

series of great judges, and I am confident that you will be one of those.

Judge COOGLER. Thank you, sir.

Senator SESSIONS. Thank you, Mr. Chairman.

Senator KYL. Senator Durbin.

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

Senator DURBIN. Thank you very much, Mr. Chairman. Let me say at the outset what a refreshing hearing this is. These are three extraordinarily good nominees. Maybe I am tipping my hand on how I might vote, but we have been so often sent nominees that are embroiled in political controversy, questionable pedigrees, controversial statements in their background, questionable qualifications, and it has led to a lot of pain in this Committee. This panel does not represent any of those things. Quite the opposite is true. I want to just salute all three of you for your willingness to stand before this process, because some who have gone before you have had their hands full, but you will not, none of you. I think each of you brings strong bipartisan support to his, as well as strong academic, legal and personal credentials.

And, Judge Coogler, I was wondering, when I looked at your financial statements, why they were so good and done so well, and then I checked out who your CPA is. I believe she is sitting behind you.

Judge COOGLER. Yes, my wife.

Senator DURBIN. I just want to give high marks to you in that regard as well.

If I could ask a few questions, let me start with Mr. Chertoff. In the course of American history when we have been confronted with times of national security crises, we try to respond with all of our skill to protect America and decisions are often made which do not survive history in terms of a positive judgment—Abraham Lincoln, from my State of Illinois, suspending habeas corpus during the Civil War, the Alien and Sedition Acts of World War I, the Japanese internment camps of the Second World War, the McCarthy hearings of the Cold War, some of the efforts by J. Edgar Hoover and the FBI during the Vietnam War. All of these things, as we reflect on them, were evidence of a perhaps over-zealous effort to protect America.

We are still, I think, in the swirl of 9/11. We don't have the historical perspective, but can you step back from your time of service here and point to areas where you think we went too far in terms of trying to protect the security of America, perhaps at the expense of liberties and rights which are so dear to us?

Mr. CHERTOFF. Well, Senator, I agree. I mean, in the wake of 9/11, as in the wake of other crises that the country has faced, it is very difficult sometimes to strike the appropriate balance. And that is, of course, largely because it is only with the benefit of history that we have the hindsight to know how things turn out. And we can never really know whether, if we had done something differently, it would have not made a difference or whether it might have resulted in, in fact, a greater catastrophe.

I do think we have tried very hard to look at history and learn the lessons of history. There are clearly things that were done facing historical crises that we recognize were wrong and we have stayed away from. I mean, we think back to *Korematsu*, for example, and the internment of Japanese American citizens, the suspension of habeas corpus. Perhaps Lincoln at the time believed he was justified. The judgment of history suggests perhaps it went too far.

I don't know that I am in a position to render the judgment of history because, as you point out, we are still in the swirl of things. I do think, though, that we all benefit from discussion and debate about these matters, and maintaining an open mind, I think, is a very important part of having this process go forward.

Senator DURBIN. Maybe you can't tell me this, but I will ask anyway. We are about to celebrate the 40th anniversary of *Gideon v. Wainwright*, where we enshrined the right to legal counsel. We have just gone through a recent episode relative to two U.S. citizens being detained by this Government and being denied the right to counsel because they are characterized as enemy combatants.

I would like to know your thoughts on that decision and perhaps your reflection on the debate within the Department of Justice and whether there was a serious debate as to the decision to deny the right to counsel to two American citizens.

Mr. CHERTOFF. Well, let me say first of all, Senator, I think *Gideon v. Wainwright* and the right to counsel in the criminal justice process is a fundamental right. I mean, it may be in some ways the cornerstone of the way the criminal justice process operates.

I know as a defense attorney, you know, even a defense attorney would need a defense attorney if they were facing the criminal justice process. In fact, I represented attorneys from time to time when I was in practice.

I can't speak about individual cases that are currently under litigation. I can say, though, that, of course, as you know, the military process is a different process; it is not the criminal justice process. For example, there are people apprehended in Iraq now who we would not normally think would be getting lawyers or participating in the kinds of process that one sees in the Federal courts. And, of course, the determination about what procedures are used in the military process is typically a Defense Department determination because that is within their purview.

I think what I can say, though, is this. I think, again, these are serious matters which are seriously debated and there are arguments on both sides. Reasonable people can sometimes disagree. There is precedent in this area, of course, Supreme Court precedent and precedent from an old case from the Ninth Circuit and a more recent one from the Fourth Circuit. And I think that ultimately the courts will determine where the right balance on that issue is.

Senator DURBIN. You have been a prosecutor in criminal cases and undoubtedly are sensitive to gun violence. In my home State of Illinois, in the city of Chicago that I love, the murder rate has reaching alarming numbers. It is lower than the historical high, but still leads the Nation and causes us great pain. And a lot of it has to do with the proliferation of guns and drug gangs and street violence and innocent victims who are often children who are caught in this crossfire.

