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UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

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NOMINATION OF DEBORAH L. COOK, NOMINEE TO BE CIRCUIT JUDGE FOR THE SIXTH CIRCUIT; JOHN G. ROBERTS, JR., NOMINEE TO BE CIRCUIT JUDGE FOR THE D.C. CIRCUIT; JEFFREY S. SUTTON, NOMINEE TO BE CIRCUIT JUDGE FOR THE SIXTH CIRCUIT; JOHN ADAMS, NOMINEE TO BE DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF OHIO; S. JAMES OTERO, NOMINEE TO BE DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA; AND ROBERT JUNELL, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF TEXAS

WEDNESDAY, JANUARY 29, 2003

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 9:39 a.m., in Room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch, Chairman of the Committee, presiding.

Present: Senators Hatch, Kyl, DeWine, Sessions, Graham, Craig, Chambliss, Cornyn, Leahy, Kennedy, Biden, Kohl, Feinstein, Feingold, Schumer, Durbin, and Edwards.

Chairman HATCH. Our hearings are open to the public and to the interested public. Of course, as a champion of the ADA and the Americans with Disabilities Act, I've done everything possible to accommodate the persons with disabilities, who informed us yesterday that they would be attending the hearing.

Now, in fact, when we received word that there would be three deaf people in attendance, we immediately arranged an interpreter for them. When we were informed that up to 100 people with disabilities would be coming, we immediately began looking throughout the building for an additional suitable room to accommodate all of them.

As background, the Committee practices to allow the public to attend hearings on a first-come, first-serve basis, and often many of the people who wait in line never get in. Rather than follow the usual practice and have most people in the hallways, we instead reserved SD–G50, a special first floor room for any guest who could

not be accommodated in the hearing room. Now, we are very disappointed that we were unable to get SH–216, which would have been a bigger room and would have allowed us perhaps to get everybody in. I have asked my staff to look at SD–G50 and see how full it is, and see if we can accommodate everybody down there because we could immediately move down there if it is. Our problem is all of the television is set up and everything else right now, but we will check on it and we will see what we can do, because I am the last person on earth who would not want to accommodate those who are persons with disabilities. So we will start here and we will check out that room. If it is capable of handling this, we will try to accommodate if we can move everything down there, but as of right now, I think we are going to have to proceed here until I receive back word from staff.

Senator LEAHY. Can I say something about that?

Chairman HATCH. And I would like your staff to work with them.

Senator LEAHY. I would. I have already asked my staff to go down and look at SD–G50. When I went by there earlier this morning, I mean it is a huge room. I think it would probably accommodate. We had people standing out here for an hour waiting, and maybe one way to do it would be to have the Senators who are here to make their statements, but I would really strongly urge that we move down there. It is a much larger room and it would be a lot easier to accommodate some people who have not been able to get in.

Chairman HATCH. Let's see if we can do it.

[Applause.]

Senator KENNEDY. I think it is a reasonable way to proceed in terms of hearing from the presenters here, and then as I understand as well, that SD–G50 is open and is available, and it seems to me that we ought to give the opportunity for people who have an interest in these nominees, an opportunity to hear them. And so I support Senator Leahy's proposal and hope that that can be—

Chairman HATCH. I think I made that comment, and I am certainly amenable to that. So let's have Senator Leahy's staff and my staff go down there and see if we can accommodate us down there. If we cannot, we are going to continue here. If we can, we will move down there with dispatch, because I am not going to waste a lot of time moving. So everybody is just going to have to move down there as quickly as they can. But I certainly want to always accommodate as many people as we possibly can, and especially those who suffer from disabilities, and we will just do it that way.

We can make our two statements, and then we will have the two Senators make theirs or any other Senators who want to come at this time.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Chairman HATCH. Good morning. I am pleased to welcome all of you to the committee's first judicial confirmation hearing of the 108th Congress. I first would like to acknowledge and thank Senator Leahy for his service as Chairman of this Committee over the past 16 months.

I also would like to extend a particular welcome to Senator Bob Dole, our former majority leader, and to Commissioner Russell Redenbaugh, the three-term U.S. Civil Rights Commissioner, who also happens to be the first disabled American to serve on that Commission. It means a great deal to me that they are both here today to support Mr. Jeff Sutton's nomination, and of course, I would also like to express my deep appreciation for the members we have here who have taken time to come and present their views on the qualifications of our witnesses today.

Our first panel features three outstanding circuit nominees who were nominated on May 9, 2001, whose hearing was originally noticed for May 23, 2001. I agreed to postpone that hearing for a week at the request of some of my Democratic colleagues who claimed that they needed an additional week to assess the nominees' qualifications. As we all know, control of the Senate and the Committee shifted to the Democrats shortly thereafter on June 5th, 2001, and these nominees have been languishing in the Committee without a hearing ever since. So I am particularly pleased to pick up where we left off in May of 2001 by holding our first confirmation hearing for the same three nominees we noticed back then: Justice Deborah Cook, Jeffrey Sutton and John Roberts. It is with great pleasure that I welcome these distinguished guests before the Committee this morning.

We also have three very impressive District Court nominees with us today: John Adams for the Northern District of Ohio, Robert Junell for the Western District of Texas, and S. James Otero for the Central District of California. I will reserve my remarks about these District Court nominees until I call their panel forward.

Our first nominee is Ohio Supreme Court Justice Deborah Cook, who has established a distinguished record as both a litigator and a jurist. Justice Cook began her legal career in 1976 as a law clerk for the firm now known as Roderick Linton, which is Akron's oldest law firm. Upon her graduation from the University of Akron School of Law in 1978, Justice Cook became the first woman hired by that firm. In 1983 she became the first female partner in the firm's century of existence. I am proud to have her before us as a nominee who knows firsthand the difficulties and challenges that professional women face in breaking through the glass ceiling.

During her approximately 15 years in the private sector, Justice Cook had a large and diverse civil litigation practice. She represented both plaintiffs and defendants at trial and on appeal in cases involving, for example, labor law, insurance claims, commercial litigation, torts and ERISA claims.

In 1991 Justice Cook left the private sector after winning election to serve as a judge on the Ninth Ohio District Court of Appeals. During her 4 years on the Ninth District Bench she participated in deciding over 1,000 appeals. The Ohio Supreme Court reversed only 6 of the opinions that she authored, and 8 of the opinions on which she joined. In 1994 Justice Cook was elected to serve as a Justice on the Ohio Supreme Court. She therefore brings to the Federal Bench more than 10 years of appellate judicial experience which is built on a foundation of 15 years of solid and diverse litigation experience. There can be little doubt that she is eminently

qualified to be a Sixth Circuit jurist, and I commend President Bush on his selection of her for this post.

Our next nominee is Jeff Sutton, one of the most respected appellate advocates in the country today. He has argued over 45 appeals for a diversity of clients in Federal and State Courts across the country, including a remarkable number, 12 to be exact, before the U.S. Supreme Court. His remarkable skill and pleasant demeanor have won him not only a lot of decisions, but also a wide variety of prominent supporters including Seth Waxman, President Clinton's Solicitor General; Benson Wolman, the former head of the Ohio ACLU; Bonnie Campbell, a Clinton nominee to the Eighth Circuit Court of Appeals; Civil Rights Commissioner Redenbaugh, the first disabled American to serve on the U.S. Civil Rights Commission; and former Senate Majority Leader Bob Dole, who is among the country's most powerful advocates on behalf of persons with disabilities.

I feel it necessary for me to comment briefly on some of the recent criticisms we have heard. Of course, no one familiar with the nominations process is surprised. We have the usual gang opposing Republican nominees. Well, their opposition of Jeff Sutton is for all of the wrong reasons. But as people who know me well will attest, I have always been willing to acknowledge a fair point made by the opposition. So in keeping with that principle, I want everyone to know that I found something commendable in the so-called report published by one of these groups about Jeff Sutton. That report conceded that, "No one has seriously contended that Sutton is personally biased against people with disabilities." Now, that is a very important point, and should be obvious since Jeff Sutton has a well-known record of fighting for the legal rights of persons with disabilities. And he was raised in an environment of concern for the disabled. His father ran a school for people affected by cerebral palsy.

Since the opposition to Jeff Sutton is not personal, then what is it? It seems to come down to a public policy disagreement about some Supreme Court decisions relating to the limits to Federal power when Congress seeks to regulate state governments. Those cases include the *City of Berne*, *Kimel* and Garrett, among others. But in those cases it was Jeffrey Sutton's job, as the chief appellate lawyer for the State of Ohio and as a lawyer, to defend his client's legal interest. As the American Bar Association ethics rules make clear: "[a] lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views of activities."

Now, I do not think anyone on this Committee would actually consider voting against a nominee out of dislike for the nominee's clients. We had an important discussion about clients in connection with the confirmation of Marsha Berzon, now a judge on the Ninth Circuit, who was born in Ohio by the way, and this Committee ultimately decided not to hold her responsible for her clients' views. Judge Berzon had been a long-time member of the ACLU, serving on the board of directors as the vice president of the Northern California Branch. She testified that, quote: "If I am confirmed as a judge, not only will the ACLU's positions be irrelevant but the positions of my former clients and indeed my own positions on any pol-

icy matters, will be quite irrelevant, and I will be required to, and I commit to look at the statute, the constitutional provisions and the precedents only in deciding the case." That was on July 30th, 1998.

Now, I want to remind my colleagues that that answer sufficed for Judge Berzon, and she was approved by this Committee with my support and confirmed by the Senate. It took longer than I would have liked it to have taken, but she was approved. I think we all agree that anybody involved in a legal dispute has a right to hire a good lawyer, even if that person is guilty of murder. And Jeff's clients are not murderers. They are state governments defending their legal rights. So let's not beat up on Mr. Sutton because he worked for the State of Ohio.

Of course, I am not suggesting that Committee members must praise the effects of the Supreme Court's rulings in *City of Berne*, *Kimel* and Garrett. Those decisions affected real people and undid some of the hard work on the part of Congress. I should know. A number of us on this committee, and certainly Senator Kennedy and I, we did a lot of work on those cases. We put in a great deal of time and energy into drafting and passing the Religious Freedom Restoration Act, the Americans with Disabilities Act, and other laws that have been declared Federal power, including the Violence Against Women Act, which Senator Biden spent so much time on, and myself. I thought those laws would be good for the country, and they still are. It was not easy to see them limited or struck down. Of course I understand the powerful constitutional principles and underpinning of the Supreme Court's decisions in those cases, but I can sympathize with those who see things differently. I have no sympathy, however, for the notion that those Supreme Court decisions and the positions of the states that were Mr. Sutton's clients are somehow a legitimate reason to oppose Mr. Sutton's nomination. That is ridiculous.

So since even the people for the American Way concedes that Jeff Sutton harbors no personal bias, and since Mr. Sutton cannot be held responsible for the Supreme Court's decisions, and since we all agree that Ohio and Alabama and Florida have the right to representation in court, then I do not see any real reason to oppose this highly skilled and highly qualified and highly rated lawyer by the ABA. I do look forward to his testimony and would only urge my colleagues and observers to keep an open mind. From the record I have observed so far, I am convinced that Jeff Sutton will be a great judge, and one who understands the proper role of a judge.

Our final circuit nominee today is Mr. John Roberts, who has been nominated for a seat on the D.C. Circuit Court of Appeals. He is widely considered to be one of the premier appellate litigators of his generation. Most lawyers are held in high esteem if they have the privilege of arguing even one case before the U.S. Supreme Court. Mr. Roberts has argued an astounding 39 cases before the Supreme Court. At least that as the last count I had. It is truly an honor to have such an accomplished litigator before this committee, and one of the most well-recognized and approved appellate litigators in history.

The high esteem in which Mr. Roberts is held is reflected in a letter the Committee recently received urging his confirmation. This letter, which I will submit for the record, was signed by more than 150 members of the D.C. Bar, including such well-respected attorneys as Lloyd Cutler, who was the White House Counsel to both Presidents Carter and Clinton; Boyden Gray, who was the White House Counsel for the first President Bush; and Seth Waxman, who was President Clinton's Solicitor General. The letter states, quote: "Although as individuals we reflect a wide spectrum of political party affiliation and ideology, we are united in our belief that John Roberts will be an outstanding Federal Court of Appeals Judge and should be confirmed by the United States Senate. He is one of the very best and most highly respected appellate lawyers in the Nation, with a deserved reputation as a brilliant writer and oral advocate. He is also a wonderful professional colleague, both because of his enormous skills and because of his unquestioned integrity and fair-mindedness." This is high praise from a group of lawyers, who themselves have clearly excelled in their profession, who are not easily impressed, and who would not recklessly put their reputations on the line by issuing such a sterling endorsement if they were not 100 percent convinced that John Roberts will be a fair judge who will follow the law regardless of his personal beliefs.

Let me just say a brief word about Mr. Roberts' background before turning to Senator Leahy. He graduated from Harvard College summa cum laude in 1976, and received his law degree magna cum laude in 1979 from the Harvard Law School, where he was managing editor of the Harvard Law Review. Following graduation he served as a law clerk for Second Circuit Judge Henry J. Friendly, and for then Justice William Rehnquist of the Supreme Court. From 1982 to 1986 Roberts served as associate counsel to the President in the White House Counsel's Office. From 1989 to 1993 he served as Principal Deputy Solicitor General at the U.S. Department of Justice. He now heads the appellate practice group at the prestigious D.C. law firm Hogan & Hartson, and he has received the ABA's highest rating of unanimously well qualified.

I have to say that this panel represents the best, and I commend President Bush for seeking out such nominees of the highest caliber.

Now, I just have a note here. Let me see what it says, and then I will turn to Senator Leahy. For everybody's information, I have been advised that we can set up in another large room. We will proceed here until the other room is ready for us at which time we will take a short recess and accommodate further the request made yesterday for additional accommodations. So I would prefer that, and even though it is an inconvenience to all of you, let's see if we can try and get at least these folks into that room first because they were here first, as well as those persons with disabilities who desire to attend. Anybody know what the room is? SD–G50 will be the room, so apparently we can hold it there.

Senator KENNEDY. Could I just thank the chair for that accommodation? Appreciate it very much.

Chairman HATCH. That is fine.

Senator LEAHY. Chairman, I think it was—

Chairman HATCH. Let me turn to the Ranking Member for his remarks.

[The prepared statement of Chairman Hatch appears as a submission for the record.]

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. I think it was a wise thing to do. As I said, when I walked by there, there appeared to be plenty of room. I am wondering, Mr. Chairman, I am wondering if we are going to be moving down there anyway, and Senator Warner and Senator Hutchinson, I would just as soon withhold my statement until we go down there, as a courtesy to Senator Warner and Senator Hutchison, and if Senator Voinovich comes, if they want to give their statement here, and then I will give my opening statement down there.

Chairman HATCH. I would prefer for you to give your opening statement, and then we will hear from the two Senators.

Senator LEAHY. Happy to do that, Mr. Chairman. I tried.

Chairman HATCH. I think my colleagues understand.

Senator LEAHY. I know they are anxious to hear my statement anyway.

Chairman HATCH. Well, I am certainly anxious to hear it.

Senator LEAHY. Following the Chairman's example, it will be a little bit lengthy.

We meet in an extraordinary session to consider six important nominees for lifetime appointments to the Federal Bench. During the last 4 years of the Clinton administration this Committee refused to hold hearings and Committee votes on qualified nominees to the D.C. Circuit and the Sixth Circuit. Today, in very sharp contrast, the Committee is being required to proceed on three controversial nominations to those same circuit courts and do it simultaneously. Many see this as part of a concerted and partisan effort to pack the courts and tilt them sharply out of balance.

In contrast to the President's Circuit Court nominees, the District Court nominees to vacancies in California, Texas and Ohio, seem to be more moderate and bipartisan. Today we will hear from Judge Otero, nominated to the U.S. District Court for the Central District of California, unanimously approved by California's bipartisan Judicial Advisory Committee, established through an agreement between Senator Feinstein and Senator Boxer with the White House. I wish the White House would proceed to nominate another qualified consensus nominee like Judge Otero for the remaining vacancy in California. Too often in the last 2 years we have seen the recommendations of such bipartisan panels rejected or stalled at the White House. I note that Judge Otero's contributed to the community, worked on a pro bono project for the Mexican Legal Defense and Education Fund, served as a member of the Mexican Bar Association, the Stanford Chicano Alumni Association and the California Latino Judges Association, among others.

We will hear from Robert Junell, nominated to the U.S. District Court for the Western District of Texas, another consensus nominee who has a varied career as litigator and member of the Texas House of Representatives, life member of the NAACP, and a former

member of the board of directors of La Esperanza clinic. I spoke earlier with Representative Charlie Stenholm, who strongly supports him.

And then of course, Judge Adams, nominated to the U.S. District Court for the Northern District of Ohio.

These are not the ones who create the controversy, and I am disappointed the Chairman has unilaterally chosen to pack so many Circuit Court nominees onto the docket of a single hearing. This is certainly unprecedented in his earlier tenure as Chairman, and it is simply no way to consider the controversial and divisive nominations in a single hearing. It is not the way to discharge our constitutional duty to advise and consent to the President's nominees.

When I was Chairman over 17 months we reformed the process of judicial nomination hearings. We made tangible progress repairing the damage done to the process in the previous 6 years. We showed how nominations of a Republican President could be considered twice as quickly in a Democratic controlled Senate as a Republican controlled Senate considered President Clinton's nominees. We added new accountability by making the positions of home-state Senators public for the first time, and we did away with the previous Republican process of anonymous holds.

We made significant progress in helping to fill judgeships in the last Congress. The number of vacancies was slashed from 110 to 59, despite an additional 50 new vacancies that arose during that time. Chairman Hatch had written in September 1997 that 103 vacancies—this was during the Clinton administration—did not constitute a vacancy crisis. He also stated his position on numerous occasions that 67 vacancies meant full employment on the Federal court. Even with the two additional vacancies that have arisen since the beginning of the year, there are now 61 vacancies on the District and Circuit Courts. Under a Democratic controlled Senate we went well below the level that Chairman Hatch used to consider acceptable, and the Federal Courts have more judges now than when Chairman Hatch proclaimed them in full employment.

We made the extraordinary progress we did by holding hearings on consensus nominees with widespread support and moving them quickly, but by also recognizing that this President's more divisive judicial nominees would take time. We urge the White House to consult in a bipartisan way and to keep the courts out of politics and partisan ideology. We urged the President to be a uniter, not a divider, when it came to our Federal Courts. We were rebuffed on that. All Americans need to be able to have confidence in the courts and judges, and they need to maintain the independence necessary to rule fairly on the laws and rights of the American people to be free from discrimination, to have our environmental consumer protection laws upheld.

Under Democratic leadership in the Senate we confirmed 100 of President Bush's nominees within 17 months. Two others were rejected by a majority vote of this committee. Several others were controversial. They had a number of negative votes, but they were confirmed. And given all the competing responsibilities of the Committee and the Senate in these times of great challenges to our Nation, especially after the attacks of September 11th, then later the anthrax attacks directed at Senator Daschle and myself, attacks

that killed several people and disrupted the operations of the Senate itself, hearings for 103 judicial nominees, voting on 102, and favorably reporting 100 in 17 months is a record we can be proud of, and one that I would challenge anybody to show, certainly in recent years to be matched. During the 107th Congress the Committee voted 102 of 103 judicial nominees eligible for votes. That is 99 percent. Of those voted upon, 98 percent were reported favorably to the Senate. Of those, 100 percent were confirmed. Incidentally, we completed hearings of 94 percent of the judges that had their files completed.

Now, this 103 judges heard in 17 months is contrast to the less than 40 a year that the Republicans had when they had President Clinton as President. Indeed, they failed to proceed on 79 of President Clinton's judicial nominees in the 2-year Congress in which they were nominated. More than 50 of them were never even given a hearing. Indeed, the Senate confirmed more judicial nominees in our 17 months than the Republican controlled Senate did during 30 months. More achieved in half the time, but achieved responsibly.

We showed how steady progress could be made without sacrificing fairness. But in contrast, this hearing today portends real dangers to the process and to the results, all to the detriments of our courts and to the protections they are intended to afford to the American people. The Senate, in this instance, and the Congress in many others, is supposed to act as a check on the Executive and add balance to the process. Proceeding as the majority has unilaterally chosen today is unprecedented. It is wrong. It undercuts the ability of this Committee and the Senate to provide balance. Three controversial Circuit nominations of a Republican President for a single hearing. That is something the Chairman, current Chairman, something he never did for the moderate and relatively noncontroversial nominees of a Democratic President just a few years ago. One has to think it is a headlong effort to pack the courts, and notwithstanding our efforts not to carry out the same instruction as we saw with a Democratic President, we seem to be going back to different rules for different Presidents.

Jeffrey Sutton's nomination has generated significant controversy and opposition. I have questions about his efforts to challenge and weaken among other laws the Americans with Disabilities Act, the Age Discrimination Employment Act, the Violence Against Women Act, and his perceived general antipathy to Federal protection for state workers. I am concerned that more than 500 disability rights groups, civil rights groups, and women's groups are opposed to his confirmation because they feel. he will act against their interests and not protect their rights. I am concerned about a reputation among observers of the legal community that he is a leading advocate for the states' rights revival. This is a nomination that deserves serious scrutiny and which ought to be considered has been the practice for decades in this Committee as the only circuit court nominee in this hearing. The process imposed by my friends on the other side of the aisle is cheating the American people of the scrutiny these nominees should be accorded.

We are also being asked to simultaneously consider the nomination of Deborah Cook. She is one of the most active dissenters on the Ohio Supreme Court. She comes to the Committee with a judi-

cial record deserving of some scrutiny, and it has also generated a good deal of controversy and opposition as well.

I note that these two difficult nominations are both in judgeships on the Sixth Circuit Court of Appeals. Now, that was a court to which President Clinton had a much harder time getting his nominees considered.

Republicans fail to acknowledge that most of the vacancies that have plagued the Sixth Circuit arose during the Clinton administration, when President Clinton had nominated people to the Court, and they were never even given a hearing. The Republicans closed the gates. They refused to consider any of the three highly qualified, moderate nominees President Clinton sent to the Senate for those vacancies. Not one of the Clinton nominees to those current vacancies on the Sixth Circuit received a hearing by the Judiciary Committee under Republican leadership from 1997 through June 2001.

Now, in spite of that history, when the Democrats took over, we gave Committee consideration, and we confirmed two of President Bush's conservative nominees to that court last year. We did not play tit for tat. With the confirmations of Judge Julia Smith Gibbons of Tennessee, Professor John Marshall Rogers of Kentucky, Democrats confirmed the only two new judges to the Sixth Circuit in the past 5 years.

Regrettably, despite our best efforts, the White House rejected all suggestions to address the legitimate concerns of Senators in that circuit that qualified, moderate nominees were blocked by Republicans when they were in charge.

The Republican majority refused to hold hearings on the nomination of Judge Helen White, Kathleen McCree Lewis, Professor Kent Markus. One of those seats has been vacant since 1995, the first term of President Clinton.

Judge Helene White of the Michigan Court of Appeals was nominated in January 1997. She did not receive a hearing on her nomination during the more than 1,500 days her nomination was before this committee, which probably set a record—4 years—51 months, in fact, no hearing. She was one of 79 Clinton judicial nominees who did not get a hearing during the Congress in which she was first nominated, and she was denied a hearing after being renominated a number of times, including in January 2001.

Actually, the committee, under Republican control, had only about eight Courts of Appeals nominees a year that they heard. In 2000, they only held five, which contrasted today, with a Republican president, they will hold three in 1 day.

We have Kathleen McCree Lewis, a distinguished African–American lawyer from a prestigious Michigan law firm was never accorded a hearing on her 1990 nomination to the Sixth Circuit, and that nomination was finally withdrawn by President Bush.

Professor Kent Marcus, another outstanding nominee to a vacancy in the Sixth Circuit, never received a hearing on his nomination. And while his nomination was pending, his confirmation was supported by individuals of every political stripe, including 14 past presidents of the Ohio State Bar Association, and more than 80 professors and groups like the National District Attorneys' Association and virtually every newspaper in the State.

Now, Professor Marcus did say in testimony at another hearing how what happened to him, here are some of the things he said:

"On February 9, 2000, I was the President's first judicial nominee in that calendar year. And then the waiting began."

"At the time my nomination was pending, despite lower vacancy rates in the Sixth Circuit, in calendar year 2000, the Senate confirmed circuit nominees to the Third, Ninth and Federal Circuits." No Sixth Circuit nominee was given a hearing.

". . .more vacancies on the way, why then did my nomination expire without even a hearing?"

And then, to quote him, "To their credit, Senator DeWine and his staff and Senator Hatch's staff and others close to him were straight with me."

"Over and over again they told me two things: There will be no more confirmations to the Sixth Circuit during the Clinton Administration. This has nothing to do with you, personally. It doesn't matter who the nominee is, what credentials they may have or what support they may have, they're not going to be heard."

As Professor Markus identified, some on the other side of the aisle held these seats open for years for a Republican President to fill, instead of proceeding fairly. That is why there are now so many vacancies on the Sixth Circuit. Had Republicans not blocked President Clinton's nominees to the Sixth Circuit, if the three Democratic nominees had been confirmed and President Bush appointed the other vacancies on the Sixth Circuit, that court would be almost evenly balanced between judges appointed by Republican and Democratic Presidents, and that is why the Republicans blocked it. They do not want balance, and the same is true of a number of other circuits.

The former Chief Judge of the Sixth Circuit, Judge Gilbert Merritt, wrote to the Judiciary Committee Chairman years ago to ask the nominees get hearings. He predicted by the time the next President is inaugurated, there will be six vacancies on the Court of Appeals. Almost half the court will be vacant.

But no Sixth Circuit hearings were held in the last three/4 years of the Clinton administration, almost the entire second presidential term, despite these pleas. And when I scheduled the April 2001 hearing on President Bush's nomination of Judge Gibbons to the Sixth Circuit, it was the first hearing on a Sixth Circuit nomination in almost 5 years, even though there had been three pending for President Clinton that never got heard, and we confirmed Judge Gibson by a vote of 95 to nothing.

But we did not stop there. We proceeded to hold this hearing on a second Sixth Circuit nominee just a few short months later—Professor Rogers. He, too, was confirmed.

This is very similar to what had happened in the Circuit of Appeals for the District of Columbia, the Nation's circuit. It plays a significant role in environmental areas, OSHA, the National Labor Relations Board. There, again, President Clinton's nominees were not allowed to be heard, although we did hold a hearing for one of President Bush's last year.

Allen Snyder was a law partner of Mr. Roberts and a former clerk to Chief Justice Rehnquist. He was never allowed a Committee vote. The Republicans refused to give Professor Elena

Kagan, another D.C. Circuit nominee, a hearing during the 18 months she was pending.

Today's nominees to the D.C. Circuit, John Roberts, worked in the Reagan Justice Department, in the Reagan White House, was an associate of former Solicitor General Kenneth Starr. It is obvious the Bush administration feels far more comfortable with him.

Also, home–State Senators I understand have not been consulted in these. We have certainly not received any "blue slips" back. What we are doing is we are appointing people to the highest courts in the land, with little more attention and scrutiny than we would pay to appoint these for a temporary Federal commission. It is a disservice to the American people.

The American people can be excused for sensing that there is the smell of an ink pad in the air, rubber stamps already out of the drawer.

Thank you, Mr. Chairman.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman HATCH. Thank you, Senator Leahy.

[Applause.]

Chairman HATCH. We will have order in the room.

We will turn to—yes, sir?

Senator SCHUMER. I know we do not have opening statements, and I do not want to get into any of the substance here, but I would ask that a letter that a number of us signed to you be added to the record.

Chairman HATCH. We will put both your letter—

Senator SCHUMER. And I would just make this point. We received notice of who the witnesses would be at 4:45 yesterday. That does not give anyone any chance to prepare. The Committee has not organized. We do not have rules. You are changing the rule of the tradition of the "blue slip," but we do not know what it is. This is just being rushed beyond, aside from the fact which Senator Leahy dealt with, in terms of the three nominees, now we have received notice for a hearing next Tuesday. We do not know who is going to be on the hearing, and there is a rule in the Committee of a one-week notice.

And so there is just a tremendous rush to judgment here that is just not fair. We know we have differences on these nominees, but all of the procedures seem to be being ripped up in an effort to rush things through, and I would just ask that you give the letter that we sent you some consideration.

It is not fair to tell us at 4:45 last night as to who the witnesses were going to be. On important judges like this, it is important that we get a chance to prepare, and I would just urge that in the future, this policy—or whatever it is—be reexamined. We have no chance, no chance to adequately prepare. If the impression that Senator Leahy said that we are just trying to rush things through without thorough examination is rankling some people, it is no wonder, because of all of these things. It is just not right for us.

And I would ask you really give consideration to the letter, as you were generous enough to move the room as well, because we are going to have an awful time over the next year if we are not going to get an adequate chance to prepare to ask questions fully,

et cetera, and I know it has not been your way in the past. You have always tried to be fair.

Chairman HATCH. I appreciate the Senator's remarks. Certainly, your letter will go into the record, and our response to your letter will go into the record as well, and I intended to put them in the record.

Also, I have been announcing for two weeks who are the witnesses are. They have been waiting 630 days. I think that is adequate time to prepare, but on the other hand, if there is a problem here, I am going to solve it for you. We will try and give better notice, but our obligation is to give notice of the hearing. Sometimes it is very difficult to adjust and get people, you know, prepared and there, but I will certainly take your comments into consideration.

Let us turn to Senator Warner, and then Senator Hutchison, and then Senator Voinovich, and then, of course, we have Senator DeWine, who, also, along with Senator Voinovich, has two Ohio State judges, and then Senator Feinstein, if you would care to make your remarks about your judge here today or we could do it right before they are called up.

Senator FEINSTEIN. Whatever is your pleasure.

Chairman HATCH. I will accommodate you. I will accommodate you.

Senator FEINSTEIN. I would be happy, since I am going to be here, I would be happy to wait for the other Senators.

Chairman HATCH. And then wait until your judge is called up.

Senator FEINSTEIN. Yes.

Chairman HATCH. That will be fine. Senator Warner?

PRESENTATION OF JOHN G. ROBERTS, JR., NOMINEE TO BE CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT BY HON. JOHN WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator WARNER. Chairman Hatch, Senator Leahy, and members of the committee, I will ask to submit my statement for the record—

Chairman HATCH. Without objection, all statements will be put in the record.

Senator WARNER. —for three reasons: First, as a courtesy to the Committee and to our guests who have been very patient; secondly, this nominee, John Roberts, is indeed one of the most outstanding that I have ever had the privilege of presenting on behalf of a President in my 25 years in the United States Senate. His record needs no enhancement by this humble Senator, I assure you.

So I ask that the Committee receive this nomination. He is accompanied by his wife Jane, his children Josephine and John, who have been unusually quiet, and we thank you very much and patient—

[Laughter.]

Senator WARNER. —his parents and his sisters.

Mr. Chairman, members of the committee, if I may indulge a personal observation, Mr. Roberts is designated to serve on the Circuit Court of Appeals for the District of Columbia. Exactly one-half century ago, 50 years, I was a clerk on that court, and so I take a particular interest in presenting this nominee.

Also, the nominee is a member of the firm of Hogan & Hartson, one of the leading firms in the Nation's capital. Fifty years ago, I was a member of that firm. And I just reminisced with the nominee. I was the thirty-fourth lawyer in that firm, which was one of the largest in the Nation's capital. Today, there are 1,000 members of that law firm, to show you the change in the practice of law in the half-century that I have been a witness to this.

Mr. Chairman, you covered in your opening remarks every single fact that I had hopefully desired to inform the committee. So, again, for that reason you have, most courteously, Mr. Chairman, stated all of the pertinent facts about this extraordinary man, having graduated from Harvard, summa cum laude, in 1976.l Three years later, he graduated from Harvard Law School, magna cum laude, where he served as managing editor of the Harvard Law Review. Those of us who have pursued the practice of law, know that few of us could have ever attained that status. Even if I went back and started all over again, I could not do it.

He served as law clerk to Judge Friendly on the usn Court of Appeals for the Second Circuit and worked as a law clerk to the current Chief Justice of the Supreme Court, Judge Rehnquist—Justice Rehnquist.

So I commend the President, I commend this nominee. I am hopeful that the Committee will judiciously and fairly consider this nomination and that the Senate will give its advice and consent for this distinguished American to serve as a part of our Judicial Branch.

I thank the chair and members of the committee.

[The prepared statement of Senator Warner appears as a submission for the record.]

Chairman HATCH. Thank you, Senator Warner. We appreciate it.

Senator Hutchison?

PRESENTATION OF ROBERT JUNELL, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF TEXAS BY HON. KAY BAILEY HUTCHISON, A U.S. SENATOR FROM THE STATE OF TEXAS

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

I am very pleased to introduce my friend, Rob Junell, who has been nominated to serve as a district judge for the Western District in Midland, Texas. This court is identified as a judicial emergency by the Judicial Conference of the United States.

Rob has brought his wife Beverly with him today, and I know he will introduce her later, but I want to say that Rob and Beverly are real friends of mine. Sometimes we nominate people that are great on the merits, but we do not know them. Well, Rob is great on the merits, and I know him well.

He served seven terms in the Texas House of Representatives, retiring voluntarily last year. He was Chairman of the House Appropriations Committee and the House Budget Committee, and I worked with him when I was State treasurer. And just a little vignette about the kind of person he is, I was elected to a 4-year term as State treasurer and introduced a very complicated piece of legislation to limit our State debt to the legislature. I asked Representative Junell to carry that bill, since he was Chairman of the

Appropriations Committee, and I thought, since it was so complicated, that I would put it out there, talk about it, let the members have the chance to really look at it and study it, and then in my second year, second part of my term, after the fourth year, I thought we would try to pass it.

Well, Representative Junell did such a terrific job of carrying the bill that he passed it the first session that I had given it to him, and we do have a limit now on general obligation debt in Texas, which has served us very well throughout the ups and downs of the economy of our State.

Rob graduated from NMMI, then graduated from Texas Tech and Texas Tech Law School, with honors. He received a master's degree from the University of Arkansas. He is very active in his local community of San Angelo, including service on the boards of the United Way of the Concho Valley, the San Angelo AIDS Foundation, and Schreiner University in Kerrville, Texas. He is a lifetime member of the NAACP.

He also has received numerous honors and awards recognizing his leadership in serving the people of Texas. He has earned the distinction as Legislator of the Year given by the Texas Public Employees Association, the Vietnam Veterans Association, and the Greater Dallas Crime Commission. The Dallas Morning News named him one of the best of the best in the Texas legislature in 1995.

In addition to Rob's legislative service, he has continued to maintain a law practice. In Texas, the legislature only meets 5 months every other year, a practice that I would recommend to the U.S. Congress. So these are people who have real jobs in the real world.

He has been a practicing lawyer, very well-respected in the San Angelo and West Texas communities and has a wide range of clients, including hospitals, small businesses, school districts and individuals. I recommend my friend Rob Junell highly to you and hope that we can have an expeditious confirmation of his nomination.

Chairman HATCH. Well, thank you, Senator Hutchison. We are sorry you have had to wait this long, but it is just the way it is on this committee, so we appreciate your patience.

Senator HUTCHISON. Thank you.

Senator LEAHY. I appreciate you being here, too. You have mentioned him before with the same kind of glowing—he should know that even when he is not in the room, you have always said such nice things about him. As I said, Congressman Stenholm called me, too, to say similar things, and I do appreciate it.

Senator HUTCHISON. Yes. Thank you very much.

Chairman HATCH. Thank you. We will turn to Senator Voinovich, first, and then we will wind up with Senator DeWine.

PRESENTATION OF DEBORAH L. COOK AND JEFFREY S. SUTTON, NOMINEES TO BE CIRCUIT JUDGES FOR THE SIXTH CIRCUIT AND JOHN ADAMS, NOMINEE TO BE DISTRICT JUDGE FOR THE NORTHERN DISTRICT OHIO BY HON. GEORGE VOINOVICH, A U.S. SENATOR FROM THE STATE OF OHIO

Senator VOINOVICH. Thank you, Mr. Chairman, members of the committee. I thank you for allowing me to speak on behalf of three deserving attorneys from the State of Ohio. I am anxious to express my strong recommendations for Justice Deborah Cook, Jeffrey Sutton, both of whom the President nominated to serve on the United States Court of Appeals for the Sixth District, as well as Judge John Adams, who has been nominated to serve on the U.S. District Court for the Northern District of Ohio.

Judge Cook and Mr. Sutton were members of the original group that the President of the United States nominated for the Federal judiciary, and I am very pleased that this Committee is finally having a hearing on their nominations.

I have known Judge Cook for over 25 years. I know her to be a brilliant lawyer, a wonderful person. She graduated from the University of Akron Law School in 1998 or 1978, and immediately went to work for the law firm of Roderick, Myers and Linton, Akron's oldest law firm. She was the first female lawyer to be hired by this firm, and in 1983 she became its first female partner.

Deborah remained at Roderick Myers until 1991, when she was elected to Ohio's Ninth District Court of Appeals. She remained on this bench until 1995, when she was elected to the Supreme Court of the State of Ohio, an office which she continues to hold.

She is married to her husband, Robert Linton, and Deborah has always exhibited a love of her family and community, and I am glad that her brother and her nephews are here today for this hearing. It is an historic day for their family.

As a long-time resident of Akron, Deborah has demonstrated her commitment to her community, involved in the Akron Women's Network, the Akron Bar Association, the Akron Volunteer Center, Summit County United Way, and the Akron Art Museum, just to name a few.

Throughout these 25 years, I have found Deborah to be a woman of exceptional character and integrity. Her professional demeanor and thorough knowledge combine to make her truly an excellent candidate for appointment to the Sixth Circuit. Deborah has served with distinction on Ohio's Supreme Court since her election in 1994 and reelection in the year 2000.

My only regret is the confirmation to the Sixth District that we will lose and an outstanding judge in our Supreme Court. However, I am confident that she will be a real asset to the Federal bench. With the combined years of 10 years of appellate judicial experience on the Court of Appeals and the Supreme Court, she uniquely combines keen intellect, legal scholarship and consistency in her opinions.

She is a strong advocate of applying the law without fear or favor and not making policy towards a particular constituency. She is a committed individual and trusted leader, and it is my pleasure to give her my highest recommendation.

I would just like to mention, in closing, that newspapers from Ohio have endorsed her on two occasions. Recently, on January the 6th, 2003, the Columbus Dispatch said, "Since 1996, she has served on the Ohio Supreme Court, where she has distinguished herself as a careful jurist, with a profound respect for judicial restraint, and the separation of powers between the three branches of Government."

The Plain Dealer, the largest newspaper in Ohio said, "Cook is a thoughtful, mature jurist, perhaps the brightest on the State's highest court."

And in May of 2000, the Beacon Journal, the Akron paper, stated that "Deborah Cook's work has been a careful reading of the law, buttressed by closely argued opinions and sharp legal reasoning."

I think that Deborah is someone that is very ideal for the Federal bench.

Jeffrey Sutton, another nominee. I am pleased to speak on behalf of Jeffrey, a man of unquestioned intelligence and qualifications. With vast experience in commercial, constitutional and appellate legislation litigation. Jeffrey graduated first in his law school from the Ohio State University, followed by two clerkships with the United States Supreme Court, as well as the Second Circuit.

Because he was the solicitor general of Ohio when I was Governor, I worked with him extensively when he represented the Governor's office, and in my judgment, he never exhibited any predisposition with regard to an issue. He has contributed so much with his compassion for people and the law. In my opinion, Jeffrey Sutton is exactly what the Federal bench needs—a fresh, objective perspective. He is fair and eminently qualified.

His qualifications for this judgeship are best evidenced through his experience. He has argued nine cases before the United States Supreme Court, including *Hohn* v. *The United States*, in which the court invited Mr. Sutton's participation, and *Becker* v. *Montgomery*, in which he represented prisoners' interests pro bono.

It is worthy to note that when I recently visited the Supreme Court to move the admission of some of my fellow Ohio State University graduates, that the clerk of the court himself commented favorably on Jeff's abilities. I will never forget it. We were moving him through, and he went out of the way.

In addition to the U.S. Supreme Court, Jeff has argued 12 cases in the Ohio Supreme Court and six in the Sixth Circuit. While his unwillingness to shy away from challenging or controversial issues has, in some instances, led critics to question his qualifications and accomplishments, I believe such comments do not accurately reflect Jeff Sutton's heart.

What these detractors fail to mention is how he argued pro bono on behalf of a blind student seeking admission to medical school; how he filed an amicus curiae brief with the Ohio Supreme Court in support of Ohio's hate crimes law on behalf of the Anti–Defamation League, the NAACP and other human rights, Bar Association; or his work on behalf of the Equal Justice Foundation, arguing on behalf of the poor. You do not hear that much about Jeff.

Jeff Sutton also should not be criticized on assumptions that past legal positions reflect his personal views. Instead, he should be lauded for always zealously advocating his clients' interests, no

matter what the issue. In fact, the letters I received in support of Jeff's nomination are some of the best evidence of his overwhelming, across-the-board support in the State of Ohio.

I am going to ask that these letters that I have got be submitted for the record, Mr. Chairman.

Chairman HATCH. Without objection. We will put them in the record.

Senator VOINOVICH. But I would like to just read an excerpt from Benson Wolman. Benson Wolman and I have known each other since we were in law school together. He was probably the most liberal member there at the Ohio State University. He is a former executive director of the ACLU of Ohio, a self-proclaimed liberal Democrat, and here is what he said:

"Jeff's commitment to individual rights, his civility as an opposing counsel, his sense of fairness, his devotion to civic responsibilities and his keen and demonstrated intellect all reflect the best that is to be found in the legal profession."

Greg Myers, chief counsel in the Death Penalty Division of the Office of the Public Defender, remarked:

"Jeff's integrity, respect, tolerance and understanding not only for the lawyers who advocate different positions, but for the legal ideas that stand in opposition to his."

Mr. Chairman, I could go on praising Jeff for the outstanding—he is one of the brightest—may be the brightest lawyer we have got in the entire State. I have questioned his sense of wanting to serve on the Federal bench at his young age, with the family that he has, but you will see from his testimony he is an unbelievably qualified individual that really wants to serve his country.

He has been active in his community. I am glad that his wife and his children are here today with him, members of his family, and I want to thank them for the sacrifice that they are willing to make, to allow him to serve in the judiciary.

So, Mr. Chairman, I have worked with Deb and with Jeff, and they are wonderful people, and they will be real assets to the court.

The last individual, and I will try to make it short, is John Adams. John is a native of Orville, Ohio. He is a very qualified candidate for the U.S. District Court for the Northern District.

Judge Adams received his degrees from Bowling Green and his juris doctorate from the University of Akron. He currently is a judge in the Court of Common Pleas in Summit County. The Court of Common Pleas is the primary State court having original jurisdiction in all criminal felony cases and all civil cases, where the amount in controversy is over $15,000. Prior to that, the judge worked as a partner in the law firm of Kaufman & Kaufman in Akron as a Summit County prosecutor and as an associate with the law firm of Germano, Rondy and Ciccolini.

Judge Adams has demonstrated a commitment to the community he lives in. He is a member of the Akron Bar Association, the Ohio Bar. He received a Volunteer Award in 2000 for the Dramatic Brain Injury Collaborative. He has memberships in the Summit County Mental Health Association, the NAACP, Summit County Criminal Justice Coordinating Council, Summit County Civil Justice Commission.

I sincerely hope that the Committee acts favorably on Judge Adams' nominations and sends this qualified nominee to the Senate floor as soon as possible.

Mr. Chairman, I would like to say one other thing. I know there has been a lot of controversy about the Sixth District and who did what and so on and so forth, whether it was during the Clinton administration and now the Bush administration.

The Sixth District is in need of new, more judges. They are in a crisis situation, and I would ask this Committee to expeditiously move on those two nominees. Either they are up or down, but let us get on with it. It is important. We have, I mean, it is just unbelievable to me that this has gone on as long as it has, and I am hopeful that maybe somehow all of you can work together to move forward to fill those two vacancies on that court.

Thank you very much for giving me the chance to be here.

Chairman HATCH. Thank you.

Senator SCHUMER. Would my colleague yield just for a comment?

Senator VOINOVICH. Certainly.

Senator SCHUMER. It has been a long time, and we want to fill them, but it would work a lot better if the White House consulted with some of the Senators in the area involved, such as Senators Levin and Stabenow, who had nominated people for years. They were not even given a hearing.

There is a way to move things along, but it is not simply saying, "This is who we pick after we blocked everybody you wanted. Now you must do those." That is all I would say to my good friend, who I now is a very fair-minded person.

Chairman HATCH. Well, let me just say this, that the administration has consulted with the in–State Senators from Ohio on this matter, which is their obligation, and I expect them to consult with the Senators from the other States when they have nominees that are up from their States, and I have demanded that they do, and I believe they are doing that. Now, I think they have met the requisite consultation here, without question, and both Senators are for all three of these Ohio nominees.

But your statement, Senator, is high praise, indeed, with the experience that you have had in the State of Ohio. I think you have made a terrific statement for these nominees from Ohio, and I commend you for it. I am sorry you had to wait so long, but we are grateful to have had you here.

Go ahead, Senator.

Senator LEAHY. I think it is fair to say that the two Senators from Ohio are well-liked by everybody on this Committee on both sides of the aisle, and I have certainly appreciated serving with them.

