

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

be imposed by the Executive Branch on the Legislative Branch—I do think that it would be worthwhile for this Committee to consider, on a bipartisan basis, trying to come up with some rules that would guide the Committee in terms of the manner in which we consider the President's nominees, regardless of who happens to be in power, a Republican President or a Democrat President, so that we can have a timely consideration of these nominees' qualifications and an up or down vote by the members of this committee, and then if it passes out of this committee, by the entire Senate.

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

So I just want to say, here on my maiden voyage on this committee, that I would hope that we would try to work in a bipartisan way toward a fresh start and a time table that would allow timely consideration of all of the President's nominees. No one is going to say a Senator has to vote one way or another. That is our prerogative as a member of the Senate, and we will indeed be held accountable to our constituents who set us here, but I think that the President is entitled to his choices, subject to an up or down vote by the Senate, and that should be done on a timely basis.

Senator LEAHY. If the Senator would yield, without losing any of his time on this, insofar as you mentioned me on this—

Senator CORNYN. I would be glad to turn it over to you in a minute, but I have waited a long time to have my shot, so if you will give me a chance just to say a couple of things, and then I will be glad to turn it over.

Senator LEAHY. Go right ahead.

Senator CORNYN. I also come to this job representing the State of Texas in the United States Senate with the background of having served in virtually all three branches of Government, as a judge, a member of the Executive Branch as attorney general and now in the Legislative Branch, albeit on the Federal level.

Of course, I think a lot of the debate that we are hearing today has to do with what is the appropriate role of not only the Legislative Branch versus the Judicial Branch, but indeed what is the proper role of a lawyer in our adversary system and whether the positions that a lawyer advocates on behalf of a client are somehow attributable to the personal beliefs and convictions of that lawyer when they argue a point of law, which they are obligated to do under the Code of Conduct, which they may or may not agree with, but which they are duty-bound to propose to the court and let the court make that decision.

And so I think the debate we are having today, in many ways, is nothing new. It is a debate, and the subject matter touched upon by the Founding Fathers, including, of course, Alexander Hamilton in Federalist No. 78, when he talked about the different roles of the branches of Government.

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

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

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

Senator CORNYN. Justice Cook, let me ask you, if you do have, as a judge, and of course your responsibilities are different under our adversary system from an advocate like Mr. Roberts or Mr. Sutton may be, what do you do as a judge when you may have personal feelings about an argument, but where the legislature has spoken or where there is precedent by a higher court on that very point? How do you address that as a judge?

Justice COOK. One of the more important things for a judge to have in mind is the importance of or to note the humility of function that is really asked of a judge. Judges need to exercise restraint and to put aside any personal convictions or preferences. The essential democracy of judging is that the judge will be above the fray. The judge will consider the cases impartially, and certainly objectively and conscientiously, and that is the method that I have employed as a judge for the past dozen years, and I know that to be the fairest way to judge.

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

Justice COOK. Oh, yes, I have.

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

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

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

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

Senator CORNYN. And how do you feel about result-oriented decision-making by a judge?

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

Senator CORNYN. Mr. Sutton, you, during some of the questioning, I think you alluded to the notion that if a court made a decision on a statutory basis, perhaps applying a statute in a particular way or that the legislature disagreed with, that the legislature would have an opportunity to come back and correct that error.

I have read scholars talk about that process between the legislature and the Judicial Branch as a conversation between the branches of Government, and I wonder if you would tell me your thoughts on that.

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

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

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

But let me ask you this, Mr. Sutton, have you ever argued a case that you've lost?

Mr. SUTTON. Unfortunately, all too often, yes.

Senator CORNYN. Have you won more than you have lost?

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

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

Mr. SUTTON. My first reaction is usually that they're the ones outside the mainstream, but, happily, that lasts about an hour, and I realize that their job is to figure out what the right decision is here.

And, no, I don't think—I don't reach that conclusion. I don't think it's the right one, and I think it's a very dangerous one to the bar because there are a lot of clients, particularly criminal defendants, who need lawyers to really push hard on their behalf. The system doesn't work if you don't have an adversarial process that is effective.

