least they are all foot-noted, and I would ask unanimous consent the whole statement be added to the record with the footnotes.

Chairman HATCH. Without objection.

Senator SCHUMER. Okay, talking about this federalism, this State's 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 is 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 restraint are now striking down all of 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 game, in which one or the other law-making power must fall."

Here is another one. "The public needs to understand that federalism is ultimately a neutral principle." Many of us would disagree with that. That is in the mind of the beholder, but it is certainly a view of yours, not who you are 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 discussed the *Morrison* case. "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 *Marbury* power to have final say over what amounts to interstate commerce, and thus to what represents the limits on Congress's Commerce Clause powers."

Right now, I disagree with these, but that is not my point here. My point is you are not simply a lawyer who was 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, 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 is in the same branch of Government as the President, and we give the President a little more deference in that regard than we do Article III. You are passionate. You have strong beliefs that most objective observers would say, whether you think they are right or wrong, is way out beyond the mainstream. Many of the things you have said, as I said, neither Scalia, nor Thomas, nor Rehnquist has said in opinions.

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

Mr. SUTTON. Right.

Senator SCHUMER. Please.

Mr. SUTTON. Thank you, Senator. You have raised several issues, and I will 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, but 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. 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 understand—

Senator SCHUMER. Please. 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 will not 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, you know, they have an agenda." I mean, we should have an open discussion here. That is the whole point of advise and consent, not simply to find out if someone is of good moral character.

Please.

Mr. 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 have been an impassioned speaker on these federalism decisions and 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, "Boy, 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.”

I, respectfully, disagree that that can fairly be said about me. I think there are many cases, representations I have handled that I think you would applaud, and if you wouldn't applaud, would at least respect my role as a lawyer.

I hope, in thinking about the federalism decisions, you will keep in mind cases I did before I worked for the State, whether it is writing a brief for the Center for the Prevention of Hand Gun Violence in the Sixth Circuit as an 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, 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 Fischer in trying to get into Case Western Reserve with her disability of blindness.

Since leaving the Solicitor's Office, while out of practice, I have 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 have done a case involving implied rate 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 have 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 have spoken to the press and the articles you referred to or when I have written articles—

Senator SCHUMER. Now, you do not express the sentiments of the people you represented in some of those cases in your private articles, only the ones on the other side.

Mr. SUTTON. I don't think that is true, actually. If you look at—

Senator SCHUMER. Okay. Well, you can submit to the record—

Mr. SUTTON. 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 am 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 whatever it was, 1989–1990. I think my tribute to him suggests that very point.

I wrote another article for the Federalist Society in the *Kiryas oe* decision, criticizing the U.S. Supreme Court majority for not allowing the Satmar Hasidim 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 dis-

ability services. People that were not disabled in that district went to private hasidic schools.

So I think if you did—

Senator SCHUMER. 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 do not think some cases where you were pro bono undoes what *Sandoval* did. I mean, you are saying treat each case equally. I cannot.

Mr. SUTTON. I perfectly understand that point. On *Sandoval*—

Senator SCHUMER. I mean, the *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?

Mr. SUTTON. *Sandoval*, keep in mind is a case—I've never written about it, I've 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 Constitution—well, it wasn't a constitutional case—the statutory interpretation arguments 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 possibly 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 an 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.

Senator 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.

Mr. SUTTON. Well, if I could respond to that, 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 *stare decisis*. The problem where people disagree quite reasonably is the application of that principle in given cases.

Senator SCHUMER. Right. Well, let us talk about one given case. I understand your point. I want to talk about *Boerne*, the *City of Berne*. In that one, as you know, the Supreme Court held 5 to 4 that Congress had exceeded its power under Section 5 of the Fourteenth Amendment when it passed the Religious Freedom Restoration Act.

Senator DEWINE. [Presiding] Senator Schumer, you are 5 minutes over your time, but you can continue a reasonable time.

Senator SCHUMER. Let me just ask this one, and then I would ask for a second round because I have a bunch, and I very much appreciate that, Senator.

Senator DEWINE. Sure.

Senator SCHUMER. And I will 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 of the Fourteenth 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 have 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 is not inexorably that that is what Ohio had to believe—other States, including my State of New York, came to the opposite conclusion that you came to when 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 is not so cut and dry, and it is not so obvious where the States' interest should be.

But what I am 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?

Mr. SUTTON. Yes, Senator. I think there is a—I may be misapprehending your question, but I am pretty sure I'm not—

Senator SCHUMER. I am asking you did the Governor or the attorney general, say, make the argument that we should go further or was that your argument?