I was struck, though, by something that Senator Voinovich said about the delays in getting vacancies filled on the Sixth Circuit. I wished that, frankly, George, I wish there had been more in your party who had expressed the same concern when there were several moderate nominees, including one from your own State, and strongly supported in your State, during the Clinton administration, and been more effort to get them to at least have a hearing so that they might have been put on there.

I would contrast that with when I became chairman, we moved two people to the Sixth Circuit within a relatively short time. From the time of their hearing to the time of their vote on the floor, was a matter of weeks, at best, and I think that you would not see the vacancies had there been more of a bipartisan effort to get those nominees of President Clinton's, to get them through, rather than to be held up by Republican holds.

Chairman HATCH. Senator Feinstein has asked to be able to go now, and then I am going to give Senator DeWine—we understand the room is available downstairs now and prepared. So, Senator DeWine, if you would prefer to go here or down there, we will give you that choice.

Senator DEWINE. It does not matter, Mr. Chairman.

Chairman HATCH. Well, then we will wait.

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

Chairman HATCH. Thank you, Senator Voinovich.

Then, if you do not mind—

Senator DEWINE. No, it does not matter.

Chairman HATCH. —we will wait until we get down there, and then you can finish your statement.

And, Senator Feinstein, if you would care to make yours now, I would be happy to accommodate you.

PRESENTATION OF S. JAMES OTERO, NOMINEE TO BE DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA BY HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

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

I am very pleased to introduce Judge James Otero to the committee. He is nominated for the Central District of California. He is the sixth candidate to come before this Committee as a product of California's Bipartisan Screening Committee, which the White House, Senator Boxer and I have set up. He received a unanimous 6–0 vote from this Screening Committee.

He is joined at the hearing today by his wife Jill, his son Evan, and his daughter Lauren. Jill is a special education teacher in the Los Angeles Unified School District. She has been that for 28 years. Evan is a junior at my alma mater, Stanford, where he is majoring in political science, and Lauren, a high school senior, just got accepted to Stanford University.

I would like to ask them to stand and be acknowledged by the committee.

Thank you very much for being here.

Judge Otero is a native Californian. He spent his entire legal career in the State. He graduated from California State University, Northridge, in 1973 and Stanford Law School in 1976.

Immediately out of law school, he joined the Los Angeles City Attorney's Office. He practiced there for 10 years. He held a number of important assignments, including assistant supervisor for the city's Criminal Division, where he was in charge of 35 trial deputies.

In 1987, he entered private practice as a lawyer for Southern Pacific Transportation Company. His time in private practice was

brief, as he was appointed to the Municipal Court of Los Angeles in 1988. Two years later, he was elevated to the Superior Court.

His 13-year career on the State bench has been distinguished. Notably, from 1994 to 1996, he served as a supervising judge of the Northern District in Los Angeles.

In 2002, he was named assistant supervising judge for the court's Civil Division, and he has earned a reputation as one of the top judges in Los Angeles City.

I can give you many quotes from Judge Gregory O'Brien, Attorney Tom Girardi, Los Angeles Superior Court Judge Chris Conway, who has described him as one of the best judges on the court.

He is active in professional and civic activities. He is secretary of the California Latino Judges' Association and previously served as vice president of the California Judges' Association.

He is a board member of the Salesian Boys & Girls Club and the Salesian Family Youth Center.

I could also note he is a fitness buff, and over the past years, he has run in over 100 races, including 10 marathons.

I think it is fair to say that I strongly recommend Judge Otero, and I thank you, Mr. Chairman.

Chairman HATCH. Well, thank you, Senator Feinstein.

Now, here is what we are going to do. We are going to move down to SD–G50. We would like all of you in this room—we are trying to accommodate you by having the Sergeant of Arms and his people accompany you downstairs so you can get seated down there. So we would like you, row by row, after the dais is cleared, to come through this door, just come up through there, through that door, and we will try and get this started.

We are going to recess for 10 minutes, and hopefully we can get set up in that time down there.

[Recess from 10:45 a.m. to 11:00 a.m., to move to Room SD–G50.]

Chairman HATCH. If everybody will come to order. I, personally, feel very, very good that we have been able to accommodate everybody, and I apologize that we did not get this done—can we turn these up somehow or another? I wonder if we can get these mikes—that is better. Now, the mikes are all open, for everybody, so they will know.

I, personally, apologize that this was not taken care of in advance. We did not know. We tried to get 216 and other large rooms, and they were not available. But when I found this was available, then we have made this accommodation which I think absolutely had to be made.

[Applause.]

Chairman HATCH. Thank you, but we would like no further demonstrations. This is a very, very serious hearing. These are three very important people who have been nominated by the President. And if you have heard the statements, and we have one more to go, a very important statement by the distinguished Senator from Ohio, then you will understand that this a hearing that deserves dignity.

So we will now turn to Senator DeWine, who is from the State of Ohio, and ask him—if you would go ahead, Senator Leahy. We will turn to Senator—

Senator LEAHY. I also want to thank the Chairman for moving down here. It was the right thing to do. It was something that, when it was suggested, we moved quickly. I applaud you for doing that and then moving out of our regular place. But I just wanted to note my applause of the Chairman for moving us down here as quickly as he did.

Chairman HATCH. Well, thank you, and I am very grateful to the Senate for scrambling and getting this room prepared and helping us to get this done in an efficient and quick manner.

Now, we will have one more statement, and then we are going to call on the witnesses, the three Circuit witnesses. We will finish with them before we call on the District Court witnesses. I know it is going to be a pain to wait for you District Court nominees, but that is the way it is going to have to be, and we will turn to our good friend and colleague, Senator DeWine.

PRESENTATION OF DEBORAH L. COOK AND JEFFREY S. SUTTON, NOMINEES TO BE CIRCUIT JUDGES FOR THE SIXTH CIRCUIT BY HON. MIKE DEWINE, A U.S. SENATOR FROM THE STATE OF OHIO

Senator DEWINE. Well, thank you, Mr. Chairman. It is my pleasure, as a U.S. Senator from Ohio, to introduce to this Committee today two very distinguished Ohioans, who have been nominated by President Bush to serve on the Sixth Circuit Court of Appeals.

First, I would like to introduce to the Committee Justice Deborah Cook, who is from Akron, Ohio. Justice Cook currently is serving her second term as an Ohio Supreme Justice, a post she was first elected to in 1994.

Let me welcome to the Committee several people who are here to support Justice Cook. First, is her husband, Bob Linton. Bob, thank you very much for being with us today.

Let me also welcome Justice Cook's brother, Kevin Cook, and his wife Katerina, and their 8-year-old son Jordan, and 6-year-old Christina, as well as Justice Cook's sister, Susan Adgate, and her two children, Frankie and Audrey, as well as two of Justice Cook's judicial clerks, Shawn Judge and his wife Corie, and another judicial clerk, Amy Cadle.

Justice Cook is an excellent judge and a gracious and giving individual who has dedicated a great deal of her personal time and energy to helping the underprivileged.

First, let me give the members of the Committee a little bit about her work as a judge. Justice Cook has been an appellate judge for over 11 years—4 years on the Ohio Court of Appeals, over 7 years on the Ohio Supreme Court.

While Justice Cook was on the Court of Appeals, she participated in deciding over a thousand cases. Of the opinions that she wrote, she was reversed just six times. Of the cases in which she joined other judge's opinions, her appeals panel was reversed eight times. So, together, of course, that is a 1.4-percent reversal rate, and by any standards, that is a remarkable record.

Now, let us take a look at the statistics during her time on the Ohio Supreme Court. As we are all aware, few State Supreme Court cases are taken for review by the United States Supreme Court. The Ohio Supreme Court is certainly no exception to that

rule. But this statistic for the Ohio Supreme Court and for her decisions on that court is still worth considering.

During Justice Cook's time on the Ohio Supreme Court, the United States Supreme Court has reviewed five Ohio Supreme Court decisions. The U.S. Supreme Court has agreed with Justice Cook in all five of those cases. Let me repeat that. The United States Supreme Court has agreed with Justice Cook in all five of those cases.

Of those cases, one of those cases was simply a unanimous Ohio Supreme Court decision affirmed by the U.S. Supreme Court 8 to 1. But in the other four cases, Justice Cook had dissented in the underlying Ohio case. She was the dissenter, and in each of these four cases, the U.S. Supreme Court reversed—reversed—Ohio Supreme Court's majority opinion and reached the same conclusion—the same conclusion—as Justice Cook did.

Now, these were not all the close 5 to 4 decisions that we sometimes see in the U.S. Supreme Court. In a Fifth Amendment self-incrimination case, the Supreme Court sided with Justice Cook 9 to nothing. Another case went 8 to 1, again siding with Justice Cook's dissent.

So it is clear from these statistics that Justice Cook's decisions, when she was dissenting in these cases, was well-founded.

Mr. Chairman, members of this committee, another useful gauge of a sitting judge is the evaluation she gets from objective observers who watch the court on a day-to-day basis.

In Ohio, the major newspapers closely watch our High Court. After observing Justice Cook on the Ohio Supreme Court for a full 6-year term, Justice Cook was endorsed by all of the major newspapers in the State of Ohio for her 2000 reelection campaign. These newspapers included the Cleveland Plain Dealer, the Columbus Dispatch, the Cincinnati Inquirer, the Akron Beacon Journal, the Dayton Daily News, and the Toledo Blade.

Let me just say, as someone who has a lot of experience with these newspapers, that covers the entire political spectrum in the State of Ohio.

Since the election in the past few weeks, several Ohio papers have endorsed her nomination to the Sixth Circuit. The Cincinnati Post wrote on January 8th of this year, and I quote, Mr. Chairman, "Cook is serving her second term on the Ohio Supreme Court, where she has been a pillar of stability and good sense. Her role on that court, one, which in the last few years has repeatedly marched on 4-to–3 votes into the realm of policy-making, has often been writing sensible dissents."

On December 29th, 2002, insisting that the Judiciary Committee act on Justice Cook, the Cleveland Plain Dealer wrote, and I quote, "Cook is a thoughtful, mature jurist, perhaps the brightest on the State's highest court."

The Akron Beacon Journal wrote on January 6th, 2003, and I quote, "Those who watch the Ohio 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 problem-solvers more than jurists. In Deborah Cook, they have a judge most deserving of confirmation, one dedicated to judicial restraint."

And the Columbus Dispatch wrote on January 6th, 2003, and I quote, "Cook's record is one of continuing achievement. Since 1996, she has served on the Ohio Supreme Court, where she has distinguished herself as a careful jurist, with a profound respect for judicial restraint and the separation of powers between the three branches of Government."

Now, Mr. Chairman, these quotes are from papers across the political spectrum, all of which endorsed Justice Cook. As these comments make clear, Justice Cook is a talented, serious judge, who works diligently to follow the low. At the same time, she also dedicates, though, a great deal of her time to volunteer work and community service.

Justice Cook has served on the United Way Board of Trustees, the Volunteer Center Board of Trustees, the Akron School of Law Board of Trustees, and the Women's Network Board of Directors. She was named Woman of the Year in 1991 by the Women's Network. She has volunteered for the Safe Landing Shelter and for Mobile Meals, and she has served as a board member, and then president, of the Akron Volunteer Center.

Furthermore, Mr. Chairman, Justice Cook has served as a commissioner on the Ohio Commission for Dispute Resolution and Conflict Management, where she focused on, among other things, truancy, mediation for disadvantaged students.

She has chaired Ohio's Commission on Public Legal Education and has taught continuing legal education seminars on oral argument and brief writing.

I find it, Mr. Chairman, remarkable that Justice Cook has found time for this level of commitment to her community, and I have yet to describe the most amazing, to me, commitment Justice Cook has made helping the underprivileged in Ohio. Like many of us, Justice Cook believes that the ticket out of poverty is a quality education, and over the years Justice Cook, and her husband, in their everyday lives, have come across hardworking young people who are making an effort to improve their lives through education.

Tasha Smith is one of those people. Justice Cook met her when she was struggling to put herself through college at Kent State by working as a waitress. Justice Cook assisted her with tuition for several years, and today this woman is in her final year of nursing school, carrying a 3.8 grade point average.

Tara King is another of these students. With Justice Cook's help, she recently graduated from the University of Akron, and she just enrolled in graduate school at Cleveland State.

After helping several students in this manner, Justice Cook and her husband decided they should structure their assistance so they could help more young people early on in their education. Four years ago, they started the College Scholars Program with a group of 20 disadvantaged third-graders from an inner-city school. The students were selected to participate based on teacher recommendations, financial need and level of family support.

Justice Cook matched each of the students with a mentor in the community. The students met with their mentors weekly and participated in other program activities. If the students maintained good grades and conduct through secondary school, Justice Cook and her husband will pay for 4 years of their tuition in any public

university in Ohio. Let me repeat that. Justice Cook is going to pay for 4 years of college tuition for 20—20—disadvantaged children.

Now, Mr. Chairman, members of the committee, these activities demonstrate a commitment to the community and dedication to helping the disadvantaged that we would like to see in everyone, and these are qualities that help make Justice Deborah Cook a fine judge.

Now, Mr. Chairman, members of the committee, let me turn my attention to another one of our fine nominees from Ohio, Mr. Jeff Sutton. Mr. Sutton, who is from Columbus, is here today with his family. I would like to introduce the Committee to his wife Peggy and their three children, Margaret, who is 6 years old; John, who is 9 years old; and Nathaniel, who just today is turning 11. Happy birthday, Nathaniel.

I would like also to welcome Jeff's parents, Nancy and David Sutton, his sister Amy, his brothers Craig and Matt, and several additional friends and family. We are very pleased that all of you could be here on this very important day.

Mr. Chairman, Mr. Sutton's legal and life experiences are extensive. A couple of years ago, before high school, his father took over—a couple of years before high school, his father took over a boarding school for children with severe cerebral palsy. Over 6 years, Mr. Sutton spent much of his time around the school doing odd jobs for his father. He was deeply affected by this experience and by the interactions that he had with these students during his formative years. It reinforced what he had been taught by his parents; that serving others is an important calling and virtue.

Mr. Sutton attended Williams College, where he was a layman scholar and varsity soccer player. He graduated with honors in history, and after college, from 1985 to 1987, Mr. Sutton was a seventh grade geography teacher and tenth grade history teacher, as well as the high school varsity soccer coach and the middle school baseball coach.

From there, he went on to law school and graduated first in his class from the Ohio State University College of Law, where he served as issue planning editor of the Law Review.

Mr. Sutton clerked for Judge Thomas Meskill on the U.S. Court of Appeals for the Second Circuit. He clerked for two U.S. Supreme Court Justices, retired Justice Powell and Justice Scalia.

From 1995 to 1998, Mr. Sutton was the State solicitor of Ohio, which is the State's top appellate lawyer. During this service, the National Association of Attorneys General presented him with the Best Brief Award for practicing in the U.S. Supreme Court, a recognition he received an unprecedented 4 years in a row.

Mr. Sutton is currently a partner in the Columbus law firm of Jones, Day, Reavis and Pogue. He is a member of the Columbus Bar Association, the Ohio Bar Association, and the American Bar Association. He has also been an adjunct professor of law at the Ohio State University College of Law since 1994, where he teaches seminars on Federal and State constitutional law.

Recently, Mr. Chairman, the American Lawyer rated him one of its 45 under 45; that is, they ranked him, named him as one of the 45 top lawyers in the country under the age of 45.

He has appeared frequently in court, having argued 12 cases before the United States Supreme Court, where he has a 9 and 2 record, with one case still pending. In the Supreme Court's 2000 to 2001 term, Mr. Sutton argued four cases. That is more cases than any other private practitioners in the entire country. Can we imagine preparing to argue one case before the Supreme Court, much less than four? And to no one's surprise, Jeff Sutton won all four.

Mr. Sutton also has argued 12 cases before the Supreme Court, 6 cases before various U.S. Courts of Appeal, and numerous cases before the State and Federal trial courts. Over the years, Mr. Sutton has been the lawyer for a range of clients on a wide range of issues. Some of these cases are quite well-known. For example, he represented the State of Ohio in *Flores* v. *City of Berne*; the State of Florida in *Kimel* v. *Florida Board of Regents*; and the State of Alabama in *University of Alabama* v. *Garrett*.

But, Mr. Chairman, I would like to tell the Committee about some less-well-known cases. He represented, as my colleague Senator Voinovich has indicated, Cheryl Fischer, a blind woman who was denied admission to a State-run medical school in Ohio because of her disability.

He represented the National Coalition of Students with Disabilities in a lawsuit, alleging Ohio University was violating the Federal motor voter law by failing to provide their disabled students with voter registration materials.

He filed an amicus brief in the Ohio Supreme Court, defending—defending—Ohio's hate crime statute, and he filed it on behalf of the NAACP, the Anti–Defamation League and other civil rights groups.

He defended Ohio's minority set-aside statute against constitutional attack.

He filed an amicus brief in the Sixth Circuit on behalf of the Center for the Prevention of Hand Gun Violence, defending—defending—an assault weapon ordinance.

He represented two capital inmates in State and Federal court, and he represented an inmate who brought a prisoners' rights lawsuit in the United States Supreme Court.

Mr. Chairman, I am sure we will have the opportunity to go through these cases in some detail and many other cases, but I am confident the Committee will be impressed by Mr. Sutton's ability in representing these various clients in these cases.

Like Justice Cook, and consistent with his upbringing, Mr. Sutton has found an extraordinary amount of time to give back to his community. Between a demanding law practice and time with his very young family, he serves on the Board of Trustees of the Equal Justice Foundation, a nonprofit provider of legal services to disadvantaged individuals and groups, including the disabled. He has spent considerable time doing pro bono legal work, averaging between 100 and 200 hours per year.

He is an elder and deacon in the Presbyterian Church, as well as a Sunday School teacher. He participates in numerous other community activities, including I Know I Can, which provides college scholarships to inner-city children, and Pro Musica, a chamber music organization.

He also coaches soccer and basketball teams.

Finally, Mr. Chairman, I was struck by something I once read that Mr. Sutton wrote in the Columbus Dispatch about former Supreme Court Justice Powell. In describing Justice Powell's practical voice on the court, he wrote the following, and I quote, "Justice Powell never lost sight of the context in which each decision was made and the people, the people, that it would affect. He believed in people more than ideas and experience, and experience, more than ideology, and in the end embraced a judicial pragmaticism that served the country well."

Mr. Chairman, I believe this same description applies to Mr. Sutton. He will approach the bench in the same pragmatic, tempered and very thoughtful way.

I appreciate the chairman's time, and I yield the floor.

Chairman HATCH. Well, thank you. Thank you, Senator.

We will call the three nominees, Hon. Deborah Cook Mr. John Roberts and Professor Jeffrey Sutton to the witness table, and if you will stand and raise your right hands.

Do you solemnly agree to tell the truth, the whole truth and nothing but the truth, so you help you God?

Justice COOK. I do.

Mr. ROBERTS. I do.

Mr. SUTTON. I do.

Chairman HATCH. We will start with you, Justice Cook. If you have any opening statement, we would like you to introduce your families again and those who are with you. We are just delighted to have you here, and we look forward to completing this hearing.

STATEMENT OF DEBORAH L. COOK, NOMINEE TO BE CIRCUIT JUDGE FOR THE SIXTH CIRCUIT

Justice COOK. Thank you, Mr. Chairman.

My family has been introduced, but I would like to introduce one additional friend who has appeared today with me, and it is Mr. Robin Weaver. Robin is a partner with the international firm of Squires, Sander and Dempsey. He is in the home office in Cleveland, and Robin also serves as the president of the Cleveland Bar Association, and he was kind enough to come today, and I wish to thank him and introduce him to the committee.

Chairman HATCH. We are delighted to have you hear, Mr. Weaver. I have heard of you, and we are very privileged to have you in our audience today.

Justice COOK. Thank you, Mr. Chairman.

Chairman HATCH. Do you care to make any statement?

Justice COOK. I won't reintroduce my family.

Chairman HATCH. That will be fine.

Justice COOK. They were good enough to already stand.

Chairman HATCH. Do you have a statement?

Justice COOK. I have no statement.

Chairman HATCH. That will be fine.

Justice COOK. Thank you, Mr. Chairman.

Chairman HATCH. Mr. Roberts, we will turn to you.

STATEMENT OF JOHN G. ROBERTS, JR., NOMINEE TO BE CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT

Mr. ROBERTS. Thank you, Mr. Chairman.

I would like to introduce my wife Jane.

Chairman HATCH. Where is Jane? Oh, yes.

Mr. ROBERTS. The Committee has already heard some unscheduled testimony from my children, Josephine and Jack—

[Laughter.]

Mr. ROBERTS. And I thank the Committee for its indulgence. I thought it was important for them to be here.

Also, here are my parents, Jack Sr. and Rosemary Roberts.

Chairman HATCH. We are delighted to have you here.

Mr. ROBERTS. My three sisters, Kathy Godbey, Peggy Roberts and Barbara Burke, my brothers-in-law, Tim Burke and Dusty Godbey and my niece Katie Godbey and many other friends that I am very happy to have here today.

Chairman HATCH. Well, we are delighted to have all of you here, and we look forward to this hearing, and I hope you do, too.

Mr. Sutton?

STATEMENT OF JEFFREY S. SUTTON, NOMINEE TO BE CIRCUIT JUDGE FOR THE SIXTH CIRCUIT

Mr. SUTTON. Thank you, Mr. Chairman. My family, I guess they could stand up again. I think most of them have been introduced, but there are a few that did not get mentioned. My brother-in-law Bill Southard has come down from Boston, another brother-in-law, Jim Southard, from Ohio, and Jim's two kids, Emily and Tyler, joined us as well, and my sister Amy's boyfriend, Chris Sterndale, who is earning a lot of praise from me in Amy's choice.

Chairman HATCH. I did not see Chris stand up here now.

[Laughter.]

Chairman HATCH. Oh, I see. Okay.

Mr. SUTTON. And, of course, thank you very much for the opportunity to have this hearing today.

Chairman HATCH. Well, thank you so much. We are delighted to have all of you here. We welcome you to the committee.

We are going to have 15-minute rounds. We have our staff member sitting in the middle. He is going to hold up cards that will tell the times left. What are the three cards? The red is what? That is out of time. Orange is one minute—okay. Well, he will give you notice when 5 minutes are remaining, then one minute, and then we are out of time. We are going to cut it off, but if a Senator feels that they just have to pursue a line of questioning, we will certainly consider allowing that.

I will reserve my time and use it later, and we will turn to Senator Kennedy at this time, with the permission of the ranking member.

Senator LEAHY. Mr. Chairman, if I could also just ask permission that a number of letters referring to Professor Sutton—I know you have introduced letters in favor of him, but I would introduce this stack for the record that are opposed.

Chairman HATCH. Without objection, we will put them in the record.

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. I must say, just before questioning our nominees here—and I want to congratulate all of them on receiving their nomination. I am troubled like other members of the Committee of having three nominees who are controversial, and having one hearing that is going to do this. I, out of necessity and desire, will attend a memorial service for the death of a former Congressman from Utah this afternoon, which I had long scheduled to be an hour and a half. We generally allocate 9:30 in the morning, and I am glad to stay here whatever time, but I think there is—this cramped process and procedure I think is unworthy, quite frankly, of the committee. These are enormously important nominees. These are incredibly important issues. And the scheduling of three nominees and others here, suggests a policy to try and jam those that have serious questions, and I resent it, and I find that it is not a particularly good way to expect that we are going to have a wide cooperation. If we have to exercise all of our rights in order to protect them, so be it. And if that is the desire to do so, so be it as well.

We have three nominees here for the Circuit Court. Mr. Sutton is a nominee for the Court of Appeals for the Sixth Circuit, has actively sought to weaken Congress's ability to protect the civil rights and the ability of the individuals to enforce their Federal rights in court. His efforts to challenge and weaken the laws are central to our democracy and providing equal opportunity are well documented. He has argued for the limitation on the reach of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination Act and Employment Act, the Violence Against Women Act, the Medicaid Act, to name just a few. A large number of National, State and local disability rights groups, civil rights groups, women's groups, senior citizen's organizations and others have raised serious questions about Mr. Sutton's nomination.

Justice Deborah Cook, another nominee for the U.S. Court of Appeals, has a disturbing record of bias in favor of business and corporation over the interest of injured individuals, workers, consumers and women. Numerous Ohio citizens and groups have raised strong concerns about her nomination, including the National Organization of Women, Ohioans with Disabilities.

And finally, the nomination of John Roberts to the U.S. Court of Appeals for the D.C. Circuit raises concerns. The D.C. Circuit, one of the most important courts in the country, having jurisdiction over many workplace, environmental, civil rights, consumer protection statutes, wiretap, other important security issues. I am concerned about Mr. Roberts' efforts to limit reproductive rights as a Government lawyer, his advocacy against affirmative action, and Federal Environmental Protection Laws in his efforts to shield states from individual suits, and to limit Congress's ability to pass legislation regulating state conduct in the name of the states' rights.

And given the strong concerns raised by each of the nominees to pack them into a single hearing impairs our ability to fulfill, I think, our constitutional duty to rigorously review their records. I will move towards questioning the nominees.

Mr. Sutton, I happened to be here, Professor Sutton, during the enactment of virtually all of these pieces of legislation like the Americans with Disabilities Act. I remember the hours of hearings, the length of the hearings, the work that was done. Senator Hatch may remember opposition at that time, objected to our considering the Americans with Disabilities Act. We had to meet after the sessions for the Senate well into the evening until it was actually filibustered to 1 or 2 in the morning.

And then we saw those in the disability community in wheelchairs come on into the hearing room, first of all 5, 10, eventually about 100, 150, and suddenly, television cameras began to come into the Committee room, more and more of them. And then finally at 2:30 the individual, the Senator who was filibustering, no longer in the Senate at this time, yielded, and we were able to pass it.

We spent weeks and months I building a record because the Americans With Disabilities Act follows a very important movement in this country to knock down walls of discrimination, which you are very familiar with, in terms of knocking down the walls of discrimination on the basis of race, religion, ethnicity, gender, and then finally the Americans with Disabilities Act, and we still have, I think, work to do in terms of sexual orientation, but the Americans with Disabilities Act.

So this was something that those of us who had been a part of that whole movement were here at the time when we made the progress in terms of knocking down the walls of discrimination on race, knocking down the walls of discrimination on gender, knocking down on limiting the discriminatory provisions of the Immigration Act, national origin quotas in the Asian–Pacific triangle, saw this progress made.

Then we passed that Americans with Disabilities Act, and we find that there is—and when we passed it and said we wanted it to apply to all Americans, we meant all Americans. But we find that the Supreme Court said that we, under arguments that you made very effectively, it does not apply to the state employees, and it means that state employees cannot get protection of that.

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

The Title VI and the Disparate Impact regulations, cannot be privately enforced, positions that you presented to the Court, supported. Those that find out that there are sitings of toxic dumps in minority communities that are resulting in the poor children suffering and contracting asthma, cancer. But the fact that it is being used in a discriminatory way, something that we take very seriously as legislators now, with understanding your position in terms of the Constitution, those kinds of remedies are not going to be able to be out there.

Title IX regulations. I remember the battle that we had. Going back, we heard the eloquent statement not long ago when Senator Bayh, the current Senator Bayh's father spoke about the work that was being done on the Title IX, and we find out it cannot be privately enforced because of the *Sandoval* decision; and the Religious Restoration Act that the Chairman has referenced, all extremely important kinds of progress over the period of these past years.

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

I am interested just about how you came to this position and your own kind of experience, and your views on it, what you can tell us about where you think as a judge, and what you would say to so many of those people that are left out and behind, that your presence on the court is not going to endanger further their rights that have been passed by Congress.

Mr. SUTTON. Thank you, Senator Kennedy, for an opportunity to address those issues and to discuss them with you and other members of the committee. I do appreciate this opportunity, and am an admirer of your work in all of those areas, and I hope there's nothing about my career that makes you think otherwise. I guess I have a few thoughts, and I hope I can answer this question. And maybe I will be able to explore this with some other questioners as well, but I guess the first point I would make is that in all the cases you referenced, I was of course an advocate. I'm not a sitting judge and not a scholar. I'm flattered that someone has put "professor" in front of this. The people at Ohio State University will be amused by that designation.

But I'm an advocate and I have been since graduating from Ohio State in 1990 and since finishing my two clerkships. And while I do understand in all of these areas, and certainly in the disability rights area, concern that an advocate would be willing to represent a state, making the arguments in *Garrett*, at the same time I would hope people would appreciate that the clients I have had and the cases I have worked on, whether for parties, for amicus entities, or on a pro bono basis, have covered the spectrum of issues of really almost every social issue of the day, and I have had an opportunity to be on opposite sides of almost every one of these issues. If one talks about the issue of disability rights I've had more cases on the side in which I was representing a disabled individual than the opposite. In fact there's only case that I can think of in my career where I had two clients come to me at the same time and say, "You can represent either side of this particular

case." That of course was the Cheryl Fischer case, which arose when I was State Solicitor of Ohio in the mid 1990's.

Ms. Fischer, as you may know, is blind, and was denied admission to Case Western's Medical School on account of her blindness. The Ohio Civil Rights Commission issued an order saying that that violated State civil rights laws, which incidentally went even further than the ADA and section 504 of the Rehabilitation Act. When that case came to the Ohio Supreme Court, there was the Ohio Civil Rights Commission order to defend on the one hand, and on the other hand the State Universities of Ohio thought that Case Western was correct, that this had not been discrimination. It was then my job to go to the Attorney General and explain to her that, in a somewhat unusual situation, she needs to appoint lawyers on both sides of this difficult issue. It fell to me to make a recommendation to the Attorney General what should be done. I thought that the State Solicitor of Ohio, the position I held, should argue Cheryl Fischer's case. I agreed with her position in the trial court. I thought it was the better of the positions, and I recommended to the Attorney General that I argue that side of the case. She agreed. She appointed someone else to argue the other side of the case. We established an ethical wall. And I think while I certainly understand people who are interested in these important nominations looking at briefs and oral arguments I made in *Garrett*, I would hope that they would take the same time to read the briefs that I wrote in the Cheryl Fischer case, my opening brief and my reply brief, and the oral argument I made there. I'd be stunned if anyone read those briefs and thought there was any risk whatsoever of hostility to disability rights. I think if anything the concern would be just the opposite.

I've had an opportunity to represent other individuals with disabilities, most recently in Federal Court. I'm sorry, I don't want to—

Senator KENNEDY. No, no. I am just watching that clock. I do not want to interrupt you, but there are—I want to let you complete but I do want to get to, in this round, get to one other area if I could.

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

Chairman Hatch said unfortunately that I never represented murderers. Well, it turns out I have. I've represented two. And I don't stand a chance in trying to become a judge if one looks at all of my clients and decides whether they agreed with their views. I was not working at the University of Alabama when they formulated their policy. I didn't work on the case in the lower courts. That position had been formulated by the time it got to the U.S. Supreme Court. I'm sorry.

Senator KENNEDY. Could I just—

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

Senator KENNEDY. Just on this. The fact is it just is not in the cases themselves, Professor Sutton. You have, in your writings, in your speeches, in your talks, you have been very eloquent, and have been, continue to be very supportive of this concept. I think we ought to disabuse ourselves that this is not something that is just you are representing a client, because I have the examples in your statements, in your writings, in the speeches, where there are positions where you took in there, any, I think, fair-minded person would read those, would find that they are deeply held.

Let me go just to one other area, and that is, the limitations that you put in terms of the individual remedies. We all understand a right without a remedy is not a right at all. You, in the *West Side* filed a friend of the court. You did not have to do that. There was no obligation. This was not a client. You went about filing an amicus brief because you wanted to, felt compelled to, and in that brief, if your position had been sustained, would have effectively overturned 65 years of Federal Court jurisprudence in terms of the Medicaid, spending clause under the Medicaid Act, and effectively it would have, in those cases, would have closed down the courthouse doors to the working parents in North Carolina who drove 3–1/2 hours each way to get dental care for their children because they could not find a dentist closer to home who would accept Medicaid even though the Medicaid Act requires states to ensure adequate supply of providers, or children with mental retardation and development disability in West Virginia who face institutionalization because they could not get Medicaid to pay for home-based services they need, even thought Medicaid Act requires the states to cover the services, or families in Arizona who are not receiving notices of impartial hearings when their Medicaid HMOs denied or delayed needed treatments, even though the Medicaid Act requires states to provide those rates to such persons.

You went into the court effectively to have them overturn 65 years of rights of individuals pursuant to try to get a remedy. What do you think of those again that are the least able to protect themselves when you are on that court, if you are on the court, and look at you, how do you think they are going to view your views about their rights and being able to ensure that they are going to be able to get remedies which have been in legislation passed by the Congress, intended to be, and passed by the Congress. And with your own, I suppose, knowledge at the efforts to reduce the enforcement of those is quite common knowledge in terms of where the Congress is at the present time in terms of enforcement of these statutes.

I thank the Chair for the additional time.

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

Senator KENNEDY. Yes.

Mr. SUTTON. And I respectfully disagree with one component of your question, and that's the indication that I volunteered to take that case or I wrote the brief on my own behalf, and that that brief reflected my views. That is not the case.

As has happened to me before in my career, I was lucky enough to have the U.S. Supreme Court once invite me to brief an issue

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

Senator KENNEDY. This was an amicus brief.

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

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

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

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

Mr. SUTTON. The judge, Judge Cleland. His clerk called me, asked me to—said he had briefing on what he perceived to be a very difficult issue, and I think the way it ultimately turned out in the case, two competing lines of U.S. Supreme Court authority. It wasn't—unlike the *Hohn* case this brief was not on behalf of myself. The Michigan Municipal League ultimately asked me to write the brief, so there was a client in the case. And I did exactly what I did in the *Hohn* case when the U.S. Supreme Court called me, which is brief the issue that I was asked to brief. And it's very important to me to explain it. I mean I was doing everything I could to advocate that particular position. I could not fairly have said to the court, "Yes, I'll brief that argument," and then pull my punches and not explain every conceivable argument that could have been raised on that side of the case. I, of course, was not involved in the case for Michigan.

I would point out as well, in hearing criticisms about that particular decision, well, I'm not going to criticize Judge Cleland's decision. The one thing I would ask you to look at if you're concerned about the case is to please compare the brief we wrote and the decision. Many of the positions he took in that case were not positions we had advocated, so I feel that that has not been accurate in the sense that it was something I suggested he do.

Senator KENNEDY. Well, but the only point—and I know that time is going on—is that you are argued. It is not that they did not accept it, because it would have basically overturned, I believe, a fair reading of the existing law in terms of the rights of individuals to be able to seek remedies.

The only point, and this is my last one, is just how can we be sure that you are not going to continue this agenda should you get on the court? If you could just give us a brief comment on that.

Mr. SUTTON. I really hope I can do my best to give you that assurance. Again, I would point out I had never heard of this case until I got a call from a Federal District Court Judge asking me to brief that side of it. So there's nothing willful about that case and my involvement in it. I was invited by an Article III Judge to do it, and I did it just as I did when the U.S. Supreme Court invited me.

The second thing is, if one is concerned about some of these issues in general, or civil rights issues more particularly, I would hope that the members of the Committee would not just consider the cases and the issues in the cases, but look at the briefs I worked on and wrote in many other cases that I am sure you would be quite supportive of, whether it was defending Ohio set-aside statute in two different cases; whether it was defending Ohio's

Hate Crime Statute on behalf of virtually every civil rights group in the State that supports that form of legislation; whether it was writing an amicus brief, voluntarily, in the Sixth Circuit on behalf of the Center for the Prevention of Handgun Violence; whether it was seeking out a prisoner civil rights case in the U.S. Supreme Court, where again one could not criticize that as states' rights. I was representing Dale Becker, incarcerated in Chilicothe, Ohio against my former boss, the Attorney General Betty Montgomery.

So I do understand your questions and I think they're very important, but I hope people will—and I think this is why the public wouldn't be concerned about my being a judge, if looked at these other representations where I was acting as an advocate.

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

Chairman HATCH. Thank you, Senator Kennedy.

Let me ask a couple questions for you. You have argued three very important but controversial cases, among others, in front of the U.S. Supreme Court concerning the scope of Congress's power, under Section 5 of the 14th Amendment, to regulate state governments. Some of your critics suggest that your involvement in those cases somehow disqualify you from this position on the bench, so just let me ask you a few questions about those cases. And I am sure you know that I worked very hard, along with Senator Kennedy and others, to enact some of the laws that you argued against. We wrote the Religious Freedom Restoration Act. We brought together almost everybody in Congress on that bill, which was struck down in the *City of Berne* case. And of course I was one of the principal sponsors, as was Senator Kennedy, of the Americans with Disabilities Act, which was limited in scope by the *University of Alabama* v. *Garrett*. I also worked closely with Senator Biden—it was the Biden–Hatch Bill—on another law that the Supreme Court has found to be beyond Federal power, in part at least, and that's the Violence Against Women Act. It was not easy for me, as well as my other people with whom I worked and who worked with me, to see these struck down after we had put so much time and energy into their enactment. Of course I understand the powerful constitutional principles underpinning the Supreme Court's decisions in those cases. But I can also sympathize with those who might see things differently. Regardless of my views about these Supreme Court decisions, I certainly do not believe that you are acting as a lawyer for your clients in those cases by itself should by any means disqualify you from the bench.

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

Mr. SUTTON. Thank you, Mr. Chairman, for an opportunity to discuss those cases. I guess the first point I would make in response to that concern is there's nothing about the issues in those cases or what happened in those cases that would have precluded me from happily representing the other side in any of them. And as a Court of Appeals Judge I have no idea what I would do with those difficult issues except to say follow whatever U.S. Supreme Court precedent was at the time.

The other point I would make is in 1995 when I became State Solicitor of Ohio, I couldn't even have given a good definition of federalism, much less a definition before this body. It wasn't something I had any involvement with; it's not something I had studied in law school. And as State Solicitor of Ohio though, I suddenly found myself for 3–1/2 years with the responsibility of representing the State's interest, sometimes in cases like the Cheryl Fischer case, sometimes in the set-aside cases, but also in the *City of Berne* case, which arose while I was State Solicitor. And the Attorney General of Ohio made the decision that the State was going to challenge RFRA. That was not a decision I was involved in. That was a challenge that started at the District Court level. I didn't get involved in that issue until it got to the U.S. Supreme Court. And at that point in time she said it would be appropriate to have an amicus brief on behalf of many states, explaining the states' perspective on these difficult issues, and that's what we did.

I do think the argument we made, while there's plenty of reason to disagree with the decision, reasonable minds can disagree about these issues. The fact of the matter is, not one Justice of all 9 members of this Court, disagreed with the position advocated in *City of Berne*, that ultimately the Court has the final decision about what the Constitution means.

In *Kimel*, that's the ADEA case that Senator Kennedy mentioned, the same is true. Not one member of the Court disagreed with the position we advocated. Four members of the Court disagreed with the *Seminole Tribe* position, but no one disagreed with what we argued in our brief in terms of what Section 5 of the 14th Amendment means.

And in the *Garrett* case, yes, there was disagreement. This disagreement was 5–4, and the disagreement there was about your record and whether it sufficed, and I can certainly understand how different people take different views on the deference that should be given to the record, the extensive and exhaustive record that you compiled. But it wasn't my job to decide that case. I was my job as a lawyer to represent the State and do my best to advocate their position, and that's what I tried to do.

Chairman HATCH. And I agree with that. I think that is the point. Do you commit to deciding cases on the basis of relevant statutes and binding precedents and the Constitution, rather than relying on any preconceptions on policy opinions that you might hold personally?

Mr. SUTTON. Absolutely.

Chairman HATCH. All right. Now, some people think this is not so much an issue of adhering to your own clients as to whether your arguments for those clients are within the mainstream of American legal thought. So if you do not mind, I am just going to go over those cases again so everybody here understands.

In the *City of Berne* v. *Florida*, it was a 6 to 3 decision dealing with the Religious Freedom Restoration Act, something that a number of us on this Committee feel very deeply about. And let me just ask it again, how many Justices on the Supreme Court disagreed with the position you advocated in that case?

Mr. SUTTON. None.

Chairman HATCH. Not one.

Mr. SUTTON. The only disagreement was about a prior decision in the Court called Smith, which is not something we agreed to argue,

Chairman HATCH. And you mentioned the *Kimel* v. *Florida Board of Regents* case. How many Justices on the Supreme Court disagreed with the interpretation of the 14th Amendment that you advanced in that case?

Mr. SUTTON. None.

Chairman HATCH. Not one. All of the Justices agreed with you.

Mr. SUTTON. Well, I should make the point that the four dissenters disagreed with *Seminole Tribe*, a prior decision of the U.S. Supreme Court which we did not brief and I was not involved in.

Chairman HATCH. You have made that point. And finally, just once again, in the *Garrett* case, how many of the Justices rejected your position in that case?

Mr. SUTTON. Well, not to be too technical but it was the State of Alabama's position, and I was arguing as their lawyer, but four justices disagreed with the State's position in that case.

Chairman HATCH. I think that there is a difference between being an advocate for clients, where you have to give the best you can for them, and being somebody who is out in the mainstream of legal thought, and the fact of the matter is, apparently you not only were in the mainstream, you were overwhelmingly approved.

I have some other questions. I will reserve the rest of my time and turn to Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman.

I know Senator Kennedy had touched on this, and of course Senator Hatch has said that it is one thing to be advocating for a client, another thing for stating your own position. All of us who have tried cases either at the trial level or at the appellate level understand that you take your client's position.

But I look at the way you do it. You have discussed the Florida case. You had advocated to preclude claims for State employees with disabilities, persons that are denied Medicaid benefits. One newspaper called "the leader of the States' rights revival." And then you said yourself in a Legal Times article, that you're quote, "on the lookout" for the types of federalism cases you have become known for. In fact you once said that while advocating for States' rights does not get you invited to cocktail parties, that nevertheless you believe in this stuff. So is this not a little bit different than a client walks in and says, "Mr. Sutton, please, take my position. Here is what I would like you to argue. If you feel I am right or not, go for it." And rather what you are doing is looking for the particular cases that you can carry out your own agenda; is that correct?

Mr. SUTTON. Thank you for an opportunity to discuss this. I would respectfully disagree with that characterization, and here's why. I think the one legitimate accusation—

Senator LEAHY. Well, not to interrupt, but do you disagree with having said what I quoted you as saying in Legal Times?

Mr. SUTTON. No, I wanted to explain what I said and what I meant by it. On the lookout for U.S. Supreme Court cases, that I can be fairly accused of. I was on the lookout for U.S. Supreme Court cases after I left the State of Ohio, had the good fortune to

argue four cases there while State Solicitor, and when I returned to Jones Day in 1998, I really was interested in continuing and developing that practice, and that is true. I don't think it's accurate to say I was only looking for federalism cases, a fairly difficult term. I mean, that covers a lot of things. I could cover any case involving a state.

And the proof of that is one case I sought out soon after leaving the State Solicitor's Office, was the *Becker* v. *Montgomery* case that I referenced earlier, which was a prose indigent civil rights case brought against the State of Ohio, where I was representing Dale Becker on a pro bono basis. And I will say I was willing to represent just about anybody at the U.S. Supreme Court because I did want to develop a U.S. Supreme Court practice which is not easy to do in Columbus, Ohio, and I tried very hard to do that. That's what I think—that's exactly what the first quote references, and that's quite true. As to the believing in this federalism stuff, well, in one sense, yes, of course I do believe at the end of the day there is a checks and balances system here in our Government, one that has checks and balances among the national branches of the Government, and one that has a vertical checks and balances between Congress on the one hand and the states. But that's a principle as deeply respected as stare decisis. The question is—

Senator LEAHY. Do you have a feeling in your own mind or interpretation in your mind of the expression "new federalism?"

Mr. SUTTON. The new federalism that I'm familiar with is one I teach at the Ohio State Law School, which is about Justice Brennan's landmark article in 1977, explaining that state supreme court and state supreme court justices should be aggressively construing their state constitutions to further civil liberties and go beyond what Justice Brennan perceived a U.S. Supreme Court was not doing.

Senator LEAHY. You say in the syllabus for that seminar, that most controversial results of the new federalism are, quote, "increased uniformity of the law and attempting new latitude for potentially result oriented judicial decision making," which is what I would hope that all of us up here would be concerned with.

Mr. SUTTON. Well, maybe I—it's possible I'm misapprehending your question because I—

Senator LEAHY. Let me say it another way. If you were confirmed as a judge, would you be able to resist the temptation to use results oriented reasoning to implement an agenda of new federalism?

Mr. SUTTON. Absolutely. I thought the accusation that I wasn't doing enough of that. I'm making the point the new federalism that Justice Brennan advocated is one that has been advancing civil liberties for the least 25 years. That's the whole point of it, and doing it through the vehicle of state courts. The state constitutional law syllabus to which you're referring, I should point out, is one written by Richard Cordray, who first—as you may know, he's a Democratic office holder in the State of Ohio. He created that class at the Ohio State University. He's a friend of mine and we have cotaught the class, and we've used the same syllabus he wrote. But I think you—I'd be very surprised, Senator Leahy—and maybe this proves I'm misapprehending your question—but I'd be very surprised if you attended that class and listened to what we were talk-

ing about and saw the textbook we were using. It's a textbook that is advancing civil liberties at every turn. That's the whole point of it.