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

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

Mr. ROBERTS. Well, I would say that it is not. I mean, if you are making an argument before the Supreme Court and you prevail, you should be criticized if you, for whatever reason, decline to make that argument. That's not to say that the Supreme Court is above criticism and it's certainly appropriate and healthy to scrutinize and, when appropriate, to criticize the Supreme Court's decisions. But I don't think it's appropriate to criticize a lawyer for making an argument that the Supreme Court accepts. That's the lawyer's job, and he wouldn't be doing his job if he hadn't made that argument.

Senator CORNYN. Well, let me ask, Mr. Roberts—and I will ask the same question of Mr. Sutton because you are not judges—

Senator DEWINE. Senator, last question.

Senator CORNYN. You are not judges now, but advocates under this adversary system we have been discussing. Are you willing to commit to assuming a new role and a different role, and that is as an impartial umpire on the law, legal arguments, and leave your role as an advocate behind where you have represented one par-

tical view or another but now to take on that disinterested, impartial, adjudicatory role?

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

Senator CORNYN. Mr. Sutton?

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

Senator CORNYN. Thank you, Mr. Chairman.

Senator DEWINE. Senator Leahy wants a point of personal privilege here.

Senator LEAHY. Just following our usual practice, once having been mentioned by another Senator on the other side, and I realize he did not want to yield for a response at that time, I would note, one, I absolutely agree that these judges should be moved as rapidly as possible, and that is why in the 17 months that I was chairman, we moved more of President Bush's judges than the Republicans had in 30 months with President Clinton's. That was 100 judges. I mention that number because even members of your party, both in the Senate and at the White House, keep referring to it as being 20 or 25. They are probably not aware—and I am sure the President wouldn't intentionally mislead the public, but the staff probably gave him the wrong numbers. It was 100.

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

Senator DEWINE. Senator Kohl?

STATEMENT OF HON. HERBERT KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN

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

Senator LEAHY. None taken.

Senator CORNYN. —somehow mischaracterize the record. All I was saying is that I hope the Committee would look forward rather than backward, because I don't view that as being conducive to doing the job that I feel like we are elected to do, and that is to move these nominees on a timely basis, in fairness to them and fairness to the people we represent.

And so I would hope that together working across the aisle we could perhaps come up with some kind of framework that would eliminate the need for the sort of finger-pointing and recrimina-

tions that I think are unfortunate, because I don't think anyone is without blame, is my only point. And I hope I have made it clearly.

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

Senator CORNYN. Thank you.

Senator DEWINE. Senator Kohl?

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

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

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

I have several questions. The first is for you, Mr. Sutton. Throughout our Nation's history, citizens have relied on our Federal courts to protect their civil liberties and constitutional rights against the actions of States and local governments in cases involving everything from employment discrimination, school desegregation, and free speech. However, you have spent much of your career arguing that individuals have no right to seek redress in Federal court for civil rights violations committed by State and local governments under the doctrine of federalism.

So then why shouldn't we be concerned that your interpretation of federalism will seriously harm the ability of ordinary citizens seeking relief against violation of their civil and constitutional rights in your court should you be confirmed?

Mr. SUTTON. Yes, Senator, thanks for an opportunity to address that. I did—when I became involved in what we'll call federalism cases or cases representing States, I did that starting in 1995 when I was appointed to be the State Solicitor of Ohio and was honored to have that job for three and a half years, and I did what all State assistant AGs or State Solicitors do and did my best as a lawyer, an advocate on behalf of the State, to just defend the State in litigation. As lawyers, obviously we weren't involved in the underlying policy decisions that led to the litigation. It was just our job and my job at the appellate courts to defend the State's position.

It is true during that time I did get involved in the *City of Boerne* case, which is a federalism case, and I did work on behalf of the States during that period of time. But it's well to note that Ohio,

like many other States, has passed a lot of laws that are very protective of civil liberties, and I was active in those cases. I helped defend Ohio's set-aside statute from equal protection challenges twice. The only case I had while I was working in that office—the only case I can ever remember where I had an opportunity to represent either side was the Cheryl Fisher case involving a blind woman who had been denied admission to medical school. And I picked her side of the case to work on it.

So I think the notion that because I've represented States, either the State of Ohio or other States, in cases where an individual disagreed with something a State was doing shows some bias, I guess I'd respectfully disagree with, one, because I was representing my client as best I could; but, two, even if one were to assess a nominee based on their advocacy and the client's positions they represented, there are many of them that are on the other side of these issues that I think you'd be very comfortable with and would have encouraged me.