Mr. 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 Berne*, represented by another lawyer. This is quite critical because not only—

Senator SCHUMER. You did not argue in that case that the Congress has no power, under Section 5, to enact any law to enforce religious freedom?

Mr. 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 Fourteenth Amendment only allows Congress to protect equal protection rights, and it is 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 Berne* 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. So we not only didn't make that argument, we argued exactly the opposite that there was such a power. The quest—

Senator 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?

Mr. SUTTON. Exactly. We didn't take a position on it, and during the oral argument—well, we were in amicus—during the oral argument, I specifically contradicted this point, even though the party on our side of the case—

Senator SCHUMER. But here is what I want to ask 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 do not know if the attorney general is elected in Ohio.

Senator DEWINE. He is. She is.

Senator SCHUMER. Okay, she is.

Mr. SUTTON. Yes.

Senator SCHUMER. Did they tell you to make this argument or did you come up with it? Answer that yes or no if you could.

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

Senator SCHUMER. Did you suggest to him that the brief be filed the way it was before he said, fine?

Mr. SUTTON. She—

Senator SCHUMER. Who came up with—she, excuse me.

Mr. SUTTON. Betty Montgomery.

Senator 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—

Mr. SUTTON. Sure.

Senator SCHUMER. 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?

Mr. SUTTON. Neither of us. Neither of us, Senator.

Senator SCHUMER. Well, tell me how it came about. It did not just—it was not spontaneous generation.

[Laughter.]

Mr. SUTTON. Exactly.

Senator DEWINE. Senator, why do you not give him a chance to answer.

Senator SCHUMER. I will.

Senator DEWINE. You are 10 minutes over already.

Mr. 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 it I think you would agree is somewhat frivolous—

Senator SCHUMER. No question.

Mr. SUTTON. —and some of it with merit, 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 that 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's power. I was not involved in that decision.

When the *City of Berne* case made its way through 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.

Senator SCHUMER. Let me, just I can come back to this, if I am 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 will wait and come back.

Senator DEWINE. No, if it is all in the same line of questioning and you want to continue, go right ahead.

Senator SCHUMER. 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."

This is on Page—well, this is a Westlaw, so I do not have the page. But it says, "Point No. 1B. The debate over the Fourteenth Amendment confirmed 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 Fourteenth 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." Does that not—

Mr. SUTTON. That is 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 Fourteenth Amendment, said, simultaneously, the 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.

Senator SCHUMER. But what you say here would exactly buttress—I mean, I will let you have the last word here—exactly what I said; that there could be no, it is not just some, but 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; is that not correct?

Mr. SUTTON. With all respect, Senator, I couldn't disagree more, and I think it would have been poor advocacy, to say nothing of wrong, to make that argument. But the proof is not only the "and" that I referred to, but the proof is to read the transcript. The transcript doesn't indicate who the justice is. It was 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.

Senator SCHUMER. Okay, well, I am going to come back to it. I am going to go read the brief, I mean, the oral argument, and we will come back to it. We will have a second round, I presume, Mr. Chairman; is that correct?

Senator DEWINE. Correct.

Senator SCHUMER. Thank you. I appreciate the committee, that I went on for a while.

Senator DEWINE. I would, at this point, ask unanimous consent that an article written by Jeffrey S. Sutton, entitled, "Justice Powell's Path Worth Following," that appeared in the Columbus Dispatch be submitted for the record made a part of the record, without objection.

Senator LEAHY. We have no objection.

Senator DEWINE. Without objection.

At this point, Senator Cornyn—

Senator SCHUMER. Mr. Chairman?

Senator DEWINE. Yes, Senator Schumer?

Senator SCHUMER. I just would ask unanimous consent. There are a whole bunch of letters of opposition to the nomination.

Senator DEWINE. They can be made a part of the record.

Senator SCHUMER. Without objection, I would ask that they be made part of the record.

Senator DEWINE. Absolutely.

Senator SCHUMER. Thanks.

Chairman HATCH. Senator Cornyn?

**STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM
THE STATE OF TEXAS**

Senator CORNYN. Thank you, Mr. Chairman.

Mr. Chairman, I am honored to be sitting here today. This is my first hearing where the Presidential'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 am a new member of the committee, perhaps you will 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 have 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 will perhaps allow me to say that I hope that the Committee can have a fresh start.

I do not think it serves the interests 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 do not believe that should be imposed. Indeed, it cannot