Senator LEAHY. Would you feel it was a fair argument that some would say you advocate States' rights over national standards?

Mr. SUTTON. I've been on both—I've been on virtually every side of the—

Senator LEAHY. What side are you on today?

Mr. SUTTON. I'm on the side of trying very hard, very hard, Senator, to show you that I would be an objective judge, and that the client I would have is a client that is the rule of law, not a former client, but the rule of law, and that's the great honor of being a judge.

Senator LEAHY. Which do you prefer, States' rights or national standards?

Mr. SUTTON. I have no idea, and it would depend on the client of the day. Again, if you looked at the cases I've represented, you'd see I've been—when I worked for the State I only had the option for 3–1/2 years of representing the State.

Senator LEAHY. Let me give you a couple examples. Desegregation and the Jim Crow Laws. The arguments were made that States' rights should override national standards. Which side do you come down on?

Mr. SUTTON. Well, the U.S. Supreme Court correctly rejected all of those, and as a Court of Appeals Judge I would obviously follow that U.S. Supreme Court precedent.

Senator LEAHY. Then do you see the—let me ask it another way. Absent a Supreme Court decision on all fours, which do you feel carries more weight, States' rights or national rights?

Mr. SUTTON. You know, there's no doubt when a Federal statute is passed, as the U.S. Supreme Court has made clear, it deserves—there's a heavy presumption of constitutionality. The Court has said that in cases of upholding Federal laws and striking them. And there's no doubt that a Court of Appeals Judge has every obligation to follow that presumption.

Senator LEAHY. You are well aware of the fact there have been a number of writings, a lot of them by people strongly supporting you. They feel you should be here because of your advocacy of States' rights at the expense of national standards. Are your friends giving you too much credit?

Mr. SUTTON. Absolutely. Absolutely.

Senator LEAHY. Well, the reason I ask that—and I don't ask it lightly, Professor—because I have said over and over again, been here with six different Presidents on this committee, and I voted for an awful lot of Republican nominees, and on those occasions when they would let us vote on the Democratic nominees, I voted on those. But I have always had the same standard. I have also voted against nominees of both Democratic Presidents and Republican Presidents when I felt that a litigant would not have a fair hearing. And I have said so many times in this committee, that to get my vote, I must be convinced that a judge not only have the abilities—and you obviously have the legal abilities, the abilities and the moral character, but also, if somebody came into that judge's courtroom, they would not feel the case had been prejudged,

either because of who they are, that they would be treated differently depending upon which side of an issue, whether plaintiff or defendant, whether they are rich, poor, Republican, Democrat or anything else. And what I am concerned about in your writings and actually—and maybe you feel your friends have done you a disservice, but in their strong support and the strong support of the President and others, that you will be one who would give far more weight on States' rights and a number of these Federal laws over a national standard.

Now, the Supreme Court has done that, as you know, in a couple of areas. They issued a series of 5 to 4 decision under the Commerce Clause in *U.S.* v. *Lopez*. They said that Congress could not enact a law to prohibit guns in or near schools. In *Morrison* they struck down a provision of Federal law that allowed women to sue their attackers in Federal Court. They held that Congress may not regulate what the Court calls non-economic activity, gender-motivated crimes of violence, for example.

Now, do you agree that Congress's power to regulate an intrastate activity should turn on whether the activity can be classified as economic or non-economic?

Mr. SUTTON. I would agree, of course, to do what the U.S. Supreme Court has said in that area, and my understanding of the *Lopez, Morrison, Wickard* v. *Filburn, Jones* v. *Laughlin, Jones and Laughlin* cases, is that while the holdings of the cases to date have been primarily economic, the Court has never said it can only be economic. In fact, they specifically reserved that point in *Morrison*. And in terms of what I would do, I have no idea. I don't know—you know, I obviously haven't gone through the process of what a judge would do, and that process is critical to being a fair-minded judge, and that's having an open mind about both parties' positions, looking carefully at their briefs, looking for any indications the U.S. Supreme Court has given as to what the Court of Appeals or District Courts should do, listening with an open mind and a fair mind to what the oral argument is, and then discussing the issue with your clerks, with your colleagues in the Court, and doing your best to get it right. And I promise that's exactly what I would try to do.

Senator LEAHY. Well, for example, last year the House of Representatives passed a bill to prohibit human cloning. Is human cloning more or less economic in nature than gun trafficking near schools or gender-motivated crimes?

Mr. SUTTON. You know, I have no idea. The one thing though that that kind of law, partial-birth abortion, all of the controversial issues that you all deal with, there's one thing that does have to be true, and I certainly agree with it, that to the extent there is a principle of federalism at the U.S. Supreme Court is requiring lower courts to follow, it does have to be followed in an even-handed way, and there's just no doubt about that.

Senator LEAHY. Let's talk about that. We have mentioned *Lopez* before, and I mentioned that because the President, in his first State of the Union message said that education is a top Federal priority because education is the first essential part of job creation, and I tend to agree with President Bush on that. But then the Supreme Court in *U.S.* v. *Lopez* said that education is a non-economic

activity, therefore outside the Federal regulatory power. Who is right, the Supreme Court or the President?

Mr. SUTTON. That's a great question, and I'm happy—

Senator LEAHY. I am waiting for a great answer.

[Laughter.]

Mr. SUTTON. I'm happy that it's the U.S. Supreme Court that has to finally decide it. The one thing I can assure you is that I would follow whatever decision they reached on that issue and adhere to it as every Court of Appeals judge has to.

Senator LEAHY. Well, we will bet back to another round, but I am worried because you have argued the Constitution requires deference to the sovereignty of states, but then when the constitutional rights are asserted, due process protections, reproductive rights, the right to be free of states trammeling upon 14th Amendment freedoms, the standard retort we get from many, including many that support you, is that if the text of the Constitution does not articulate these rights, they do not exist. But cannot the same point be made of a theory of state sovereignty? I mean is there any words explicitly in the Constitution given out the right of state sovereignty?

Mr. SUTTON. It's a very difficult question, and as I think you know, the U.S. Supreme Court has struggled with it for 200 years. I mean you can go back to *Chisholm* v. *Georgia*, and then many of the cases in the last two decades addressing it, and of course it is up to the U.S. Supreme Court at the end of the day to decide whether there is such a thing as sovereign immunity that applies to states. So far they have. I guess I don't know what their explanation would be.

Senator LEAHY. What is your philosophy on it, and realizing—I certainly will grant this, and I have no question you are honest enough in this when you say that the Supreme Court has a decision, you are going to follow stare decisis, but you have to get—if it is getting all the way up to the Court of Appeals, you have to be getting a lot of cases of first impression. What is your philosophy on that?

Mr. SUTTON. Well, I mean, my philosophy, the point of sovereign immunity I just wanted to mention is a difficult one for the national government and the States. In other words, the national government has sovereign immunity as well, of course. That's this body, and that's not mentioned either. So that's I think the reason the Court's been struggling. In terms of my philosophy, my philosophy is about what's a good Court of Appeals Judge and what he does. And what the good Court of Appeals Judge should do is look at every case with an exceedingly open mind and when they look at that case do what—I've actually tried at sometimes as an advocate, at all times to do—see the world through other people's eyes, see the world through, when I'm an advocate, other judges' eyes, my opponent's eyes. And I think when you're a Court of Appeals Judge it's a different perspective. You're trying to see the world through two different advocates. We have this adversarial system. Their job, these lawyers, is to present the best conceivable arguments within reasonable bounds that advance their clients' position, and I would think I would do what I think good Court of Appeals Judges do, and that's honestly and in a fair way consider

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 AlabamaAttorney 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 add 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 ensured 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 there 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 renotice, after I brought up the hearing, you have renoticed 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

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 phase 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-

ticular 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 predilection, 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 e 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 anticompetitive 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 claus 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

sure that if they are going to err, they are going to err on the side of people who have similar political views to the President. That suggests to me that this is not an automatic process. And I think—I hope—that you would concede that many close cases give judges at every level a chance to see a new facet of the law that hasn't been seen before, and perhaps in seeing it and ruling on it, to change the course of that law and its future.

Would you concede that point?

Mr. SUTTON. There is no doubt even Court of Appeals judges deal with difficult issues, but I do think a point that was raised earlier is a good one, whether it's the Sixth Circuit, other Courts of Appeals, or even the U.S. Supreme Court, a high percentage of cases are either unanimous or fairly unanimous, if it is at the U.S. Supreme Court, precisely because there usually are right answers. But I couldn't agree with you more that every now and then you do get very difficult cases. Of course, the more difficult the case, and particularly that have involved the constitutionality of a Federal law, the more likely the U.S. Supreme Court would review it. But I think your point is a very good and a fair one.

Senator DURBIN. I think it is important when a vast majority of bills and resolutions in the House and Senate never get any attention, nor should they. But a handful of important bills come before us, and we have to make a decision as to whether they should be the law of the land. And that really goes to the point that has been made over and over as to your values, who you are, what you are going to do on those close calls, when you have a case that truly is going to set a new precedent, that is really going to open up the new line of thinking.

And I think the fact that the reaction to your nomination has been so heated is an indication that many people are concerned, that when it comes down to those close cases, when the issue before the court is an issue of civil rights or human rights, the rights of minorities or women or the disabled in America, that you have shown a pattern of conduct of insensitivity by virtue of your advocacy in the past. I have never seen a hearing where we have had so many disabled Americans come forward, frankly, to protest your nomination. It tells me that they are concerned about you and what really is in your heart.

Now, in the past, in our history, seldom do people announce publicly that they are prejudiced. They don't say that. It is rare. The primacy of States' rights has historically been the beard for discrimination in America. Only a few people are bold enough to just state forthright that they oppose civil rights, the rights of women, minorities, and the disabled.

Instead, most have argued that they were not opposed to civil rights but only the power of the Federal Government to protect them. History has not been kind to those who concealed their sentiments in this legal distinction.

Mr. Sutton, Professor Sutton, your legal career has been spent practicing time and again in the shadows of States' rights. You have said in publications that have been quoted over and over again how much you value federalism and this whole issue where time and again you found yourself in key cases, like *Garrett*, on the side of States' rights as opposed to individual rights. You have be-

come a predictable, reliable, legal voice for entities seeking to limit the rights of Americans in the name of States' rights.

Do you believe that the *Garrett* case, despite what Senator Sessions has said, and its conclusion expanded or restricted the rights of disabled Americans?

Mr. SUTTON. Well, there's no doubt that it restricted in the sense that in that particular case someone was seeking relief and they didn't get it. But in that particular case, as I think I pointed out earlier, Ms. *Garrett*'s Section 504 Rehabilitation Act claim is still pending, so she still may get relief. That would be the first point.

The second point is what the Court did—and I would point out that is not a case I've spoken publicly about. That's not a case I've written about. It was a case I was arguing on behalf of a client. I think the State did deserve representation at the U.S. Supreme Court. I think it would have been quite unusual had they not had it. But even in that case, with all of that, all it said was that the State at the end of the day was in charge of deciding when they could waive their sovereign immunity in the same way the U.S. Supreme Court has said the same thing about the U.S. Government. It doesn't mean in future cases claims can't be brought in Federal court if States waive them, and many States have waived them.

If there's one point, though, that I—some of the charges are—they're hurtful charges, and, you know, you asked about my values, and I think that is a fair question. It's an important question, and I do want to respond to that. There is no doubt this country's history when it comes to States' rights is despicable. There's no room for argument about that, and I think you know that's exactly how I feel. The worst violations, the most egregious violations when it comes to States' rights, of course, came in the area of race discrimination. And there, you know, if people are going to look at my advocacy, I hope they would appreciate that on a pro bono basis before I was State Solicitor, I defended Ohio's hate crime statute on behalf of every civil rights group with an interest in that type of legislation. I know the Federal Government is thinking of doing the same thing, on behalf of local chapters of the NAACP, the Columbus Urban League, several others. And while State Solicitor, I helped defend Ohio's set-aside statute.

So I do—I know it's very important, this process, for you to raise those questions, and I assume you want me to answer them, and that's how I'm responding—

Senator DURBIN. But there had to be this moment of truth for you as an attorney when you were asked to represent the Board of Trustees of the University of Alabama, when you knew that your success in that case would restrict the rights of disabled Americans, which you have conceded here, and you decided, not because you were assigned or required to, that you were going to forward in that role of advocate.

Now, there are many other examples that are exceptions to this rule, but the one that troubles the people who have gathered here in the disability community is that, conscious of what you were seeking you went forward and said, "I will be the advocate of the cause that will restrict the rights of disabled Americans."

Did that ever give you pause as to whether or not that was the just thing to do?

Mr. SUTTON. Sure, the case is an excruciatingly difficult case, and it did give me pause. But, first of all, I did not pursue the case. I was approached by the State and was hired by the State, and I did have the option, you're right, I have the option of saying no. But, remember, that's the exact same choice that the U.S. Solicitor General's office has been faced in 88 cases where they have said there's not—a claim cannot be brought by a Federal employee—

Senator DURBIN. The Solicitor General is not seeking appointment here today, our approval. It is you.

Mr. SUTTON. No, I'm not saying—I'm not making that point. I'm making the point that this is the job of an advocate, and the job of an advocate is not to decide in an exercise of vanity what is—what would I do, what could I do? It was long too late for that. I was not involved in the underlying decisions of the University of Alabama in terms of what to do with Ms. *Garrett*. I wasn't involved in the development of their constitutional arguments in the District Court and in the Court of Appeals. I became involved when they asked me to represent them in the U.S. Supreme Court, and I think if I have a sin here, the sin was that I did want to develop a U.S. Supreme Court practice. There's on doubt about that, and maybe that's what led me to take the case. But, Senator, I've done several cases, in fact, more cases on the disability rights side of the equation.

Senator DURBIN. Do you think there would have been a time when you would have had that chance to argue before the Supreme Court and would have said to yourself, rather than get another notch in my gun to go up to the Supreme Court, I just don't want to be identified with a case that restricts human rights, civil rights, the rights of the disabled?

[Applause.]

Chairman HATCH. Let's have order.

Mr. SUTTON. Senator, I respectfully—and, you know, this is a difficult place to make this point in this forum, but I couldn't disagree with you more. I think it is exceedingly wrong to ascribe the views of a lawyer—the client to the lawyer. That's exactly what the ABA code says. It's exactly what would prevent any criminal defense lawyer—I mean, I've represented two capital inmates. It doesn't mean I agree with their underlying acts or what happened. They deserved a representation. I provided that representation.

The one case—and this is, I think, the fair response to your question and your concern. I've only had one case that I can think of where I was given an opportunity to represent either side of a civil rights case. That's the Cheryl Fisher case. When that came up to the Ohio Supreme Court, I was given the opportunity to represent Cheryl Fisher, help her get into Case Western University as a blind medical student, or represent the side of the State universities who wanted to deny her that right. I recommended to the Attorney General—it was her choice, of course—that the State Solicitor ought to argue that case, and I thought she had the better side of the argument, and I did everyone I could—or could to make that argument.

I've represented the National Coalition for Students with Disability in applying Federal law, the motor-voter law so that students with disabilities have access to the right to the vote.

In a case pending in the Ohio Supreme Court, the Gobo case, I inserted an argument not made below that an application of Ohio insurance law would violate the ADA.

My father, you know, ran a school for cerebral palsy children. I mean, I wouldn't say this is a perspective that is lost on me. But I did feel at that time my higher obligation was to the client and that they did deserve a right to representation before the court.

Senator DURBIN. Well, I will concede that you have represented many different clients, but when it comes to the cases that you have been involved in that have had the broadest impact on the greatest number of Americans and their rights, it is hard to find a case really in your career that matches the *Garrett* case. What was decided by the Court by virtue of your argument has denied rights to disabled people across America. It has restricted their rights to recover under the law. And as Senator Schumer said earlier, you can represent a lot of individual defendants before you make up for the loss of rights to a class of individuals, disabled individuals, because of that decision.

May I ask another question? As we try to monitor the legal DNA of President Bush's nominees, we find repeatedly the Federalist Society chromosome. And I would like to ask you as an officer of the Federalist Society—and I know every time I raise this at a hearing, the right-wing press screams bloody murder that this is dirty politics. But you have represented that you are an officer of the Federalist Society. Why is it that membership in the Federalist Society has become the secret handshake of the Bush nominees for the Federal court?

Mr. SUTTON. Well, I don't know that that's true. I don't have any idea whether it is true. The one point I would make is while I am a member of the Federalist Society, I'm also a member of the Equal Justice Foundation. And I hope—in thinking about my nomination, I know how important it is to realize who this person is and what kind of judge they would be.

You will keep in mind that while I have been a member of the Federalist Society, I was asked separately to join the Equal Justice Foundation, which—whose whole purpose is to provide legal service to the indigent. That, of course, is a pro bono effort, takes more time than anything I do for the Federalist Society, and as to the rest of your question, I don't know the answer.

Senator DURBIN. Let me just ask you your impression. What in your mind is the Federalist Society philosophy that draws so many Bush nominees to the Federal bench to its membership?

Mr. SUTTON. Well, I have no idea of what their philosophy is. In fact, my understanding is they don't take—

Senator DURBIN. Are you an officer? Are you not an officer?

Mr. SUTTON. I'm an officer of the Separation of Powers Working Group. That's true. But that doesn't mean there's a philosophy. In fact, my understanding of the Society is they don't take positions on cases.

The one point I would make is my understanding of the purpose of the Federalist Society and the reason I was attracted to joining it was that they've tried to sponsor forums to discuss important legal issues. And most of my involvement has been in the Columbus chapter to that end. And I think the Federalist Society has

done a very good job having presentations that involve speakers on both sides of the issue. In fact, most of the criticism I have heard of the federalism decisions all came from Federalist Society publications. First time I saw anyone criticize *Seminole Tribe* was in a Federalist Society publication. My article about the *City of Berne* decision was a point-counterpoint piece next to Judge McConnell's, Judge McConnell saying it was wrongly decided, my saying it was rightly decided.

So I do think they've tried hard to do that. I can understand someone having a different perspective on that.

Senator DURBIN. Let me ask you about your representation of tobacco companies in your private practice. You represented Lorillard Tobacco in challenging a Massachusetts regulation regarding the sale and promotion of tobacco products. In that case, you argued these regulations violated the Free Speech Clause of the First Amendment. In addition, you have been critical of the $145 billion tobacco judgment in Florida. Although you are an advocate of States' rights in some contexts, you don't seem to like what they have done to tobacco companies.

What is your view generally about the efficacy of tobacco litigation, and do you feel that is ever justifiable?

Mr. SUTTON. Well, RJR is a Jones Day client, and that's how I became involved in that case. I was not involved in that case in the lower courts. I became involved in it when they tried to seek certiorari before the U.S. Supreme Court, and at the time I had a U.S. Supreme Court practice and I was asked by the firm to become involved in the case. And I did. I mean, it was a firm client, and I think it would have been a rather unusual decision on my part to not represent them, be unwilling to represent a client of the firm.

Senator DURBIN. Did you say RJR and Lorillard are clients of the firm?

Mr. SUTTON. No. RJR—all of the—the name of the case goes by Lorillard, but it had several tobacco companies in it.

Senator DURBIN. And RJR was your client.

Mr. SUTTON. Exactly. Exactly. And in terms of the case itself, you know, under the Free Speech Clause, that was the main issue in the case. It's no surprise in most of the biggest U.S. Supreme Court cases, the free speech argument is not on behalf of a popular client. I mean, that's often—or, for that matter, popular speech. That's exactly the way it traditionally goes, and I think if you looked at the 20 biggest free speech cases in the country, I suspect you'd disagree with the underlying speech in every single one of them, and I—

Senator DURBIN. I understand that, and historically—

Mr. SUTTON. But it's a constitutional right, and even though they may be—you know, it's a company with which people can disagree with the work they're doing, their products are legal. They've not been outlawed. And I think they do have a right to raise a constitutional offense.

Senator DURBIN. I don't argue with that premise at all. Again, it is a question about that moment in time when the senior partner came in and said, "Jeff, I want you to take up the cause of RJR, somebody's trying to restrict their advertising that's appealing to children," and you said, "I'll take it." That is a tough call, and law-

yers in their profession make those difficult calls. But I am, again, trying to find out what is driving you and motivating you in terms of your legal values, and as you said, it was one of the clients of the firm.

I don't know how much time I have left here.

Chairman HATCH. Your time has been up.

Senator DURBIN. All right. Thank you very much, Mr. Chairman. Thank you, Professor Sutton.

Chairman HATCH. Well, we will begin our second round then.

Senator DEWINE. I haven't gone.

Chairman HATCH. Well, could I ask one question before you do? Then I will turn to you.

Senator DEWINE. But I haven't done anything on the first round.

Chairman HATCH. Okay. I didn't know whether you—

Senator DEWINE. No, we haven't completed the first round.

Senator LEAHY. I thought you did a second round.

Senator DEWINE. No, I haven't done a second—I haven't done a first round.

Chairman HATCH. Well, let's turn to Senator DeWine.

Senator DEWINE. You can go ahead, Mr. Chairman.

Chairman HATCH. No, no. You go ahead. That is okay.

Senator DEWINE. Mr. Sutton, good afternoon. I know it has been a long day already for all of you, and we appreciate you all hanging with us.

Chairman HATCH. Excuse me just one second. If you need a break, just raise your hand and I will be glad to—

Mr. SUTTON. I am proving I am older than I look. I am getting there. But I will go another half-hour.

Chairman HATCH. Why don't we go another half-hour and then we will—let's go another 15 minutes with Senator DeWine, and then we will—

Senator DEWINE. We will see who has the guts to raise their hand, right?

Chairman HATCH. We will break for 5 minutes and then come back.

Senator DEWINE. The good news for all of you, it is a lifetime appointment.

Senator LEAHY. They probably feel like today has been a lifetime.

Senator DEWINE. Probably. That is right.

[Laughter.]

Senator DEWINE. Absolutely.

Mr. Sutton, I don't pretend to be a legal scholar, but I did have the opportunity to look at a lot of the cases that have gotten the bulk of the publicity in regard to the cases that you have argued before the Supreme Court. And I was here in the Congress when we passed the ADA, and I must be candid and tell you that I think if I was on the Supreme Court, I would have decided these cases differently. I don't agree with the decisions. I don't agree with the bulk of the decisions that you argued in front of the Supreme Court, at least on the controversial ones. But I am not sure how relevant that is. In fact, I don't think it is relevant at all.

I want to follow up with a line of questioning from my good friend Senator Durbin, and I wish he was here. I know he had to go to another meeting. But I think we go down and start down a

very dangerous path when we probe deeply into the clients and the causes that nominees have either advocated or represented. I think it is legitimate. I think we can look at them. But I think when we start down that path, it is rather dangerous.

It is dangerous if we conclude that a person cannot go on the Federal bench because of certain clients that they have represented or because of certain positions they may have taken in arguing a case before the Supreme Court of the United States or any other court.

If we follow that position, there would be many principled lawyers in our history who never would have served on the Federal bench. But, more importantly, if this Committee would be saying that and if this Senate would be saying that, I think it would have a chilling effect on the practice of law as we know it in this country.

How many young lawyers would say to themselves, "I can't take this case, I can't represent this client, I can't advocate this position because, you know, someday I may want to serve as a judge, someday I may want to be on the Federal bench"? And all the young lawyers, I think, at one point in time think that they would like to be a judge. Some of them get over it. But many of them feel that way at some point.

So I think it is a mistake. I don't fault any of my colleagues for engaging in that conversation and that give and take and trying to find out what is in Mr. Sutton's or Mr. Roberts' or Justice Cook's heart and soul. I think that is legitimate. But if we extend it to the natural consequence of that discussion and really say, no, we can't put that person on the bench because they advocated that position, I think that is a very, very serious mistake. And whether it is—if we look back in history and whether it is John Adams and the Boston Massacre or whether Thurgood Marshall representing rapists, or whoever, whatever the case might be, and we can go back in history, I think it would be a very, very serious mistake. And if we applied that law, we would have been denied some very great people on the Federal bench and in politics and in Government. And I think it would have been a mistake.

I think ultimately, Mr. Sutton, and all of you, the question is: Will you follow the law? Will you follow the Constitution? And will you follow the precedent? I assume from each one of you the answer is yes. Mr. Roberts?

Mr. ROBERTS. Yes, Senator.

Senator DEWINE. Justice Cook?

Justice COOK. Yes, indeed.

Senator DEWINE. Mr. Sutton?

Mr. SUTTON. Yes, Senator.

Senator DEWINE. Mr. Sutton, let me read you the entire section of the 1998 Legal Times article that was quoted to you. It is only a part of the article, but I think it was excerpted a little bit, and I want to read it to you.

"Sutton says he and his staff are always on the lookout for cases coming before the Court that raise issues of federalism or will affect local and State government interests."

What position did you hold at that point in time? And who was your staff? What were you talking about?

Mr. SUTTON. Yes, Senator, I was the State Solicitor at that point.

Senator DEWINE. At that time you were State Solicitor.

Mr. SUTTON. I was State Solicitor.

Senator DEWINE. Why were you looking for these cases?

Mr. SUTTON. Because Betty Montgomery, the Attorney General, correctly realized—I think she had some vision in this area—that just because a case comes from another State, another set of courts, and goes to the U.S. Supreme Court, it doesn't mean it's not going to affect them. In fact, it's just the opposite. You could have a case coming from Arkansas, Alabama, California, and once the U.S. Supreme Court decides that issue of Federal statutory law, U.S. constitutional law, that decision's binding on every State, including Ohio.

What the article was pointing out and what Betty Montgomery asked me to do and we did do was to look for cases principally in her area of interest. Her area of interest was, of course, criminal law. She's a former prosecutor. And we must have sought out and written—you know, I don't want to exaggerate. I'm sure it's several dozen, if not considerably more, briefs in U.S. Supreme Court cases generally advancing her perspective on criminal law issues, which was her interest and what she asked us to do, and those were the types of cases—in fact, I think the article was about one of those cases. It was not about, you know, a Section 5 case. It was about the *City of West Covina* versus *Perkins*, which involved the Due Process Clause and the return of property that was seized in a Fourth Amendment seizure and the procedural protections individuals have and their rights in getting it back.

Senator DEWINE. Mr. Sutton, I would like to clarify one point. We have had a little discussion about this, and your nameplate says "Professor Jeffrey Sutton." I think you are listed that way maybe because the Committee put it down that way because you are an adjunct professor. This is a little different than a full-time professor. I just state that because the articles you have written were written by you really, though, in your role as a lawyer, not as an academic. Is that correct?

Mr. SUTTON. Absolutely. In fact, the first articles mentioned were articles written while I was State Solicitor, and, of course, pursuing the job I was asked to do, representing the State. I think one or two of them were written after I was State Solicitor, but the commentary was principally about cases I argued. And, of course, a lawyer would have an ethical obligation not to say publicly that his or her client in a given case had urged a position that was ultimately incorrectly decided by the U.S. Supreme Court. I mean, in those cases, my clients happened to win, and it would have been not only unusual, but I think ethically barred for me to publicly say the U.S. Supreme Court was wrong in those decisions. And I was—if one reads those articles, one would see pretty quickly that they were simply recycling the briefs that I had written in those very cases. In fact, I hate to say it, word for word. I don't think one can plagiarize oneself, but if one can, I've just made an awful admission. But that's what you would see if you read those articles and compared them to the brief.

Senator DEWINE. I want to go back to the *City of Boerne* case and the discussion that you had with Senator Schumer a few min-

utes ago. In that exchange, he asked you about a supposed position that you took during oral argument, and I would like to clarify it.

As I understand it, you argued that Congress does have the authority to enforce the Bill of Rights using Section 5 of the 14th Amendment as those rights are incorporated in Section 1 of the 14th Amendment. So as I understand it, you argued that Federal authority was broader and that the Federal Government has the authority to protect more rights than some of the other parties in the case did.

So in that case, with regard to your position, Senator Schumer's concerns were unfounded.

Mr. SUTTON. I think that's right, Senator. It was a very important issue in *City of Boerne* because until that decision, the U.S. Supreme Court had not clarified that critical point. If one looked at all of the Section 5 laws that have been reviewed for 100-plus years by the U.S. Supreme Court, you would have seen that they all involved, at least the ones that were upheld, racial discrimination remediation or voting rights remediation. They hadn't extended to the other Bill of Rights protections, whether it's free speech, criminal rights protections, or in the case of *City of Boerne*, free exercise of religion.

And the State was in a difficult position in that case because the party in the case, the *City of Berne*, had taken the position, because no case had held otherwise, that Section 5 only allowed Congress to correct race discrimination and voting rights discrimination. And we were in a difficult position. Usually an amicus tends to agree with the party that you're supporting. But at the same time, you know, not that reasonable minds couldn't disagree with this point—and Justice Scalia ultimately gave me a very hard time on this—but took the view that by its terms, the Constitution said Section 5 enforces the provisions of Section 1. Section 1 says due process. The U.S. Supreme Court had construed the Due Process Clause to incorporate many if not all of—well, most of the provisions of the Bill of Rights. And so we made that argument, and Justice Scalia gave me a very difficult time. I mean, if you've ever seen him ask a question, my knees clearly quivered. But, I mean, my backbone did stiffen on this point, and we said that's wrong, Justice Scalia, by its terms and, you know, as a textualist, you have to—you should agree with this. By its terms, it covers all rights protected by Section 1.

So while, you know, there's part of that outcome of that case that one could be unhappy with and certainly reasonable minds could disagree with, we feel good about that part. The Court did agree with us on this.

Senator DEWINE. Good.

Justice Cook, you have been making appellate court decisions now for well over a decade. Obviously in that time, you have developed a style and a way of making decisions and an approach to that job. Tell us how you approach the job, how you do that, and how you would approach the job as a circuit court judge. There has got to be a technique, there has got to be a way of doing it.

Justice COOK. Right.

Senator DEWINE. Everyone has got their own style. How would you do it? How do you do it now?

Justice COOK. My process is structured, and I hope you would find it principled, and it's the process I think most appellate judges engage in. It's first a review of the record of proceedings, a reading, a thorough reading and studying of the contesting briefs, then a review of the existing law, and then the application of logic, sometimes custom, and generally rules. And this is done—you know, I'll give some credit to my counsel because every judge has talented law clerks, and in my chambers—actually some of my clerks are still here, I think. In my chambers, my clerks do serve as my counsel. And so I think that that process generally and with the inclusion of bright young minds to challenge any decisions that I come to, I think we achieve the impartiality and really the objective approach that fairness dictates, and any good jurist engages in pretty much that same decisional process, I would say, Senator.

Senator DEWINE. Do you go through a few drafts?

Justice COOK. Oh, yeah. And then we exchange the drafts among the members of the court, and in that process, we're also able to learn, you know, if any other member of the court writes a concurrence or a dissent that helps in our decisionmaking to double-check our reasoning, to double-check our research. And so it is a—it's a process—it's a learning process at its base. And that's what we—that's our job.

Senator DEWINE. Good. Thank you very much.

Thank you, Mr. Chairman.

Chairman HATCH. Well, thank you, Senator.

Let's take a 5-minute break, and we will come right back.

[Recess from 3:48 p.m. to 4:02 p.m.]

Chairman HATCH. We will start the second round of questions, and maybe I can start it off or, Senator Leahy, if you would prefer?

Senator LEAHY. No, go ahead.

Chairman HATCH. Well, I will start it off, and we will turn to Senator Leahy as soon as I am through. Hopefully this is all the round we need, but I want my colleagues to feel like they have been treated fairly and want them to be able to ask what questions they have in mind. But there has to be a reasonable time, and we will call this at a reasonable time. This is their chance to question the three of you, and we will just have to see what happens.

Let me just go back to you, Mr. Sutton. As a matter of fact, I understand that you came to represent the University of Alabama in the *Garrett* case because the Alabama Attorney General's office called you up and asked you to take the case. Is that right?

Mr. SUTTON. That's correct.

Chairman HATCH. Okay. So you were asked by the Attorney General of the State of Alabama.

What if it had been the other way around? I mean, what would you have done if Mrs. *Garrett* or the United States had called you up and asked you to represent their side in the *Garrett* case? Would you have done it?

Mr. SUTTON. Yes, Your Honor, absolutely. And I would have been very eager to represent that side of the case, either for Ms. *Garrett* or if I had been fortunate enough to be in the Solicitor General's office.

Chairman HATCH. So when you represented your clients, you were doing what attorneys do, represent clients.

Mr. SUTTON. Yes, I was.

Chairman HATCH. I have to admit, I am absolutely nonplussed that some of my colleagues seem to think that you should only represent the people who agree with them. Now, I don't know any attorney who does that who is worth his salt, if he really has any real broad experience. You are not going to please everybody by the people you represent, but to ascribe to you the negative aspects of your clients I think is the height of sophistry. And it is really bothering me that on this committee, with the sophistication of this committee, that we have had those types of indications.

Let me just ask you this. Now, I get so sick and tired of the Federalist Society, they beat up on the Federalist Society. I happen to be a member. I am on the board of advisors. I know what they do. I know what they don't do.

Now, since your membership on the Federalist Society has been raised here today and since various groups such as the People for the American Way and NARAL, the National Abortion Rights Action League, have also expressed concern over your involvement with that group, just let me ask you a few questions about it.

You are indeed a member of the Federalist Society, are you not?

Mr. SUTTON. Yes, I am.

Chairman HATCH. Okay. Well, I am, too. And I happen to think that it is one of the best organizations in the whole country, and I have found, frankly, that the Federalist Society encourages open and honest discussion from all points of view, from a variety of perspectives on a multitude of current issues. Have you found the same thing?

Mr. SUTTON. I have, Your Honor. On the cases I argued on behalf of several clients, I've seen as much criticism of those cases in Federalist Society publications as I've seen anywhere.

Chairman HATCH. I have never known the Federalist Society to take a position on any issue. Do you know whether they have?

Mr. SUTTON. I'm not aware of that, no.

Chairman HATCH. Well, I don't think—I've never seen it. So I get a little tired of this beating up on the Federalist Society as though there is some sort of a secret society. It is the most open society in our country right now from a legal standpoint. In fact, Federalist Society events are known for their intellectual vigor and open debate. Do you differ with that statement?

Mr. SUTTON. I don't, to the extent I've been to them, yes.

Chairman HATCH. Leading liberal academics and Government officials regularly participate in the organization's events. Isn't that correct?

Mr. SUTTON. That is correct.

Chairman HATCH. From all points of view.

Mr. SUTTON. That's very correct.

Chairman HATCH. From the right to the left. Right?

Mr. SUTTON. Yes, exactly.

Chairman HATCH. Regular participants include Walter Dellinger. Walter Dellinger was President Clinton's Acting Solicitor General. Very, very intelligent, interesting, and good man, but very liberal.

Stephen Reinhardt—you have got to be pretty liberal to be to the left of Reinhardt, from the Ninth Circuit Court of Appeals. But one of the really brilliant people in our society. He really believes in

what he does, even though I think many justly criticize some of his activist approaches.

How about Nadine Strossen? She is the president of the ACLU. She is no shrinking violet, yet she participates in the seminars and the conferences.

Professor Laurence Tribe of Harvard. Now, no one would say that Laurence Tribe is an insidious conservative.

How about Cass Sunstein of the University of Chicago? A regular. They, I think, enjoy these give-and-take sessions, and they should.

Do these sound like a gang of right-wing participants to you?

Mr. SUTTON. No.

Chairman HATCH. For some reason, I knew that is what your answer was going to be.

Senator LEAHY. I had even figured that out.

Chairman HATCH. Even Leahy figured that out.

[Laughter.]

Chairman HATCH. That is great. I am so happy for that.

Senator LEAHY. I am glad to see you so supportive of Walter Dellinger insofar as when you were chairman, we couldn't get him through the committee. That is why he was Acting Solicitor General.

[Laughter/applause.]

Chairman HATCH. Well, I have to say that I do have a lot of respect for Walter Dellinger. I do. I even have respect for you, Senator Leahy, quite a bit. And I have earned it over the years, I tell you.

Mr. Roberts, one of my Democratic colleagues has criticized you, albeit rather regularly, for cases that you worked on in your official capacity as Principal Deputy Solicitor General at the U.S. Department of Justice. The positions you took in these cases represented the position of the U.S. Government, right?

Mr. ROBERTS. Correct.

Chairman HATCH. The U.S. Government was your client, right?

Mr. ROBERTS. That's right.

Chairman HATCH. You didn't necessarily choose these cases, right?

Mr. ROBERTS. No.

Chairman HATCH. You had supervisors who worked with you?

Mr. ROBERTS. Yes.

Chairman HATCH. Suggestions were made to you?

Mr. ROBERTS. Yes.

Chairman HATCH. And you followed those suggestions?

Mr. ROBERTS. Yes, and quite often, of course, we were in a defensive position defending Federal agencies that were sued in court.

Chairman HATCH. Sure. And am I correct that the Government's position in these cases was often arrived at as a result of collaborative process in which many different persons aired and debated different views?

Mr. ROBERTS. It's a very broad collaborative process. I don't think everyone's familiar with it. But when a case reaches the Supreme Court that might affect the Federal Government, or in which a Federal agency has been a party, you canvass the whole scope of the Federal Government. And in a typical case, you will

get responses from ten different agencies, sometimes all over the map, sometimes, you know, consistent in a position. A number of different divisions within the department, different offices, all weighing in on what the position of the United States should be.

Chairman HATCH. Well, and as a lawyer in the Solicitor General's office, you were duty-bound to represent the official position of the United States even if it conflicted with your own personal beliefs, right?

Mr. ROBERTS. Certainly.

Chairman HATCH. That is what attorneys do.

Mr. ROBERTS. Not only in the public sector, but I think in the private sector as well, that that's the highest tradition of the American bar.

Chairman HATCH. Well, I have to again caution my Democratic colleagues about the danger in inferring a Government lawyer's personal views from the position he or she takes as an attorney for the United States. I think that Walter Dellinger, who as we all know served as Solicitor General during the Clinton administration, said it best. He said that it is "very risky" to judge judicial nominees by the positions they have taken as Government lawyers and that such judgments may lead to a rejection of "the most qualified of the nominees, those who, like Mr. Roberts, have been out and have had a major lifetime of accomplishment." One of the leading Democrat legal thinkers in the country.

Now, specifically with regard to Mr. Roberts, Mr. Dellinger said this: "The kind of arguments that John Roberts was making in the position of Deputy Solicitor General were the type of arguments a professional lawyer is expected to make when his client, the Chief Executive of which is the President of the United States, has run on those positions."

Now, Mr. Roberts, I want the persons who have made predictions about how you would rule as a judge to listen to some of the things your colleagues, the persons who know you best, have said about you.

Shortly after your nomination in 2001, the Committee received a letter from 13 of your former colleagues at the Solicitor General's office. Now, I want to read a portion of this letter because I think it will help my colleagues in evaluating your nomination.

The letters says, "Although we are diverse political parties and persuasions, each of us is firmly convinced that Mr. Roberts would be a truly superb addition to the Federal Court of Appeals. Mr. Roberts was attentive and respectful of all views, and he represented the United States zealously but fairly. He had the deepest respect for legal principles and legal precedent, instincts that will serve him well as a Court of Appeals judge."

"In recent days, the suggestion has surfaced in press accounts that Mr. Roberts"—meaning you—"may be expected to vote along the lines intimated in briefs you filed while in the Office of Solicitor General." In fact, this is their quote. Let me just quote it. And these are your colleagues from diverse political views—Democrats, Republicans, maybe some who aren't either. They say, "In recent days, the suggestion has surfaced in press accounts that Mr. Roberts may be expected to vote in particular cases along the lines intimated in briefs he filed while in the Office of Solicitor General.

As lawyers who served in that office, we emphatically dispute that assumption. Perhaps uniquely in our society, lawyers are called upon to advance legal arguments for clients with whom they may in their private capacity disagree. It is not unusual for an individual lawyer to disagree with a client while at the same time fulfilling the ethical duty to provide zealous representation within the bounds of law, and Government lawyers, including those who serve in the Solicitor General's office, are no different. They, too, have clients. Federal agencies and officers with a broad and diverse array of policies and interests. Moreover, the Solicitor General, unlike a private lawyer, does not have the option of declining a representation and telling a Federal agency to find another lawyer."

Then they go on again: "We hope the foregoing is of assistance to the Committee in its consideration of Mr. Roberts' nomination. He is a superbly qualified nominee."

I will submit a copy of that letter for the record, along with copies of several other letters echoing support for your nomination.

Now, the resounding theme of these letters is that you will be a fair and impartial judge whose deepest respect for law and the principle of stare decisis combined with your brilliance will make you one of the greatest Federal judges ever confirmed.

Now, people who know you, that is the way they feel, regardless of their political beliefs or their ideological beliefs, that you are a great lawyer, as are the other two on this panel.

I have had Supreme Court Justices say you are one of the two greatest appellate lawyers living today, to me personally. Now, they don't do that, you know, very easily. And I think everybody who knows you knows that that is how good you are.

This is not your first appointment to the courts, is it?

Mr. ROBERTS. No, Mr. Chairman, it's not.

Chairman HATCH. When were you nominated before and by whom?

Mr. ROBERTS. I was nominated 11 years ago last Monday to the same court by the first President Bush.

Chairman HATCH. So basically it has taken you 11 years to get to this particular position.

Mr. ROBERTS. Well, I like to think I haven't been just treading water in the meantime, but it has been 11 years.

Chairman HATCH. There has been an expiration of 11 years since your first American people, and then you have had to be—you were appointed on May 9th of 2001.

Mr. ROBERTS. This current round, yes.

Chairman HATCH. And this is the third time you have been reappointed this January by current President Bush.

Mr. ROBERTS. Correct.

Chairman HATCH. Well, I will reserve the balance of my time, but I just wanted to get those points out because for the life of me I can't understand why anybody who loves the law and who respects great lawyers would not want any of the three of you to serve in our Federal courts. I know one thing: I would sure want to be able to argue cases in front of you. I know one thing: I know I would be treated fairly. And you and I both know another thing: When we tried cases, I didn't want a judge on my side. I didn't want him against me. I wanted him or—I wanted the judge, re-

gardless of who it was, to be fair, down the middle, to apply the law. If they did, I was going to win that case. I could lose the case by the judge favoring me just because a jury would get mad. Or I could lose the case by a judge not favoring me just because the judge was so respected.

We want judges who are going to be down the middle, who are going to—that doesn't mean you have to be down the middle in ideology and everything else. Just on the law, they are going to be down the middle and do what is right and honest and legally sound. Well, I have every confidence that the three of you, each of you, will be exactly that type of a judge. And I commend you for these nominations, for your nominations, and I look forward to seeing you confirmed, and I hope we can do that relatively soon.

Senator Leahy? I will reserve my other 5 minutes.

Senator LEAHY. Thank you, Mr. Chairman.

I don't know where this pesky idea of the Federalist Society came from, probably because one of the nominees testifies here under oath that he was told if he wanted to be a Federal judge appointed in the Bush administration, he should join the Federalist Society. I mean, that may have stuck in people's minds. I don't know. You know how those little things are.

Chairman HATCH. I doubt anybody of any intelligent mind would worry about that.

Senator LEAHY. Well, I would hope you wouldn't suggestion that President Bush's nominee who we confirmed as a Federal judge would be lying under oath.

Chairman HATCH. Of course not.

Senator LEAHY. Okay. Am I down to only 4 minutes that quickly?

Chairman HATCH. No, no. That was my 5 minutes.

Senator LEAHY. Goodness gracious. Man, I never should have let you have that big gavel.

The Federalist Society's membership certainly hasn't stopped people. Paul Cassell was confirmed to the Utah District Court. Karen Caldwell, Edith Brown Clement, Harris Hartz, Lance Africk, Morrison Cohen England. They are all Federalist members, all confirmed. Michael McConnell to the Tenth Circuit, John Rogers to the Sixth Circuit, both members. Ken Jordan, Arthur Schwab and Larry Block. I mean, I could go on and on. In fact, it seems a lot of more were there. So maybe it is coincidence, the statement of one, who says that they had to join to be made a judge, or maybe it is a coincidence so many have gone through. But be that as it may, it hasn't been held against them. Certainly I would not do as some of my colleagues have on the other side, vote against a nominee, as they have of a Clinton nominee, because she had dared in her private practice to represent a labor union. They voted against her because of that, and having listened to your testimony, all of you, and Chairman Hatch's testimony, that clients take their—or lawyers take their clients and represent them, although I would note just so that it doesn't seem totally one-sided, we had one vote against for defending labor unions, we had another one for taking a couple pro bono cases for the ACLU and so on.

Chairman HATCH. Was that Marsha Berzon who now sits on the Ninth Circuit Court of Appeals?

Senator LEAHY. That is right. You were not the one that voted against her.

Chairman HATCH. I know. Neither were most everybody else. I am condemning both sides if they are going to do that type of reasoning.

Senator LEAHY. So we won't go through a number of the ones who were never given a hearing because their clients weren't liked. But let's talk about stare decisis, and I am sure that every one of you would, of course, agree that you would follow stare decisis. I have never known a judicial nominee to say otherwise, and even including some who, after getting on the bench, were reversed because they did not follow stare decisis. But it is a hornbook law that you have to.

Now, Professor Sutton, in a Federalist Society paper in 1994—and I realize they don't take any positions in the Federalist Society, but you praised the analysis in Justice Clarence Thomas' concurring opinion in *Holder* v. *Hall*, a case that considered Section 2 of the Voting Rights Act. And you specifically praised Justice Thomas for providing persuasive and important reasons to reconsider and overrule prior Court precedent broadly interpreting the Voting Rights Act. And you told the Federalist Society that Justice Thomas' approach goes a long way to developing a conservative theory for doing an unconservative thing, overruling precedent.