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

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

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

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

Since being State Solicitor, I've continued, I've represented a prisoner inmate in a civil rights case at the U.S. Supreme Court. I've defended two death penalty inmates. And I'm a member of the Equal Justice Foundation. I was asked to be a member of that foundation before I was nominated, and the purpose of the Equal Justice Foundation, which, of course, is a pro bono effort, is to provide legal services to all manner of indigent claimants, first and foremost, the disabled, but those based on race and many others. And that group has done a lot of very good things in Ohio. They've led the effort to, you know, eliminate—put curbside ramps in Ohio's cities successfully under the ADA.

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

worked for the State before I went back to private practice. But it didn't reflect any bias at all. In fact, it's quite the opposite.

Senator KOHL. I appreciate your answer. I am not as fully convinced as you would wish me to be with respect to your prediction, but clearly you are trying to present your position as well as you can, and I do respect that.

Mr. SUTTON. Thank you.

Senator KOHL. Mr. Sutton—and I would like to also ask opinions from the other two nominees—in the past few years there has been a growth in the use of so-called protective orders in product liability cases. We saw this, for example, in the settlements arising from the Bridgestone–Firestone lawsuits. Critics argue that those protective orders oftentimes prevent the public from learning about the health and safety hazard in the products that they use. In fact, the U.S. District Court for the District of South Carolina recently passed a local rule banning the use of sealed settlements altogether.

So I would like to ask you, Mr. Sutton, and then the other two nominees: Should a judge be required to balance the public's right to know against a litigant's right to privacy when the information sought to be sealed could keep secret a public health and safety hazard? And what would be your views regarding the new local rule of the District of South Carolina on this issue, which is, as I said, banning the use of sealed settlements altogether?

Mr. Sutton, you first.

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

I suspect you're right that what U.S. Supreme Court precedent requires is exactly the balance you're talking about, a balance between the public's right to know and the privacy rights of whatever that particular defendant might be. But I can't say I know that for sure. What I can tell you is that I would discern what that precedent requires. I'd look at what Sixth Circuit precedent requires. I'd look very carefully and open-mindedly at the arguments of either party on this kind of issue. And I certainly appreciate the perspective you have on it and do my best, having done all that, to decide it correctly.

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

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

Senator KOHL. Really?

Mr. SUTTON. Yes.

Senator KOHL. You don't know that at all?

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

Senator KOHL. Right.

Mr. SUTTON. But I'm just making the point it's not something I know very much about at all. In fact, it's the opposite. I know very little about it, legally. And as a Court of Appeal judge—

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

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

Mr. ROBERTS. It's not an area that I have litigated in either. I certainly am aware of the cases as they've come up, although I don't think it's an issue that the D.C. Circuit has addressed. At least I'm not aware that it's done so. And I hesitate to opine on it without having studied the law. I certainly would obviously follow the Supreme Court precedent and the precedent of the circuit if I were to be confirmed.

I suspect that you're correct that the applicable law would involve some balancing. There are some interests in sealing settlements in some cases, but I'd be very surprised if that required or permitted sealing in a case where that actively concealed a harmful condition on an ongoing basis that was continuing to present a danger. But, again, I'm just surmising at this point, and as a judge, I would apply the law in the circuit or in the Supreme Court.

Senator KOHL. Okay. Ms. Cook?

Justice COOK. I agree with Messrs. Sutton and Roberts, and, of course, balancing judges do—balancing is one of our regularly engaged in endeavors. So this certainly sounds—the issue would demand balancing if there is danger and harm to others, potential danger. In the absence of disclosure, I understand that balancing would be important.

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

Now, in this simplistic kind of a presentation that I am trying to put before you, which is fairly black and white, while I am not sure whether you are going to answer, I would hope, as a judge—I would hope—that you would not allow any settlement that endangered the health and safety of the users of products to be made simply to benefit a corporation who wanted to keep that knowledge from the users of that defective product. Where you will come out on these issues in the event you are confirmed, I don't know, but obviously you know where I am coming from, and I think you know where most Americans would be coming from.

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

firm enforcement of our antitrust laws and to ensuring that anti-competitive conduct is sanctioned.

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

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

Mr. Sutton?

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

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

Senator KOHL. Mr. Roberts?