I have been critical of this Department of Justice and this Attorney General when it comes to the issue of guns. I think that they have taken a pass on important opportunities, like keeping gun records for a long enough period of time so that they can be investigated to find out if there is any criminal wrongdoing.

Attorney General Ashcroft said destroy the records as quickly as possible. That is good news to the National Rifle Association. I don't think it is good news to law enforcement.

Do you think this Justice Department has been as aggressive as it should be in dealing with guns used in crime?

Mr. CHERTOFF. Well, speaking from my area, I think the illegal use of guns has been a very high priority for the Department. Every U.S. Attorney candidate who comes through the Department and is interviewed is always given some kind of a summary of what the Department's principal priorities are and stamping illegal gun trafficking and illegal gun violence is always one of those priorities.

I don't have the statistics with me, but my understanding is that gun prosecutions have increased. Across the country, prosecutors know how important it is not only to attack individual illegal use of guns by felons through some of the programs like Project Exile in Virginia, but also to focus on the trafficking networks. We, in fact, did a good deal of work with the Mexicans in terms of cross-border trafficking in firearms.

Senator DURBIN. But what about the destruction of these records that come in as evidence of sales of guns, the destruction of records in such a short period of time? And this has been approved by Attorney General Ashcroft?

Mr. CHERTOFF. I have to say, Senator, again the issue of record-keeping under the Brady Act is not an area that I particularly am involved in, so it is not an issue I can address.

Senator DURBIN. I won't pressure you on it.

Judge Coogler, let me ask you a question which is not an easy one, I understand. I read your comments here and heard the questions asked by my friend and fellow colleague, Senator Sessions about judicial philosophy. I think what you said is what we would expect to hear and hope to hear from every judicial nominee.

In your written statement, you said if a judge were to utilize his position to implement his personal views on policy matters, he would be substituting his own views for those of the elected representatives of the people. That is a reasonable response and one we hear quite often.

But I was struck, as I have said to Senator Sessions, in my first visit to your State just a few months ago when Congressman John Lewis, of Atlanta, Georgia, took us down to visit in Birmingham and Selma and Montgomery, and relive some of the moments in the civil rights movement and some of the great events that took place in your State.

Congressman Lewis said to us at one point, as much as we put into this, we never would have gotten anywhere in the effort of civil rights in Alabama were it not for one courageous Federal district court judge, Frank Johnson.

Judge Johnson really, I think, broke away from the popularly held views even of the elected representatives at that point, and he

stood up for civil rights and liberties at a time when it wasn't popular. He faced death threats and was shunned by the society in his area.

I would like, if you can, for you to put that in some perspective. Do you believe Judge Johnson went too far in imposing his personal views on civil rights and should have been more conservative and more restricted in his rulings?

Judge COOGLER. Well, Senator, let me say this. I am greatly concerned with the particular issues that Judge Johnson was as well, and Alabama has come leaps and bounds from back when those times were. And so it is difficult for someone like me—I came to the University of Alabama in 1977 and the State of Alabama had made great leaps and great strides at that point.

So it is very difficult for me, even though I lived in Alabama when I was a very small child, to place myself back in that position. It is also difficult for me to second-guess a Federal district judge, especially one of his stature.

I can say this. Hindsight is always 20/20 and there are certain situations where people do things and make decision that, in hindsight, absolutely worked out for the best. I don't think there is anyone who would question that.

However, I think as a judge my primary role will be to allow those kinds of decisions to be made by the political structure, including the Senators and Congress, who are best suited to taking testimony, seeing the overall big picture, and making laws relevant and relative to those situations and enforcing those laws.

So I can say that, in hindsight, absolutely it was an admirable thing and took a lot of courage in Alabama at that time. But to extrapolate that out and say that I—as I have said before, people have to be able to rely on the laws and they have to take the appropriate action to challenge the laws when they need to be challenged and bring it to the attention of their legislators so their legislators can make appropriate changes when they need to be changed. If a judge does it, then the judge is substituting himself in an area that he shouldn't be substituting himself, generally speaking.

Senator DURBIN. Thank you very much, Judge, and I prefaced it by saying it was a tough question because I don't know that there is a right answer there. But others—and I will conclude, Mr. Chairman, by saying others, including one of the nominees just recently approved this week by the Senate, I think stated very succinctly and clearly that if you stick with the strict constructionist standard, it is not likely that *Brown v. Board of Education* would have been decided the way it was, or *Miranda* or *Roe v. Wade*, or that Judge Frank Johnson's decisions would have been made. And I look back and think what America would be like if those decisions had gone the other way over the last 50 years.

So I am sorry, Justice Callahan, we don't have time to ask a few questions of you, but I want to again say, Mr. Chairman—

Justice CALLAHAN. I am sure you have me in your thoughts.