Why wouldn't this just be conservative judicial activism? And I know you were expecting the question, so I would like to hear your answer.

Mr. SUTTON. No, I wasn't expecting the question. Why wouldn't it in Justice Thomas' position be conservative judicial activism? Is that the question?

Senator LEAHY. Yes.

Mr. SUTTON. Well, I think the point the article made was that the Section 2 cases had led to a very difficult set of interpretations for the Court in the voting rights arena, and it's important to remember that in that *Holder* v. *Hall* case, Justice Thomas' vote was a concurrence, the majority. I don't know exactly what the vote was, but I think it was pretty overwhelming, ultimately said that you couldn't bring this type of vote dilution claim under Section 2.

Justice Thomas took the view that while that was an application of several cases of the Court, including a case called *Allen*, I think from the 1960's, that the *Allen* case and the case after it hadn't been correctly decided, and that the Court shouldn't have gone down this road trying to determine as a matter of political theory what size a voting group should be—a county, a city, number of members.

The opinion Justice Thomas relied upon was Justice Harlan's opinion in that. I don't remember if he was concurring or dissenting. Justice Harlan, of course, is one of the Court's moderates, or at least he's perceived as a moderate, not unlike Justice Powell. So I don't think the perspective Justice Thomas had on the case was, you know, out of the mainstream. He was following Justice Harlan. But I guess more importantly, as a Court of Appeals judge, one would not have any option of doing anything of the kind. I mean, whatever the Court does with—

Senator LEAHY. Well, not exactly. Within your circuit, within your circuit you could overrule stare decisis.

Mr. SUTTON. Oh, not—I understand what you're saying. In other words, circuit precedent.

Senator LEAHY. Yes, you would not have to follow—I mean, you are presumed that you will follow it, but you are not required to follow the precedents of your own circuit, and circuits do change—not often, but circuits either reverse themselves or circuit judges dissent from positions. It is not unheard of for a circuit to reverse itself in a subsequent case.

Mr. SUTTON. That's true, although in a panel decision, a three-judge panel doesn't have that option.

Senator LEAHY. I agree.

Mr. SUTTON. So if the panel, no matter what the prior precedent, no matter how much a judge disagreed with it, they have to follow it. And then and only then if the—

Senator LEAHY. It goes up en banc.

Mr. SUTTON. —the losing party chooses to ask the entire court, however many members, to decide whether they should review that prior precedent. But, of course, that's not one judge's vote. That's a majority vote of the entire circuit.

Senator LEAHY. That is true.

Mr. SUTTON. And I guess the thing that Justice Thomas, I thought, was trying to do was determine what is the hardest thing in this area, neutral principles for not following a precedent. And to me that was admirable. But the risk, great risk when it comes to stare decisis is that it becomes result-oriented, that someone is simply deciding they personally didn't like something and so they vote to overrule. The very point of the article or this section of the article—this was the same article, I should point out, that was criticizing the Court for a ruling that heard disability rights. But in this part of the article, I was simply making the point that neutral principles for determining when stare decisis ought to apply and shouldn't apply are to be applauded. A good idea.

What you said actually there about Judge Thomas is, on the one hand, adherence to precedent is an ostensibly conservative notion. One consistent with protective reliance interests, in particular, and furthering judiciary restraint in general. But on the other hand, it cannot be that all liberal victories become insulated by stare decisis, while all conservative ones remain open to question, and I worry that what you are doing is suggesting a blueprint for overturning court decisions that maybe some of your friends do not like on civil rights, but here you are a strong adherent, which is a conservative principle to stare decisis or am I reading too much into your comments?

Mr. SUTTON. Well, I think perhaps a little bit, Senator. The point I think I was making was one I would assume everyone would agree with. It would not be a very coherent or fair principle of stare decisis that said we only stick with certain types of precedential rulings and not with others and simply making the point it is a conservative doctrine to stick with stare decisis, but it wouldn't be a legitimate application of stare decisis to not apply it neutrally to all precedents that, in the U.S. Supreme Court, has many cases

that have given instruction not just to the Justices, but to the lower courts as to when one would decide.

I mean, the *Buck* case that we talked about earlier, forced sterilization of the handicapped, I mean, if ever there were a case calling for an overruling, it would be that case, and there are principles to look at, whether the underlying reasoning makes sense.

Senator LEAHY. I understand, but we are also not going to have too many *Dred Scott* or *Plessy* v. *Ferguson* or cases like that. What we are going to find are some very specific cases following Congressional action within the last 5 years/10 years or a year. What I am trying to determine is your full sense of stare decisis.

Let me tell you why some of this comes up. Have you read the book or are aware of the book Judge Noonan wrote, Narrowing the Nation's Power?

Mr. SUTTON. I have read the book.

Senator LEAHY. It is a short, but really powerful, book. I picked it up 1 day flying back here from Vermont, and I started reading it on the plane, and I was still reading it at 2 o'clock in the morning. I felt like I was back in law school cramming, but I found it difficult to put down.

He was talking about a number of the reasons why States, in effect, do not enjoy the sovereign immunity that what I consider a very activist Supreme Court has been giving them in the last few years, and I was persuaded by the conclusion that the best reason that States should not enjoy immunity from suit is that such treatment is simply unjust and why should a State not pay its just debts?

Why should it not compensate victims for the harm it wrongly causes or why should States be subject to Federal patent law, and Federal copyright law, and Federal prohibitions of discrimination from unemployment, but not be accountable if it invades somebody else's patent or copyrights or accountable for discriminatory acts as an employer?

Has the Supreme Court, in these areas—copyright, patent law and others—have they been, as someone said, a very activist court are you are very comfortable with the decisions they have made?

Mr. SUTTON. Well, I can't say I read Judge Noonan's book as quickly as you did, but I—

Senator LEAHY. No, no, no. I read it until 2 o'clock in the morning. That doesn't mean that I would want to do my third-year law exam on the book, but these are some of the things that I got out of it.

Mr. SUTTON. No, I did read the book. I enjoyed the book. I think he makes a forceful case for that position, and I actually think that's the most difficult position the court has taken in all of these we'll call them "federalism" cases.

Senator LEAHY. Are you comfortable with that direction of the Supreme Court?

Mr. SUTTON. Well, the point I was going to make was I wasn't involved. That's the *Seminole Tribe* case that makes that ruling, that made that decision that the Eleventh Amendment does apply to States and that the only way Congress can alter that immunity is through Section 5 legislation or Spending Clause legislation.

So I was not involved in arguing *Seminole Tribe*. The cases I have done have been principally—

Senator LEAHY. Are you comfortable with the decisions the Supreme Court has followed?

Mr. SUTTON. Well, I'm comfortable that I would follow them as a Court of Appeals judge. Would I have done that as Court of Appeals judge had that case faced me? Would I have done that in any other position? I don't know. I've never been in the position where I had a chance to do what a good judge should do and ask yourself, okay, what does one side have to say about this? What precedent do they think supports them? What would another side say?

I guess the one part of the decisions that, you know, it's the one part that Judge Noonan doesn't deal with is his point that the doctrine that the king can do no wrong is a bad doctrine I think everyone would agree, and that's exactly why most democratically elected legislatures have allowed suits against States and the Federal Government.

The one point I would make, to be consistent with him, and he doesn't make it, is that if you're going to say the king can do no wrong, and there's no such thing as sovereign immunity because the term doesn't appear in the U.S. Constitution, it seems to me appropriate that that be true with the U.S. Government because it doesn't apply there either.

I think that's what the court has done. Now, maybe the U.S. Supreme Court is wrong in these cases, but I think they have seen some symmetry in money damages cases being brought against elected Congress, elected State—

Senator LEAHY. But you understand some of the concerns that many of us up here are suggesting, that the States are suddenly being protected from taking responsibility for discrimination, for example, that they or their agencies decide to do or violating other people's copyrights that they or their agencies do, that they are protected, and—I mean, I have to ask myself were not the Civil War amendments, including the Fourteenth, designed as an expansion of Federal power and actually an intrusion into State sovereignty?

Mr. SUTTON. Oh, absolutely, and that is exactly why the *City of Boerne* decision and these other cases allow individuals to bring money damages, actions, against States under the Fourteenth Amendment because of Section 5 legislation. So I agree entirely with that.

Senator LEAHY. Well, then, if that is the case, we have also a problem, and I realize you did not decide the cases, but here in the Congress we might have weeks or months of hearings—so they have the ADA, and RFRA, and ADEA bringing in evidence, not only in hearings here in Washington, but field hearings around the country, and isn't Congress in a better position to determine facts relevant to the exercise of its Section 5 authority after all of those hearings than the court is after an hour's hearing over in the marble hall across the street?

Mr. SUTTON. Absolutely, and the U.S. Supreme Court has said that you're in a better position to make those findings, you're better equipped to gather that kind of evidence. The thing that I think the U.S. Supreme Court has found to be tricky in this area, and

I think this is another area Judge Noonan criticized, and reasonable minds can differ on this point, is the question of is it complete deference or virtually complete deference to Congressional fact findings?

And I think the point the U.S. Supreme Court has made—and on this point I don't think there is disagreement—I think all nine Justices, not applying in a given case—but I think all nine Justices would agree that one can't decide that a Congressional fact finding is binding on the determination of the validity of Section 5 law because that would be to delegate the ultimate Marbury power to this branch of Government.

So I think that principle is a difficult one.

Senator LEAHY. On that on the general principle, I would agree with you, but I believe we also have a court that is totally ignoring the legislative record or saying that it is virtually irrelevant. That is what I mean by a very, very activist Supreme Court.

Mr. SUTTON. Well, the part that I certainly sympathize, if not empathize, with you on is these decisions are recent rulings. *City of Berne* is 1997 or so, and many of these laws that were reviewed were enacted before the *City of Berne* decision. Now, the *City of Berne* relies on many existing precedents, but it had not dealt with nonvoting rights, nondiscrimination cases—the court had not—and so I certainly understand your position, and I think that's what Judge Noonan was saying. It doesn't seem fair to suddenly judge these laws based on a standard that was developed after the law. I think you're right to be skeptical of that.

Senator LEAHY. If I look at Justice Breyer's dissent in *Garrett* things like that, I find it very compelling.

But my time is up, Mr. Chairman, and I will wait for my next round.

Chairman HATCH. Senator Schumer, we will turn to you.

Senator SCHUMER. Thank you, Mr. Chairman. I want to thank everybody. I know it has been a long day, but I think it is an important day as well. So I am going to ask a few more questions of Professor Sutton.

Now, a few years back, as you well know, the court, the Supreme Court invalidated part of the Violence Against Women Act, holding that Congress did not adequately establish that Violence Against Women had an impact on interstate commerce, and the decision was criticized by many as an incredible incident of judicial activism.

Justice Breyer, one of the four who dissented, wrote, "Since judges cannot change the world, it means that within the bounds of the rational, Congress, not the courts, must remain primarily responsible for striking the appropriate State–Federal balance."

That, to me, sounds right. It seems to me that is exactly what the Founders intended. "For better or worse, we are charged with making policy, and the judiciary's role, while just as important, is quite different. And yet it appears to me that with increasing frequency the courts have tried to become policymaking bodies, supplanting court-made judgments for ours, the unelected branch of government. The Founding Fathers set them up to interpret, not make, the laws for a reason, and it is not good for our government, and it is not good for our country."

Now, I want to read back to you a quote I read earlier, something you said regarding *Morrison*, which was the case in which the court invalidated part of the Violence Against Women Act. You said, "Unexamined deference to the VAWA fact-findings would have created another problem as well. It would give to any Congressional staffer with a laptop the ultimate *Marbury* power, to have the final say over what amounts to interstate commerce and, thus, to what represents the limits on Congress's Commerce Clause powers."

I have to tell you I am troubled by that statement, very troubled. Senator Biden and I can both tell you a little bit about the record Congress created on VAWA because he was the author in the Senate, and I pushed it in the House.

It is not as if we had our counsel sit down at their computers with a couple of beers and make up some Congressional findings. It is not as if we called our legislative directors and said, "Hey, could you make up some stuff about how when violent acts are perpetrated against women, it affects their ability to participate in interstate commerce."

You seem almost contemptuous of the legislative process in your comments. I think you can make a pretty compelling case, without actual studies and testimony, simply by using logic that violence against women has a real effect on interstate commerce, but that is not just what we did.

In passing many of the laws the court has struck down, but in particular in passing VAWA, because I was involved minute-to-minute, and you can imagine, when I read something like this and see the court saying we did not have a basis for making the law, how infuriating it is, because they were not there, we were. We took testimony from citizens, from academics, from State lawmakers, from State attorneys general and an array of other interested parties. It took us years to formulate it, to change it, to test it, to see where it was right and where it was wrong in the legislative process. We solicited input and received a green light from States on the question of whether there was a need for the national legislature to act.

The VAWA findings, as I presume you know, were voluminous. I am not sure what more the five Justices on the Supreme Court thought we needed to do.

So I wanted to ask you this: Why did you think that the findings underlying VAWA were not enough? What more did Congress need to do to make the record that violence against women has an impact on interstate commerce? And if the courts should not give unexamined deference to Congress's findings, what should the standard be?

Mr. SUTTON. Thank you, Senator. I do appreciate having a chance to talk about that case and that brief.

The first point I would make, which I hope you'll respect my making it, is it wasn't a brief on my behalf, that was a brief on behalf of a client, and I was doing my best to represent them. I can assure you I would have been happy to represent the other side in that case, and as a Court of Appeals judge, I would, of course, follow the U.S. Supreme Court, whether it's the *Morrison* case, as is, or the case is reversed.

Now, in terms of that statement, I agree with your criticism of it, in part, and then I disagree with it, in part. The part with which I agree is the line is too rhetorical. I don't think it actually did advance my client's cause, and I regret that. I do think it's a little too rhetorical for good advocacy.

The part with which I disagree, in terms of it being a reasonable position for the State in that case to argue was this underlying issue I was just discussing with Senator Leahy, and that's the issue of the court has said, and they said it again in *Morrison*, and they've said it forever, that of course there's a great presumption of constitutionality to Federal statutes and even more to the fact-finding capacity of this body when it comes to determining whether there's a social problem, whether that problem relates to interstate commerce, whether that problems relates to underlying constitutional violations or discrimination, and I think the court has correctly said that throughout.

I think the part I slightly disagree with the suggestion of your question, though, is that it is somehow wrong to suggest that there's some limit to that deference; that the deference, in other words, is complete.

I think of, in the *Morrison* case, Justice Souter's, he was the primary dissenter, and Justice Breyer joined this part of his dissent, I can't tell you the footnote number, but there is a footnote, where Chief Justice Rhenquist, who wrote the majority opinion, and Justice Souter are discussing this deference point. And Justice Souter concedes that the U.S. Supreme Court does have a role, all nine members are agreeing they do have a role in ensuring that the evidence that this body gathered did, in fact, concern interstate commerce.

And so I think that principle is not only within the mainstream, I'm not aware of a single Justice that has agreed with it. And then I think what you're stuck with in *Morrison* is a terribly ch*Allen*ging, excruciatingly difficult application of that principle—

Senator SCHUMER. Can I just—I want to let you finish. But did you disagree that the evidence we found was dispositive—you may disagree with it—but was directed at interstate commerce? We did not say count the number of trees in Montana and that justifies—I mean, it was all directed at interstate commerce. We made a case about interstate commerce.

Mr. SUTTON. I couldn't agree more that that's what you were trying to do. I agree.

Senator SCHUMER. Well, then continue. You just said that there are limits, but here there is no dispute that we addressed the issue of interstate commerce. So explain the ruling to me. Explain what you think here.

Did you disagree with how we did it? Did we not do it enough? Or is it really that somehow, and this would be different I think than the holding in *Morrison*, that you just did not think this affected interstate commerce, period, and it did not matter if we found that it did. Your view would supplant ours.

Mr. SUTTON. When writing this brief for this client, again, as an advocate, the issue for me wasn't agreeing or disagreeing. That wasn't why I was hired, to tell them—

Senator SCHUMER. I want to know what you think.

Mr. SUTTON. Well, that was not an exercise I went through, and I have no idea, Senator, what I would have done had that been a case, I had been a Court of Appeals judge on—

Senator SCHUMER. But do you think we tried to address interstate commerce when we made the findings in terms of VAWA or not?

Mr. SUTTON. Oh, of course, you were—I repeat what I said earlier. You were trying to reach—you were trying to establish a factual record that established that the terrible results of gender-related crimes, gender violence-related crimes, have impacts on interstate commerce, and nothing in that brief said Congress wasn't trying to do that.

What the brief made the appoint, again, on behalf of a client, was that the theory of the Congress's views that it was related to interstate commerce was a theory that would apply to the regulation of all matters—family law matters, all criminal law issues. And while someone could disagree with that, and in fact I'm sure reasonable minds would disagree with it, I can't imagine not making that argument as an advocate on behalf of that client. I mean, the client was entitled to the best representation—

Senator SCHUMER. Sir, in all due respect, aside from advocating for the client, which you are seeming, you know, you sort of—you are saying all of this work I did, and everyone, you know, it is almost like we are in 1984 here because your views on federalism are not just advocating for clients. You have become a leading—you write articles. The things you advocate, the pro bono cases are not in keeping with what your general activities and beliefs are, many of them. This is.

I want to read from an article you wrote, not advocating for a client, advocating for yourself. This is from the Review of Federalism and Separation of Powers Law, and let me read it because it says the exact, same thing, and these are your views, signed by you, and I think you are hiding behind the client thing, and we're not having a real debate on the issues here.

[Applause.]

Senator SCHUMER. Please, that is not fair, because everyone knows how you feel on this, and you know how you feel on this. That does not mean, as a judge, maybe you could not change, but these are not just views you advocated for a client. These are deeply held views by you, I would believe from looking at the whole record, and it would be awfully hard to disprove it.

Here is what you wrote: "The necessary stacking of one inference on top of another required to connect an interstate rape to an act of interstate commerce had no fathomable limit the court held. Once accepted, only the most unimaginative lawyer would lack the resources to contend that all manner of in-state activities will have the rippling affects that ultimately affect commerce. Such an approach would have a disfiguring effect on the constitutional balance between States and national Government, and would indeed make the Tenth Amendment but a truism, and would ultimately make irrelevant every other delegation of power to act under Article 1."

"Unexamined deference to the VAWA fact-findings would have created another problem as well." And here is the regretful phrase. "It would give to any Congressional staffer with a laptop the ulti-

mate *Marbury* power, to have a final say over what amounts to interstate commerce."

You may have said that in the brief, I do not know, but you said it separately under your own pen, under your own article. So you cannot say, well, you were saying that just on behalf of a client. Those, at one point, I do not know if they still are, are your views. Are they still?

Mr. SUTTON. Well, Senator, I do think a lawyer who is representing a client does have a prerogative to write an article—this actually was not an article about this case. It was an article about several decisions—saying that the court got it right when it ruled on behalf of your client. Obviously, the opposite was not true. I did not have the alternative to say publicly that the court got it wrong, after arguing on behalf of the State in that particular case. I mean, my ethical duty would have precluded that.

But I want to go back to what I was trying to say earlier. No one disagrees, on the Supreme Court anyway—

Senator SCHUMER. So, wait, can I just, again, because there is a lot of sophistry here, do you believe that unexamined deference to VAWA would give any Congressional staffer with a laptop the ultimate *Marbury* power? Do you, Jeffrey Sutton—

Mr. SUTTON. I have no—

Senator SCHUMER. —not as a lawyer representing someone, but as a professor, as somebody who has written articles, as somebody who is well-known to have a strong view on these issues?

Mr. SUTTON. Well, as I said earlier, I have no idea what I would do as a judge because I have no idea what a judge—

Senator SCHUMER. I did not ask that.

Mr. SUTTON. You asked what I believe, and I am telling you—

Senator SCHUMER. I did not ask what you would do as a judge. I asked what you, as Professor Jeffrey Sutton, not representing a client, do you believe this phrase or not? You know, I have written things that I have changed my mind later. So I am not—

Mr. SUTTON. I think it is very consistent with something I said earlier today—I am not sure you were here at the time—is, yes, I do believe in the principle of federalism in the sense that there is a principle that says, on a separation of powers basis, there are checks and balances, horizontally, among the Federal branches of Government, this body, the U.S. Supreme Court and the President, and vertically between the national Government and the States. That's a principle that's imbedded in the Constitution, and there are countless U.S. Supreme Court cases that recognize it.

And the statement you have just quoted makes the point, and this is what I perceive the court is trying to do, and maybe one could disagree that this is what they did, but is making the point that as long as that court has the *Marbury* power, and perhaps people could disagree with it, but as long as they have that power, they have not just the power, but a duty to review even the most exhaustive fact-findings of this body.

And the reason I am not comfortable telling you my view on whether those findings related to interstate commerce or not is I just am not familiar enough to say that. That's just not something I could tell you.

Senator SCHUMER. Could you say that again. I did not—you are not familiar enough with what?

Mr. SUTTON. With all of the issues in the case to make that point. I was hired by a client to make one side of the argument. I have never had the opportunity to sit back and say objectively, "What would you do, Jeff, with this particular issue?"

Senator SCHUMER. You wrote this in an article, professing a viewpoint, your viewpoint.

Mr. SUTTON. And I'm just telling you that that stands for the principle that the national Government, as broad as its powers are, they do have limitations. And I would say, but the broader point, Senator, is had I been asked by the other side in that case to argue that case, I can assure you I would have done it—

Senator SCHUMER. That is not what I am asking, and please do not keep bringing that up. We know that you are a very successful, persuasive advocate, and we know you have advocated in different positions. You wrote an article where you said the exact, same thing as in the brief. You first told me it is just because you were advocating for a client. Now, I have an article here where you wrote it again. You did not say, "As I argued in or as was argued in"; you professed the belief as yours, and now you are not giving me an answer, whether you believed it at the time and still believe it now.

Mr. SUTTON. But I do think I did answer it.

Senator SCHUMER. I did not ask you what you would do as a judge. I know, as a judge, you would have to examine both sides. I understand that. My knowledge is not as great as yours, in terms of juris prudence, but I know that much, but I also know that I feel very strongly that it is my obligation and your responsibility to let people know your views because they will influence how you are as a judge.

I know that there are a lot of people who say, "Oh, no, every judge will make the same decision, but then we would have all 9-nothing decisions, and every one of the circuits would be the same." And in terms of studies, those appointed by Democratic Presidents and those appointed by Republican Presidents would come out the same, not the same way, but in the same percentage way, and we all know that is not true.

If I have tried to do anything in the last year, it is to break through this shibboleth that philosophy does not matter. And by the way, if philosophy did not matter, the White House would send us a far broader panoply of judges, in terms of their views, than they do, without any question.

And so we should be discussing this. We should be discussing this issue honestly, not hiding behind representation, not hiding and saying, "Well, I do not know what I think." Most of us on this panel, I believe, know you know what you think on this, but you refuse to discuss it, even though you wrote an article saying it.

Mr. SUTTON. Well, again, first of all, Senator, I respect your views on this, and I have been paying attention to them the last couple of years, and I certainly understand the seriousness of the issue. I guess I feel I disagree with what you are saying, in terms of my refusing to answer the question about this article.

I did write the article. It was obviously a recycling of the brief, as proved by the fact it quotes the exact language of the brief. I do think there is a lawyer's prerogative—

Senator SCHUMER. You quoted it as your own, not representing a client.

Mr. SUTTON. Exactly, and I am making the point the lawyer has a prerogative, having argued a case, to say that the court got it right. That is exactly what I did, and I cannot tell you that that is the right decision. How could I possibly say that to you, given how much respect I have for the role of a Court of Appeals judge and what their job is when it comes to deciding what they would do with a given case?

And I think it would be just the opposite of what that judge's role is to say, "Oh, I could tell you what I would do with that kind of a case." I couldn't tell you that.

Senator SCHUMER. Could I ask you to do this within the week? Could I ask you to review the Congress's findings in VAWA and tell us whether you agree—you, personally, not representing anyone—whether you agree with the majority or minority's findings or someplace in between?

Chairman HATCH. Well, let me just interrupt. Look, I also was a prime sponsor in the Senate. It was the Biden–Hatch bill. Those materials are so voluminous. Now, come on, let us quit asking what he is going to do as a judge or what he believes. Let us talk in terms of—

Senator SCHUMER. Well, Mr. Chairman, in all due respect, of course, I want to know what he is going to do as a judge. So does everybody.

Chairman HATCH. Well, I agree with that.

Senator SCHUMER. It is not some kind of mathematical formula that every judge, just depending on their intellectual power—

Chairman HATCH. But you seem to want a foregone conclusion from him.

Senator SCHUMER. No, I do not. I want to get—

Chairman HATCH. And he is not willing to give that to you.

Senator SCHUMER. I want to know his views, not what his client's views are and not how persuasive an advocate he is.

Chairman HATCH. Oh, but he is making the point that his views are irrelevant when he becomes a judge.

Senator SCHUMER. And I do not think anyone really believes that or—

Chairman HATCH. That may be, but that is what—

[Applause.]

Senator SCHUMER. —or what he—

Chairman HATCH. Now, let us understand something. I am going to clear this room—

Senator SCHUMER. Please.

Chairman HATCH. Something that I have made possible for everybody if we continue to have these outbursts. First of all, it is not fair to anybody.

Senator SCHUMER. Right.

Chairman HATCH. It is not fair to the witness, it is not fair to the Senators up here. We are supposed to have some decorum here, and I expect this proceeding to be treated with dignity. Now, let

us just remember that. I respect all of you, but I want no more outbursts.

Senator SCHUMER. And I would say, in all due respect, it does not help my case when you applaud.

Chairman HATCH. That is right.

Senator LEAHY. If I might on that, Mr. Chairman. I have served as Chairman of numerous committees and subcommittees, as have you—

Chairman HATCH. Right.

Senator LEAHY. And we must have decorum. I know the feelings are very strong here. I agree with the feelings of many who have expressed it here, but we also have three witnesses who are answering questions under oath, Senators who are working to ask them, and the only way we are going to do this is through decorum. So I will support the Chairman in maintaining the decorum, and especially, as I have said before, I appreciate the Chairman taking the recommendation of myself and others to move down here so that everybody could be accommodated.

Senator SCHUMER. Mr. Chairman, you have been very generous in time, and I would still ask, if he decides he wishes to, to ask Professor Sutton to let me know his views on whether the majority was correct in finding that Congress, in its findings, did not really justify a reach into interstate commerce in *Morrison*. You do not have to do that now. I will ask you to do it in a written question.

Senator SCHUMER. Before I conclude, Mr. Chairman, I have some more questions, and I know it has been a long day, and I do want to thank you, Mr. Sutton. My questions are strong, but they are not personal, and they are heartfelt, as your answers are, and I respect that.

Mr. SUTTON. I believe that.

Senator SCHUMER. And I just, Mr. Chairman, I have other—I have to go to two other places. I have more questions of Mr. Sutton, and I have not even begun to ask questions of either Mr. Roberts or Judge Cook, and so I would simply ask that we at least come back at another point in time and be able to ask—I think it would not be fair to us if we did not get a chance to ask Mr. Roberts and Judge Cook questions at another time.

Chairman HATCH. Well, unfortunately, I cannot do that. In other words, this is the hearing. And, frankly, we will keep the record open for questions, and Senator Leahy has already asked that we make sure we get a transcript of the record so that more questions can be asked, but, no, we are going to finish the hearing today.

Now, I hope that we can accommodate you to come back and ask any further questions you would like—

Senator SCHUMER. I am going to appeal the ruling of the chair. I do not think it is fair. These questions are not frivolous—

Chairman HATCH. No, they are not.

Senator SCHUMER. And I would appeal the ruling of the chair and ask for a roll call vote that we finish with Professor Sutton today, as long as it takes, but we come back and ask both Mr. Roberts and Judge Cook questions next week.

Chairman HATCH. It is not fair to them. I am prepared to sit here as long as it takes, within reason. I mean, I think there is a point where you have to call an end to the hearing, but this is to-

day's hearing. These people have sat here patiently now—for how many hours, is it? Since 9:30 this morning—and we are going to finish this today.

And I notice that Mr. Sutton's three kids, they are the best kids I have ever seen in a—they have not raised a fuss here at all. I just want to compliment your wife and you for the wonderful children you have.

Senator SCHUMER. In all due—

Chairman HATCH. I want to be fair, but on the other hand, Mr. Roberts has been waiting 11 years.

Senator SCHUMER. In all due respect, Mr. Chairman—

Chairman HATCH. The other two have been waiting almost 2 years—

Senator SCHUMER. We are having—

Chairman HATCH. I think it is up to us to ask the questions here today, and I am providing the time to do so, and I am also providing an additional time to ask written questions, a reasonable time, but not an unreasonable time. We are going to finish this today.

Senator SCHUMER. In all due respect, we are having a third hearing on Pickering, we are having a second hearing on Owens. The ones who we defeated—

Chairman HATCH. I do not know what I am going to do on those.

Senator SCHUMER. —they get all the hearing time you want to change the record, but we do not have a full opportunity with Mr. Roberts, to the second most important court in the land, with Judge Cook, in terms of a Circuit, the Sixth Circuit—

Chairman HATCH. But you do.

Senator SCHUMER. —which has been kept open for a long period of time.

Chairman HATCH. I am not prepared to leave.

Senator SCHUMER. It is not fair—well, it is not fair—

Chairman HATCH. When can you come back, Senator, for your further questions. I will be happy to be here.

Senator SCHUMER. I can come back later this evening, but I do not know if my colleagues can, and I have never seen this kind of thing happen. We have never had three Court of Appeals—

Chairman HATCH. Well, it is going to happen here.

Senator SCHUMER. —judges on one panel. We knew that Professor Sutton, in particular, would take a great deal of questioning—

Chairman HATCH. And he has.

Senator SCHUMER. And I do not think it is right. I do not think it is fair, and I think if the public—

Chairman HATCH. Senator, if you need more time, take it right now. I will be glad to give it to you, but the point is I am not going to mistreat these people either. I mean, my gosh, they have been waiting for 2 years, Mr. Roberts 11 years. We have made them available. They have been here since 9:30 this morning, and I think it is only fair that if you have questions, you ask them.

Senator SCHUMER. Okay.

Chairman HATCH. Now, you might have a schedule that is different. I cannot help that. I mean, there are a lot of things I have

had to forego today and some I have just had to do, but the fact of the matter is that that is what we have these hearings for.

Senator SCHUMER. I appeal the ruling of the chair and ask for a vote.

Chairman HATCH. Well, I reject the appeal.

Senator SCHUMER. I ask for a vote.

Chairman HATCH. Well, this is not a formal Committee markup. You can bring it up tomorrow in a vote, and I will be happy to have you appeal the ruling of the chair, and we will vote on it tomorrow.

Senator SCHUMER. I thought that, Mr. Chairman, when the chair rules this way, you can appeal—

Chairman HATCH. Tell me what rule you are talking about.

Senator SCHUMER. —the ruling of a chair at a hearing, as well as at a markup.

Chairman HATCH. Not that I know of.

Senator SCHUMER. Well, could we ask counsel to rule on that? Parliamentarian?

Chairman HATCH. We will check with the parliamentarian, but I will defer that ruling, in any event, as chairman, until tomorrow, and we will have the vote tomorrow, and if you win, I guess we will have to come back. But the fact of to matter is—

Senator SCHUMER. So, in other words, if you want to ask questions, you can stay all night, but you can defer a vote of people who do not want to ask questions?

Chairman HATCH. No, Senator Schumer. There is a reasonable time that is given for hearings.

Senator SCHUMER. This is just not right.

Chairman HATCH. I am prepared to sit here. I will give you more time right now. I will give you more time, within a reasonable time, after right now, but this is the time to ask your questions, and I would like you to do it. If you do not want to, that is your privilege. If you do not want to ask oral questions, then submit written questions, and we will have them answer them within reason.

But these folks have been under the impression that this is their hearing, and it is, and it has been a long, lengthy one, and I expect it is going to still be fairly lengthy, but I will be happy to give you more time right now, Senator Schumer. I have no problem with that.

Senator SCHUMER. Mr. Chairman, this is one of the reasons that—

Chairman HATCH. And I have already given you 21 minutes.

Senator SCHUMER. You have been generous each time I have been here, but let me say this—

Chairman HATCH. Well, and I will continue to be.

Senator SCHUMER. Let me say this. We do not even have rules in this Committee yet. We have not passed rules of how the Committee works. We are already rushing to do three Court of Appeals justices at once, and I just do not think it is the fair way to run this committee.

Chairman HATCH. Well, I apologize to you because I do think it is a fair way, and I think it has to be done, and I do not think we can keep delaying these people and putting it off. They are making themselves available. I am giving you more time if you need it.

Senator SCHUMER. Mr. Chairman, in all due respect, this is a lifetime appointment, a very important court—

Chairman HATCH. Well, it does not have to be a lifetime hearing, I will tell you that.

Senator SCHUMER. And if people, and if nominees are not willing to wait an extra day or two to be questioned openly and fairly, I wonder about that.

Chairman HATCH. I am not willing to put them through that. We are here, let us have the hearing, and let us finish.

Senator LEAHY. Mr. Chairman?

Chairman HATCH. Yes, Senator Leahy?

Senator LEAHY. Several of us have spoken prior to this hearing of concern of having three controversial Court of Appeals judges on the same day, rather than having day-by-day or however you might want to do it.

You have spoken of Mr. Roberts being waiting for 11 years. Looking at Mr. Roberts, he must have been about 20 years old at the time he was first nominated, but you also recall that Mr. Roberts was with a number of people who were nominated within the so-called Strom Thurmond rule, which means that most nominations, after a certain period of time in a presidential election year, are not heard, unless it is an extraordinary circumstance.

And you also recall, and I was here at the time, that there was no really great push by the White House or other Republican leadership to make an exception for Mr. Roberts, partly because they were convinced that President Bush was going to get reelected easily, and they would bring him up the following January.

I see Mr. Roberts smiling. He probably heard some of that at the time. I am not putting you on the spot. But just so everybody understands that the Strom Thurmond rule, which has been followed in this for the nearly 30 years I have been here, is that the President, Republican or Democrat, except for extraordinary circumstances, and we have made some exceptions, does not get a nominee through after about July or so of a presidential election year.

Senator Biden did put through a number for President Bush that year, but they were the ones that the White House really pushed very hard for. Professor Sutton, Mr. Roberts and Judge Cook were first nominated while you were Chairman of this Committee and were there for a couple months before the control of the Senate, and nobody brought them up at that time.

So this is not a case, I mean, I just want to get all of the facts on the table, another day or so to be able to complete an adequate hearing and have an adequate hearing record for the Senate does not do the nominees bad nor does it hurt the Senate.

Chairman HATCH. Well, I have been prepared to finish the hearing today. I am prepared to do it. I am prepared to give you more time, Senator Schumer, and I would be glad to do it out of order or any way you would like to have it, but we are going to finish the hearing tonight and go from there, and I think it is only fair to the nominees. I think it is fair to Senators. We have to adjust our schedules to be able to be here and participate. It certainly would be fair to the chairman, too, who has had a whole raft of

things I have had to ignore all day long, some of them very, very important as well.

Senator LEAHY. Even I have had important things.

Chairman HATCH. And even the Ranking Member has had to do that. So I apologize. I would hate to have you feel badly about it, but that is the way it is going to be.

Senator Feingold?

Senator FEINGOLD. Thank you, Mr. Chairman.

Obviously, I have been following this discussion, and I just have to add, before I start my round, that this highlights exactly the problem that we pointed out at the outset of the hearing. This is not, 1 day, long enough to question three controversial nominees, and obviously we should not forget that we have three District Court nominees on the agenda.

Chairman HATCH. Senator, would you yield for just a second?

I feel badly about this, but I have asked for a little bit of leeway by my colleagues because I think it is time that we bite the bullet and do what is right with regard to at least these three nominees. I have been listening to my colleagues all day. I do not think it has been an unfair thing. I have certainly made myself available. We have certainly allowed all of the questions. We are prepared to sit for longer, within a reasonable time, but I do think there has to be some consideration to the people who are nominated, too.

It has now been 630 days since they were nominated, and in the case of Mr. Roberts, 11 years, and three times. Now, I think there comes a time when we have got to put partisan politics aside, and I have not seen a glove laid on these people all day long, for all of the desire to question them. And I have seen tremendous answers, and tremendous abilities displayed here, and there comes a time when we have got to say, hey, look, it is the end of the hearing.

Senator FEINGOLD. Mr. Chairman—

Chairman HATCH. I think today is the day, and I have made that clear from the beginning. I have asked for some help from the minority, I have asked for some leeway here, and I hope that you will give it. If you do not, we are going to end this today.

Senator FEINGOLD. Mr. Chairman, I regret—

Senator SESSIONS. Mr. Chairman, I would like—

Senator FEINGOLD. Mr. Chairman, I believe I have the floor.

Senator SESSIONS. Mr. Chairman, I would like to raise a question. I thought it might have been my time next. Senator Schumer had 20 minutes. I kept my time within my limit. Others, on the other side, have gone over. I think you have bent over backwards beyond belief to be fair, but if Senator Feingold is ready to go now, I will wait. But I just think that you have been as fair as can possibly be, and if you want to let the other side have their say right now, I am willing to yield.

Chairman HATCH. Our side has been willing to defer so that the Democrats' side can ask the questions that they want to. I want to be fair. Everybody knows that I am, and, frankly, that is why we have a hearing. Usually, these hearings go for about two hours, and we have been here since 9:30. It is now 5:30 almost.

Go ahead, Senator. I am sorry to interrupt you.

Senator FEINGOLD. Mr. Chairman, I regret the fact that these three nominees have to sit all day through this, but, you know, frankly, the problem is, and I have been on this Committee only for 8 years—that does not compare to you, Mr. Chairman—but I have never seen this done. I have never seen, and the idea that the hearings on Court of Appeals judges are only two hours? That is not the case. That is not what I have witnessed here.

The serious hearings about very important appointments like this take much longer. They usually take all day, and frankly Mr. Sutton should have been the one for all day today, and I do not think people have been dilatory. These questions are reasonable—

Chairman HATCH. If the Senator—

Senator FEINGOLD. And I will just say one more time, you know, I do have tremendous respect for you. I think you are very—

Chairman HATCH. I appreciate that.

Senator FEINGOLD. —but this procedure today really does trouble me.

Chairman HATCH. If the Senator would yield, I remember a time—and now I have been on this committee, this is my 27th year—I remember a time when Senator Biden had three on 1 day, and I do not remember any griping about it because we want to fill these benches. These are emergency positions. And, frankly, I am willing to be here, and I think it is incumbent upon our colleagues to be here and ask their questions, and like I say, my side is deferring so that you can.

Senator FEINGOLD. Mr. Chairman, I—

Chairman HATCH. Now, look, let me say one other thing. I really respect you. You have always been honest. You have always been straightforward. You are very intelligent. You are a great lawyer, and I respect your feelings, but respect mine, too. I am just trying to do my job—

Senator FEINGOLD. I do, and I hope—

Chairman HATCH. —as a chairman. I am trying to fill these courts, and I have not seen anything wrong here today. These three nominees have been excellent. But in any event, you have to make up your own mind, but there has to be a time when you bring these things to a conclusion. Today is the day we bring this hearing to conclusion, and everybody knew that before we started.

And if people just want to ask questions of Mr. Sutton, although we have had questions of all three, then that is your privilege, but my gosh, I am providing means whereby you can ask questions of others. Please start his clock over because I have used his time.

Senator LEAHY. Mr. Chairman, could I make a suggestion before you start the clock?

Chairman HATCH. Yes.

Senator LEAHY. Usually, you and I have been able to find a rational way out of such impasses. Could I suggest that we, and with the members who are here, could we recess for about 5 minutes and we talk privately? You lose nothing by that, nor do we.

Chairman HATCH. No, that is fine.

Senator LEAHY. It has been a long day. It is going to be a long evening. Why do we not just talk privately out of the hearing of the room. I mean, you are the chairman, it is whatever you want,

but I would suggest we do that. You and I have almost always been able to work things out.

Chairman HATCH. I think that is reasonable request. We will recess for 5 minutes, and then we will resume, but we are going to finish this today.

[Recess from 5:10 p.m. to 5:27 p.m.]

Chairman HATCH. We will turn to Senator Feingold.

Senator FEINGOLD. Mr. Chairman, again, I very much enjoy working with you—

Chairman HATCH. And vice versa.

Senator FEINGOLD. —but the record does need to reflect my concern, and the concern of many members, that this process today really was not a fair process, although you are generally very fair in your leadership of this committee.

I just want the record to reflect that many of us believe that these nominees are controversial, and to be sure that there is not a precedent for the future, based on the claim that Senator Biden had done this in the past, the fact is when Senator Biden had there Court of Appeals nominees at the same hearing, they were as a courtesy to the previous Bush administration, and they were noncontroversial. So let the record reflect that this should not be a precedent for future attempts to have three significant, controversial Court of Appeals nominations—

Chairman HATCH. Would the Senator yield?

Senator FEINGOLD. —put forward at the same time. I think it is a very bad process and precedent for this committee.

Chairman HATCH. Would the Senator yield on that point? I agree that it is extraordinary to have three Circuit Court nominees. It has been done before. Senator Biden did it, and I think it is not a precedent and we—we should avoid. But it has caused a great deal of concern among my colleagues, and I will certainly try to be more considerate in the future, but I would like to finish this tonight if we can, and I believe we can. In fact, we are going to.

I appreciate my fair colleague. You have always been fair. You have always been decent to me, and I think you are being decent again. We, respectfully, disagree on this, but I will try to take your feelings very deeply into consideration in the future.

Senator FEINGOLD. Thank you, Mr. Chairman.

I will go to Mr. Sutton again.

In response to my earlier question about the *Swank* case, you told me that you had not really made a direct argument that the migratory bird rule violated the Constitution—

Mr. SUTTON. No, I don't think I did. I said we made a constitutional avoidance argument and then raised the constitutional issues that would be implicated if the court couldn't deal with this on statutory construction grounds.

Senator FEINGOLD. Right. You said you had only made an argument you called constitutional avoidance, and we have actually looked up the amicus brief here filed on behalf of the State of Alabama. The entire second half of the brief, six pages out of a total of ten pages of argument, is an argument with the following heading: "The Regulation Exceeds Congress's Commerce Clause Powers." In other words, you made a constitutional argument, not sim-

ply a statutory interpretation argument based on the doctrine of constitutional avoidance; is that correct?

Mr. SUTTON. It is correct, Senator, but maybe my earlier testimony was misapprehended or maybe I misspoke. I am sure the odds are better that I misspoke.

One can't make a constitutional avoidance argument without making a constitutional argument. I mean, in other words, if one said to a court that you want to construe a statute in this way to avoid a constitutional issue, I can't imagine a lawyer not then arguing the constitutional issue—

Senator FEINGOLD. I do not think that is the point that I am trying to raise. I appreciate that.

I do understand that yours was the only amicus brief that took this position, so I want to get directly to the constitutional issue. I wanted to give you an opportunity to supplement your answer to my earlier question, and so let me add the following direct question before you respond.

Do you personally believe the assertion in the State of Alabama's amicus brief that the migratory bird rule exceeds Congress's Commerce Clause power? Do you personally believe it does?

Mr. SUTTON. I have no idea. I, obviously, was not involved in the underlying litigation that generated the *Swank* case that ultimately went to the U.S. Supreme Court. I wasn't involved in it in the lower courts, and I simply had a client who was interested in making that argument, and I helped them make that argument.

I was never—I can't imagine working for a client and assuming my job was to tell them, first, what the right answer was and then acting as their lawyer. The way I saw my job, and still see my job as a lawyer, is if a client asks me to do something, find all reasonable arguments that can be made to support their position. I have done that, you should know this is not the only environmental case.

I have helped environmental cases on the other side of the issue. There's a case that came out of Ohio, the *Sierra Club* case, which dealt with logging in the timberlands, and while I didn't argue the case for the lawyer—I wasn't even a lawyer in the case—I did help the lawyer who argued on behalf of the *Sierra Club* in that case in getting ready for the U.S. Supreme Court and participated in the moot court with him.

So this is another situation where I have been on both sides of these issues as a lawyer. It wasn't a question of personal views. I didn't decide, in the *Sierra Club* case, this is something I'm going to do because I have personal views. This is something I'm going to do to help someone arguing a case, and likewise with the *Swank* case.

Senator FEINGOLD. Let me move on to a different area then.

You filed an amicus brief on behalf of Los Angeles County and the California State Association of Counties in the *Buck*hannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources. Do you recall that case?

Mr. SUTTON. I do.

Senator FEINGOLD. As you will recall, the *Buck*hannon facility sued the State, alleging a violation of the Fair Housing Amendments Act and the Americans with Disabilities Act after being

forced to close for not meeting a self-preservation requirement of its residents as defined in State law.

In response to the suit, but before the court ruled, the State legislature eliminated the self-preservation requirement. That gave *Buck*hannon all of the relief it sought.

The District Court dismissed the case as moot, but then ruled that *Buck*hannon could not be considered a prevailing party in the case, and therefore could not recover its attorney's fees.

