

particular 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.