Mr. ROBERTS. As a private lawyer, I have actually represented probably more plaintiffs and enforcement interests in antitrust actions than defendants. I represented the State Attorneys General in the Microsoft case and represented several private plaintiffs in antitrust appeals as well, handled some antitrust cases when I was in the Solicitor General's office.

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

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

Senator KOHL. Thank you.

And, Ms. Cook?

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

Senator KOHL. I thank you.

Thank you, Mr. Chairman.

Chairman HATCH. Well, thank you, Senator.

We will turn to Senator Sessions now. Senator Sessions, you are up.

Senator SESSIONS. I would like to ask the three of you one question. You have had great experience and you are lawyers of integrity and ability. Do you believe that a conscientious judge can read the Constitution, read statutes and prior case authority, and render—and be able to interpret a statute? Do you believe that you are capable of that? I would like to hear your answer to that.

Mr. SUTTON. Senator, you are looking at me, so I will take that as I should start.

Senator SESSIONS. I will start with you first.

Mr. SUTTON. Yes, thank you, Senator.

Senator SESSIONS. You were smiling. I thought—

Mr. SUTTON. Yes. Absolutely, I do. There's no doubt there are difficult cases. There are cases at the margin where text gets difficult to interpret. But, yes, I do think what lawyers do is at the end of the day what judges do, which is read Constitutions, read statutes to determine what the Framers or that legislative body meant. Those words have meaning. There are statutes—rules of construction that give guidance to the meaning of those words. And judges have an obligation to follow those rules and to follow the text of the statute or in some cases the text of the Constitution in cases before them. And, happily, as a Court of Appeals judge, Court of Appeals judges have a lot of guidance from the U.S. Supreme Court on those very things, and a Court of Appeals judge would, of course, follow that.

Senator SESSIONS. Mr. Roberts, do you agree?

Mr. ROBERTS. Yes, I do. In other words, I do think there is a right answer in a case, and I think if judges do the work and work hard at it, they're likely to come up with the right answer. I think that's why, for example, in the D.C. Circuit, 97 percent of the panel decisions are unanimous, because they are hard-working judges and they come up with the same answer in a vast majority of the cases.

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

Senator SESSIONS. Judge Cook, do you agree?

Justice COOK. Yes, I do. I think that judges search—I think it's great when judges search for objectified meaning, that is, the meaning that a reasonable person would gather from the text that a judge is called upon to interpret. And certainly I really think in good faith judges working conscientiously can come to different conclusions sometimes, but I really think that there are objective boundaries within which most cases are really decided within those boundaries.

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

We have a theory afoot in America, sort of a post-modernism illness, deconstructionism, critical legal studies that all law is politics and that you are being asked about your political views about matters, and that is being promoted to a large degree, I think, by people who don't really understand that in every court in America all over this country, day after day after day, judges are reading statutes and rendering sound rulings that never get appealed. If they do, they get affirmed unanimously, as you mentioned, because I believe we can ascertain the plain meaning of words and can render consistent verdicts, and to me that is what justice is.

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

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

Senator SESSIONS. Mr. Roberts?

Mr. ROBERTS. Yes, you know, if it all came down to just politics in the judicial branch, that would be very frustrating for lawyers who worked very hard to try to advocate their position and present the precedents and present the arguments. They expect the judges to work justified. And if the judge is going to rule one way or the other, regardless of the arguments, well, he could save everybody a lot of work, but the rule of law would suffer. And I know that's a particular concern in the D.C. Circuit. I know one of the things that frustrates very much the judges who are on that court, all of whom are very hard-working, is when they announce a decision and they're identified in the press as a Democratic appointee or a Republican appointee. That makes such—gives so little credit to the work that they put into the case, and they work very hard and all of a sudden the report is, well, they just decided that way because of politics. That is a disservice to them. And I know as an advocate, I never liked it when I had a political judge, when I was in front of a political judge, because, again, you put a lot of work into presenting the case, and you want to see that same work returned. And the theory is that that will help everybody reach the right result, and I think that's correct.

Senator SESSIONS. Judge Cook?

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

Senator SESSIONS. I just think that is so important, and I think it is dangerous for us to say we are going to determine people's ideology and then we are going to vote to confirm them or not. And to our friends in the disability movement, let me say to you, as I read these cases, they have nothing whatsoever to do with the pol-

icy of providing protections for people with disability. It is a matter of constitutional questions such as sovereign immunity.