The Fourth Circuit, contrary to the rulings of every other circuit that had addressed the issue, affirmed.

The Supreme Court ruled 5 to 4 that "under the various attorneys' fees statutes plaintiffs may recover attorneys' fees from defendants only if they have been awarded relief by a court, not if they prevailed through a voluntary change in the defendant's behavior or a private settlement."

So this is a narrow interpretation of a definition of prevailing party, which I think has potentially disastrous implications for people whose civil rights have been violated, but who cannot afford to hire a lawyer.

In calculating whether to take a case, an attorney for a plaintiff will have to consider not only the chances of losing, but the chances of winning too easily. Even if a plaintiff secures a complete victory by getting a defendant to admit to wrongdoing or prompting a change in a statute, the attorney who labored for years to bring about such a victory would not be paid at all.

In the amicus you filed in *Buckhannon*, you argued, in your words, that "'as a matter of mundane litigation realities,' a narrow definition of prevailing party would prevent parties from commencing 'time-consuming' satellite litigation over fee awards."

I want you to know that I agree that litigation over fees is something to be minimized, but I would argue that a much more important interest to be furthered is the ability of aggrieved parties to find attorneys who will take their cases.

The court's interpretation of prevailing party potentially prevents people from seeking protection guaranteed to them under existing civil rights laws, and the mundane litigation realities might actually point in the other direction.

The decision could, in fact, force attorneys to drag out lawsuits, to keep going to make sure that they get a judicial order, rather than accepting a nonjudicial settlement that give their clients everything they seek.

So let me ask you do you believe that a person who has a legitimate claim of civil rights violation should be able to seek redress in court?

Mr. SUTTON. Of course.

Senator FEINGOLD. Do you believe that people with civil rights claims should have the ability to secure adequate counsel to pursue those claims?

Mr. SUTTON. Of course.

Senator FEINGOLD. Is that not why Congress enacted statutes giving successful plaintiffs the rights to collect attorneys' fees?

Mr. SUTTON. I think that is, I think it is 42 U.S.C. Section 1988, and I think that is the purpose of it. I agree with you.

Senator FEINGOLD. Then, how will a person with a legitimate claim be able to get adequate counsel in a case that could take months or even years to resolve, when defendants can avoid the possibility of paying attorneys' fees by simply offering the plaintiff everything they want before trial?

In other words, explain to me how the *Buckhannon* decision, which you argued for in your amicus brief, can be squared with a desire to encourage the enforcement of the civil rights laws and other statutes in which Congress has made a judgment that attorneys' fees should be available?

Mr. SUTTON. Yes. Well, first of all, I think this is an important issue, and I would like to think the brief I wrote on behalf of a client, Los Angeles County is a longstanding Jones Day client. They obviously get sued a lot, so that's why we wrote the brief on their behalf.

And, you know, as a board member of the Equal Justice Foundation, whose, you know, 90 percent of their revenue comes from attorneys' fees, I can tell you that I am sensitive to this issue and hope that—I think the legislation you have proposed to correct the *Buckhannon* decision is correct—is successful because it will certainly help EJF when it comes to raising funds.

The issue in that case was a statutory one of whether the term "prevailing," and prevailing was the key word, and the difficulty which led the Fourth Circuit to rule one way and the other Courts of Appeal to rule the other way, was whether someone had prevailed when, in fact, there wasn't a court judgment indicating this, but simply a change in conduct.

I fully appreciate your point, which is, my lord, if that's the rule, then a litigant, a recalcitrant State or city, engaging in civil rights violations, can simply stop their conduct, after litigating for many years, change their rule, and now have the case dismissed, but not owe any attorneys' fee awards. Precisely because I appreciated the very point you raised, at the end of the brief that we offer for Los Angeles County, we dealt with this issue, and the way—

Senator FEINGOLD. Well, then why in your *Buckhannon* brief you asserted that "precedent confirms" your interpretation of the attorneys' fees statute, yet you failed to bring to the attention of the court the decisions of nine Court of Appeals that contradicted your position?

Mr. SUTTON. Well—

Senator FEINGOLD. Did you not have an obligation to make the court aware of these decisions, especially in light of the fact that you have indicated that you believe that the law should allow a litigant to be able to settle a case at an appropriate time and still get attorneys' fees?

Mr. SUTTON. It's very rare in U.S. Supreme Court briefs that I have relied on Court of Appeals' decisions, in general, so I would say that's just typical of me and cuts across cases and issues.

But the point I wanted to address, which you have raised, and I think it's a critical one, is what about the recalcitrant city or State that suddenly stops their conduct? Are they now scott free from liability, attorney fee liability, and I think your concern is a valid one.

And we indicated in the brief, we raised this very point—I think it is in the last couple pages of the brief—and said that's not necessarily true. We made the point, a concession for a county which is sued all of the time, that if there's a case—gosh, it's a Justice Ginsburg decision, it may be Laidlaw. We cite in the back of our brief. I think it's—that makes the point that just because a litigant, a city or State, stops their conduct, that doesn't necessarily moot the case because of the possibility they may do it again or, as you're suggesting, the possibility they're just trying to hide from attorney fees.

So I'd like to think—I obviously had a client's perspective to represent. I did my best to represent it, but I felt like we were actually trying to address that very important consideration in the brief, and I do think it was within the mainstream to argue the point, on behalf of them as a client, and as you well know, this ambiguity can quickly be clarified by legislation.

Senator FEINGOLD. I thank you, Mr. Sutton. I thank you, Mr. Chairman.

Chairman HATCH. Are you through? Do you need more time, Senator Feingold?

Senator FEINGOLD. No.

Chairman HATCH. Thank you.

Senator Leahy?

Senator LEAHY. Professor Sutton, I would suggest, I would urge you to go back and reread Judge Noonan's book. I have no question that with your mental ability, you probably can recite most of it verbatim, but I think that, again, I cannot tell you how much many of us are concerned that we have a very activist Supreme Court that has determined that the Congress is basically irrelevant, and our feelings are basically irrelevant.

And you are going to have a number of cases that are going to come to you on the first impression if you are confirmed to this position. Well, obviously, I cannot tell you how one would rule, but I would like you to at least consider that.

Mr. SUTTON. Can I respond to that?

Senator LEAHY. Oh, of course.

Mr. SUTTON. I can assure you, over the last 2 years, I have thought a lot about the very perspective all of you have. This is obviously not a Democratic–Republican issue, this is an institutional issue. And, you know, when one is criticized, as I have been, for advocating those cases, I really have thought about the other perspective, and I do think there are very reasoned criticisms of those decisions, but I do think they're difficult decisions. They always are when the court is asked to referee boundary disputes between branches of Government.

So I can assure you that if I were fortunate enough to be confirmed, I really would consider the perspective this body has when it comes to passing laws in the first instance, when it comes to gathering evidence, establishing whether there is a policy issue to be addressed or when it comes to determining whether there are underlying constitutional issues that need to be remedied.

Senator LEAHY. Thank you, Mr. Chairman. At this time I have other questions, but Senator Durbin has been in and out of the In-

telligence Committee and I would rather—I am going to be here, anyway, and I am just wondering if Senator Durbin—

Chairman HATCH. We will be happy to turn to Senator Durbin. Go ahead.

Senator DURBIN. No.

Senator LEAHY. Then I guess I will go.

Justice Cook, let me talk to you—I don't want you to feel that you have been neglected here and that Professor Sutton has been hogging all the time, but—

Justice COOK. I was feeling that.

Senator LEAHY. What?

Justice COOK. Oh, yes, I was feeling that.

Senator LEAHY. Yes, I know you would much rather we were asking you the questions, but I understand you are the most frequent dissenter on the Supreme Court of Ohio. You had well over 300 dissents in your 8 years on the court. I am told you once joked that the female Justices on your court had three names; Alice Robey Resnick, Evelyn Lundberg Stratton, and Deborah Cook Dissenting.

Should I have a concern about your judicial temperament and inability to reach consensus if you have that many dissents? And I ask the question not in a frivolous fashion, because the Sixth Circuit is a fairly polarized court and, if anything, we would like to see the Sixth Circuit help the people within its circuit to reach more consensus opinions and not polarized. Should I be worrying about your judicial temperament?

Justice COOK. I should think not, Senator. Dissenting is really—as I said before in answer to some other question, it really is a learning process. Many times I am somehow designated to write the dissent for other members of the court and, therefore, my numbers look rather high. But dissents are offered as a—for the benefit of the other side who offered the first opinion. It's a method to reach consensus sometimes, and in our court it's actually a matter of logistics. The members of the court live in various parts of the State, so consensus is the first objective and, unfortunately, it's not always reached. But certainly that's the first goal. But I don't really think you can take anything from the fact that I write dissents other than I am attempting to do a precise reading of the law.

Senator LEAHY. Well, you may think that a Democratic Senator would take comfort in the fact that often you have dissented. The Republican majority in your own court, though, has been quite critical of your view of the law. In *Bunger* v. *Lawson*, the majority called your interpretation of the law "nonsensical." They said that it leads to untenable positions, unfair to employees. They said your opinion would be "an absurd interpretation that seems borrowed from the pages of *Catch–22*." In *Russell* v. *Industrial Commission of Ohio*, they stated your dissent lacked statutory support for its position, that you were unable to cite even the slightest dictum from any case to support your view, that your argument, which has not been raised by the commission, the bureau, or the claimant's employer in any of their supporting amici is entirely without merit. In *Ohio Academy* v. *Sheward*, the majority held that a tort reform law was unconstitutional because it severely limited an injured party's ability to recover from wrongdoers, no matter the type of injury. And then they responded to a dissent you joined, stating that,

"The dissenting judges mischaracterized our findings, misconstrued prior decisions of this court, selectively extrapolated portions of the legislation at issue, while ignoring its overall tenor and content, disassociated themselves from a decision in which one of them concurred, suggested we had created a new theory of standing, minimizing the magnitude and scope of the legislation and the importance of separation of powers, accused of us language unbecoming a judicial opinion, and questioned our faith in our courts of record, all in an obvious effort to distort our opinion into a form susceptible to competent criticism and protect this legislation from any timely, meaningful, and inclusive judicial review."

Now, I don't know about Ohio, but in Vermont, that would go beyond understated New England criticism. That is pretty strong criticism. And I read this because I worry, one, as I said, a polarized Sixth Circuit, whether you would be not one to help bring people together but one to further polarize it; that you overwhelmingly favor employers in complaints brought by workers—in fact, I haven't found a case where you dissented in favor of an injured employee in a claim brought against his or her employer.

So I raise this, Justice Cook. These are all things you have heard. I mean, you have read the opinions. Please help us here. Why such strong words by the majority, many of them Republicans, for your dissents?

Justice COOK. The court is nominally 5–2 Republican, but as you will note from some of the newspaper stories, there are a number of Republicans on the court who are labeled—as everyone is labeled, they are labeled as liberal, and I am so-called conservative. So I am not sure we can draw too much from a conservative—

Senator LEAHY. Is this a liberal vendetta against you?

Justice COOK. No, not at all. I think it was—you know, I'm sorry for the tone. It does appear to be a tone a little beyond what we expect. But it was a reasonable difference. In *Sheward*, in fact, that's the case where you find that language. I'm not—I think it might be stirred somewhat by the fact that this case was very unusual. In fact, it was exceedingly unprecedented and really an untenable procedural posture by which the case came to us. It wasn't an individual bringing a case to right a wrong or to achieve a remedy. In fact, it was an organization, the Ohio Academy of Trial Lawyers, so that's where the standing issue came in. That's not typically what we see. And beyond that, the case was brought as an effort to get a writ, to ask the court to issue a writ to tell the judges in the State to not enforce this newly enacted legislation on tort reform. And my dissent, frankly, was only on the issues of standing and the procedural posture that simply wasn't tenable. And, nevertheless, the court did issue writs, a writ, even though the standard for issuing a writ couldn't possibly have been met in this case. So I'm—

Senator LEAHY. But they were—

Justice COOK. I can't really defend the language in the majority.

Senator LEAHY. But they were pretty strong in more than one case. I mean, they were pretty strong in their criticism of your dissent, and when you have had well over 300 dissents in 8 years, you know, I assume that you can pick and choose where they are critical. But in the areas that I have read, the criticism seems to go

way beyond the collegiality one normally sees in a court. And the numbers of your dissent, of course, go way beyond anybody else in the court.

It is one thing to joke that your name is Deborah Cook Dissenting, but, again, in a polarized Sixth Circuit it creates a problem to me. I am concerned that as an appellate judge you have repeatedly voted to overturn a jury's determination that the employees before them were victims of discrimination.

Now, I have tried an awful lot of jury cases. I know all the effort that goes into getting a jury verdict, and I know the courts are very reluctant to overturn a jury verdict. They have only got a cold record. They haven't seen the witnesses. They haven't heard them. But I think your dissent in *Glenner* v. *St. Cobain*, that is troubling. Four women sued their employer for gender discrimination. They received a jury verdict. It was overturned by the appellate court. And then a majority of Supreme Court of Ohio ruled that the appellate court erred in overturning the jury verdict. None of the proper legal standards—they could not uphold the appellate court's unless reasonable minds could come to only one conclusion, the employer was not liable.

Justice COOK. I think that's the case—if I may, Senator.

Senator LEAHY. Sure.

Justice COOK. I believe that's the case where the Court of Appeals initially ruled that the verdict should be overturned on insufficiency and, in fact, wrote a 97-page, very detailed opinion. And when the case reached our court, it actually was a very short decision that said there was some evidence. And it seemed to me in my—and I voiced this in my dissent—that the court had really not applied any analytical rigor nor applied the standards set forth in Civil Rule 50 for a directed verdict. And that was the basis for that dissent.

And I don't—I think collegiality is very important on the court. I have had a very good reputation for improving the collegiality at the Court of Appeals where I formerly served.

Senator LEAHY. But collegiality aside, Justice Cook, it seems that time and time again if somebody has sued an employer and have gotten a jury verdict, you seem very comfortable in overturning that jury verdict.

Now, I have seen runaway juries where the appellate court should overturn it, but it is rare. It is extraordinarily rare. You seem to find them a lot. But I think in most States that is pretty rare that a jury that was the finder of fact gets overturned.

Justice COOK. I don't know—if we went through all the cases, I don't know that we'd find that it is done a lot. I know a case that's been cited is the *Burns* case. But that was a majority opinion that overturned that verdict in an employment case.

Senator LEAHY. The *Reeves* case, the *Burns* case, the *St. Cobain* case.

Justice COOK. I can tell you, Senator, I've been on the receiving end of that, and I know it's no fun. I actually made some law in Ohio on discrimination representing a woman in an age discrimination case, Jean Barker, and it is the Jean Barker case that is cited as authority in the *Burns* decision. I, as I say, didn't write that decision, but Jean Barker had—we had a verdict at the trial level,

and it was overturned by the Supreme Court. So it's precedent that pops up in some of these cases.

So I certainly don't take it lightly, and verdicts are not to be overturned unless there is—in some of these cases, it's insufficiency of the evidence. We all know the standards where a verdict can be overturned, and it's not done without the right facts or the absence of facts that warrant reversing a decision. But in a lot of these cases, I think you'll find that if I were the dissenter, I wasn't writing just for myself, and, moreover, quite often you'll find that it's the Court of Appeals, a unanimous Court of Appeals that felt likewise. So I'm not sure I can easily be said to have missed the boat inasmuch as sometimes at least three other judges and perhaps as many as five agreed—six agreed.

Senator LEAHY. Justice Cook, my time is up, and we will come back, but I did not want you to feel neglected and feel that—

Justice COOK. I appreciate that.

Senator LEAHY. —Professor Sutton was hogging all the questions.

Chairman HATCH. How considerate of you, Senator.

Senator LEAHY. I try.

Chairman HATCH. Senator De Wine for just a few minutes.

Senator DEWINE. Justice Cook, Senator Leahy has indicated that you seem to always rule in favor of the employer. I have got at least 23 cases here where you have ruled in favor of the employee in employment cases: *Ahern* v. *Technical Construction, Browder* v. *Morris Construction, Boyd* v. *Chippewa Local School District, Connolly* v. *Brown, Douglas* v. *Administration*—I will go on and on. I would submit these for the record, Mr. Chairman.

Chairman HATCH. Without objection, we will put those in the record.

Senator DEWINE. Justice Cook, I want to discuss with you for a moment Senator Leahy's comments about you being labeled "a dissenter," and you certainly have dissented in a number of cases. But let's first start with the cases that—the five cases that were appealed from the Ohio Supreme Court to the United States Supreme Court. One of the cases was simply a unanimous Ohio Supreme Court decision which was, in fact, affirmed by the U.S. Supreme Court. But in the other four cases, you disagreed with the majority of your colleagues. You dissented. You dissented. Your colleagues were on the other side.

In each one of those cases, the United States Supreme Court said you, Justice Cook, were right and your colleagues were wrong. Is that correct?

Justice COOK. Yes, it is.

Senator DEWINE. So being a dissenter in that case may not have been right, but at least it is what the United States Supreme Court thought was right.

Justice COOK. That's right. That was good enough for me.

Senator DEWINE. So being a dissenter is not always the worst thing in the world.

In the State of Ohio, Mr. Chairman and members of the committee, we do have, right or wrong—right or wrong, we do have what at least the Ohio newspapers—and as I said earlier this morning, and it seems like it has been a long, long time ago—I

guess it was a long time ago—what the Ohio newspapers have labeled to be a very activist Ohio Supreme Court. And whether you think that is a good idea or not a good idea is not what we are debating today. But the Ohio newspapers, which run the gamut of the political spectrum—and I can say this as someone who has run for political office in Ohio for a long, long time. We have everything from the liberal to the conservative in the State of Ohio as far as the newspapers. But each newspaper, major newspaper in the State of Ohio has labeled the Ohio Supreme Court as being a very, very activist Supreme Court.

I will not take the time of the Committee at this point to read the different editorials that make this point, but I am going to hand out to the different members of the Committee and also ask the Chairman to make a part of the record this document.

Chairman HATCH. Without objection.

Senator DEWINE. Which basically talks—these are different quotes from different editorials—which talks about how active the Supreme Court is.

And I would tell the members of the Committee that it is on a bipartisan basis that it is active. This activist—very sweeping activist opinions. And I am just going to read a couple of the—take just a moment to read a couple of the comments from the newspapers.

This is from the Toledo Blade. "The Ohio Supreme Court simply is not well regarded around the country, and it's the meddling tendencies of this four-judge super-legislature that deserves most of the blame. The people of Ohio elect a legislature and a Governor to make laws and govern, but their intent has been thwarted by this activist court."

Senator BIDEN. Excuse me, Senator. I didn't hear what he is quoting from.

Senator DEWINE. This is a Toledo Blade editorial.

Senator BIDEN. Okay. Thank you.

Senator DEWINE. The point is that I think you will find, again, whatever way you come down on these issues, that disputes on the court and the disagreement that Senator Leahy was quoting from in these cases pretty much comes down to where Justice Cook was dissenting based on her strict interpretation of the law versus the court's more activist interpretation of the law.

I will reserve the balance of my time, Mr. Chairman.

Chairman HATCH. Thank you.

Senator Biden has not had his first round, so if it is all right with everybody, we will turn to him.

Senator BIDEN. Thank you, Mr. Chairman. I apologize to the Committee and the witnesses. This has been a pretty busy day, and I have been spending my whole day dealing with issues relating to Iraq. And I have a lot of questions. I hope we are going to have a chance to have this panel over because I for one have—not a lot. I have about a half-hour's, an hour's worth of questions that I am, because of the schedule today, not able to do and—

Chairman HATCH. We are happy to give you the time now, Senator Biden. You are a former chairman.

Senator BIDEN. Well, let me—I won't take that time now because in large part I can't. I have another commitment relating to the

Foreign Relations Committee I have to do at 6:18. But let me start off by just asking one or two questions in a few minutes here.

Professor Sutton, I am a little concerned with the nature and the way in which the Supreme Court necessarily has cut back significantly the number of cases it reviews to about 80 cases a year, and that most of the significant cases, whether we are talking about the decisions relating to *Roe* v. *Wade* or any other case, there is enough ambiguity and significantly less review that the Circuit Court of Appeals in every circuit has a significant impact beyond what they had 20 years ago in making law.

And so I have a number of questions for you, Professor, relating to your notion of the role of the court and your assertion, I am told—and correct me if I am wrong—that you have indicated, and I quote, that "federalism is a zero-sum situation in which either the State or the Federal lawmaking prerogative must fall."

That is a constitutional view that I have an overwhelming disagreement with, and I suffer from the fact that I spent a lot of time teaching this separation of powers doctrine, and I think it is not inconsistent with where the majority of the Supreme Court has gone, but I think it is fundamentally flawed constitutional methodology.

That is not to say that it is not intellectually defensible. It is to say that I have fundamental disagreement with it. And I want to be straight up with you. I know this is not for the Supreme Court, but based on what I have read, assuming it is consistent with what you would respond to, if you were a nominee for the Supreme Court I would not—even though you are intellectually and morally and in every way capable of sitting on the Court, I would do all in my power to keep you off the Court because it appears as though we have such a fundamentally divergent view of the Tenth Amendment, the 11th Amendment, and the role of federalism that I just want to be up front with you about that.

And so for me, I will not get an opportunity to go into any great detail tonight, obviously, but I have some questions I would like you to respond to.

Let me begin by suggesting that—and I do not ask this out of parochial interest, although I have great pride in being the person who drafted the Violence Against Women Act. But I would like to understand your reasoning beyond the fact that you were an advocate here, if there is a reason beyond your advocacy representing a client.

You filed a brief in the Supreme Court on behalf of the State of Alabama arguing against the constitutionality of the Federal civil remedy of victim sexual assault and violence. Now, this is not a question of whether or not you are confirmed or not confirmed by the court, whether your view prevailed or not. It is a question of my trying to figure out how you approach these issues.

Among other things, your brief in *Morrison* stated that gender-based violence does not substantially affect interstate commerce. Now, prior to the Violence Against Women Act, I literally held nine hearings and received testimony from over 100 witnesses, at the end of which, that long and thorough exploration, the Congress concluded—not just me—that gender-based violent crimes in fear of these—I must leave in one minute? Wonderful. I am going to have

to submit this question to you in writing, but the bottom line is, what I am trying to get a sense of is how you approach what you consider to be the prerogatives of the Congress, Section 5 of the 14th Amendment, the significant change in the way in which this Court, which I think is a bright Court but is the most activist court in the history of the United States of America, no court has overruled as many national pieces of legislation, including the New Deal era, as this Court has. And I want you to know that, to be blunt with you, I come from sort of the Souter school of—in his dissents in the *Florida Pre–Paid* cases and their progeny, where Souter said, "The fact of such a substantial effect is not the issue for the courts in the first instance, but for the Congress whose institutional capacity for gathering evidence and taking testimony far exceeds ours."

Going on, Souter says, "I'm left wondering. Where does the Court's decision leave Congress' former plenary power to remove serious obstructions to interstate commerce by whatever source? It is reminiscent of the *Lochner* era when they said, By the way, you have those labor standards having to do with mining. Mining is not interstate commerce. Then they came along and said production is not interstate commerce. Then they said manufacturing is not interstate commerce. Until midway in the New Deal, with the end of the Lochner era, they said, Whoa, whoa, whoa, wait a minute, wait a minute."

What I am really trying to get at—and I will submit these questions in writing—is: At what point does the Court decide to become the Federal traffic cop? At what point does the Court's authority to intervene in what I believe constitutionally has been left to the Congress under the Constitution to make judgments about? And you seem to have an incredibly restrictive view of the Congress' prerogatives. This is not *Lopez* where the Court did not have sufficient findings—where the Court did not find sufficient findings. Even this Court said there is no question that there was an extensive record. But we—as they did in *Alton Railroad* years earlier, said, "But we don't think that's sufficient." And I wondered who the hell the Court is to make that judgment that we don't think the remedy you chose is effective.

That is a very rapid attempt to summarize my concern so that you have a context in which to understand the questions, why I am asking the questions straightforwardly.

Mr. SUTTON. No, I appreciate that. I appreciate your being straightforward. There is no doubt the criticism you just levied against the *Morrison* decision is the strongest criticism, and it was clearly the most difficult part of the case for the Court and exactly where the 5–4 line was. And that line was how much deference to give to these findings. And, you know, you were kind enough to mention—I was involved in that case on behalf of a client. I was working as an advocate, and I was doing my best by them. And, you know, what I would have done in that case, God only knows.

The one thing I would say, though, about your concern about Court of Appeals judges, I agree with you. I wish the U.S. Supreme Court would take more cases. It's made my U.S. Supreme Court practice very difficult to sustain. They take so few cases. But I'm not aware of too many—in fact, none—Court of Appeals decisions

that struck a Federal law—in other words, your handwork—that weren't eventually, and usually quite promptly, reviewed by the U.S. Supreme Court.

Senator BIDEN. I think that is true. Most have been. But there are cases—and I am compiling this. I think we will be able to show there are roughly—there are over 200 cases the Circuit Court of Appeals has found enough leeway in the existing law where they have changed basic law without any review by the Supreme Court because the Supreme Court never took the cases.

I have had my staff in the process of preparing that for some time now, which is, quite frankly, unrelated to you or any one of you, beginning to make me review my standard for review of nominees. I have a very different standard for 30 years reviewing Supreme Court nominees because they are not bound by stare decisis than I do reviewing district and circuit court judges. But I am moving to the view that there should be, in effect, to steal a phrase from the Court, "an intermediate standard" for Circuit Court of Appeal judges because they have become so much more significant in being the final arbiters—they are not legally. The Court, the Supreme Court is. But because of the review process, they have become the final arbiters in areas where I used to be able to say I know the Court will review this, if you are bound by stare decisis, you will—and I trust your judicial temperament that you mean that, then, in fact, I will take a chance on you even though I fundamentally disagree with your constitutional methodology because you will abide by the decisions. But there are enough discrepancies or differences or holes in the reasoning—I mean, look at all the cases that have flown—and this is not my major concern. But look at all the cases that have been the progeny of *Roe* v. *Wade*. They are very, very, very complicated, whether it is *Casey* or whether it is the issue of parental notification—all these issues.

And in the past, I never doubted that the Court would review those, but now what is happening is the Court is in the position where it does not review a significant portion of the Circuit Court of Appeals decisions that change State law or uphold State law that are never reviewed. And that is the only generic point I wish to make with you.

One of the questions is going to be: You as an advocate—I assume it is your answer, but I would appreciate an honest answer if it is not. You argued in your brief that even the Congress did not show that sexual violence, violence against women, had no impact on interstate commerce. Whether or not we get into the question of what constitutes commerce, that it had no impact by the old standard of what constituted commerce, as I read your brief.

Mr. SUTTON. Well, maybe I am not understanding the question, but the point I think we were trying to make was in all of the Commerce Clause cases, high-watermark cases, *Wickard* v. *Filburn*, *Jones* v. *Laughlin*, *Lopez* even, there has been a consensus that the Court does have a role in determining whether something does impact—

Senator BIDEN. Is interstate commerce.

Mr. SUTTON. —interstate commerce. And I thought that was—it was meant to be the main theme of the brief, that the Court did have a role here, whether it decides to uphold *Bower* or not.

Senator BIDEN. But did not you argue that it does have a role in making a judgment whether it impacts, but in order for you to reach the conclusion that it did not impact interstate commerce, you had to fundamentally disregard the 100 hours of hearings that the Congress held and concluded that it did. Correct?

Mr. SUTTON. I can certainly understand someone taking that view, but I would say it is correct that it might—

Senator BIDEN. Is there any other view to take?

Mr. SUTTON. My client, the client is the one that took that position, and I did everything I could to advocate that position. And I do understand—

Senator BIDEN. Do you believe that? Do you believe that? I am not suggesting it was inappropriate for you to—for example, if you were teaching it, would you teach that the Congress—the facts presented in the case in the Congressional Record did not warrant the Court's concurrence because, as my good friend Justice Scalia says, everybody knows they never read this stuff and they never write this stuff, those Senators. It is done by staff. So, dismissively, it is taken out of the record. I mean, is that a view you share?

Mr. SUTTON. No, it is not a view I share. I guess the point I would make is that there was a voluminous record, no doubt about it, in the VAWA. And, of course, there was just one provision of that law at issue. The rest of it was not even—

Senator BIDEN. I know that.

Mr. SUTTON. —much less attacked. And I think the issue in the case, a difficult one, is whether there are sufficient amount of findings that no matter how much they are, no matter how much better equipped this body is to make these findings than the Court is, whether there's still a role and a responsibility of the Court to examine them to determine whether they do constitute under the Constitution interstate commerce.

What would I have done? I have no idea as a Court of Appeals judge. I just—I'm sorry, I can't tell you that—

Senator BIDEN. No, I'm not asking—

Mr. SUTTON. —I have not looked at the issue—

Senator BIDEN. —you what you would have done. But I do want to explore these issues with you, and I have questions as well for the other nominees. Like I said, I hope we have more time.

I understand my name was invoked when someone raised the issue of whether or not we had three—not unqualified but controversial nominees, all in one hearing, and that Biden did it. The three that Biden put together had a vote of, I think, 98–0. So they were not controversial.

I thank you all. I apologize for—

Chairman HATCH. I stand corrected.

Senator BIDEN. Thank you, Mr. Chairman.

Chairman HATCH. Senator Kennedy?

Senator KENNEDY. Thank you, Mr. Chairman, and I thank our witnesses. It has been a long day for all of you, and we appreciate your patience, your good will.

I regret that I was unable to be here earlier today. This afternoon I attended a memorial for a former Congressman, Wayne Owens, who was a Congressman from the State of Utah. And I had thought that perhaps we could have had a brief recess where sev-

eral of us who knew Wayne Owens and had a lot of respect for him—he actually worked for me, worked for my brother Bob—had a chance to go there. So unlike most of the other hearings where members are able to stay and go through it, we come in here not sure whether some of these areas have been covered in the past or not. But, nonetheless, I will move ahead and we will do the best we can.

I must say I just again want to register with the Chairman at the opening of the session, if this is the way the Committee is going to be conducted, I am not sure that this accelerates the good will of the Committee or the action of the Committee in the long term, or even in the short term. But that is an issue for another time.

Justice Cook, I want to come back to this issue in terms of your dissents and who you have been finding for. I picked up a little bit of the comments that my friend Senator DeWine raised in the response to Senator Leahy's questions, but I would like to come back to this issue with you, if I could, please.

There is at least an argument that is made that your decisions come down in protecting the more powerful against the weak, that you have worked hard to make it more difficult, for example, for those that are injured in the workplace to get rightful compensation. You have made it more difficult for victims of discrimination to get justice. You have made it easier for large corporations to avoid paying for the harms that their defective products have caused.

I know these are not new to you, but I want to hear from you. In fact, some have said that your views have marginalized you, even on a conservative court; that you authored at least 313 dissents, many of them lone dissents. This number is extraordinary, is, in fact, more than any other Justice on your court. Even with all of these dissents, you have never dissented from any decision of the court that was favorable to the employer. You stand up for big business all the time. You have never stood up for the rights of the individual. To the contrary, you have dissented 23 times in cases in which the court rules in favor of the employee. That is 79 percent of the time. You have only voted for an employee six times, and in five of those cases, the court was unanimous. In the other case, the court voted 6–1 in favor of the employee.

All of this is why your rating by the Ohio Chamber of Commerce is not surprising. They say you rank first in voting for the employer in employment cases. You also rank first in voting with the defendant in product liability cases. You even scored a perfect 100 percent in insurance cases, and issues affecting the environment, voting with the corporate defendant 100 percent of the time.

Now, all of us are aware about these percentages, and I wanted to give you an opportunity to respond to those and to the other observations that I made about your holdings.

It seems that you are in dissent so often because you are consistently and militantly pro-business, anti-worker, anti-civil rights, and I want to hear from you what conclusions you think we ought to draw from those percentages and from that record about how balanced you can be and how either workers or those people, again, who are left behind, those that care about the environment, other

issues that are in conflict between employer and employee, how they could look to you in your court and feel they are going to get a fair shake.

Justice COOK. Thanks, Senator. I'll address that.

First of all, I think to say—as you acknowledge, these percentages are nothing I can ever check or know how they arrive at those, so I sure don't vouch for those sort of things. But if you will, you know, I tried to just gather cases. I think Senator DeWine put out a listing of the cases that show that, frankly, I'm not a reliable vote for anyone, but that my decisionmaking—and I hope you will find this if you actually read the cases and read the dissents, you will find, I hope, that it's a matter more of my precise reading of the law, looking for the actual text of the statute, and when the cases—the results of the cases go against an employee or, you know, in the general civil rights kind of ideas, I frankly don't think I deserve any blame for the legislation that I am asked to construe or interpret.

And so as in many of the cases, there is the *Doe* case, which involved allowing insurance for negligent hiring in molestation cases. In *Haines* v. *City of Franklin*, there was an edge drop off a road, and though the majority of the case thought that the city was immune and not liable for damages in that case, I dissented and said indeed the city was because the city created a nuisance.

In *Richie Produce*, I upheld a minority business set-aside. In *Nakoff* v. *Fairview General Hospital*, it was a tragic case of medical malpractice where an individual came in with a fracture of the leg. In the setting of that leg, the circulation was cut off, which ultimately resulted in amputation. I upheld the verdict of $2.4 million.

In the *Buckeye Hope* case, I dissented from the court's decision that a referendum could deny minority housing in a city in Ohio. Ultimately the court reconsidered that case and my dissent then became part of the majority.

In *Valish* v. *Copley Board of Education*, I upheld a verdict for a teacher—or a parent who came on school property. Again, the majority found that that individual—that the school was immune under our sovereign immunity law, and I ruled the other way.

In *Rice* v. *Certainteed*, it is a case about whether or not punitive damages can be awarded in discrimination cases, and in that case I interpreted the language of the statute. The word "damages" I found was not limited by context or any modifiers and, therefore, allowed—ruled that that word included the whole panoply of pecuniary remedies.

In *Wallace* v. *Ohio Department, Gibson* v. *Metalgold*, I have—I don't want to bore the committee, but I have more, Senator.

Senator KENNEDY. Well, the reason I raise this, you mentioned some, and I will review those cases. I was thinking of some of those, I guess *Bunger* v. *Lawson*, and in that case the court, as I understand it, called Cook's interpretation of the law "nonsensical," said that it leads to an untenable position, unfair to employees, adopting the lower court's interpretation or taking the position adopted by Justice Cook in her dissent would be, as the majority clearly stated, "an absurd interpretation that seems to borrow from the pages of *Catch–22*."

Justice COOK. And, actually, Senator, in that case it was interpreting the statute in the usual mode, but what the majority really was concerned about was that the law in Ohio is pretty plainly expressed that someone who is injured in the course of employment, the compensability can be narrower than the immunity. Employers are immune from suit, and, therefore, there are occasions where someone can be injured but not—their injury is not compensable. And that's exactly how the law is written, and that is my job, to read it precisely.

Senator KENNEDY. In the *Russell* v. *Industrial Commission*, the court stated that your dissent lacks statutory support for its position and has been unable to cite even the slightest dictum from any case to support its review.

Justice COOK. Well, like so many dissents—

Senator KENNEDY. No, I didn't have an opportunity to give these cases to you before, so I—

Justice COOK. I know that case.

Senator KENNEDY. —would be glad to let you give whatever response or the time to do it because it's—

Justice COOK. In that case, there was, number one, a statutory—a new enactment, so a statutory change in the language. My dissent was joined by the chief justice, and so I think it's well-reasoned. I think it's based on the statutory text.

Senator KENNEDY. Well, now, in the *Russell* case, as I understand, you argued that the workmen's compensation benefits should terminate without a hearing as soon as the non-attending physician says the benefits should stop. You argued that, in spite of the statutory language, that couldn't be more clear. It says that benefits—this is what the statutory language says: "Payments shall be for a duration based upon the medical reports of the attending physician. If the employer disputes the attending physician's report, payments may be terminated only upon application and hearing by a district hearing officer."

Justice COOK. That's right.

Senator KENNEDY. And you interpret that statute entirely differently. You argue that the compensation should be terminated without a hearing as soon as the non-attending physician said the benefits should stop. Now—

Justice COOK. Actually—

Senator KENNEDY. —as I understand it, if the employer disputes the attending physician, payment may be terminated only, as I said, upon the hearing officer. The majority stated your dissent lacks statutory support, unable to cite even the dictum for the case.

Justice COOK. Right, and we really disagreed in that case as people in good faith can always disagree about the meaning of words. But in that case, the majority and the dissent disagreed about which statute to read. So I was construing—my dissent construed an analogous statute and a parallel statute that had to be read in conjunction with the one that the majority was relying upon.

Senator KENNEDY. I am not an expert on the Ohio law, but it seems that the citation is fairly clear, that "Payment shall be for a duration based on the medical reports of the attending physician."

Chairman HATCH. That's right, and—

Senator KENNEDY. "If the employer disputes the physician, payments may be terminated only upon application and hearing by a district hearing officer." And you made the judgment that it could be terminated without a hearing.

Justice COOK. The issue—

Senator KENNEDY. And you have another statute.

Justice COOK. Yes. The issue really surrounded—

Senator KENNEDY. Could you reference that, the other statute?

Justice COOK. Yes, I will.

Senator KENNEDY. The concern is about in light of the persistent dissents and your consistent siding with the large corporations against the individuals and departures from the clear language of the law, how are we going to be assured that you won't overreach in order to reach a conservative result.

Now, let me give you another example. As you know, one of the real best weapons that we have in the struggle to improve the lives of those who are left behind in our society is education. And when we educate our children well, we give them an opportunity to take part in the American dream. You, however, have taken the Ohio Constitution's provisions guaranteeing a thorough and efficient public education and voted to basically interpret it out of existence. This is the *DeRolph* v. *Ohio* case.

You were confronted with overwhelming evidence that State funding of public schools was woefully inadequate. In fact, much of the evidence in that case showed that children were attending schools that were in dangerous repair, with poor sanitation, few if any resources for education. The majority of the court followed Ohio Supreme Court precedent that said where a school district is starved for funds or lacks teachers, buildings, or equipment, the right to an education is violated. It found that the woefully underfunding of such an important State function as education violated the Ohio Constitution. You dissented.

You would have denied the children of Ohio the right to a thorough and efficient State education. In fact, your dissent was harshly criticized, and particularly said that if your position had prevailed, it would have turned 200 years of the constitutional jurisprudence on its head.

I understand in your personal life you acknowledge that education is important, but we are talking about this particular case. How do you explain your decision on this issue that is so important and is an issue that is common to my State and States across the country and in which there is such a challenge in order to try to provide some quality of funding for children? And Ohio has such a very strong statute, I find it very difficult to understand your dissent.

Justice COOK. Senator, my dissent was, first of all, grounded on—no member of the court, and there were three members—or two other members of the court who joined me in dissent about the constitutional bases that the majority was using to order a coequal branch of government to enact new funding statutes. So, actually, I never did in any way vote to reduce educational spending or in any way voted to say that the sorry state of some schools in Ohio was okay.

The Court has an assigned limited role, and I exercised my role appropriately, I think, in saying that the phrase that the Court was hanging its hat on did not justify its ordering a co-equal branch to enact new funding laws because the Department of Education had certified that every county in the State had met the minimum standards for providing and education, so my view was beyond the minimums. It was the General Assembly's role to decide what level of funding should be allocated to schools versus every other required funding—every other aspect of State Government that required funding was a policy decision to be made by the Legislative Branch.

But I must say that that case had a—has a fairly sorry history. It lasted some 6 years and the Court never, though it had some, I think, very well intentioned—it was a well-intentioned effort, but it actually—the Court never was able to continue to order the General Assembly to do more and do more, and frankly, it finally just—the case faded away.

Senator KENNEDY. Well, that is a sad conclusion that has happened in some States. States have different, in their Constitutions, guards or different—ours, Massachusetts, John Adams drafted our Constitution in Massachusetts and made it very specific with regards actually to—on the responsibility of the State in education.

It is interesting that every State Constitution has a guarantee on education. They are interpreted in different ways. But let me come back to the Ohio. The Ohio Constitution requires a thorough and efficient education. These words have meaning. They can be interpreted, enforced by a Court willing to take its responsibility seriously. In fact, a number of States have found that similar clauses in their constitution's enforceable. Your unwillingness to interpret, enforce this clause of the constitution I find disturbing. I understand you believe the clause is too vague for judicial enforcement. In your dissent you compared it to another provision of the Ohio Constitution that says that all citizens possess inalienable rights to life, liberty, property, happiness and safety, but even that clause has much the same language of the Fifth and 14th Amendments of the Constitution clauses, which have been analyzed, enforced for many years. And I am just wondering how much assurance that we can have here that you are going to interpret these statutes in ways that we are intended to, and that reasonable people would feel that they should be intended.

Justice COOK. That would be my goal, Senator, that would be my effort.

Senator KENNEDY. If I could, Mr. Chairman, I have one additional area.

Chairman HATCH. That would be fine, Senator Kennedy. We will give you the additional time.

Senator KENNEDY. Thank you.

Much of the last 2 years have been spent recovering from corporate malfeasance that has hurt our economy—I am talking about our country—and undermined the public's trust in big business. The laws play an important role in restoring the confidence of the American people for preventing this abuse in the future. Unfortunately, in looking over your record—and I want to give you a chance to respond—one could conclude that you have consistently

voted to shield corporations from the legal consequences of their actions. In the *Davis* v. *Wal-Mart*, Mrs. Davis alleged that Wal-Mart instructed its employees to lie to her after her husband was killed while working for Wal-Mart. Wal-Mart allegedly told its employees to lie about the way in which Mr. Davis had been killed, in order to encourage Mrs. Davis to settle out of court. The majority understandably found this sort of deception reprehensible and allowed Mrs. Davis to sue Wal-Mart. You would have prevented her from doing that, thereby allowing Wal-Mart to reap from the benefit of the lies, and encouraging other corporations to do the same thing.

Justice COOK. My decision in that case does not suggest that I too don't find that behavior reprehensible. My dissent actually was based on a fundamental principle of jurisprudence, and that is res judicata, and it was based on really well-settled law, that that—the fact that Mrs. Davis sued Wal-Mart, got a judgment for negligence, and then years later came back with a spoliation case, I found—my view was that it was res judicata, and in favor of finality of judgments, as we all know. That's why that principle is there and why it's accorded importance by judges.

Senator KENNEDY. But the majority did not find that.

Justice COOK. No, they did not.

Senator KENNEDY. They reached a different conclusion.

Justice COOK. Yes, that is right.

Senator KENNEDY. In *Norgard* v. *Brush Wellman*, the defendant corporation withheld information concerning how much it was exposing its employees to beryllium, including withholding the fact that it knew its air samplings were flawed and that it had ventilation problems. And it gave the plaintiffs in this case a skin disorder, so severe he had ulcers. He suffered for a protracted period of dizziness, coughing and had difficulty breathing. The company just told him not to worry and continued to withhold the information about the problems with beryllium. The majority found that the employee's time to file a suit started running from the time he found out about the information his employer had been withholding. But you would have allowed the corporation again to reap the benefits by barring this suit. What can we draw from that?

Justice COOK. I hope that the only thing that you'll draw from that is that I look at the law on statute of limitations and the particular—my decision was simply a statute of limitations decision.

Senator KENNEDY. Well, when? That is the—

Justice COOK. May I finish? And as a lawyer, Senator, and so many people n the Committee are, this individual had knowledge of his injury and the expected cause, but didn't file suit until some 5 years later when the statute of limitations in Ohio is 2 years. So I just viewed, and perhaps I was the one who was mistaken, but I viewed the majority decision as contorting the law of statute of limitations beyond the scope of its justification there.

Senator KENNEDY. Well, you are right, the majority differed with you. The corporation withheld information concerning how much was exposed to the employees. And so since the defendant did not know about this, effectively, by the time they found out and brought the case, you ruled that they really did not have—the statute had run on it, and they were denied any opportunity. This is enormously important. We have a lot of workers, miners. We have

a lot of occupational health and safety issues involving lung damage, and increasingly so with regards to the dangers of toxic substances that are being used in industry all of the time on this. It is a very serious matter I know for great numbers of workers.

Justice COOK. I think so too, Senator.

Senator KENNEDY. I am concerned that if the employer is denying them the information about the dangers of this, and then they only find out about it later, to have their opportunity to get some kind of remedy of this is being denied to them, I mean I have difficulty understanding how you reached the conclusion that the statute ran.

Justice COOK. Actually, the plaintiff admits that he knew that he was sick and that he knew it probably was the beryllium from the plant. I mean he was inhaling gross amounts of this, and of course it is a horrible scenario. But it wasn't my personal view about whether this individual deserved to recover. It was simply an application of the well-settled law that it is not all the elements of a claim, which is what the majority held here, until this individual knew all the elements of their claim, they couldn't bring the case. But indeed, this gentleman unfortunately both knew that he had an injury, and he knew the likely cause. It was later when he saw a website some 5 years later, that he chose to bring the action, and my considered judgment and I think reasoned judgment, was that that was beyond the discovery rule and the particular statute of limitations here.

On the other hand I can tell you of another case on the discovery rule involving NCR, where I wrote the majority opinion that extended the discovery rule in that case, and it was I think the first time in the country. So there are always occasions where cases are decided differently based on the facts presented. And if you're a jurist who attends to the law and tries to be diligent and conscientious about that, I think that you'll find the decisions—I can't do anything about which person wins and loses because I must be impartial.