Senator DURBIN. I do, I do, and maybe this is a good sign.

Senator KYL. Senator Durbin, if you would like to take a couple of more minutes, I would be happy to yield some of my time to you, if you would like.

Senator DURBIN. I just have one question, if I might, of Justice Callahan.

Because you come from such a diverse State, I would like your thoughts on the fact that we see a disproportionate number of people of color being arrested, tried, convicted and incarcerated in America. This is not lost on minority populations that our justice system, which is supposedly blind to color and religion and ethnic background, in fact, generates more prosecutions and more incarcerations of people of color.

I would like to know what your thoughts are, based on your legal experience, in terms of what a judge's responsibility is in light of that fact.

Justice CALLAHAN. Well, I think you raise a very complicated issue and there isn't one simple answer to it, and it is something that the minority communities have a great deal of concern about.

As a judge, one of the things that I have been involved in where I live in San Joaquin County and also where I sit in Sacramento County are programs, focus groups with the minority communities and citizens academies with the minority communities to have them become involved with the system and get their input, because access to justice are very important decisions, and to hear why they think some of the problems are occurring and getting that input when you are not dealing with a specific case.

So I think we do have to—I think we have to very much stay in touch with what is going on in our communities and be in contact with our minority communities to find out why they think this is happening, because even if justice is done in a particular case, if the perception of justice is not there, the system badly suffers and as a judge, you have to work very hard.

And so I think we always have to be getting input, look into alternatives and make sure that that is not, in fact, happening, and also, too, involving ourselves in things in the community if there are groups that are particularly at risk, and there are. And either by virtue of their family status or they are impoverished or the areas that they grow up in, they are subjected both as victims and to become involved in crime because of where they have to live.

It is very important to have the community support to address these issues, so hopefully young people that may by virtue of their birth be destined to have more likely contact with the criminal justice system hopefully do not.

Senator DURBIN. Let me just add parenthetically, and I will close with this, I think your nomination can be a step in that direction, too. As I have tried to bring forward Hispanic nominees in my State of Illinois so that those who are standing before the bench feel that they are not completely adrift, that they have someone who at least has an ethnic background which will help make them more comfortable with the system.

I don't know what your background has been in dealing with Hispanic issues in your area, Hispanic legal issues, but you certainly with this new appointment will have an excellent opportunity to do that.

Justice CALLAHAN. Thank you, Senator.

Senator DURBIN. Thank you very much. Thanks, Mr. Chairman.

Senator KYL. Thank you.

Senator SESSIONS, did you have one other question before I turn to Senator Kennedy?

Senator SESSIONS. Well, just briefly, I know on the gun question it is something I asked you about at confirmation. I was with one of your United States Attorneys and they told me their gun prosecutions have gone up 50 percent.

I think you are having something close to that nationally. I believe this Department of Justice, under Attorney General Ashcroft—and I asked him about that when he was confirmed—has, in fact, really set a high standard for aggressive prosecution of gun laws, have they not?

Mr. CHERTOFF. That is correct, Senator.

Senator SESSIONS. I just think that is important. Ultimately, you are focusing on criminals who are out threatening people and killing people.

You know, Senator Durbin, on Frank Johnson, he was indeed a great judge. He was a prosecutor in his early life and he had a fierce hostility to wrong. He did not like to see wrong, and people who dealt with him knew that. It wasn't anger so much as just a deep conviction that wrongdoing shouldn't be accepted.

You could say those were activist opinions, but really I think the better judgment may be—and you and I can talk about this some as we go along, but I think the better judgment of that ought to be that the Constitution and the laws were not being followed correctly.

We had allowed social and political pressures to justify interpreting the constitutional protections of equality and due process—to be interpreted in a way that did not allow that and it was not occurring in reality, and he did, in fact, step up courageously. I think he would say that he merely affirmed the great principles contained in the Constitution.

“Strict construction” is a phrase the President has used. I am not sure that is the best phrase. Miguel Estrada in his hearing was asked about it and he said, well, he thought maybe “fair construction” would be the right phrase. Maybe that is a better phrase. What is strict construction or fair construction? I don't know, but you raised some good points and I just wanted to make those comments.

I think these people have demonstrated a high degree of fidelity to the highest ideals of our Constitution and liberties.

Senator KYL. Senator Kennedy.

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

Senator KENNEDY. Thank you very much, Mr. Chairman, and I welcome our nominees. I apologize. I was necessarily absent earlier, but I appreciate the chance now to ask Mr. Chertoff some questions dealing with the Criminal Division. I am grateful for your presence here.

In late March, as the House of Representatives was about to vote on important child abduction legislation, a controversial amendment on sentencing was added to the bill. This amendment, called the Feeney amendment, had nothing to do with the protection of