I know that Senator Robert Byrd and other Senators in our body defend tenaciously the prerogative of the United States Senate. And if a coequal branch does not defend its prerogatives, it will lose those privileges. And Attorneys General are that way, aren't they, Mr. Sutton? I know Attorney General Cornyn is here, but I was Attorney General, and I did not feel that I would have done my job if on my watch the legal prerogatives of the State of Alabama were eroded by my failure to defend those rights.

You have worked for the State Attorney General's office. Isn't that true of any Attorney General?

Mr. SUTTON. I think it's true not only for State Attorney Generals, it's true for the U.S. Solicitor General and the U.S. Attorney General, that if—just as if a State is sued in any case, their lawyers have an obligation to do their best to represent the client. The lawyers aren't involved in the underlying policy decision that leads to the dispute, that leads to the lawsuit. The lawyers come in once that dispute can't be resolved outside of court, and at that point, whether it's a State AG or the United States Solicitor General, you know, whether it's a claim of racial discrimination, disability discrimination, those lawyers have in the past and do continue to represent the governmental body which is publicly elected. And that's, I think, an honor for people that have had the chance to represent the people by working in an Attorney General office, and I'm sure people that have worked in the U.S. Solicitor General's office would say the same thing.

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

Mr. SUTTON. Well, I think every State has to make a decision what it's going to do in a given case. But it is true—and my understanding—I don't know all State Constitutions, but I'm familiar with many of them—the State Attorney Generals have—they don't have choices in these matters, and that's particularly through in sovereign immunity cases where at the end of the day there's a claim of—an individual's claim, but there's also a claim for money. And the AGs—it's the same with the U.S. Solicitor General. They don't have the keys to the vault. The keys to the vault are with the legislature and the executive branch. The lawyers have an obligation to defend as long as the executive branch tells them to defend.

Senator SESSIONS. As a former Attorney General and former United States Attorney representing the United States in court, I can tell you, an Attorney General that allows a State's sovereign immunity to be eroded I think will have a difficult time justifying that position. And so with regard to the Alabama case, you not only filed a brief on behalf of the State of Alabama, but you also gained support from a number of other Attorneys General, including a Democratic Attorney General, Mark Pryor, who is now a member of this Senate. Is that not correct?

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

Senator SESSIONS. And they saw the issue not as a disability issue, but as a question of State power and sovereign immunity. Is that correct?

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

Senator SESSIONS. Well, I think that is important for us to think about. You have defended criminals, have you not, and advocated any legal, justifiable position that they were entitled to, you were prepared to defend?

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

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

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

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

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

Senator SESSIONS. And the U.S. Government can intervene and sue a State for money damages for a disability violation, can it not?

Mr. SUTTON. That's also true.

Senator SESSIONS. And a private person can sue the State for injunctive relief to get the State enjoined from unfairly treating them due to a disability. Is that not correct?

Mr. SUTTON. In fact, get their job back. Exactly, yes.

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

Mr. SUTTON. That's true, yes.

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

Mr. SUTTON. That's true, and even then, Congress can still do the same thing either by passing new legislation with different fact-findings or by enacting spending clause legislation. As I'm sure

you know, Congress has already done that under Section 504 of the Rehabilitation Act. In the *Garrett* case, Ms. *Garrett* has a claim which is still pending under that very law. So it was just about Section 5, and, of course, it had nothing to do with the spending clause where Congress has conspicuously broad powers.

Senator SESSIONS. Well, I just would say in conclusion how much I appreciate the three of you. You are outstanding nominees with terrific records, unsurpassed experience handling some of our country's most difficult cases in ways that I think have shown your mettle and your ability. I congratulate you on the nominations to these important offices. I feel like that it is good for us to go through this process so that we confront the issue that just because a lawyer takes a position in a case does not mean that they are against the policy involved in the case. It does not mean if you defend a criminal that you are for criminals or you are for law-breakers. It means that criminals have certain rights, and the law has to be carried out in certain proper ways. And I believe that is your record in all of these cases, and I thank you for that, and I believe the President has done an outstanding job in these nominations.

Thank you, Mr. Chairman.

Chairman HATCH. Well, thank you, Senator Sessions.

We will turn to Senator Durbin now.

**STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR
FROM THE STATE OF ILLINOIS**

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

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

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

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

Apparently there is a belief in the White House that even though it is a fairly automatic and mechanical process, they want to make