Senator KENNEDY. Well, I agree that that has to be the desired standard. The majority of course found that the employee's time to file suit started running from the time he found out the information his company had been withholding, and that the company doctors were misleading the worker. So you were in the dissent in making the judgment. And the matters, there is a pattern. My time is just expiring. I mentioned several of these cases. There are many others, and when it comes out to the bottom line it has virtually 100 percent on the one side. I agree that figures are not always necessarily absolutely accurate, but what we have is a pretty significant pattern on here, where in these cases involving workers, in the cases that I have mentioned here, others, that your dissents always seem to be at the expense of individuals, workers, in these cases workers rights, and it is troubling. My time is up.

I want to thank you, and I want to say, Ms. Cook, that if you want to provide other kinds of cases that show a different side, I would welcome them. I always try, if I am going to ask a nominee about cases, to indicate what they are going to be beforehand. I did not have the chance just because of the way this was sort of, we

are working on this. So if there are other cases that support yours, I am more than glad to take a look at them.

Justice COOK. Thank you.

Senator KENNEDY. Thank you.

Chairman HATCH. Thank you, Senator Kennedy.

Here is what we are going to do. Senator Schumer wants to ask some questions, and he will be here at 8 o'clock. So we are going to—I apologize to you that this is taking so long, but I do want to get this completed today because—for a variety of reasons, but especially for you. And I want you to be treated fairly, and this Committee I think is attempting to do that.

But what we are going to do is we are going to discontinue this part of the hearing till 8 o'clock. That will give you a chance—by the way, I have ordered some food if you can stick around. I would like to chat with you for a minute. And what we would like to do at this point is to proceed to the three District Court nominees and see if we can resolve them at this point, and then we will resolve you after 8 o'clock.

Senator KENNEDY. Mr. Chairman, just again, how we proceed is not up to all of you. You have been gallant witnesses today. Mr. Roberts, I have not had a chance to question you. We have others, I guess Senator Schumer and others. I will submit questions to you. I appreciate your patience, all of our nominees, their patience with us. It has been a long day for you and these are complicated and very important issues, and I thank them.

Chairman HATCH. Thank you, Senator Kennedy, for your kind remarks.

And, Senator Sessions?

Senator SESSIONS. I just wanted to say I think you have been generous. And I notice you did something very unusual in having 15 minute rounds. I am not sure we have ever done that before.

Senator LEAHY. We have done it a lot.

Senator SESSIONS. Senator Kennedy, I just notice he was 13 minutes past his 15, which is all right. You have been generous on that. And I would just say this, that when President Clinton's nominees were coming by and there was a hearing set, if I had other committees or other responsibilities, I knew I had to either be there or not. I did not come in and expect the Committee to adjust itself totally to my schedule. But you have been generous and fair, I believe, and I wanted to say that for the record.

Chairman HATCH. Well, thank you, Senator. Let us take 5 minutes—

Senator LEAHY. Mr. Chairman?

Chairman HATCH. Excuse me. I am sorry, Senator Leahy.

Senator LEAHY. Mr. Chairman, you and I discussed this procedure, and I think it is a wise way to do it. We have some other letters, I know Mr. Sutton will be happy to know, regarding him, and we will put those in the record.

Chairman HATCH. Without objection, we will put those in the record.

Senator LEAHY. I would also note, Mr. Chairman, that you have been very fair on the clock. I think that the Senator from Alabama and others would agree that President Bush's nominees, during the time I was Chairman, that if any one of them had any questions

at any time, on either side of the aisle, they got whatever time they wanted or time to introduce or anything else, and several times rearrange a schedule so that the home State Senators could introduce President Bush's nominees.

Senator SESSIONS. I think that is a lot of truth, and sometimes we just had to resort to written questions because they work too.

Chairman HATCH. There were many times we did written questions because of the time constraints. We have tried to be fair here and I think we have been. And you folks have been more than stalwart in being with us this long, and you are going to have to be here a little longer. I apologize to you, but this is an important hearing, and my colleagues have felt like all three of your are, quote, "controversial," unquote. I do not agree with that assessment, but some feel that way and they have a right to feel that way if they want to. So what we are going to do is we will recess for just 5 minutes. I want everybody back in 5 minutes, and we will start with the three District Court nominees, and we want you here promptly at 8.

Senator LEAHY. The Court of Appeals nominees can take off if they want, right?

Chairman HATCH. Yes, until 8 o'clock, but I would like to see the three of you just for a minute in this 5-minute period. Thank you.

[Recess from 6:48 p.m. to 6:57 p.m.]

Chairman HATCH. We are going to reconvene. If I could have you stand and hold up your right hands. Do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

Judge ADAMS. I do.

Mr. JUNELL. I do.

Judge OTERO. I do.

Chairman HATCH. Thank you. I would like to welcome to the Committee our three District nominees, Judge John Adams, who has been nominated for the Northern District of Ohio; Robert Junell, who has been nominated for the Western District of Texas; and Judge James Otero, who has been nominated for the Central District of California.

It has been a long day so far, and you have been very, very patient, and I am very appreciative of you. So in the interest of time, I am going to enter my statement in the record and as soon as Senator Leahy gets here, we will have him give any statement he cares to give. Until then maybe I can start with questions.

Well, first of all, let me show a little more courtesy than that. We will go with Judge Adams and then Judge Otero, and then Mr. Junell. If you would care to make a statement and introduce anybody who is here from your family. They are probably all gone by now, and perhaps before we begin, I would like to turn to Senator DeWine to introduce Judge Adams.

PRESETATION OF JOHN ADAMS, NOMINEE TO BE DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF OHIO BY HON. MIKE DEWINE, A U.S. SENATOR FROM THE STATE OF OHIO

Senator DEWINE. Thank you very much. I deferred this morning, Mr. Chairman, introducing Judge Adams, and it is my pleasure to

introduce really another fine Ohio nominee appearing before the Committee today, Judge John Adams.

Judge Adams, we welcome you to the committee, and we thank all of our nominees for their patience. I know it has been a very, very long day.

And Judge Adams from Akron has been nominated to be a U.S. District Judge for the Northern District of Ohio. He currently serves as a Judge on the Court of Common Please in Summit County. I am pleased to welcome Judge Adams, his former law partner, Philip Kaufman, to the Committee as well. Judge Adams is a 1978 graduate of Bowling Green State University, where he earned a Bachelor of Science degree in education. In 1983 he received his law degree from the University of Akron School of Law. While a student at Akron, Judge Adams clerked for Judge Spicer with the Summit County Court of Common Please. Following this position Judge Adams spent 5 years in private practice, and during this time also served as Assistant Summit County Prosecutor. In 1989 Judge Adams returned to private practice as an associate and then a partner at the firm of Kaufman and Kaufman in Akron.

Since 1999 Judge Adams has served as a judge on the Court of Common Pleas for Summit County. In this position Judge Adams has demonstrated that he is an intelligent, hard-working and dedicated jurist. He is well respected, both inside the courtroom and out, and exhibits an excellent judicial temperament. He has shown that he has what it takes to be an excellent District Court Judge.

In endorsing his reelection effort just this last November, the Akron Beacon Journal stated that Judge Adams, and I quote, "has the potential to be a distinguished Federal Judge, building on the record of fairness and thoughtfulness that has marked his 3 years on the county bench." I agree completely, Mr. Chairman, with that sentiment.

While Judge Adams' professional accomplishments are impressive by any measure, I would also like to take this opportunity to highlight his involvement in the Akron community. Judge Adams has been a lifelong member of the NAACP. He has also been active in the Summit County Mental Health Association and the Summit County Civil Justice Commission.

In summary, Mr. Chairman, I urge my colleagues on the Committee to join me in support of this fine nominee as Senator from the State of Ohio. Thank you, Chairman.

Chairman HATCH. Well, thank you, Senator DeWine.

And that is high praise, Judge Adams.

We will turn to Senator Cornyn for his comments about Mr. Junell.

PRESENTATION OF ROBERT JUNELL, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF TEXAS BY HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. Mr. Chairman, I just want to add my brief comments to those made by Senator Hutchison this morning in introducing Mr. Rob Junell, nominee for the United States District Court for the Western District of Texas. Senator Hutchison talked

primarily about Mr. Junell's legislative accomplishments and his personal background.

But just for the committee's information I first met Mr. Junell about 20 years ago when I was a young lawyer and he and I happened to be on the opposite side of a lawsuit. You learn a lot about the character and the competence of your adversary in those circumstances, and I wanted the Committee to know and the record to reflect the high regard in which I personally hold Mr. Junell as a lawyer, as a person, and a person who has devoted many years of his life to public service already, and who I know will do an outstanding job on the Federal Bench.

And also his wife, Beverly, who is here with him today. It seems like, Mr. Junell, you were introduced a long time ago, but just for a refresher and to add my comments and congratulations to you.

Thank you, Mr. Chairman, for that opportunity.

Chairman HATCH. Thank you, Senator.

We will begin with Judge Adams, and then Judge Otero, and then Mr. Junell. And if you have any statements to make, we would be happy to take them, and if you would, introduce anyone who is accompanying you here.

STATEMENT OF JOHN ADAMS, NOMINEE TO BE DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF OHIO

Judge ADAMS. Senator, first of all, I would like to thank the Committee for allowing us this hearing this late day. I know it has been a long day for you. We greatly appreciate it. I greatly appreciate the courtesy in being permitted to be heard today.

I want to acknowledge my former law partner who is here today, Mr. Philip Kaufman, as Senator DeWine has acknowledged him.

I additionally would like to acknowledge my father who could not be here today due to his age, somewhat age and somewhat unwillingness to travel here today, and acknowledge the memory of my mother who passed away some time ago and could not be here. I am sure she would be quite proud. And once again, thank you, Senator, for your courtesy.

Chairman HATCH. Well, thank you, Judge. Appreciate it.

Judge Otero?

STATEMENT OF S. JAMES OTERO, NOMINEE TO BE DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA

Judge OTERO. Thank you, Senator. I just want to thank the Committee for having me here. I am very honored. I would like to thank Senator Leahy and Senator Feinstein for the gracious statements made earlier today, and also to Senator Boxer for her written statement provided to the committee.

I would like to thank my family who is back there for being here, and also my parents who could not be here today because of health concerns.

Chairman HATCH. Introduce your family to us.

Judge OTERO. My wife Jill is here.

Chairman HATCH. Jill.

Judge OTERO. And my daughter Lauren.

Chairman HATCH. Lauren.

Judge OTERO. And my son, Evan.

Chairman HATCH. Evan. Happy to have you with us as well.
Judge OTERO. Thank you.
Chairman HATCH. Thank you, sir.
Mr. Junell?

STATEMENT OF ROBERT JUNELL, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF TEXAS

Mr. JUNELL. Thank you, Mr. Chairman. It is indeed an honor to be here today. I want to thank both you and Senator Leahy for allowing us to be here for this hearing, and I want to thank Senator Hutchison and Senator Cornyn, the two Senators for Texas that said such nice things.

My wife Beverly is here with a crutch from knee surgery. She hurt the other one, Senator, at Snowbird about 10 years ago in your state.

Chairman HATCH. Oh, my goodness. That is not good.

Mr. JUNELL. And this time it was in New Mexico, so she recently had surgery.

Senator LEAHY. Should have skied in Vermont.

[Laughter.]

Chairman HATCH. No, no, that is worse there. It is just plain ice there. We at least have powder snow.

Mr. JUNELL. My son, Ryan, who is in California, could not be with us. My daughter Keith is the Peace Corps in Bolivia, and my son Clay is a student at Angelo State University in San Angelo.

Chairman HATCH. Well, we are honored to have all of you with us, and we again apologize for this taking so long, but it is the nature of this place. Every once in a while it does take a little bit of time, so please forgive us.

I think we will begin with Senator Leahy. He has been so patient all day, I am going to turn to him first, and then whatever questions he does not ask, maybe the rest of us can.

Senator LEAHY. Thank you, Mr. Chairman. I will try to be brief. The level of controversy is a lot different here.

Judge Adams, you have been actively involved in partisan politics on behalf of your fellow Republicans. You served as an elected official. You have contributed to Republican campaigns. You have volunteered on campaigns. You have run for city council. All of which is perfectly appropriate, but when you go to the Federal Bench, you have no problem with the fact that partisan activity then is—it is gone; is that correct?

Judge ADAMS. Absolutely, Senator, and I think as a common police court judge my record will establish that that has certainly been the case while on the bench.

Senator LEAHY. Thank you. And you assure us that if somebody walked into your court, if you are confirmed, that they would not have to worry about whether they were the right political party or the wrong political party; they would just have to worry that Judge Adams reads the law correctly?

Judge ADAMS. Absolutely, Senator. You can rest assured in that regard, please.

Senator LEAHY. In private practice you specialized in estate planning and trust and probate law. You had a special emphasis on providing service to senior citizens and people with mental and

physical disabilities, and I commend you for that. What do you bring from that, the work you did with people with disabilities? What do you bring from that as you go into a Federal Bench?

Judge ADAMS. Well, I think I bring a couple things that I've learned from my representation of seniors and folks with disabilities. I've learned how important it is to listen. I think as a judge, one of the most important things that we overlook is how important it is to take time to listen to the litigants, the parties, their attorneys. Sometimes I think we, the judges, overstate our own importance, and I think I have learned a great deal in representing seniors, and in my life I always enjoy listening to their life experiences, and I think I have learned a lot from them, I have gleaned a lot from them and from their life experiences. And it has given me balance in my life, in my views from the bench.

Senator LEAHY. Thank you. And I think you are right. It is very easy for a judge who sits there, it is "all rise" and all that kind of thing. I think the judges who are best is, when they hear the "all rise" they almost have to stop themselves to see who it is they are doing that for, and not take it for granted. And the judges that keep themselves fairly grounded in their community end up being the best judges. I mean there are a lot of things you have to give up as a judge. I mean I love politics and I am sure you do too, giving up some of those things. You have to be careful of your associations. Like any member of the bar, a lot of your friends are going to be lawyers. You have to pick and choose there. But you are not really in a monastery. I mean you are still a human being, and the most important thing is that the people who are in front of the bench are also human beings, and so I appreciate that.

Judge Otero, you have served as a judge for the last 14 years. Correct me if I am wrong in any of this. First in the Los Angeles Municipal Court and then on the Los Angeles Superior Court. Is that correct?

Judge OTERO. Yes, Senator.

Senator LEAHY. I spent some years ago in the Superior Court when I was a prosecutor. One of my fellow board members in the National DAs was the District Attorney of Los Angeles, and the times we have meetings out there I go into some of those courts and realize that Los Angeles is larger than my jurisdiction in Vermont or what was my jurisdiction. I do get out there now and then. I have a son, a former Marine, and his wife, who live in Los Angeles, in the Los Filas area, and I do not think there is just about any kind of case anybody is ever going to see that has not been in the Los Angeles Superior Court at one time or another.

Judge OTERO. That's correct. We may be the largest court system in the United States, if not the world.

Senator LEAHY. I think it is an extraordinary court system. I know a lot of the people I see who come here from other countries to study our judicial system, that is one of the places they want to go to, and you probably have seen a lot of foreign representatives who come to your court to see it.

Judge OTERO. From China recently and from Japan also.

Senator LEAHY. One thing that we talk about is the impartiality of our Federal Judiciary. One thing I think might interest you is when the Soviet Union broke up, a group of Soviet, or now Russian,

lawmakers came here to meet with me, with Senator Hatch, others, and I remember one question one of them asked almost incredulously. He said, "We have heard in the United States there have been times when the Government has been sued and the Government actually lost. I mean did you not quickly replace the judge?"

[Laughter.]

Senator LEAHY. And we had to explain to him, no, we have a certain independence here, and yes, the Government does lose on occasions. And I think this was probably as big an eye opener as ever. I have always encouraged these people to go out to Los Angeles and watch your court system.

Now, a number of issues of the death penalty have come up. Justice O'Connor said there were serious questions about whether the death penalty is fairly administered. She added, "The system may well be allowing some innocent defendants to be executed." Now, you have presided over a capital murder case. One case you presided over, *People* v. *Chauncey Beasley, Delano Cleveland and Rashish Sheron*. The jury returned a guilty verdict against the three defendants, recommended death. And you had the sentencing hearing. You sentenced two of the defendants to death. You rejected the jury's recommendation of death for the third defendant. You sentenced him to life without possibility of parole. And I am not asking you what is your reasoning in that case, but you have obviously had to look at the question of the death penalty. Do you think there are changes that are warranted in the way the death penalty is administered? None of us have questioned that it is constitutional. The Supreme Court has held so. But are there changes that should be made in capital cases, or are they all, in your experience, always fairly handled?

Judge OTERO. I would hesitate to comment about the particular case because it's before the California Supreme Court.

Senator LEAHY. I do not want you to comment about that one, but I mention it only because obviously it has focused your attention here.

Judge OTERO. I think as judges we have to be very concerned about the rights of defendants, especially in capital cases. I think the entire issue is probably better handled by the legislature. As judges it is our duty to follow the law and interpret the law to the best of our abilities. In California we have a system that allows the trial judge to conduct an independent review of the aggravating and mitigating factors, to sit as a 13th juror on the penalty phase, and I think that's a very good system.

Senator LEAHY. Do you feel that it is an absolute, that especially in a capital case, that a judge should make sure that there is adequate counsel, and I mean real counsel for the defense?

Judge OTERO. Oh, absolutely, absolutely, Senator.

Senator LEAHY. We can assume the State will always have the best in a capital case and that if there is evidence available, incriminating of exculpatory, that it be available to both sides.

Judge OTERO. Absolutely. One of the fundamentals of our system is to make sure that all evidence is turned over to both sides.

Senator LEAHY. The reason I say that, there have been some states and some jurisdictions that has not happened, or where the least competent counsel has been appointed at a small flat fee in

a capital case, and that is where we have problems. You have probably found, as has been my experience and I think Senator Hatch's experience and Senator DeWine's, in trying cases you actually have a far easier time of it if you have good counsel on both sides.

Judge OTERO. Good lawyers make for a better trial judge, absolutely.

Senator LEAHY. Mr. Junell, we are chatting earlier, and I repeated the call I received from Congressman Stenholm, who assured me that in his estimation you would be a fair judge of the matter of who was before you. I want to ask for a moment about your work as a State legislator in a claim that a whistleblower named George Green. In August of 1989 he was an employee of the Texas Department of Human Services, and he reported what he thought was corruption among his superiors and others. The State of Texas responded by investigating him and firing him. Then they indicted him, and the indictment was, the charge eventually dropped. He sued under the Texas Whistleblower Statute. The jury awarded him $13.6 million. In February 1994 the Texas Supreme Court affirmed that judgment, saying the State did not have immunity because of the Texas Whistleblower law. Under State Law, to collect the award Mr. Green was required to get his claim approved by the State legislature. He tried to do that. You were Chairman of the Texas House Appropriations Committee. You refused to approve the full amount, which had grown to around 19 million with interest, and offered him 25 percent or 25 cents on the dollar. You were quoted as saying that the State of Texas does not owe him this money; under the law of sovereign immunity we do not have to pay. The Texas legislature eventually gave him a substantial portion of that.

I raise this because this Committee has heard from people like Sharon Watkins, who are out to expose many of the misdeeds at Enron, or we have read of hers. FBI Special Agent Colleen Rowley brought public attention to some of the shortcomings in the Department of Justice prior to 9–11. Senator Grassley and I have worked—it has been very much of a bipartisan thing—on whistleblowers. A lot of people risk everything to point out waste or corruption and so on. So one, why did you want to deny Mr. Green his full award? Do you think that deterred other whistleblowers?

Mr. JUNELL. No, Senator, and I appreciate you asking that question. No, it didn't. Texas law at that time, if the State of Texas ran over somebody in a truck out on the highway, the amount of damages that could be recovered for someone who either perished or who was made a quadriplegic is $250,000. In the case of the Whistleblower Act, which was passed before I came to the legislature, there was not a cap on the damages, but it did require a review by the legislature, somewhat like this process of presidential appointees being reviewed with the advice and consent of the Senate and of this committee.

Senator LEAHY. Well, we are written into the Constitution, the U.S. Constitution.

Mr. JUNELL. We are written into statute in the same manner. We are written into statute that all awards of that nature, if there was not a permission to sue prior to the time the suit was brought, had to come to the legislature to apply for the money. We held hearings

on Mr. Green's case. I don't want to—spent a lot of time reading trial testimony and reviewing all of his case. Ultimately participated in amount. And senator, I don't remember the amount that it was ultimately settled for. It was in the millions of dollars though. The legislature, either that session or the next session revised the statute to put the cap the same that we have on our Tort Claim Act as well.

Senator LEAHY. So now he could only recover a quarter of a million?

Mr. JUNELL. Yes, sir, but I can tell you that we have active—not only at the State level, but at the county level and at the city level. Any political subdivision is covered by that, and it has not deterred anyone to my knowledge. I have never heard that, anyone being deterred of reporting wrongdoing in Government.

Senator LEAHY. Well, there you had a specific statute to review. A trial judge can review a question of damages that a jury awards. Is that something a trial judge should eagerly jump in to do, or should they be reluctant to overturn or change a jury verdict?

Mr. JUNELL. I think they should be very reluctant to overturn a jury verdict.

Senator LEAHY. I do too. If I have other questions, I will submit them for the record. You have been patient. Your families have been patient. Senator Hatch has the patience of Job sometimes.

Chairman HATCH. Sometimes, that is for sure, and today is one of them is all I can say.

But you have had patience, and we have been very grateful to have you here. I know all three of you. I know how good you are. I know your reputations. I have no real desire to put you through any more questions. All I can say is that I would—just one little thought.

Mr. Junell, I understand that you are quite well read and that you have excellent taste in books. I would just like to know the last book that you have read.

Mr. JUNELL. You know, one of my favorite books, Mr. Chairman, is *A Square Peg*.

Senator LEAHY. Oh my God.

[Laughter.]

Senator LEAHY. Hold that man over.

[Laughter.]

Chairman HATCH. I think everybody should read that, including Senator Leahy.

Senator LEAHY. I am halfway through it.

Mr. JUNELL. I understand they are going to make a movie, by the way. Tom Cruise is looking to play—

Chairman HATCH. I see. I should be so lucky. Well, thank you.

Senator LEAHY. I would have been able to finish the book today if you had not kept us here so long, Mr. Chairman.

[Laughter.]

Senator LEAHY. That is one of my greatest disappointments.

Chairman HATCH. I have a feeling I am going to support you, Mr. Junell. I am going to support all three of you, and we are grateful that you are willing to take these jobs. We know that it is really a sacrifice for people like yourselves to take these jobs, but yet they are extremely important for our society. Without these Federal Dis-

trict Court Judges, our society would not exist nearly as well as it does.

Let me just say that the one thing that I caution you on, as an attorney trying a lot in Federal Courts, there seems to be a little syndrome that happens sometimes when Federal District Judges and Circuit Judges—well, frankly, all the way to the top. Once they are on the Court for just a little while, they seem to begin to think they have elements of deity, and we just want to make sure that you three do not get that attitude. Just remember—and do not try cases for the other attorneys. When a young attorney is there and he or she might not understand the evidence as well, you can help them, but do not try their cases for them. And be patient, and do not let being a Federal Judge go to your head. That is one bit of caution that I will tell you. And I have seen it happen in so many cases, even with really dear friends of mine, where they just—and part of it is because you have to make decisions all the time, and you have to sometimes draw a line, and sometimes you get so that you get used to that. But I think it is very important that you help everybody concerned and do justice in the Courts. And I have a great feeling that all three of you will.

So with that, we—

Senator LEAHY. I may note for the record, this deification never happens to the 100 members of the U.S. Senate, you understand.

Chairman HATCH. That is right. What we are going to do is we will probably put you on the next markup Thursday after this one, and hopefully you—now anybody on the Committee has a right to put people over or put any item on the markup agenda over for a week. It is an automatic right on the committee, and it is a very important rule. But hopefully no one will put you over for a week. But with that, if they do put you over for a week, in about two weeks we hopefully will have you out of committee. Then we have to get you on the floor, and we will work on that as well. So we will do our very best to push this process along. And I intend to do that when there is a Democrat President as well. I tried to do it, and I think we did do it to a large degree with President Clinton. It was not perfect, but we did move a lot of judges for him. He became second only to Reagan, the all-time champion, and only five less than Reagan, but nevertheless, I wish we could have done better.

And both Senator Leahy and I are committed to try to change this atmosphere to where we can, whoever is President will be given tremendous consideration on his or her selection of judges.

So with that, we are grateful for your patience. Because of it you really have not had to spend an awful lot of time with us, and that is a great blessing. Think about it. And with that, we will—

Senator LEAHY. Mr. Chairman, excuse me. And I have heard of absolutely no objection on our side of the aisle to these three, so I suspect you are going to be able to keep to that schedule without people putting them over.

Chairman HATCH. We are going to try, and then we will try to get you up on the floor immediately thereafter.

I just want to thank Senator DeWine for his leadership on this committee, and he has not asked any questions any more than the rest of us, and frankly, he plays a great role on this committee, and

Mr. Adams, you are lucky to have him as your Senator, as well as Senator Voinovich.

[The biographical information of Judge Adams, Mr. Junell, and Judge Otero, follow.]

QUESTIONNAIRE FOR NOMINEES BEFORE THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE

1. **Name:** Full name (include any former names used).

John Randell Adams, aka
John Randell Adams, Jr., aka
John R. Adams, nka
Judge John Adams

2. **Position:** State the position for which you have been nominated.

Answer:

U.S. District Court Judge, Northern District of Ohio

3. **Address:** List current office address and telephone number. If state of residence differs from your place of employment, please list the state where you currently reside.

Answer:

Summit County Court of Common Pleas
209 South High Street
Akron, OH 44308
Phone: 330-643-2230

4. **Birthplace:** State date and place of birth.

Answer:

Born September 22, 1955
Orrville, Ohio

5. **Marital Status:** (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es). Please also indicate the number of dependent children.

Single

6. **Education:** List in reverse chronological order, listing most recent first, each college, law school, and any other institutions of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

Answer:

University of Akron School of Law (Evening program) – 1979-1983
Juris Doctorate 1983

Attended University of Toledo School of Law – September 1978
Withdrew due to mother's diagnosis with cancer

Bowling Green State University – 1974-1978
Bachelor of Science in Education received in June, 1978
(cum laude)

7. **Employment Record:** List in reverse chronological order, listing most recent first, all business or professional corporations, companies, firms or other enterprises, partnerships, institutions and organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or job description where appropriate.

Answer:

Current employment: 1999 to present:
Judge, Court of Common Pleas
Summit County, Ohio (Akron)
209 South High Street
Akron, OH 44308

January, 1989 to March 1, 1999:
Associate and Partner, law firm of Kaufmann & Kaufmann
1200 First National Tower
Akron, OH 44308
330-762-7655

July 1, 1986 to February 3, 1989:
Assistant Summit County Prosecutor
Summit County Prosecutor's Office
53 E. Center Street
Akron, OH 44308
330-643-2800

January 6, 1984 to January, 1989:
Associate
Law firm of Germano, Rondy, Ciccolini Co., L.P.A.
P. O. Box 2104
2715 Manchester Road
Akron, OH 44309
330-753-1051

March 23, 1981 to January 6, 1984:
Law Clerk
Judge W. F. Spicer
Court of Common Pleas
209 South High Street
Akron, OH 44308
330-643-2330

1979 through March 1981:
Maintenance and laborer
Morton Salt Co.
151 South Industrial Avenue
Rittman, OH 44270
330-925-3015

Approximately Jan.., Feb., Mar. 1979:
Temporary during strike at Frito-Lay, Inc.
Maintenance and laborer
Servomation, Inc.
Address: Unknown
Company believed to be no longer in existence

1978 Summer-Fall:
Employment Relations Clerk
Frito-Lay, Inc.
1626 Old Mansfield Road
Wooster, OH 44691

8. **Military Service:** Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number and type of discharge received.

Answer:

None.

9. **Honors and Awards**: List any scholarships, fellowships, honorary degrees, academic of professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

Answer:

Bowling Green State University – cum laude 1978
Volunteer Award, Traumatic Brain Injury Collaborative
October 2000

10. **Bar Associations:** List all bar associations or legal or judiciary-related committees, selection panels or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.

Answer:

Member, Akron Bar Association – 1983 to present
Served on the following committees during that time:

Common Pleas & Appellate Courts Committee
Community Relations Committee
Corporate Challenge Committee
Fee Arbitration Committee
Lawyer Referral & Information Service Committee
New Lawyer Committee
Probate Law Section – President 1991
Professional Continuity Committee
Program & Entertainment Committee
Investigative Sub-Committee A
Investigative Sub-Committee B

Member, Ohio State Bar Association

Member, Estate Planning, Trust and Probate Law Section of Bar Association
(Summit and Portage Counties Representative) 1994 to date
Currently, Member Emeritus of said Committee

Also, member of Elder Law Committee – 1998 to date

11. **Bar and Court Admission**: List each state and court in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Answer:

Admitted to Ohio Bar on November 1, 1983

Admitted to Practice of Law in U.S. District Court, Northern District of Ohio
August 13, 1986

12. **Memberships**: List all memberships and offices currently and formerly held in professional, business, fraternal, scholarly, civic, charitable, or other organizations since graduation from college, other than those listed in response to Questions 10 or 11. Please

indicate whether any of these organizations formerly discriminated or currently discriminates on the basis of race, sex, or religion – either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

Answer:

Summit County Mental Health Association
Women's Network
NAACP, life member
Traumatic Brain Injury Collaborative Group
Summit County Criminal Justice Coordination Council
Summit County Civil Justice Commission
Presenter – Leadership Akron

13. **Published Writings:** List the titles, publishers, and dates of books, articles, reports, or other material you have written or edited, including material published on the Internet. Please supply four (4) copies of all published material to the Committee, unless the Committee has advised you that a copy has been obtained from another source. Also, please supply four (4) copies of all speeches delivered by you, in written or videotaped form over the past ten years, including the date and place where they were delivered, and readily available press reports about the speech.

Answer:

None.

14. **Congressional Testimony:** List any occasion when you have testified before a committee or subcommittee of the Congress, including the name of the committee or subcommittee, the date of the testimony and a brief description of the substance of the testimony. In addition, please supply four (4) copies of any written statement submitted as testimony and the transcript of the testimony, if in your possession.

Answer:

None.

15. **Health:** Describe the present state of your health and provide the date of your last physical examination.

Answer:

My present state of health is excellent;
I received a complete physical exam on May 17, 2002.

16. **Citations:** If you are or have been a judge, provide:

(1) a short summary and citations for the ten (10) most significant opinions you have written;

1. State of Ohio v. Clarence A. Elkins
Summit County Court of Common Pleas Case No. CR 1998-06-1415
Ninth District Court of Appeals C.A. No. 19684

This was a death penalty case where the only eyewitness to the crime was a seven-year-old girl. The Court held that the child was competent at the time the hearsay statements were made based on her ability to recollect, communicate, understand the difference between a truth and a lie and the appreciation to be truthful. The Court further held that the hearsay statements were admissible under Ohio Evidence Rule 807 on the basis of independent proof of sexual acts and physical violence and the trustworthiness of those statements made to parents, physicians, hospital personnel, police officers, neighbors and friends. The Ninth District Court of Appeals affirmed this conviction.

In May of 2002, the Defendant filed a Motion to Vacate Conviction/Set Aside Sentence and Motion for a New Trial based on the following claims: (1) another individual committed the crime; (2) the child-victim recanted; (3) the police investigation was flawed; and (4) ineffective assistance of counsel. The State responded with a Motion to Dismiss, as the postconviction petition was untimely filed. The Court held that the Motion was untimely filed and Defendant did not satisfy the requirements of the Ohio Revised Code allowing the Court to consider an untimely motion. The Court further held that even if the Motion had been timely filed, the evidence submitted in support of the postconviction petition lacked sufficient credibility to justify the granting of Defendant's motions.

2. Sarah E. Ostergard, Executrix of the Estate of Walter Ostergard v. Thomas J. Kirby, M.D., et al.
Summit County Court of Common Pleas Case No. CV 1996-03-1156
Ninth District Court of Appeals C.A. No. 19899

This case involved medical malpractice. Plaintiff's decedent suffering from end stage emphysema, underwent a surgical procedure, developed a postoperative infection and died shortly thereafter. Plaintiff identified a trial expert. Defendants filed a motion to exclude her from testifying, as she was not competent to give expert testimony. The Court agreed and prohibited this expert from testifying as she did not devote at least one-half of her time to active clinical practice and she was not generally qualified to render opinions in this matter. This doctor did not admit patients, had no hospital privileges, never performed the type of surgery involved in this case, was not qualified to perform this type of

surgery and did not treat patients with end stage emphysema. The Ninth District Court of Appeals upheld this decision.

3. Citizens for Choice, et al. v. Summit County Council, et al.
Summit County Court of Common Pleas Case No. CV 1999-07-2672
Ninth District Court of Appeals C.A. No. 20117
Ohio Supreme Court Case No. 01-1046 – certiorari denied

This was an administrative appeal. The appellants were seeking declaratory judgment claiming that appellees improperly permitted withdrawal of signatures of freehold electors petitioning for erection of a new township. The Court determined what was meant as an "official action" and further determined when the "official action" took place in this case. The initial official action occurred when the Clerk of Council invoked the official action of the Summit County Auditor. This action rendered further additions and withdrawals of signatures invalid. Based on that date, the Court determined that there were sufficient signatures upon the petitions. The Court further held that it was constitutional for freehold electors to petition to create a new township and it did not violate equal protection clause to those electors who are no landowners. This decision was affirmed by the Ninth District Court of Appeals and certiorari was denied by the Ohio Supreme Court.

4. Wilbur Fath and Joshua W. McPeck, et al. v. Mutual Oil & Gas Co., et al.
Summit County Court of Common Pleas Case No. CV 1997-01-0960 & CV 1997-01-1973
Ninth District Court of Appeals C.A. No. 19851 & 19856

Plaintiffs were driving on unoccupied land in the country when their vehicle got stuck in the mud. They rocked the vehicle until it slid out of the mud and down a slope. The vehicle collided with a gas wellhead and exploded. The plaintiffs had been on the premises before and knew the area. They did not have permission of the landowner to be on the property. The Court held that the plaintiffs were licensees or trespassers. The plaintiffs failed to point to any willful, wanton or reckless misconduct of the landowner. Therefore, Defendants' Motion for Summary Judgment was granted. This was upheld by the Ninth District Court of Appeals.

5. Rebecca Ralston v. John Difiglio
Summit County Court of Common Pleas Case No. CV 1999-02-0475
Ninth District Court of Appeals C.A. No. 19875

This case involved plaintiff and defendant living together for about 14 years, during which time they had two children. The defendant later left the home. He was ordered through Domestic Relations Court to pay child support, which he faithfully did without arrearages. Plaintiff, thereafter, sued defendant for child

support during the time they were living together. The Court held that the defendant was a residential parent and that not only is support presumed but that there was actual evidence of support during that time. The Court granted the Defendant's Motion for Summary Judgment. The Ninth District Court of Appeals affirmed this decision.

6. Marie L. Gehri v. Leslie M. Yung
Summit County Court of Common Pleas Case No. CV 1999-09-3885

Plaintiff was involved in a motor vehicle accident. She discovered that she was pregnant at the time of the accident. She then miscarried approximately one month later. Plaintiff identified a chiropractor as an expert to testify as to the causation of the miscarriage. The Court's opinion held that the chiropractor was not qualified to testify in the area of obstetrics and gynecology and did not permit him to testify.

7. State of Ohio v. Joshua J. Zeffer
Summit County Court of Common Pleas Case No. CR 1999-08-1676
Ninth District Court of Appeals C.A. No. 19893 & 19963

The defendant pled guilty to involuntary manslaughter, multiple counts of aggravated vehicle assault, driving under the influence of alcohol or drugs and lanes of travel/weaving. Prior to sentencing, it came to the defense counsel's attention that the deceased victim was improperly intubated during her medical treatment after the accident. After sentencing, the defendant filed a Motion for Modification of Sentence, Motion to Withdraw the Guilty Plea and Motion for a New Trial. The basis for these motions was that the victim died from other causes than that of the defendant. The Court heard testimony from a registered nurse, not on the scene that evening, and the coroner who performed the autopsy in this case. The Court held that even if the intubation contributed to her death, that but for the defendant's action she would not have died. The opinion discussed causation and that the defendant is responsible for intervening acts. The defendant's motions were denied. This opinion was upheld by the Ninth District Court of Appeals.

8. Lawrence A. DeAngelis v. Carriage Services, Inc.
Summit County Court of Common Pleas Case No. CV 2000-08-3610
Ninth District Court of Appeals C.A. No. 20668 – dismissed

A member of the DeAngelis family passed away. The defendant's company removed the body from the basement of the home. The allegations were that the defendant was not careful in handling the body in front of family members. The plaintiffs alleged in their complaint negligent infliction of emotional distress and intentional infliction of emotional distress. The Court held in its Decision and Order on Motion for Summary Judgment that the plaintiffs failed to meet the elements for negligent and intentional infliction of emotional distress as no

serious emotional injury was established. Most of the plaintiffs did not undergo any type of psychological treatment or counseling whatsoever after the death of their family member. As to the other plaintiffs that did undergo psychological treatment and counseling, they were all seeking treatment prior to the death of their family member. Further, there was no evidence of aggravation of the psychological injury due to the conduct of the defendant.

9. Police & Firemen's Disability & Pension Fund v. City of Akron
Summit County Court of Common Pleas Case No. CV 1999-08-3198
Ninth District Court of Appeals C.A. No. 20996

The plaintiff, a multiple employer public retirement system for uniformed, full-time police and firemen, alleged that the defendant provided incorrect information to the plaintiff for purposes of calculating benefits. As a result overpayments were made to many firefighters. The plaintiff requested that the State Auditor conduct an audit to determine the accuracy of the compensatory time certified by the defendant. The audit revealed that overpayments were made to some 68 retired firefighters. The plaintiff's remaining causes of action were pursuant to O.R.C. §117.28 to recover illegally expended public money and breach of duty pursuant to O.R.C. Chapter 742. The Court held on defendant's Motion for Summary Judgment that the plaintiff had not met the statutory requirements of O.R.C. §117.28 as the Audit Report failed to make a finding for recovery. Further, the Court held that no cause of action was conferred under O.R.C. Chapter 742 for breach of duty. This decision was affirmed on appeal.

10. State of Ohio v. John Goff
Summit County Court of Common Pleas Case No. CR 2001-06-1390A
Ohio Supreme Court S.C. NO. 02-AP-046

The defendant requested that the trial judge be disqualified in his case, as the trial judge was the trier of fact in the co-defendant's case. The co-defendant was charged with two counts of Complicity to Commit Sexual Battery and one count of Endangering Children. The Court found the co-defendant guilty on one count of Complicity to Commit Sexual Battery and one count of Endangering Children. To find the co-defendant guilty of Complicity to Commit Sexual Battery, the Court made a determination beyond a reasonable doubt that a Sexual Battery occurred with the defendant (the principal offender). This is a required element of proving a Complicity to Commit Sexual Battery. The Court held in its decision that it was relying on the facts in that case. The theory of the co-defendant's case was not to establish that the defendant was not guilty. Further, the defendant did not waive a jury in his case. Therefore, the Court would not assess the credibility of the witnesses. The Court was not bias or prejudice, but made its decision based solely on the evidence presented in the co-defendant's case. Therefore, the Court could be fair and impartial in the subsequent case. Subsequent to this decision,

the defendant filed a petition before the Ohio Supreme Court pursuant to O.R.C. §2701.031. The Ohio Supreme Court denied the affidavit of disqualification.

(2) a short summary and citations for all rulings of yours that were reversed or significantly criticized on appeal, together with a short summary of and citations for the opinions of the reviewing court; and

1. Gene Woodson v. Gregory Carlson, dba Aurora Interiors
Summit County Court of Common Pleas Case No. CV 1999-03-1088
Ninth District Court of Appeals C.A. No. 20296

Defendant missed the time in which to answer. The plaintiff filed motion for default judgment. The following day, the defendant moved for leave to plead and later filed an answer and counterclaim. The plaintiff then followed with a motion to strike. The Court granted default judgment. Thereafter, the defendant filed a Motion to Vacate the Default Judgment pursuant to Civ. R. 60(B) on the basis of excusable neglect. The defendant argued that he lost his secretary during the week that the answer was due and then within four weeks went to another law firm. The Court held that it was excusable neglect and granted the Motion to Vacate. The Ninth District Court of Appeals held that the defendant (Appellee) did not meet the tripartite test in order to prevail on a motion for Civ. R. 60(B) in that he did not make the requisite showing of excusable neglect. The trial court abused its discretion in granting the motion. However, the dissenting opinion held that what constitutes excusable neglect is a judgment call for the trial court. That the trial court did not abuse its discretion as it was not unreasonable, arbitrary or unconscionable.

2. Todd J. Schumacher, et al. v. Donald R. Tabor, et al.
Summit County Court of Common Pleas Case No. CV 1997-01-0112
Ninth District Court of Appeals C.A. No. 20027

The defendant executed two promissory notes without specifically indicating that he was signing in a representative capacity. The defendant promised to provide shares of stock to the plaintiff, which never occurred. The plaintiff filed suit. Thereafter, the defendant filed for bankruptcy and the case was stayed. The bankruptcy court held a hearing to determine if the defendant was eligible under Chapter 13. After hearing, the bankruptcy court determined that the defendant was ineligible and dismissed the bankruptcy petition. The bankruptcy court in making that determination found that the defendant was personally liable on the notes and determined that he was liable in the amount of $233,494.31 as of August 4, 1998. The trial court granted summary judgment in favor of the plaintiffs on the basis of *res judicata* as the issue of personal liability and amount were already decided by the bankruptcy court. The Court further awarded $264,128.75 to the plaintiffs. The defendant appealed. The Ninth District Court of Appeals affirmed in part and reversed in part. It held that the bankruptcy court

was a court of competent jurisdiction. The issue of the defendant's personal liability on the notes was actually and necessarily litigated by the bankruptcy court and therefore collateral estoppel prevented that issue from being relitigated. However, the issue of the amount of liability was not specifically litigated and determined by the bankruptcy court. The issue before the bankruptcy court was whether the defendant exceeded the limit to be a Chapter 13 debtor. Therefore, collateral estoppel did not apply to the amount of the liability.

3. Michelle Stefano v. Commodore Cove East Ltd., et al.
Summit County Court of Common Pleas Case No. CV 1999-08-3419
Ninth District Court of Appeals C.A. No. 20447

The plaintiff, a condominium owner, had damage to her premises after a pipe burst. The plaintiff contacted the condominium management to file a claim under their insurance policy. She also filed a claim with her own insurance company, since it was unclear which policy would govern. The condominiums were built and maintained by a limited liability company. Then in 1995, a condominium association was formed imposing bylaws and requiring insurance coverage on the property. When the plaintiff filed her claim in 1997 under the condominium's insurance policy, the insurance company was told by the limited liability company (not the association who was their insured) not to pursue the claim. After four years, the insurance company paid the plaintiff's claim. The remaining cause of action was for bad faith in not pursuing the claim. The Court granted summary judgment in favor of the condominium's insurance company on the claim of bad faith. However, the Ninth District Court of Appeals found that there was a genuine issue of material fact as to the bad faith claim. The insurance company relied on an entity that was not their insured in not pursuing the claim. Further, it took them four years to complete an investigation before paying the claim.

4. Alice Yakubik v. Angela Yakubik
Summit County Court of Common Pleas Case No. CV 1998-06-2383
Ninth District Court of Appeals C.A. No. 19587

Plaintiff served requests for admissions upon defendant, which were not timely answered. The plaintiff then filed a motion to deem them admitted. Some twenty-one days later, the defendant filed a notice that she had responded to the requests for admissions. The next day, the Court deemed the requests for admissions admitted. Thereafter, the plaintiff filed a motion for summary judgment and the defendant opposed and requested that she withdraw the admissions. The Court granted the motion for summary judgment and held that the requests be deemed admitted. The defendant then filed a Motion for Reconsideration and Motion for Relief from Judgment pursuant to Civ. R. 60(B). The Court granted the Motion for Relief from Judgment, vacating the order deeming the admissions admitted. The Ninth District Court of Appeals held that Civ. R. 60(B) may not be used as a substitute for a direct appeal. Once the trial

court's decision became final, it is the appellate court and not the trial court that should reconsider the decision in order to correct legal errors. There was a concurring opinion in judgment only, stating that the trial court should be able to correct its own errors when appropriate in the interest of judicial economy.

5. James A. Lamb, et al. v. Summit Mall, et al.
Summit County Court of Common Pleas Case No. CV 1998-08-3178
Ninth District Court of Appeals C.A. No. 20011

Plaintiff, an employee of a subcontractor, fell from a ladder at a mall and was injured. The defendants, the mall and general contractor, filed motions for summary judgment. The Court granted such motions as the work performed by the plaintiff was inherently dangerous and the defendants did not actively participate in the subcontractor's work. Therefore, the duty owed was less. The Ninth District Court of Appeals affirmed. However, the Court dismissed a fourth-party complaint by the general contractor against the subcontractor *nunc pro tunc*. The Ninth District Court of Appeals held that although the claim for indemnification is moot based on the motion for summary judgment, there was still an issue for costs and expenses. An order *nunc pro tunc* was not a proper way to dismiss that claim.

6. Instant Win, Ltd., et al. v. Summit County Sheriff, et al.
Summit County Court of Common Pleas Case No. CV 2001-05-2100
Ninth District Court of Appeals C.A. No. 20762

The plaintiffs filed a complaint seeking declaratory judgment, injunctive relief and a temporary restraining order. The Court denied the temporary restraining order. The defendants moved to dismiss the complaint. The Court granted the motion to dismiss based on the jurisdictional priority rule. The Ninth District Court of Appeals reversed saying that the jurisdictional priority rule applies in situations where the causes of action are the same or sufficiently similar in both cases. Further, the same parties must be involved and where the ruling of a subsequent court could affect or interfere with the issues before the other court. As the plaintiffs' motion to intervene in the Franklin County Case was not yet ruled on, therefore the same parties are not involved and the jurisdictional priority rule does not apply.

7. State of Ohio v. LaMonta R. McCoy
Summit County Court of Common Pleas Case No. CR 2001-01-0049
Ninth District Court of Appeals C.A. No. 20656
Ohio Supreme Court Case No. 02-0439

The Defendant was indicted on one count of Rape, Intimidation of a Crime Victim or Witness, and three counts of Sale to Underage Persons. The Defendant went to trial on these charges and the jury returned a verdict of not guilty of Rape

and Intimidation of a Crime Victim or Witness, but guilty of Attempted Rape and all three counts of Sale to Underage Persons. Thereafter, the Defendant filed a Petition for Post Conviction Relief raising ineffective assistance of counsel. The Defendant's lack of employment and schooling was put to the jury by his own counsel. Counsel further asked the Defendant during trial about his criminal record and about being in jail. The Defendant's criminal record was not likely to come in during the State's case-in-chief as the record included only traffic and misdemeanor offenses that were not crimes of dishonesty. Although the Defendant's criminal record only included misdemeanors, some of these crimes were against women, i.e. domestic violence and menacing. Further, the Defendant's counsel brought up the fact that a protection order was filed against the Defendant by his girlfriend. Defense counsel even corrected the Defendant when he was testifying about his prior convictions. The Court held that even if these actions by themselves did not fall into a category of ineffective assistance of counsel, in combination they rose to a level of deficient performance. As a result of such actions, the defendant was prejudiced and this information did weigh in the outcome. The Ninth District Court of Appeals held that the defendant did not overcome the presumption that the trial counsel's introduction of such evidence might be considered sound trial strategy and that he was prejudiced. This decision was appealed to the Ohio Supreme Court.

8. State of Ohio v. Kevin Lee Blanchard
Summit County Court of Common Pleas Case No. CR 1999-02-0281
Ninth District Court of Appeals C.A. No. 19943

Defendant was charged with Receiving Stolen Property after he informed a co-defendant on how to burglarize his girlfriend's parents' home. He further showed the co-defendant where the home was located. Once the home was burglarized and the co-defendant pawned the items, he split the proceeds with the defendant. A bench trial was held, the Court found the defendant guilty. The Court concluded that the definition of property included the cash proceeds thereof. The Ninth District Court of Appeals held that since the defendant did not have dominion or control over the property throughout, the State cannot establish that he received, retained or disposed of the property. Further, the Ninth District Court of Appeals felt that cash proceeds went beyond the legislature's intent. It also argued that if the proceeds are considered property then also could the items purchased with those proceeds, making the definition of property endless. The dissenting opinion held that property could include proceeds from the sale of stolen property.

9. State of Ohio v. Ronald Spatney
Summit County Court of Common Pleas Case No. CR 1999-04-0859
Ninth District Court of Appeals C.A. No. 20288

The defendant plead guilty to one count of Attempted Rape, a felony of the second degree. The Court sentenced him to the maximum sentence of eight years in prison. The defendant appealed to the Ninth District Court of Appeals arguing that the trial court failed to set forth findings on the record for imposing the maximum sentence. The case was remanded and the Court resentenced the defendant to eight years in prison after placing the appropriate findings on the record.

10. State of Ohio v. Debra Roberts
Summit County Court of Common Pleas Case No. CR 2000-05-1086(C)
Ninth District Court of Appeals C.A. No. 20266

The defendant plead guilty to one count of Robbery, a felony of the third degree. The Court sentenced her to the maximum sentence of five years in prison. The defendant appealed to the Ninth District Court of Appeals arguing that the trial court failed to set forth findings on the record for imposing the maximum sentence. The case was remanded and the Court resentenced the defendant.

11. State of Ohio v. Darius Allison
Summit County Court of Common Pleas Case No. CR 2000-03-0601
Ninth District Court of Appeals C.A. No. 20195

The defendant plead guilty to one count of Robbery (a felony of the second degree), firearm specification (one year term) and aggravated menacing (a misdemeanor of the first degree). The Court sentenced him to the maximum sentence of eight years in prison on the charge of Robbery and six months on the charge of aggravated menacing to be served concurrently. Further, the Court sentenced him to a term of one year for the firearm specification to be served consecutively. The defendant appealed to the Ninth District Court of Appeals arguing that the trial court failed to set forth findings on the record for imposing the maximum sentence. The case was remanded and the Court resentenced the defendant.

12. State of Ohio v. Gary A. Phares
Summit County Court of Common Pleas Case No. CR 1998-07-1780(A)
Ninth District Court of Appeals C.A. No. 19884

The defendant plead guilty to Burglary (a third degree felony) and Felonious Assault (a second degree felony). The Court sentenced him to four years in prison for burglary and six years in prison for felonious assault to be served consecutively. During the sentencing, the Court relied on statements by the victim and made reference to these statements during the sentencing. These victim impact statements were not disclosed to the defendant or his counsel prior to sentencing, as is usual protocol. The Ninth District Court of Appeals held that the Court failed to provide the defendant or his counsel with an opportunity to

comment on such statements before being sentenced since it was relied on for purposes of sentencing. The case was remanded and the Court resentenced the defendant after providing an opportunity for the defendant to respond to those statements.

13. State of Ohio v. Joseph D. Martin
Summit County Court of Common Pleas Case No. CR 2000-05-1086(D)
Ninth District Court of Appeals C.A. No. 20292

The defendant plead guilty to Aggravated Robbery, a felony of the first degree. The Court sentenced him to the maximum of ten years in prison. The defendant appealed his sentence to the Ninth District Court of Appeals, which affirmed in part and reversed in part. The appellate court held that the appropriate findings for the maximum sentence were made, that no prejudice occurred in not instructing on "bad time" and that the defendant was notified that he was subject to post-release control. However, the Court failed to inform the defendant of the ramifications of a violation of post-release control. The case was remanded and the Court advised the defendant of such ramifications.

14. State of Ohio v. Kreighammer Vonniordsson
Summit County Court of Common Pleas Case No. CR 2000-08-1918
Ninth District Court of Appeals C.A. No. 20368

The defendant plead guilty to one count of Corruption of a Minor, a felony of the fourth degree. The Court sentenced him to the maximum sentence of eighteen months in prison. The Court further found that the defendant was a sexual predator. The defendant appealed to the Ninth District Court of Appeals arguing that the trial court failed to set forth findings on the record for imposing the maximum sentence and failed to follow the State's recommendation that he be declared a sexually oriented offender. The Ninth District Court of Appeals affirmed in part and reversed in part finding that the Court failed to make findings for a maximum sentence. However, the Court was not bound to the recommendations made by the State regarding the defendant's sexual offender status. The case was remanded and the Court resentenced the defendant.

15. State of Ohio v. Kendrick L. Edwards
Summit County Court of Common Pleas Case No. CR 2001-04-0820
Ninth District Court of Appeals C.A. No. 20840

The defendant plead guilty to Possession of Cocaine and was sentenced to two years community control with the condition that he enter and successfully complete the Summit County Community Based Correctional Facility (CBCF). Thereafter, he violated his community control by failing to complete the CBCF program and was found guilty by the Court. The Court sentenced him to eleven months in prison, but denied credit for time served in CBCF. The defendant

appealed the denial of credit for time served in CBCF. The Ninth District Court of Appeals reversed and remanded to determine if the time in CBCF was confinement entitling him to jail time credit.

16. State of Ohio v. Kenneth D. Linscott
Summit County Court of Common Pleas Case No. CR 1999-07-1466
Ninth District Court of Appeals C.A. No. 19947 & 20021

The defendant plead guilty to two counts of gross sexual imposition (felonies of the third degree). The Court sentenced him to five years community control with the condition that he enter and successfully complete a sex offender program. Within nine days of entering that program, the defendant was terminated from the program and violated on community control. The defendant plead not guilty to his community control violation. A hearing was held and the Court found the defendant guilty. The Court sentenced the defendant to the maximum five years on each count to be served consecutively. The Court further found that he was a sexual predator. The Ninth District Court of Appeals affirmed in part and reversed in part. The appellate court affirmed the acceptance of the guilty plea, order of the competency evaluation, enforcement of the order to interview the defendant, effective assistance of counsel, imposing of a prison term that was not the minimum and permitting hearsay during a probation violation hearing. The appellate court reversed as the trial court failed to make the requisite findings for the maximum and consecutive sentences and failed to provide adequate notice prior to holding the sexual offender hearing. The case was remanded and the Court resentenced the defendant and held the sexual offender hearing after adequate notice.

17. The Maple Street Living Trust v. Frank J. Spada, et al.
Summit County Court of Common Pleas Case No. CR 2000-07-3029
Ninth District Court of Appeals C.A. Nos. 20736, 20737

This case was brought as a Foreclosure action on certain real property in Summit County, Ohio, known as lots 279 and 280. It is undisputed that the Plaintiff has a proper mortgage on the property at issue. The Plaintiff filed a Motion for Leave to file a Motion for Summary Judgment and a Motion for Summary Judgment to foreclose on both lots. One of the defendants, Fifth Third Bank, has a subsequent mortgage on lot 280 only. That defendant filed a Motion to Strike Portions of the Summary Judgment that applied to lot 280, or in the alternative, a Motion to Reconsider and Deny the Plaintiff Leave to Request Summary Judgment on lot 280. The Court denied the Defendant's Motions and granted the Plaintiff's Motion for Summary Judgment, allowing both lots to be sold to satisfy the outstanding mortgage. The Ninth District held that upon denying Defendant's Motion to Strike, the Court was required to give Defendants the opportunity to respond to Plaintiff's Motion before ruling. The Court's ruling was reversed and

remanded with instruction to allow Defendant time to respond to Plaintiff's Motion.

18. State of Ohio v. Marsha L. Weese
Summit County Court of Common Pleas Case No. CR 2000-10-2422
Ninth District Court of Appeals C.A. No. 20769

The Defendant was charged with Driving While Under the Influence of Alcohol or Drugs, Aggravated Possession of Drugs, and Possession of Drugs. The charges were filed after an incident where the Defendant was found in her car, stopped at a green light, slumped over the steering wheel. When a police officer approached the Defendant's vehicle, she depressed the accelerator, causing the vehicle to lurch forward. After the Defendant stopped the vehicle, the officer noticed that she appeared confused. Defendant was given a field sobriety test, which had conflicting results. The Defendant repeated that she was tired. The officer allowed the Defendant to drive to a parking lot in order to call someone for a ride home. When she was unable to obtain a ride, the officer decided to drive her to a hotel. Before entering the vehicle, the officer requested that the Defendant empty her pockets for safety reasons. The contents of her pockets contained five round blue pills. When unable to obtain a satisfactory answer as to the substance of the pills, the Defendant was placed under arrest. The officer then searched the Defendant's purse and discovered cocaine. The Court held a suppression hearing regarding the pills uncovered and the cocaine subsequently found in the Defendant's purse after her arrest. The Motion to Suppress was denied. The Ninth District Court of Appeals held that the officer's request to have the Defendant empty her pockets exceeded the scope of a pat-down search under Terry v. Ohio. As such, the cocaine found in the Defendant's purse was fruit of the poisonous tree and was therefore also inadmissible.

19. State of Ohio v. Richard D. Bronner
Summit County Court of Common Pleas Case No. CR 2001-03-0568
Ninth District Court of Appeals C.A. No. 20753

Defendant was charged with Rape of a Child under the age of thirteen and Sexual Battery. The charges were based on allegations, made by the maternal grandfather who also had legal custody of the child, that the Defendant had the four-year-old child perform sex upon him. The Defendant went to trial on these charges. During opening statements, Defendant's counsel implied that the grandfather was bias against the Defendant because of his race. After cross-examination of the grandfather, the State requested a sidebar and approached the Court about introducing evidence in rebuttal of other reasons why the grandfather disliked the Defendant other than race. The State argued that defense counsel inaccurately left the impression that the grandfather disliked the Defendant because of his race and it should be permitted to rebut the impression by introducing evidence of other reasons, such as a prior arrest, a conviction and

other illegal acts. The Court concluded, over defense objection, that the State was permitted to introduce such evidence in order to rebut the impression left by the defense and to fully explain why the grandfather may not like the Defendant. The jury returned a verdict of guilty on both the Rape and Sexual Battery. Thereafter, the Defendant filed an appeal to the Ninth District Court of Appeals. The Ninth District, in a split decision, held in a majority, that the defense did not "open the door" to the character testimony presented by the State, that the evidence presented by the State did not properly rebut the inference made by the defense, and that the testimony presented by the State was improper character evidence. The majority further held that because the only evidence presented was the word of a young child, the Defendant was prejudiced by the introduction of this character evidence. Justice Carr gave a strong dissent to the majority decision. Justice Carr stated that the evidence was properly admitted and that the State presented more evidence of Defendant's guilt than just the child's testimony. The other evidence presented was that the child demonstrated behaviors such as wetting the bed, uncharacteristically aggressive and clingy behavior and sexually provocative actions toward others. Justice Carr further stated that the character evidence presented by the State was meaningless when compared to the Defendant's taped statement about the incident placing the blame on the four-year-old victim for sexually attacking him. Note: The State of Ohio has appealed this decision to the Ohio Supreme Court.

20. Barry Smith, et al. v. Coldwell Banker Hunter Realty, et al.
Summit County Court of Common Pleas Case No. CV 2000-07-3255
Ninth District Court of Appeals C.A. No. 20908

Plaintiff alleged fraud and intentional misrepresentation against Defendant, Coldwell Banker Hunter Realty, and its agent in recommending a builder to the Plaintiff. Due to the Court being in trial on a criminal matter, this action was referred to another Common Pleas Judge, who heard the case as a courtesy to the Court. After the Plaintiffs rested their case in chief, the presiding Judge, upon the court's own motion, dismissed the case without prejudice pursuant to Civ. R. 41(B), for the Plaintiff failing to offer evidence of all issues. It appears from the record that the basis of the trial court's ruling was that the Plaintiff failed to offer evidence of diminution in value to establish damages. The Plaintiff then filed a Motion for a New Trial. This Court granted the Plaintiff's Motion, determining that the Plaintiff was not required to prove diminution of value in their case in chief. The Ninth District ruled that diminution in value of real property is a limiting factor on an award for damages to real property, keeping the restoration costs from being grossly disproportionate to the diminution in value. Because the damage to the property in this case totaled almost one-half the purchase price of the home, the Ninth District found that the case was properly dismissed for failure to present evidence of diminution in value in the Plaintiff's case in chief.

21. Ralph Howell v. Summit County, et al.
Summit County Court of Common Pleas Case No. CV 2000-03-1269
Ninth District Court of Appeals C.A. No. 20958

In this action, the Plaintiff claimed that his employer and various individuals unlawfully discriminated against him based on race and sex. The Plaintiff based his allegations from a complaint that he made in 1992, that his pay was not comparable to other employees of a different race or sex. After this initial conversation, no action was taken against the Plaintiff for years. Several years after his complaint, the Plaintiff was reprimanded and his position changed, although his pay remained the same. Plaintiff claims that his change in position was in retaliation to his 1992 complaint. Plaintiff's alleged damages include the fact that he is no longer able to receive phone calls at work or receive mail delivered to his prior office, that in his new position, his pay has the potential of being reduced and that he has suffered physical and emotional harm. The Defendant filed a Motion for Summary Judgment, which this Court granted. The Court found that the Plaintiff failed to establish a prima facie case of retaliatory discrimination because the Plaintiff was replaced by a person of similar race and sex, and that the Defendant established a legitimate, non-discriminatory business reason for the Plaintiff's transfer. The Ninth District Court of Appeals held that, although the Plaintiff may have failed to establish a prima facie case of retaliatory discrimination because he was not replaced by a non-protected person, that he may be able to do so by showing that a comparable non-protected person was treated better. Because this issue was not addressed in the Defendant's Motion, the Ninth District determined that Defendant had failed to meet its burden and reversed the Court's ruling.

22. State of Ohio v. Wayne A. Wood
Summit County Court of Common Pleas Case No. CV 1999-07-1423
Ninth District Court of Appeals C.A. No. 21044

The defendant plead guilty to one amended count of Burglary, a felony of the third degree. The Court sentenced him to the maximum sentence of five years in prison. The defendant appealed to the Ninth District Court of Appeals arguing among other claims, that the trial court failed to set forth findings on the record for imposing the maximum sentence. The case was remanded to the Court for resentencing. A hearing is scheduled for December 10, 2002, to resentence the defendant.

23. MGM Landscape Contractors, Inc. v. Robert W. Berry, et al.
Summit County Court of Common Pleas Case No. CR 1996-12-5174
Ninth District Court of Appeals C.A. No. 20979

The plaintiff originally filed an affidavit for a mechanic's lien for defendants' failure to pay for landscaping services. The plaintiff later amended the complaint to include a demand for money judgment for labor and material and a request that the mechanic's lien be found to be valid so that it could foreclose on the property. The defendants filed multiple counterclaims. The claims remaining at trial were for a violation of the Consumer Sales Practices Act, breach of contract, slander of title and failure to complete the work in a workmanlike manner. The defendants were involved in various other legal actions regarding other contractors on this same property, the plaintiff's law firm, defendants' own attorney, the plaintiff's insurance company, the insurance company's claims adjuster and the wife of MGM Landscape Contractors, Inc.'s president. Further, the defendants filed suit on these same claims against the plaintiff in other courts. The trial court admitted this evidence of defendants' litigiousness on the basis that it demonstrated the defendants' motive and/or plan to not pay for services. The Ninth District Court of Appeals held that such evidence was not relevant and the probative value was not substantially outweighed by the danger of unfair prejudice pursuant to Ohio Evidence Rules 403(A) and 404(B). The case was remanded to the trial court for further proceedings consistent with the appellate decision.

(3) a short summary of and citations for all significant opinions on federal or state constitutional issues, together with the citation for appellate court rulings on such opinions.

1. Cleveland Neighborhood Builders, Inc., et al. v. The Council of the City of Akron, et al.
Summit County Court of Common Pleas Case No. CV 1999-06-2242
Ninth District Court of Appeals C.A. No. 20273

This is an administrative appeal arising from Akron City Council's denial of a conditional use permit to Cleveland Neighborhood Builders, Inc. The Court affirms the decision of Akron City Council. The Court could not find that the city council's decision was capricious and unreasonable and based solely on objections by the community. The city code sets forth factors to be considered in determining whether to grant a permit. All of these factors must be met to grant such a permit. This Court found by a preponderance of the evidence that one of the criteria was not met and therefore the decision was reasonable. Cleveland Neighborhood Builders, Ind. further argued that the city's code was unconstitutional which the Court rejected. This decision was ultimately affirmed by the Ninth District Court of Appeals.

2. State of Ohio v. Delbert L. Dewitt
Summit County Court of Common Pleas Case No. CR 1999-03-0475

The defendant being charged with rape, kidnapping and attempted murder, pled guilty to felonious assault and attempted rape. He was sentenced to seven years

on each count consecutively in prison. The defendant subsequently filed petition for post-conviction relief on the basis of ineffective assistance of counsel and violation of due process. The Court's opinion held that the defendant's plea was voluntarily made. The defendant did not raise this issue until after he was sentenced. Further, the trial court had a lengthy discussion with the defendant at the time of his plea, determining whether the defendant knew the nature of the charges and the maximum sentence that he could face. Further, the Court held that counsel was effective. The defendant failed to show that counsel performance was deficient and but for the counsel's errors, he would not have pled guilty. The defendant was provided several attorneys throughout the course of his case. He also failed to appear at sentencing.

3. State of Ohio v. Timothy P. Carmichael, Sr.
Summit County Court of Common Pleas Case No. CR 1999-04-0778(A)

The defendant was previously charged and pled guilty to theft of equipment. He was later charged with theft in office of ghost payroll accounts. An administrative hearing by his employer resulted in a pay reduction and transfer to another position based on the theft conviction. The Court held that double jeopardy did not attach either to the first theft case or the administrative hearing. Further, the Court held that collateral estoppel did not apply. The Defendant's Motion to Dismiss was denied.

4. State of Ohio v. Neil E. Webster
Summit County Court of Common Pleas Case No. CR 1999-09-1897
Ninth District Court of Appeals C.A. No. 20184 – dismissed

The defendant pled guilty to one count of Corruption of a Minor (felony of the fourth degree) and was sentenced to eleven months in prison. He then filed a Motion to Terminate Post Release Control as it violates the Fifth, Eighth and Fourteenth Amendments of the United States Constitution. There was an issue of standing if the defendant had not yet served his sentence and been placed on post release control as of the time of his motion. The Court's opinion further held that it is not the discretion of the trial court to determine who will be on post release control. By statute, it is the authority of the parole board. Therefore, the defendant's motion was denied. An appeal was filed on July 24, 2000, to the Ninth District Court of Appeals and was later dismissed.

5. State of Ohio v. Clyde DeWayne Rice
Summit County Court of Common Pleas Case No. CR 1986-06-0757

The defendant pled guilty to Aggravated Robbery with a firearm specification in 1986. Subsequently, he pled guilty to aggravated trafficking charges. The defendant stated that he was not aware at the time he pled guilty to the robbery (considered a violence specification) he had become a candidate for enhancement

of any future sentence. The defendant filed for Writ of Error Coram Nobis. The Court held that writs of coram nobis are not part of the law in Ohio and considered it a petition for post conviction relief. The Court further held that the defendant's motion was untimely filed and denied the relief.

6. State of Ohio v. David L. Piper
Summit County Court of Common Pleas Case No. CR 1998-07-1833

The defendant was charged with multiple counts of Sexual Penetration (first degree felony), Gross Sexual Imposition (third degree felony) and Endangering Children (first degree misdemeanor). The defendant filed a motion to dismiss on the basis of State v. Hughes (1999), 86 Ohio St.3d 424, claiming that the misdemeanor charges were not brought within the speedy trial time. The Court noted an exception to the tolling of time when it is based on the defendant's own motion and any reasonable continuance.. After time was calculated, there was only one period in dispute. That period involved setting a trial date. Defendant's counsel requested a date in April and the Court directed that it be set in March, as that was the court's next available trial date. It was determined that such continuance was reasonable. Therefore, the motion to dismiss was denied.

7. State of Ohio v. Jeffery T. Cole
Summit County Court of Common Pleas Case No. CR 1993-10-2448(B)
Ninth District Court of Appeals C.A. No. 20065

The defendant was found guilty by a jury of Involuntary Manslaughter with the underlying offense of assault with a firearm specification, which offenses occurred on or about October 16, 1993. The defendant was sentenced to consecutive sentences of four to ten years in prison on the Involuntary Manslaughter and three years mandatory on the firearm specification. Defendant requested judicial release pursuant to Ohio Revised Code §2929.20. However, the offenses, trial and sentencing were prior to Senate Bill 2, which became effective on July 1, 1996. Therefore, the Defendant is not eligible for judicial release, as Senate Bill 2 does not apply retroactively. The defendant was also not eligible for shock/supershock probation due to using a firearm in committing the offense. The Court held that the defendant's equal protection and due process under the Fourteenth Amendment was not violated because Senate Bill 2 is not retroactively applied. The defendant argued that he did not receive the benefits of post Senate Bill 2. However, the defendant does receive the benefits of pre Senate Bill 2, such as good time. Therefore, the defendant's Motion for Judicial Release was denied. The Ninth District Court of Appeals affirmed that decision.

8. State of Ohio v. James B. Barnett
Summit County Court of Common Pleas Case No. CR 2000-10-2441

The defendant filed a motion to suppress on multiple issues. The Court found that the stop was lawful as the officers were stopping the defendant on a traffic violation. The Court found the statements made by the defendant were admissible on the basis that the Miranda warnings were given and that the defendant made the statements on his own without questioning by the officers. A gun was discovered on the seat of the vehicle. The Court held that when the officer went to retrieve marijuana in plain view he observed the gun in the open pouch in plain view. The Court further noted that the gun would have inevitably been discovered during the inventory for tow of the vehicle. The defendant argues that his refusal to take a breathalyzer test is inadmissible due to the officer's failure to advise him of the consequences of the refusal. The Court held that failure to advise of the consequences of the refusal can affect the administrative license suspension, but it does not affect the admissibility of the refusal.

9. State of Ohio v. Richard Louis Curley
Summit County Court of Common Pleas Case No. CR 2000-09-2145
Ninth District Court of Appeals C.A. No. 20474

The defendant was a suspect in a string of burglaries in the area. He was arrested on other pending charges and taken to the police station. He confessed on two occasions to the burglaries and also took the officers to the homes that he burglarized. On a Motion to Suppress, the defendant claimed that he was not given his Miranda warnings and that his statements were not voluntarily made. The evidence supported that the Miranda warning was given to the defendant on both occasions. The defendant argued that he requested to call his family so they could contact an attorney and the police refused. He also argued that they threatened not to release his girlfriend unless he confessed and promised him drug treatment with no prison time. However, the evidence supports that the defendant knew of his girlfriend's release and still continued to talk with police. Although the police promised to get him help for his drug problem, it was not in exchange for his confession. At no time did they promise that he would not go to prison. The Court denied the defendant's motion to suppress. The defendant filed a notice of appeal on February 23, 2001, to the Ninth District Court of Appeals. The Court dismissed the case as untimely filed.

10. State of Ohio v. Russell L. Dossie
Summit County Court of Common Pleas Case No. CR 1999-07-1376
Ninth District Court of Appeals C.A. No. 19935

This case arose out of an incident on July 4th where the victim got out of his vehicle and approached the defendant's cab in anger. The defendant then shot the victim, killing him. The defendant left the scene and disposed of the weapon. The State charged the defendant with murder pursuant to Ohio Revised Code §2903.02(B). The defendant filed a Motion to Dismiss this indictment on the basis that this statute was unconstitutional. The Court held that although there is

no mens rea requirement in that murder statute, the underlying first or second-degree felony does have a mens rea attached. The defendant argued violation of equal protection, as the new felony-murder statute and involuntary manslaughter are identical in proof but impose different penalties. The Court held that the crimes were not identical as the new felony-murder statute limits the underlying offense to that of a first or second-degree felony of violence. The Court further held that this statute does not violate the defendant's rights against cruel and unusual punishment, as the penalty is not greatly disproportionate to the offense. This case was appealed to the Ninth District Court of Appeals and affirmed. However, the jury found the defendant not guilty of the murder charge.

11. State of Ohio v. Michael L. Roper
Summit County Court of Common Pleas Case No. CR 2000-04-0945

The defendant was brought to trial on four separate occasions on the same charges of Aggravated Robbery and Aggravated Murder. The first three jury trials resulted in a mistrial as the jurors were unable to reach a unanimous verdict. The jury reached a verdict of guilty on all counts in the fourth trial. At the start of the fourth trial, individual voir dire was conducted of the prospective jurors specifically to pretrial publicity and bias. During the second day of deliberations, jurors expressed concerns of unwanted media attention and concerns for their safety. After the Court addressed some of the issues, the jurors resumed deliberations and eventually reached a verdict. After the verdict, each juror individually, on the record, indicated a desire not to have their names and addresses disclosed to the media. The jurors were approached upon leaving the jury room and some later were contacted by media following the filing of the verdict forms. Their answers were the same. They refused to answer questions or be interviewed. The Court did not permit the release of the jurors' names and addresses upon requests from local media. After a hearing regarding the matter, the Court denied the request to release the names finding an overriding interest compels limitation upon the right of access and that this was the least restrictive means possible. No appeal was taken on this decision.

12. State of Ohio v. John T. Goff & Narda K. Goff
Summit County Court of Common Pleas Case No. CR 2001-06-1390

The defendants made statements to employees from the Department of Job and Family Services, the magistrate and an assistant prosecutor during a shelter care hearing and informal meeting in regard to the placement of the child. Further, questions were asked of the defendants regarding paternity as is required for the shelter care hearing. The defendants made further statements during a meeting with the agency when introducing the new social worker on the case. The defendants also made statements to the police prior to them being considered suspects in the case. During none of these statements were *Miranda* rights given

to the defendants. The Court held these interviews with the defendants were not custodial in nature and therefore did not trigger the need for *Miranda* warnings.

13. State of Ohio v. Marsha Weese
Summit County Court of Common Pleas Case No. CR 2000-10-2422
Ninth District Court of Appeals C.A. No. 20769

An officer made a proper Terry stop upon observing suspicious operation of a motor vehicle. He made all accommodations possible to assist the driver in obtaining alternate transportation, which she was unable to do. The officer then offered to transport the defendant to locale where she could stay. In placing her in the cruiser, he performed a safety search and discovered drugs. Defendant's Motion to Suppress the contents of the search was denied. This decision was reversed on appeal. See Answer to Question 16(2), No. 18.

14. State of Ohio v. Clarence A. Elkins
Summit County Court of Common Pleas Case No. CR 1998-06-1415
Ninth District Court of Appeals C.A. No. 19684

This was a death penalty case where the only eyewitness to the crime was a seven-year-old girl. The Court held that the child was competent at the time the hearsay statements were made based on her ability to recollect, communicate, understand the difference between a truth and a lie and the appreciation to be truthful. The Court further held that the hearsay statements were admissible under Ohio Evidence Rule 807 on the basis of independent proof of sexual acts and physical violence and the trustworthiness of those statements made to parents, physicians, hospital personnel, police officers, neighbors and friends. The Ninth District Court of Appeals affirmed this conviction.

In May of 2002, the Defendant filed a Motion to Vacate Conviction/Set Aside Sentence and Motion for a New Trial based on the following claims: (1) another individual committed the crime; (2) the child-victim recanted; (3) the police investigation was flawed; and (4) ineffective assistance of counsel. The State responded with a Motion to Dismiss, as the postconviction petition was untimely filed. The Court held that the Motion was untimely filed and Defendant did not satisfy the requirements of the Ohio Revised Code allowing the Court to consider an untimely motion. The Court further held that even if the Motion had been timely filed, the evidence submitted in support of the postconviction petition lacked sufficient credibility to justify the granting of Defendant's motions.

If any of the opinions or rulings listed were in state court or were not officially reported, please provide copies of the opinions.

17. **Public Office, Political Activities and Affiliations:**

(1) List chronologically any public offices you have held, federal, state or local, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also state chronologically any unsuccessful candidacies you have had for elective office or nominations for appointed office for which were not confirmed by a state or federal legislative body.

Ran unsuccessfully for 5th Ward City Council, Akron, Ohio, in 1985.

(2) Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

Answer:

Volunteered in the judicial campaigns of Judge Donna J. Carr, Ninth District Court of Appeals, and in the judicial and prosecutor campaigns of Maureen O'Connor.

18. **Legal Career:**

(a) Describe chronologically your law practice and experience after graduation from law school including:

(1) whether you served as a clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

Answer:
Clerk to Judge W. F. Spicer
Court of Common Pleas, Probate Division, Summit County, Ohio
209 South High Street, Akron, OH 44308
During and immediately following law school –
March 23, 1981 to January 6, 1984

(2) whether you practiced alone, and if so, the addresses and dates;

No

(3) the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each.

Answer:

Associate with the law firm of Germano, Rondy and Ciccolini Co., L.P.A.
P. O. Box 2104
2715 Manchester Road
Akron, OH 44309
330-753-1051
From January, 1984 to January, 1989.

Associate and partner in the law firm of Kaufmann & Kaufmann
1200 First National Tower
Akron, OH 44308
330-762-7655
From January, 1989 to March, 1999.

(b)

(1) Describe the general character of your law practice and indicate by date if and when its character has changed over the years.

Answer:

From 1984 through 1986, during my years as an associate in the law firm of Germano, Rondy & Ciccolini Co., my practice consisted primarily of the general practice of law. During that time, I handled a wide range of matters, including criminal, civil, domestic and probate related matters.

From 1986 through 1989, during my tenure in the Summit County Prosecutor's Office as an Assistant Prosecutor, I handled civil matters representing various office holders of Summit County, as well as subdivisions thereof. While serving as Assistant Prosecutor, I also maintained a part-time association with the law firm of Germano, Rondy & Ciccolini Co., almost exclusively probate and estate planning related matters.

Upon joining the law firm of Kaufmann & Kaufmann in 1989, my practice became almost exclusively limited to the area of estate planning, probate, trust law, specializing in such areas as guardianships, adoptions, medicaid planning, and planning for those with disabilities. That specialty continued throughout my tenure as both an Associate and Partner with the law firm of Kaufmann & Kaufmann and Philip S. Kaufmann.

Answer:

Families, senior citizens, disadvantaged and handicapped.

(c)

(1) Describe whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe each such variance, providing dates.

Answer:

During the early part of my career, during the general practice of law, my appearances in court were frequent, including civil, criminal and probate. Those appearances were almost exclusively in state courts, both municipal and common pleas.

During my tenure as an Assistant Summit County Prosecutor, the frequency of court appearances lessened; however, during that time frame my practice also extended to the Federal District Court.

(2) Indicate the percentage of these appearances in:

(a) federal courts;
(b) state courts of record;
(c) other courts.

Answer:

I would roughly estimate that during my tenure in the Summit County Prosecutor's Office that approximately 80 percent of the cases were at the state court level, with approximately 20 percent at the federal court level. As a private practitioner from 1983 to 1986 I would estimate 50% of my cases were in probate courts and 50% were in other state courts of record. From 1989 to 1999, 95% of my cases were in probate courts and the balance were in other state courts of record.

(3) Indicate the percentage of these appearances in:

(a) civil proceedings;
(b) criminal proceedings.

Answer:

As noted above, during the early part of my career, I would estimate that my practice was divided into 60 percent civil and 40 percent criminal. Following 1986, during my tenure in the Summit County Prosecutor's Office, thereafter my practice consisted almost exclusively of civil related matters.

(4) State the number of cases in courts of record you tried to verdict or judgment rather than settled, indicating whether you were sole counsel, chief counsel, or associate counsel.

Answer:

There were no cases which I tried to verdict or judgment.

(5) Indicate the percentage of these trials that were decided by a jury.

Answer:

Almost all of the cases were non-jury matters.

19. Litigation: Describe the ten (10) most significant litigated matters which you personally handled and for each provide the date of representation, the name of the court, the name of the judge or judges before whom the case was litigated and the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties. In addition, please provide the following:

(1) the citations, if the cases were reported, and the docket number and date if unreported;

(2) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;

(3) the party or parties whom you represented; and

(4) describe in detail the nature of your participation in the litigation and the final disposition of the case.

Answer:

1. State, ex rel. Hartlaub v. Morgan (1989), 57 Ohio App. 3d 113.

Date of representation: 1989

Trial Court Judge Edward Mahoney; Appellate Court Judges William Baird and Mary Cacioppo.

No co-counsel

Principal counsel for each of the other parties:
Douglas Godschall, Hanna, Campbell & Powell, P. O. Box 5521; 3737 Embassy Parkway, Suite 100; Akron, Ohio 44333; Phone: 330-670-7300; and
Richard M. Boyce, 1617 W. State Street; Alliance, Ohio 44601;
Phone: 330-829-0151.

Represented the Summit County Executive in response to a complaint seeking to compel the executive to make payment of monies to a member of the Summit County Soldiers' Relief Commission.

The Court of Appeals ruled in the Summit County Executive's favor.

2. Joseph A. Hartlaub, plaintiff v. County of Summit, et al., In the U.S. District Court, Northern District of Ohio, Eastern Division, Civil Action No. C87-2766A.

Date of representation: 1998. 1999.

U.S. District Court, Northern District of Ohio, Eastern Division
Judge Ann Aldrich.

No co-counsel

Principal counsel for each of the other parties:
Douglas Godschall, Hanna, Campbell & Powell; P. O. Box 5521; 3737 Embassy Parkway, Suite 100; Akron, Ohio 44333; Phone: 330-670-7300; and
Richard M. Boyce; 1617 W. State Street; Alliance, Ohio 44601;
Phone: 330-829-0151.

In this matter I served as counsel for various officers of Summit County, including the Summit County Executive and others defending constitutional claims under 42 U.S.C. Section 1983 as well as claims for defamation and breach of contract.

Upon our motion for summary judgment, the District Court ruled in favor of Summit County and dismissed the plaintiff's action.

3. American Legion Post 209 v. Summit Cty. Bd. of Elections (1988), 57 Ohio App.3d 95.

Date of representation: 1988

Trial Court Judge Mary F. Spicer; Appellate Court Judges Daniel Quillin, William Baird, Mary Cacioppo.

No co-counsel

Principal counsel for each of the other parties:
Christopher T. Cherpas, P. O. Box 9400; Akron, Ohio 44305;
Phone: 330-798-4600.

Matter involved a liquor permit holder appealing the outcome of an action seeking to void a local election.

In this matter, as Assistant County Prosecutor, I represented the Summit County Board of Elections.

The Trial Court ruled in favor of the plaintiff, American Legion Post 209, on appeal, I was successful in having the decision of the Trial Court reversed and ruling in favor of the Summit County Board of Elections.

Note: a Motion to certify the record of the Supreme Court of Ohio was overruled.

4. Lawrence v. Edwin Shaw Hosp. (1988), 57 Ohio App. 3d 93.

Date of representation: 1988

Trial Court Judge James Murphy; Appellate Court Judges William Baird, Edward Mahoney and Joyce George.

No co-counsel.

Principal counsel for each of the other parties:
James L. Wagner, 529 White Pond Drive; Akron, OH 44320;
Phone: 330-864-3100

Plaintiff was a management level employee who was discharged by his employer. The plaintiff brought suit alleging that an employee handbook created an express employment agreement

Plaintiff's case was dismissed on summary judgment at the trial level. The Court determined that the plaintiff was an at-will employee and that the employee handbook did not constitute a valid employment contract. The dismissal was upheld on appeal.

Note: A Motion to certify the record of the Supreme Court of Ohio was overruled.

5. Mary Santillo Weaver v. William Fenwick, et al. (1995), Summit County Case Nos. CV-95-06-2142; CV-96-04-1529.

Date of representation: 1995

Court of Common Pleas, Summit County, Ohio
Judge James Williams/James Winter, visiting Judge by assignment.

Name, address and phone number of co-counsel:
Andrea L. Norris; 4367 State Road; Akron, Ohio 44319; Phone: 330-644-0706.

Principal counsel for each of the other parties:
A. Edward Bonetti, Jr.; 441 Wolf Ledges Parkway, Suite 302; Akron, Ohio 44311; Phone: 330-376-9691.

Represented plaintiff, a widow, in her rights to retain certain real estate as against an individual who fraudulently obtained title to said real estate from her.

In re the Guardianship of Stephen Giovrekos, Summit County Probate Court Case No. G95-05-028.

Date of representation: 1995

Court of Common Pleas, Summit County, Ohio, Judge W. F. Spicer, Magistrate Larry Poulos.

No co-counsel

Principal counsel for each of the other parties:
Gus O'Neil; 1221 West Market Street; Akron, Ohio 44313; Phone: 330-836-8159.

This was an action to obtain guardianship over an elderly Greek gentleman and prevent him from being removed from this country by a non-blood relative. Successful in our efforts to establish a guardianship for Stephen Giovrekos and to prevent him from being removed from the country.

7. In re the Guardianship of Sophie Pasko, Summit County Probate Court Case No. G96-04-021

Date of representation: 1996.

Court of Common Pleas, Summit County, Ohio, Judge W. F. Spicer.

No co-counsel

Principal counsel for each of the other parties:
James B. Chapman; 159 South Main Street; Akron, Ohio 44308;
Phone: 330-535-5900

This was an action to obtain guardianship over an elderly woman who was allegedly being exploited by one of her children. Settlement.

8. John Curia vs. Jeanette Curia, Summit County Probate Court Case No. 1997 CV-12-003.

Date of representation: 1998

Court of Common Pleas, Summit County, Ohio, Judge W. F. Spicer, Magistrate Ann Snyder.

Co-counsel:
Thomas A. Teodosio; 156 South Main Street, Suite 907; Akron, Ohio 44308;
Phone: 330-535-9111.

Principal counsel for each of the other parties:
Howard L. Calhoun; 707 Key Bldg; 159 South Main Street, Akron, Ohio 44308;
Phone: 330-253-1111.

Represented John Curia, an elderly gentleman, in seeking to have his Will validated prior to his death. Settlement.

9. Mary Lou Pizzutte v. Nicholas J. Battaglia, et al.,
Portage County Case No. 1990 CV-38713

Date of representation: 1990.

Court of Common Pleas, Portage County, Ohio, Judge Thomas Carnes.

Co-counsel:
Laurie J. Pittman, now Portage County Municipal Court Judge Laurie J. Pittman;
203 W. Main Street; P. O. Box 958, Ravenna, Ohio 44266; Phone: 330-678-0947.

Principal counsel for each of the other parties:
Leon A. Weiss; 113 St. Clair Bldg., Suite 300; Cleveland, Ohio 44114;
Phone: 216-687-1311.

This was an action brought to contest a Will. The case was settled.

10. In re Adoption of Megan Elizabeth "Doe," Summit County Probate Court Case No. A89-04-02.

Date of representation: 1990-1991

Court of Common Pleas, Summit County, Ohio, Judge W. F. Spicer; Magistrate Maureen O'Connor.

No co-counsel.

Principal counsel for each of the other parties:
Patrick M. Maniscalco; Suite 200, 1414 South Green Road; South Euclid, Ohio 44121.

Successfully represented adoptive parents in an attempt by birth mother to invalidate an adoption.

20. **Criminal History:** State whether you have ever been convicted of a crime, within ten years of your nomination, other than a minor traffic violation, that is reflected in a record available to the public, and if so, provide the relevant dates of arrest, charge and disposition and describe the particulars of the offense.

Answer:

No

21. **Party to Civil or Administrative Proceedings:** State whether you, or any business of which you are or were an officer, have ever been a party or otherwise involved as a party in any civil or administrative proceeding, within ten years of your nomination, that is reflected in a record available to the public. If so, please describe in detail the nature of your participation in the litigation and the final disposition of the case. Include all proceedings in which you were a party in interest. Do not list any proceedings in which you were a guardian *ad litem*, stakeholder, or material witness.

Answer:

No

22. **Potential Conflict of Interest:** Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts of interest during your initial service in the position to which you have been nominated.

Answer:

I will resolve any potential conflict of interest by fully disclosing same to litigants, parties or other officials appearing before me. I will follow the Code of Judicial Conduct in such matters.

23. **Outside Commitments During Court Service**: Do you have any plans, commitments, or arrangements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

24. **Sources of Income**: List sources and amounts of all income received during the calendar year preceding the nomination, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500. If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.

See attached Financial Disclosure Report

25. **Statement of Net Worth**: Complete and attach the financial net worth statement in detail. Add schedules as called for.

See attached Net Worth Statement

26. **Selection Process**: Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts?

Answer:

Yes

(1) If so, did it recommend your nomination?

Answer:

Yes, I believe so.

(2) Describe your experience in the judicial selection process, including the circumstances leading to your nomination and the interviews in which you participated.

Answer:

I was interviewed by a committee formed by Senators DeWine and Voinovich to select nominees to the Federal Bench. Following the committee's

recommendation, I was personally interviewed by Senators DeWine and Voinovich. I was interviewed by the White House Counsel's Office and the Federal Bureau of Investigation.

(3) Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how you would rule on such case, issue, or question? If so, please explain fully.

Answer:

No.

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		LIABILITIES	
Cash on hand and in banks	1,000.00	Notes payable to banks-secured	
U.S. Government securities-add schedule	94,001.94	Notes payable to banks-unsecured	17,327.48
Listed securities-add schedule		Notes payable to relatives	
Unlisted securities–add schedule		Notes payable to others	
Accounts and notes receivable:		Accounts and bills due	
Due from relatives and friends		Unpaid income tax	
Due from others		Other unpaid income and interest	
Doubtful		Real estate mortgages payable-add schedule	327,707.89
Real estate owned-add schedule	415,000.00	Chattel mortgages and other liens payable	
Real estate mortgages receivable		Other debts-itemize:	
Autos and other personal property	57,950.00		
Cash value-life insurance	2,581.83		
Other assets itemize:			
Retirement Account (see att.)	64,273.26		
		Total liabilities	346,635.37
		Net Worth	288,171.66
Total Assets	634,807.03	Total liabilities and net worth	634,807.03
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, comaker or guarantor		Are any assets pledged? (Add schedule)	No
On leases or contracts	1,600.00	Are you defendant in any suits or legal actions?	No
Legal Claims		Have you ever taken bankruptcy?	No
Provision for Federal Income Tax			
Other special debt			

FIRSTMERIT BANK / AKRON ADMIN PG 1
HOLDINGS LIST PRICED AS OF:12/04/02 12/05/02 13:31
11930-00 JOHN R. ADAMS AGT. U/A CASH BASIS

S	SECURITY DESCRIPTION / SHARES/PV	MARKET VALUE	FEDERAL COST	%MKT	P ANNUAL INC/ UNREAL G/L	CURR YIELD
	U.S. GOV. MONEY MARKET FUNDS					
	FEDERATED AUTO GVT CASH-IS #82				1 6	
	469.8200	469.82	469.82	0.5	0	1.2
	DOMESTIC COMMCN STOCKS					
	FIRSTMERIT CORPORATION				1 800	
	800.0000	17,888.00	2.00	20.7	17,886	4.5
	DOMESTIC EQUITY MUTUAL FUNDS					
	FEDERATED CAP APPRECIATION-A #674				1 58	
	967.8830	19,386.70	31,918.96	22.5	-12,532	0.2
	FIDELITY ADV EQUITY GROWTH CL I #86				1 0	
	179.8360	6,649.40	7,873.68	7.7	-1,224	0.0
	FIDELITY ADV EQUITY PORT INC I #80				1 86	
	319.2047	8,780.10	6,647.91	7.8	110	1.3
	FIDELITY CONTRAFUND INC #22				1 64	
	290.6420	11,279.82	0.89	13.1	11,279	0.6
	FRANKLIN SM-MID CAP GR FD CL A #198				1 19	
	229.5370	5,254.10	4,652.69	6.1	601	0.4
	JANUS GROWTH AND INCOME FUND #40				1 188	
	695.5860	16,902.74	1,233.19	19.6	15,670	1.1
	INTL EQUITY MUTUAL FUNDS					
	TEMPLETON FOREIGN FUND CL A #104				1 30	
	198.3290	1,695.71	1,860.22	2.0	-165	1.7
	INVESTMENTS	86,286.41	54,659.36	100.0	1,251	1.4
					31,627	
	PRINCIPAL CASH	-1,135.25	-1,135.25			
	TOTAL	85,151.16	53,524.11			
	INCOME CASH	1,135.25				
INV.	INCOME CASH	0.00				
VERY	LIQUID BALANCE		469.82			

FIRSTMERIT BANK / AKRON ADMIN PG 1

HOLDINGS LIST PRICED AS OF:12/04/02 12/05/02 13:31

11930-01 JOHN R. ADAMS IRA ROLLOVER SEP CASH BASIS

S	SECURITY DESCRIPTION / SHARES/PV	MARKET VALUE	FEDERAL COST	%MKT	P	ANNUAL INC/ UNREAL G/L	CURR YIELD
	U.S. GOV. MONEY MARKET FUNDS						
	FEDERATED GOVERNMENT OBLIGATIONS FD				1	330	
	23,563.7300	23,563.73	23,563.73	36.7		0	1.4
	DOMESTIC COMMON STOCKS						
	FIRSTMERIT CORPORATION				1	236	
	236.0000	5,276.96	1.00	8.2		5,276	4.5
	DOMESTIC EQUITY MUTUAL FUNDS						
	FIDELITY ADV EQUITY GROWTH CL I #86				1	0	
	273.2680	10,149.17	13,717.57	15.8		-3,568	0.0
	FIDELITY ADV EQUITY PORT INC I #80				1	93	
	345.2840	7,326.57	7,731.06	11.4		-414	1.3
	FIDELITY BLUE CHIP GROWTH #811				1	20	
	308.3460	11,016.01	15,658.22	17.1		-4,639	0.1
	FRANKLIN SM-MID CAP GR FD CL A #198				1	10	
	123.3090	2,822.54	2,526.13	4.4		296	0.4
	WHITE OAK GROWTH PORTFOLIO #986				1	0	
	111.7500	2,822.81	7,000.00	4.4		-4,177	0.0
	INTL EQUITY MUTUAL FUNDS						
	TEMPLETON FOREIGN FUND CL A #104				1	23	
	152.6860	1,305.47	1,517.41	2.0		-212	1.7
	INVESTMENTS	64,273.26	71,712.12	100.0		712	1.1
						-7,439	
	PRINCIPAL CASH	0.00	0.00				
	TOTAL	64,273.26	71,712.12				
	INCOME CASH	0.00					
	INV. INCOME CASH	0.00					
	VERY LIQUID BALANCE		23,563.73				

Listed Securities (Cont'd)

FirstMerit Common Stock:	
155 Shares @ 22.36	$3,465.00
McDonald Investment Account holding:	
Fidelity Contrafund and Fidelity Adv. Growth Op. CLB:	$4,250.53

Real Estate Owned

Real property – residential

Appraised Value: $415,000.00

Real property in Smithville, Ohio, subject to Life Estate to family member.

Value unknown

QUESTIONNAIRE FOR NOMINEES BEFORE THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE

1. **Name**: Full name (include any former names used).

   Robert Alan Junell

2. **Position**: State the position for which you have been nominated.

   United States District Judge, Western District of Texas

3. **Address**: List current office address and telephone number. If state of residence differs from your place of employment, please list the state where you currently reside.

   301 West Beauregard Avenue, Suite 200
   San Angelo, Texas 76903
   915/481-2550

4. **Birthplace**: State date and place of birth.

   El Paso, Texas
   January 27, 1947

5. **Marital Status**: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es). Please also indicate the number of dependent children.

   Beverly Ann Singley Junell
   Housewife
   One dependent child

6. **Education**: List in reverse chronological order, listing most recent first, each college, law school, and any other institutions of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

A. Texas Tech University School of Law; September 1974 to December 1976. JD with Honors, December 1976;
B. University of Arkansas; approximately 1972 to August 1974 (attended while in the U.S. Army overseas) M.S. 1974;
C. Texas Tech University; September 1967 to May 1970. B.S. 1969;
D. Angelo State University; Summer of 1968; and,
E. New Mexico Military Institute; September 1965 to May 1967; A.A. 1967.

7. **Employment Record**: List in reverse chronological order, listing most recent first, all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or job description where appropriate.

A. Jackson Walker LLP; January 1999 to present; 225 W. Beauregard, San Angelo, Texas; Of Counsel;
B. Small, Craig and Werkenthin LLC; August 1996 to December 1998; 225 W. Beauregard, San Anglo, Texas; of Counsel;
C. Smith, Carter, Rose, Finley and Griffis; August 1994 to August 1996; 222 W. Harris; Partner;
D. Griffis, Motl and Junell; October 1990 to August 1994; 16 E. Beauregard, San Angelo, Texas; Associate and Partner;
E. Webb, Stokes and Sparks; April 1979 to October 1990; 314 W. Harris, San Angelo, Texas; Associate and partner;
F. Scott, Hulse, Marshall and Feuille; April 1977 to April 1979; El Paso, Texas; Associate;
G. George Gilkerson, Attorney at Law; May 1975 to February 1977; Lubbock, Texas; law clerk;
H. 1st National Bank of Lubbock, Texas; May 1974 to August 1974; Lubbock, Texas; clerk;
I. United States Army (#8) June 1970 to December 1973;
J. Texas Tech University; January 1970 to May 1970; Graduate Assistant football coach;
K. Some welding company in Lubbock, Texas; summer 1969; welder;
L. Texas Tank Car Works; summer 1968; 600 N. Baze, San Angelo, Texas; hand;

M. Continental Airlines; Lubbock Regional Airport, Lubbock, Texas; summer 1967; baggage clerk;
N. KILE Radio Station; summer 1966; Galveston, Texas; handyman;
O. Rim Rock City; summer 1965; Lubbock, Texas; handyman
P. Advisory Director; First National Bank of Mertzon; July 1995 to present; 106 South Broadway, Mertzon, Texas;
R. Board of Directors, San Angelo Chamber of Commerce, (Ex Officio); 1988 through the present;
S. Trustee, West Texas Boys Ranch Foundation;
T. Trustee, Schreiner College;
W. Member of the Advisory Board for ASU Management.
X. Past Board Directors; Shannon Health System; November 1995 to September 1999;
Y. Past Board Director, Tom Green County AgriFood Education Council;
Z. Past Board Director, Shannon Health System;
AA. Past Board Director, Shannon SportsCare Advisory Board;
BB. Past Board Director, La Esperanza Clinic;
CC. Past Board of Directors, Research and Oversight Council on Workers' Compensation;
DD. Past Executive Council Member, Concho Valley Council of Governments;
EE. Past Board Director, Adult Day Care of San Angelo, Inc.;
FF. Past Member, Junior League Advisory Board;
GG. Past Board Director, San Angelo Council on Alcohol and Drug Abuse;
HH. Past Board Director, Texas Tech School of Law Association;
II. Past Board Director, Volunteers in Public Schools;
JJ. Past Member, State MHMR Volunteer Services Council;
KK. Past Member, San Angelo Adopt-A-School Advisory Council;
LL. Past Board Director, Texas Tech Ex-Student Association;
MM. Past Board of Directors, Advisory Board of the Southwest Institute for Addictive Diseases, Texas Tech University;
NN. Past Chairman, State Employee Charitable Campaign, San Angelo District
OO. Past Board of Directors, United Way of the Concho Valley, (Ex Officio);
PP. Past Board of Directors, San Angelo AIDS Foundation;
QQ. Past Board of Directors, San Angelo Child Support Volunteer Service Board; and,
RR. Member San Angelo Area Foundation.

8. **Military Service**: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number and type of discharge received.

Commissioned a Second Lieutenant in the U.S. Army in December 1969 upon graduation from Texas Tech University; served on active duty from June 1970 to December 1973; Honorably Discharged as a Captain on August 31, 1980. Serial number was 460-68-7596.

9. **Honors and Awards**: List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

Recipient of the "Elmer Martin" award, Mitchell County, Texas, for service to the County, 2002;
Named one of the "Top Ten Legislators, Best in the House" by Gallery Watch, 2001;
Named one of Texas Class Room Teachers Association "Legislative Stars," 2001;
Recipient of award from Childrens Hospitals of Texas (Chariot); 2001;
Declared "Honorary Member" of Friends of San Angelo State Park; 2001;
Recipient of "Frank J. Tejeda" award, Texas State Teachers Association; 2000;
Named "Man of the Year In Agriculture", Texas County Agricultural Agents Association, 2000;
Named "Director of the Year", West Texas Boys Ranch, 2000;
Recognized by the Texas Rural Electric Coalition for Selfless Support of Rural Texas & The Rural Electric Cooperatives That Serve the Country 2000;
Recognized for Supporting the County Attorney Compensation Act of the 76th Legislature by the Texas District & County Attorneys Association, 2000;
TIPRO Hats Off! Award, by the Texas Independent Petroleum & Royalty Owners Association, 2000;
Received the "TCJL Top 11 Award" by the Texas Civil Justice League for Outstanding Contributions on Behalf of Tort Reform, 1999;
Selected as an "Outstanding Texas Leader" by the John Ben Shepperd Leadership Forum, 1999;
Named Regional "Minority Small Business Advocate of the Year" by the Small Business Administration, 1999;
"STAR" Award for Outstanding Service, Angelo State University Student Body,

1999;
Named "Legislator of the Year," Texas Council of Child Welfare Boards, 1999;
Recognized by the Texas Association of Community Schools for Outstanding Efforts On Behalf of Public School Education, 1998;
Awarded the "Gold Apple Award" from the Texas Association of Mid-Size Schools, 1998;
Named "Honorary Alumnus" by the Angelo State University Ex-Student's Association, 1998;
"Appreciation Award" for Service to Retired Teachers by the Texas Retired Teachers Association, 1998;
Named "Advocate Of The Year," by the Texas Association for the Gifted and Talented, 1998;
Recognized by the Texas Association of Mexican American Chambers of Commerce for Outstanding Effort and Achievement on Behalf of the Hispanic Business Community, 1997;
Named "Outstanding Legislator of the Year" by the National Association of Royalty Owners, 1997;
Named "Distinguished Alumni" by Texas Tech University and Texas Tech Ex-Students Association, 1997;
Named "Legislator of the Year" by the Texas Municipal League, 1995;
Named one of the "1995 Texas House Crime Fighters Of The Year" by the Combined Law Enforcement Association of Texas, 1995;
"Top Ten Legislators" by Texas Monthly Magazine, 1991, 1995; 1999; "Honorable Mention", 1993; "Rookie of the Year", 1989;
Named one of the "Best Of The Best In The Texas Legislature" by the Dallas Morning News, 1995;
Readers Choice Award for "Favorite Politician," San Angelo Standard-Times, 1992-1999;
Recognized by the Texas Civil Justice League for Outstanding Contributions on Behalf of Tort and Civil Justice Reform, 1991, 1992, 1993, 1994 and 1995;
Named the first "Outstanding Alumnist" by the Texas Tech University of Law, 1995;
Recognized for "Outstanding Leadership" in the Prevention of Child Abuse and Neglect, Children's Trust Fund of Texas Council, 1995;
Named "Outstanding Legislator of the Year" by the Texas Arts Council, 1995;
"1994 Citizen of the Year" from the San Angelo Chamber of Commerce, 1995;
"Distinguished Citizen of the Year" by the Concho Valley Council, Boy Scouts of

America, 1994;
"Legislator of the Year" by the Texas Transit Association, 1994;
"Legislative Leadership Award" from the Texas Game Warden's Association, 1994;
Named "1993 Legislative Crime Fighter of the Year" by the Greater Dallas Crime Commission, 1994;
"Friend of Business Award for 1993" from the Texas Chamber of Commerce, 1994;
"Award of Appreciation" for Ensuring Liberty, Dignity and Respect, NAACP, 1993;
Recognized by the Texas Rehabilitation Association for Outstanding Efforts on Behalf of Texans with Disabilities and the Rehabilitation Professionals who serve them, 1993;
Named "Legislator of the Year" by the Vietnam Veterans of America, 1992;
Named the John A. Traeger "Legislator of the Year" by the Texas Public Employees Association, 1992;
Award of Appreciation, Board of Trustees of Community MHMR Centers and Texas Council of Community MHMR Centers, 1991;
"Rising Star" in the Texas Legislature by the Dallas Morning News, 1991;
"Legislative Leadership Award" by the Texas Chamber of Commerce, 1991;
"Silver Spur Award" from the Texas Tourism Association for Outstanding Legislative Service, 1991;
Named "Legislator of the Year" by the Texas Industrial Vocational Association, 1990;
Certificate of Appreciation from the Texas Municipal League for Outstanding Service in the Texas House of Representatives, 1989;
"Legislator of the Year" by the Texas Association of Municipal Health Officials, 1990; and
Named Outstanding Freshman Legislator of the Year by the Texas House of Representatives, 1989.

10. **Bar Associations**: List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.

Member State Bar of Texas from June 1977 through the present. Member Tom Green County Bar Association from May 1979 through the present.

11. **Bar and Court Admission**: List each state and court in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Licensed to practice in all state courts in the State of Texas from June 1977 to the present. Admitted to practice in the U.S. District Court for the Northern District on July 9, 1979, and the Western District of Texas on January 7, 1983.

12. **Memberships**: List all memberships and offices currently and formerly held in professional, business, fraternal, scholarly, civic, charitable, or other organizations since graduation from college, other than those listed in response to Questions 10 or 11. Please indicate whether any of these organizations formerly discriminated or currently discriminates on the basis of race, sex, or religion - either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

Trustee, West Texas Boys Ranch Foundation;
Board of Directors, First National Bank of Mertzon, Texas;
Board of Directors, San Angelo Chamber of Commerce, (Ex Officio);
Member of the Advisory Board for ASU Management;
Member, Tom Green County Community Justice Council;
Lifetime Member of NAACP;
Trustee, Schreiner College;
Member, Tom Green County Democratic Club;
Member, U.S. Polo Association;
Elder, First Presbyterian Church, San Angelo, Texas;
Past Board of Directors, Tom Green County AgriFood Education Council;
Past Board Director, Shannon Health System;
Past Board Director, Shannon SportsCare Advisory Board;
Past Board Director, La Esperanza Clinic;
Past Board of Directors, Research and Oversight Council on Workers' Compensation;
Past Executive Council Member, Concho Valley Council of Governments;
Past Board Director, Adult Day Care of San Angelo, Inc.;
Past Member, Junior League Advisory Board;

Past Board Director, San Angelo Council on Alcohol and Drug Abuse;
Past Board Director, Texas Tech School of Law Association;
Past Board Director, Volunteers in Public Schools;
Past Member, State MHMR Volunteer Services Council;
Past Member, San Angelo Adopt-A-School Advisory Council;
Past Member, Professional Rodeo Cowboys Association of America;
Past Member, Attorney General's Child Welfare Advisory Council;
Past Board Director, Texas Tech Ex-Student Association;
Past Board of Directors, Advisory Board of the Southwest Institute for Addictive Diseases, Texas Tech University;
Past Chairman, State Employee Charitable Campaign, San Angelo District
Past Board of Directors, United Way of the Concho Valley, (Ex Officio);
Past Board of Directors, San Angelo AIDS Foundation;
Past Board of Directors, San Angelo Child Support Volunteer Service Board; and
Member of Board of Directors, San Angelo Area Foundation.

With the exception of First Presbyterian Church in which I have been a deacon and I am now an elder, I am or have been a board member of all the other organizations with the exception of the NAACP, the Professional Rodeo Cowboys Association, and the U.S. Polo Association, in which case I am or have been only a member.

13. **Published Writings**: List the titles, publishers, and dates of books, articles, reports, or other material you have written or edited, including material published on the Internet. Please supply four (4) copies of all published material to the Committee, unless the Committee has advised you that a copy has been obtained from another source. Also, please supply four (4) copies of all speeches delivered by you, in written or videotaped form over the past ten years, including the date and place where they were delivered, and readily available press reports about the speech.

Attached are two Texas Tech University School of Law Review articles, being Texas Tech Law Review, Volume Twenty-Seven, No. 4, 1995-1996, The 1995 Revisions To The DTPA: Altering The Landscape, pages 1441-1485; and Texas Tech Law Review, Volume Twenty-Eight, No. 4, 1996-1997, Consideration of Illegal Votes in Legislative Election Contests, pages 1095 – 1160.

I give a number of speeches each year to various groups in connection with my legislative duties including commencement addresses, speeches to civic clubs, and groups interested in legislative topics. For the most part, none of these speeches are formally prepared. Attached is a list of the speeches I have delivered over the past ten years. Also attached is a copy of some of the speeches that were written and for which I have a copy.

14. **Congressional Testimony**: List any occasion when you have testified before a committee or subcommittee of the Congress, including the name of the committee or subcommittee, the date of the testimony and a brief description of the substance of the testimony. In addition, please supply four (4) copies of any written statement submitted as testimony and the transcript of the testimony, if in your possession.

None.

15. **Health**: Describe the present state of your health and provide the date of your last physical examination.

My health is excellent. My last physical examination was in September, 2002.

16. **Citations**: If you are or have been a judge, provide:

(1) a short summary and citations for the ten (10) most significant opinions you have written;

Not applicable.

(2) a short summary and citations for all rulings of yours that were reversed or significantly criticized on appeal, together with a short summary of and citations for the opinions of the reviewing court; and

Not applicable.

(3) a short summary of and citations for all significant opinions on federal or state constitutional issues, together with the citation for appellate court rulings on such opinions.

Not applicable.

If any of the opinions or rulings listed were in state court or were not officially reported, please provide copies of the opinions.

Not applicable.

17. **Public Office, Political Activities and Affiliations**:

(1) List chronologically any public offices you have held, federal, state or local, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or nominations for appointed office for which were not confirmed by a state or federal legislative body.

Elected to Texas House of Representatives in 1988 to represent District 72 in the Texas Legislature and am currently serving my 7th term which will expire in January 2003.

(2) Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

I have participated in a number of political campaigns on the local, state, and federal level since 1975. I have never held an official title in any campaign, nor have I ever been paid to participate in any campaign.

18. **Legal Career**: Please answer each part separately.

(1) Describe chronologically your law practice and legal experience after graduation from law school including:

(1) whether you served as clerk to a judge, and if so, the name for the judge, the court and dates of the period you were a clerk;

Not applicable.

(2) whether you practiced alone, and if so, the addresses and dates;

Not applicable.

(3) the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each.

Jackson Walker LLP; January 1999 to present; 301 W. Beauregard, Suite 200, San Angelo, Texas 76903; of Counsel;
Small, Craig and Werkenthin LLC; August 1996 to December 1998; 225 W. Beauregard, San Anglo, Texas; of Counsel;
Smith, Carter, Rose, Finley and Griffis; August 1994 to August 1996; 222 W. Harris; Partner;
Griffis, Motl and Junell; October 1990 to August 1994; 16 E. Beauregard, San Angelo, Texas; Associate and Partner;
Webb, Stokes and Sparks; April 1979 to October 1990; 314 W. Harris, San Angelo, Texas; Associate and partner;
Scott, Hulse, Marshall and Feuille; April 1977 to April 1979; El Paso, Texas; Associate; and,
George Gilkerson, Attorney at Law; May 1975 to February 1977; Lubbock, Texas; law clerk;

(2) (1) Describe the general character of your law practice and indicate by date if and when its character has changed over the years.

From 1977 to 1979 I generally was a litigator primarily representing insurance companies. From April 1979 to October 1989, I primarily represented plaintiffs in personal injury cases. From October 1989 to the present date, I have generally represented insurance companies and businesses who have been sued, an occasional plaintiff in a personal injury case, political sub-divisions in litigation and businesses in commercial litigation.

(1) Describe your typical former clients, and mention the areas, if any, in which you have specialized.

My clients range from a hospital, a doctors' clinic, a school district, political sub-divisions, pharmaceutical companies, small businesses, a bank and individuals. Virtually, all my practice is litigation related.

(3) (1) Describe whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe each such variance, providing dates.

From 1977 to 1988, I have tried numerous cases each year. Since my election to the legislature in 1988, the actual number of cases tried each year has decreased as we are in session for five months every other year and when the governor calls a special session. Additionally, the nature of my practice has changed from handling personal injury cases to more commercial litigation. I recently finished a six week trial in a bank related matter.

(2) Indicate the percentage of these appearances in

(1) federal courts;
(2) state courts of record;
(3) other courts.

(1) federal courts - 10%
(2) state courts - 90%
(3) other courts - not applicable.

(3) Indicate the percentage of these appearances in:

(A) civil proceedings;
(2) criminal proceedings.

(A) 100%
(2) 0%

(4) State the number of cases in courts of record you tried to verdict or judgment rather than settled, indicating whether you were sole counsel, chief counsel, or associate counsel.

(4) I have tried approximately 50 cases to a verdict. In most of these cases, I was either the sole or chief counsel.

(5) Indicate the percentage of these trials that were decided by a jury.

(5) 90%

(4) Describe your practice, if any, before the United States Supreme Court. Please supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the U.S. Supreme Court in connection with your practice.

(4) None.

(5) Describe legal services that you have provided to disadvantaged persons or on a *pro bono* basis, and list specific examples of such service and the amount of time devoted to each.

Both in my role as a state representative and as an attorney, I have assisted many individuals on a pro bono basis. Last year I represented a lady in a workers' compensation case in which the insurance company sued her in Dallas over medical benefits. Even though Dallas is some 250 miles from San Angelo, I filed an answer on her behalf and was prepared to try the case on her behalf when the insurance company dismissed their claim against her. Presently, I am assisting an elderly gentleman who has been defrauded by a car salesman. I am involved in numerous civic activities including the United Way, Meals for the Elderly, the West Texas Boys Ranch, the Boys and Girls Clubs, and my church.

19. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, and for each provide the date of representation, the name of the court, the name

of the judge or judges before whom the case was litigated and the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties. In addition, please provide the following:

(1) the citations, if the cases were reported, and the docket number and date if unreported;

(2) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;

(3) the party or parties whom you represented; and

(4) describe in detail the nature of your participation in the litigation and the final disposition of the case.

(A) State of Texas v John Melvin Dorough; 1978; 34th District Court of El Paso County, Texas; Judge Jerry Woodard; Co-counsel Richard Munzinger 915-533-2493; Steve Simmons District Attorney of El Paso County;

(1) I no longer have that information.

(2) Capital murder case. The defendant murdered a young man and sexually assaulted a young lady. We pled our client "not guilty" by reason of insanity.

(3) Court appointed to represent the defendant.

(4) My co-counsel and I provided a full defense for our client who was facing the death penalty. I did investigation in the case, interviewed witnesses including psychiatrists, did briefing, participated in individual voir dire, suppression hearings, examined and cross examined witnesses. The case lasted six weeks including jury selection. The jury found our client "guilty' of capital murder, but gave life imprisonment rather than the death penalty.

(B) Jinks Taylor v. Morris Brothers Construction Company; 1982; 112th District Court of Sutton County, Texas: Judge Troy Williams; Co-counsel Tom Webb (deceased); Guy Choate, 314 W. Harris San Angelo, Texas, 915-653-6866; Don Griffis, 225 W. Beauregard, San Angelo, Texas, 915-481-2550

(1) I no longer have that information.

(2) Personal injury case where the widow sued a construction company over the death of her husband who was killed when dynamite was used improperly.

(3) I represented the plaintiffs, who were the deceased's wife and child.

(4) I fully participated in all aspects of the case including pre-trial discovery, briefing, examining and cross-examining witnesses and making final argument. The jury returned a verdict of $5 million dollars.

(C) Wilson v. Midland American Bank, 2001-2002, 238th District Court of Midland County, Texas; Judge John Hyde; Co-counsel Bob Cohan and Mark Steiner, Jackson Walker L.L.P., 901 Main Street, Suite 6000, Dallas, Texas 75202-3797, 214-953-6000; opposing counsel Rodney Satterwhite representing Estate of William B. Wilson, Stubbeman, McRae, Sealy, Laughlin & Browder, Inc., Suite 800, 550 West Texas Avenue, Midland, Texas 79702; and James B. Wilcox representing Wil-Roye II and Universal Reserves, Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., Suite 700 North Building, 1120 20th Street, N.W., Washington, D.C. 20036.

(1) J. W. Wilson, et al v. Washington Mutual Bank, FA, Cause No. 42,274.

(2) Claim against bank for fraud, misrepresentation, negligence and breach of duty of good faith and fair dealing. The President of the bank was alleged to have recommended to a bank customer to do business with another bank customer, who the President was alleged to have known was not a good credit risk.

(3) I represented the bank.

(4) I fully participated in all aspects of the case including taking depositions, presenting contested motions to the court, examination and cross-examination of witnesses and briefing legal issues. The case took approximately 6 weeks to try to the court and final arguments were scheduled on May 16, 2002. The Court has

entered a judgment in our client's favor. A Notice of Appeal was filed by the Plaintiffs on December 26, 2002.

(D) Debbie Ferguson v. Town and Country Food Stores, 1998,United States District Court for the Western District of Texas, Midland Division, Judge Lucius Bunton; Opposing counsel - Cindy Weir, Suite 5, 5050 E. University Blvd., Odessa, Texas 79762, 915-550-0292; and Co-Counsel, Ana Thornton, 6007 Hart Cove, San Antonio, Texas 78249, 210-696-4638.

(1) Debbie Ferguson vs. Town & Country Food Stores, Inc., Cause No. MO-97-CA-130.

(2) Claim against convenience store chain for wrongful termination and violations of EEOC by former store manager.

(3) I represented the defendant convenience store chain.

(4) I full participated in all aspects of the case including taking all depositions, presenting contested motion to the Court, examination and cross-examination of witnesses, jury selection and final argument. The jury returned a verdict of no liability against the defendant.

(E) Herman Hoffpauir v. Alsups, Inc., 1989 United States District Court for New Mexico, Roswell Division, Judge John Conway. Co-counsel, Doug Perrin, 1250 E. Copeland Rd., Suite 744, Arlington, Texas 76011, 817-469-6199. Opposing counsel, Stephen Bell, Atwood, Malone Law Firm, 400 N. Pennsylvania, Roswell, New Mexico, 505-622-6221.

(1) I no longer have that information

(2) Claim against convenience store chain for personal injuries to customer who was injured when another customer's vehicle jumped the curb and struck him while he was using the payphone in front of the store in Artesia, New Mexico.

(3) I represented the plaintiff/customer, who was injured.

(4) Jury returned verdict of $500,000.00 with the store being found 50% at fault (I believe this was correct finding). I fully participated in all aspects of the case including jury selection, pre-

trial discovery, examination and cross-examination of witnesses and final argument.

(F) Twin Mountain Supply Company v. John David Whipple, Individually and d/b/a Pel USA, et al, 1999-2000, 391st District Court of Tom Green County, Texas; Judge Tom Gossett, Opposing counsel, John E. Sutton, P.O. Box 871, San Angelo, Texas 76902-0871, 915-482-8470; Opposing counsel, Brad Haralson, 331 West Avenue B, San Angelo, Texas 76903, 915-655-4187; Opposing counsel, Ophelia F. Camina, Susman Godfrey, L.L.P., 901 Main Street, Suite 4100, Dallas, Texas 75202-3775, 214-754-1900.

(1) Twin Mountain Supply Company v. John David Whipple, Individually and d/b/a Pel USA, Erin Vaught, Harlan Fenske, Lee Allison, and Pel Industries, Ltd., Cause No. A-00-0023-C.

(2) Claim against former employees for breach of non-competition agreement and violation of contract not to disclose trade secrets. Claim against supplier of products for tortious interference with contract and breach of contract. Suit for injunctive relief and damages.

(3) I represented the business who brought suit against the former employees and product supplier.

(4) Court issued Temporary Restraining Order and after a contested hearing issued a Temporary Injunction. Prior to trial on the granting of a Permanent Injunction, the parties mediated the case and settled it by the entry of an agreed injunction and payment of damages to the plaintiff. I participated in all aspects of this case including pre-trial discovery including depositions and all arguments in hearings on the TRO and temporary injunction. I also was the representative for the plaintiff at the mediation.

(G) Southwest Plaza Shopping Center, Inc., et al v. Johnson and Johnson, Inc.

(1) Southwest Plaza Shopping Center, Inc., Normond Linder and Jo Ann Linder, Individually and as Trustees of the Linder Trust, and Eric Linder and Barbara Linder vs. Johnson & Johnson, Inc., Ethicon Endo-Surgery, Inc., (Individually and as Successors-In-Interest to Ethicon, Inc., Technicare Corporation and Ohio-

Nuclear, Inc.), Theodore Steans and Raymond Russell; Cause No. B-97-1510-C.

(2) Claim against manufacturing company located in San Angelo, Texas, for toxic torts. Allegations included that defendants had disposed of hazardous waste by placing it in the city sewer system without proper treatment.

(3) I represented the defendants.

(4) I participated in formulation of trial strategy and taking of depositions of both defense witnesses and plaintiffs' witnesses. Prior to trial of case, the case was mediated, and I participated in mediation of case. The case settled at mediation.

(H) From 1998 through 2001, I was counsel in the western portions of Texas for American Home Products in all cases brought against them for the manufacturing and sale of the drug known as "Phen-Fen." I was listed as counsel for AHP in approximately 130 cases. Only one case was almost tried. It was entitled Esther Justice v. American Home Products, et al. It was part of a group of cases originally filed as Archie Burroughs, et al v. American Home Products, et al. Co-counsel included lawyers from Arnold and Porter (national counsel), Burgain Hayes, 700 Lavaca Street, Austin, Texas, 512-472-8800, and Zollie Steakley, 207 Oak Street, Sweetwater, Texas, 915-235-4944. Opposing counsel included Scott Nabers for the Plaintiff, 440 Louisiana, Suite 1710, Houston, Texas, 713-844-3750; Temple Dickson, 115 E. 3rd Sweetwater, Texas, 915-236-6691; and Don Bowen, deceased, Helm, Pletcher, Bowen & Saunders, 2929 Allen Parkway, Suite 2700, Houston, Texas 77019, 713-522-4550. In all of the Phen-Fen litigation, there were numerous plaintiffs' counsel and defense counsel who represented nominal co-defendants. The Judge in the Esther Justice matter was Judge Weldon Kirk (now retired) of the 32nd District Court of Nolan County, Texas.

(1) Archie Burrough, Betty Olson, Esther Justice, Frances Westbrook and Julie Yates v. American Home Products Corporation; Wyeth-Ayerst Laboratories Company, a Division of American Home Products Corporation; A.H. Robins Company, Incorporated; Ion Laboratories, Incl; Medeva Pharmaceuticals, Inc.; Gate Pharmaceuticals, a Division of Teva Pharmaceuticals, U.S.A., Inc.; Fisons Corporation; Richwood Pharmaceutical Company, Inc.;

Zenith Goldline Pharmaceuticals, Inc.; Goldline Laboratories, Inc.; Camall Company; Eon Labs Manufacturing, Inc.; Rugby Laboratories, Inc.; Ben Chavez, M.D.; K-Mart; Robert James Davis and Kenneth D. Frich, Jr.; Cause No. 17,996.

(2) Claim against pharmaceutical manufacturer for sale of unsafe drug.

(3) I represented the defendant, American Home Products.

(4) I participated in investigation of claims, taking of depositions, arguing pre-trial motions, including interlocutory appeals of venue and joinder issues, including a mandamus of the trial judge to the Court of Appeals. I was the lead attorney on joinder of all cases in our administrative judicial region for discovery and pre-trial purposes. Prior to the trial of the Esther Justice case, the case settled as did (to my knowledge) all of the Phen-Fen cases in our region.

(I) Roman Catholic Diocese of San Angelo v. Kathleen L. Mayrand, Individually and as Temporary Administrator of the Estate of David Mayrand, 1997-1999, Judge Dick Alcala, 340th District Court of Tom Green County, Texas. Co-counsel was Guy Choate, Webb, Stokes & Sparks, L.L.P., 314 West Harris, San Angelo, Texas 76903, 915-653-6866; Harold Loftin, Small, Craig & Werkenthin, 225 West Beauregard, San Angelo, Texas 76903, 915-481-2550 (no longer with the firm). Opposing counsel, George Finely, 36 West Beauregard, Suite 300, San Angelo, Texas, 915-653-6721; and James Carter, 515 West Harris, San Angelo, Texas 915-655-4889.

(1) Roman Catholic Diocese of San Angelo v. Kathleen L. Mayrand, Individually and as Temporary Administrator of the Estate of David Mayrand; Cause No. C-97-1429-C.

(2) Claim by Church against former (deceased) bookkeeper of Diocese who embezzled approximately four million dollars from the Diocese over a period of twenty years.

(3) I represented the Plaintiff, the Diocese.

(4) A temporary restraining order was filed by the Diocese and an Agreed Order Granting Temporary Injunction against Defendants

was entered on December 5, 1997. I fully participated in all aspects of the case including working closely with the accountants for the Diocese to trace how much money had been diverted and where the money had gone. The case was settled at mediation.

(J) Richard Middleton v. KAS Construction Company 1989-1992. Judge Mark Whittington, 160th District Court of Dallas County, Texas.

(1) David Richard Middleton v. KAS Construction Co.

(2) This was a claim by an employee of a mill work company against a contractor for personal injuries for negligence while the plaintiff was unloading his truck and trailer at the construction site.

(3) I represented the injured worker/plaintiff.

(4) I fully participated in all aspects of the case, including all pre-trial discovery, voir dire, direct and cross-examination and final argument. The jury returned a verdict for the plaintiff.

20. **Criminal History**: State whether you have ever been convicted of a crime, within ten years of your nomination, other than a minor traffic violation, that is reflected in a record available to the public, and if so, provide the relevant dates of arrest, charge and disposition and describe the particulars of the offense.

None.

21. **Party to Civil or Administrative Proceedings**: State whether you, or any business of which you are or were an officer, have ever been a party or otherwise involved as a party in any civil or administrative proceeding, within ten years of your nomination, that is reflected in a record available to the public. If so, please describe in detail the nature of your participation in the litigation and the final disposition of the case. Include all proceedings in which you were a party in interest. Do not list any proceedings in which you were a guardian *ad litem*, stakeholder, or material witness.

A. Esther Justice v. American Home Products, Burgain Hayes and Robert Junell; Cause No. 18,137; 32nd District Court of Nolan County, Texas. 1999. Plaintiff in a "Phen-Fen" case against my client, American Home Products, (see

#19 (8) above), sued our client, my co-counsel, and myself for breach of contract. The agreement dealt with a Rule 11 agreement to proceed to trial. We refused after consultation with our client because the Eastland Court of Appeals had issued a "Stay" in the case until it made a decision on an interlocutory appeal dealing with venue and joinder of parties (the plaintiff was from Indiana). The case was dismissed when the underlying "Phen-Fen" case was settled. There were no proceedings or discovery in the case.

B. Kerry Gilmore v. Webb, Stokes, Sparks, Parker, Junell, and Choate and Robert Junell. Cause No. CV91-0856-C, in the 340th District Court of Tom Green County, Texas. 1991. Plaintiff was a former client of the firm, who had been represented by other lawyers and a suit filed by them in federal district court prior to our firm being retained. Limitations had already run against the named defendants in the first case prior to our firm being contacted (negligence and strict liability in tort). I decided, after consultation with experts and other lawyers, that we could not make a case and that it would be frivolous for us to continue with the case. Mr. Gilmore signed an agreed motion to dismiss the case, and then two years later, sued us stating that we should have advised him to sue his first lawyers. The trial court granted us a summary judgment, and the case was settled on appeal.

22. **Potential Conflict of Interest**: Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts of interest during your initial service in the position to which you have been nominated.

If appointed, I would automatically recuse myself from hearing any cases involving my current law firm or clients for a period of two years. After that time, I will make it known to litigants in the court by filing with the clerk's office a list of former clients and the name of my current firm and should any party desire for me to be recused because of the fact that my current firm is involved or because a former client of mine is involved, then they may file a "blind" recusal with the clerk, and I will not hear the matter. I have only a 401K with my current firm and a former firm and a partnership with one former firm involving real estate. I will move the 401Ks and divest myself of my interest in the real estate partnership.

23. **Outside Commitments During Court Service**: Do you have any plans, commitments, or arrangements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

I own a small ranch near San Angelo, and I plan to continue to operate it. We raise cattle and plant cotton, wheat, and hay. My wife owns a 25% undivided interest in a farm along with her sisters. She plans to continue to operate it. I also have served as both a deacon and Elder of my church.

24. **Sources of Income**: List sources and amounts of all income received during the calendar year preceding the nomination, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500. If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.

See attached Financial Disclosure Report.

25. **Statement of Net Worth**: Complete and attach the financial net worth statement in detail. Add schedules as called for.

See attached Financial Statement – Net Worth

26. **Selection Process**: Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts?

Yes, there is a selection commission in my jurisdiction.

(1) If so, did it recommend your nomination?

I believe so.

(2) Describe your experience in the judicial selection process, including the circumstances leading to your nomination and the interviews in which you participated.

I answered a questionnaire from the Committee. I appeared before the Committee San Antonio, Texas, in April/May 2001. I went to

Washington, D.C. in May 2001 to be interviewed by Sen. Gramm and Sen. Hutchinson.

(3) Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how you would rule on such case, issue, or question? If so, please explain fully.

No.

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in banks		40	000	Notes payable to banks-secured			
U.S. Government securities-add schedule		12	781	Notes payable to banks-unsecured			
Listed securities-add schedule				Notes payable to relatives			
Unlisted securities–add schedule				Notes payable to others			
Accounts and notes receivable:				Accounts and bills due		4	000
Due from relatives and friends		5	000	Unpaid income tax			
Due from others				Other unpaid income and interest			
Doubtful				Real estate mortgages payable-add schedule		160	059
Real estate owned-add schedule		540	000	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		184	000				
Cash value-life insurance							
Other assets itemize:							
Livestock		35	000				
Proceeds from annuities with Metropolitan Life to be received in 2004, 2005, 2006, and 2007 of $67,250 each year		269	000				

Spouse's IRA – Moneyfund		6	045				
Spouse's Individual Account – see schedule		23	749				
CASHFUND UBS – Paine Webber		1	762				
IRA – see schedule		10	722				
IRA – see schedule		61	825	Total liabilities		164	059
IRA – see schedule		397	635	Net Worth	1	423	460
Total Assets	1	587	519	Total liabilities and net worth	1	587	519
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)			Yes
On leases or contracts				Are you defendant in any suits or legal actions?			No
Legal Claims				Have you ever taken bankruptcy?			No
Provision for Federal Income Tax							
Other special debt							

FINANCIAL STATEMENT – NET WORTH

Schedule – U.S. Government Securities

A.	**Spouse's IRA**	
1.	FHLB 0 Series Al – Strips Rate 0.0% matures 8/25/03 -	$4,937.00
2.	Cert Accrual TSY 0% 03 due 11/15/03 Secs Ser K Prin Pmt on 11.875 2003 -	$1,971.00
3.	TINT TRSY Interest Payment Matures 05/15/09	$2,336.00
4.	Cert Accrual TSY 0% 09 Due 05/15/09 Secs Ser Q Int Pmt on 13.25 2014	$ 766.00
5.	Chattanooga Valley Corp Secd 1st Mtg Matures 07/01/10	$2,765.00
B.	**Spouse's IRA**	
1.	UBS PaineWebber Money Fund	$6,045.75

FINANCIAL STATEMENT – NET WORTH

Spouse's Individual Account:

UBS – PaineWebber

A.	Mutual Funds		
	1.	AIM MID CAP Equity Fund Class A	$ 5,709.00
	2.	AIM Weingarten Fund CL A	$ 9,400.00
	3.	Delaware Select Growth Fund CL A	$ 2,475.00
B.	UBS PaineWebber Cash Fund		$ 6,078.00
		Total:	$23,662.00

FINANCIAL STATEMENT – NET WORTH

Filer - IRA

A.	Money Fund	$ 20.29
B.	Mutual Funds – Brinson S&P 500 Index Fund Class A	$61,805.00

FINANCIAL STATEMENT – NET WORTH

Filer - 401K Jackson Walker L.L.P.

A.	Vanguard Index S&P 500		$ 3,817.80
B.	Europacific Growth		$ 8,078.12
C.	Income Fund of Americas		$ 3,826.70
		Total:	$10,722.62

FINANCIAL STATEMENT – NET WORTH

IRA – Webb, Stokes & Sparks, L.L.P.

A.	Merrill Lynch	$397,635.03

FINANCIAL STATEMENT – NET WORTH

Schedule - Real Estate Owned

A.	320 Acres, Tom Green County, Texas	$460,000.00
B.	(Spouse) ¼ undivided interest 640 acres in Collingsworth County, Texas (estimate)	$ 80,000.00

FINANCIAL STATEMENT – NET WORTH

Schedule – Real Estate Mortgages – Payable

(Also, this Schedule is referenced under General Information, first question.)

A.	Mortgage with GMAC Mortgage on house located on 320 acres	$82,606.66
B.	Mortgage with sellers on 110 acres of pasture land (part of 320 acres) – Rebecca Phy and Rachel Barring	$77,453.90

QUESTIONNAIRE FOR NOMINEES BEFORE THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE

1. **Name:** Full name (include any former names used).

S. James Otero, Samuel James Otero, Jim Otero

2. **Position:** State the position for which you have been nominated.

United States District Judge, Central District of California.

3. **Address:** List current office address and telephone number. If state of residence differs from your place of employment, please list the state where you currently reside.

Superior Court of the State of California, Los Angeles County. 111 Hill Street Los Angeles, California, 90012. (213) 974-5707

4. **Birthplace:** State date and place of birth.

Los Angeles, California, December 30, 1951

5. **Marital Status:** (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es). Please also indicate the number of dependent children.

Married, Jill Otero (maiden name: Sadja), Special Education Teacher, Severally Emotionally Disturbed Children. Los Angeles Unified School District. We have two dependent children.

6. **Education:** List in reverse chronological order, listing most recent first, each college, law school, and any other institutions of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

Stanford Law School J.D. 1976 (1973-1976)
California State University, Northridge, B.A. Political Science, Magna Cum Laude, 1973 (1969-1973)

7. **Employment Record:** List in reverse chronological order, listing most recent first, all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or job description where appropriate.

Appointed, Judge of the Superior Court of the State of California, Los Angeles County. (9/90 to present) 111 N. Hill Street, Los Angeles, California 90012.

Board member and Former Vice President of Salesian Boys and Girls Club and Salesian Family Youth Center. (1992-present) (Nonprofit centers helping at risk youth and their families in East Los Angeles)

Elected, Board Member and Vice President of the California Judges Association. (1998-2001)

Elected, Vice President (1999-2000) and current Board Secretary California Latino Judges Association.

1/4 Partnership interest in an 8 unit residential apartment, located at 6057 Pleasant Valley Rd., Placerville, California. The units were sold in 1999. The partnership dissolved upon the sale.

Appointed, Judge of the Municipal Court, Los Angeles. (12/88-9/90, elevated to the Superior court in 1990) 650 N. Grand Street, Los Angeles, California 90012.

Office of the City Attorney, City of Los Angeles (Senior Law Clerk 1977, Deputy City Attorney) 1977-1987. 1800 City Hall East, 200 N. Main Street, Los Angeles, California 90012.

Elected Board Member Los Angeles Deputy City Attorney and Assistant City Attorneys Association. Elected Board Member Latino City Attorney Association. 1980-1982 (Nonprofit)

Regional Counsel Southern Pacific Transportation Company & General Counsel and Vice President, Southern Pacific Warehouse Company. (7/87-12/88) 417 S. Hill Street, Los Angeles, California 90013.

Southern California Gas Company. (Summer job 1975) Law Clerk
Now Sempra Energy. 101 Ash Street, San Diego, California.

Chemical Plant in Pacoima, California. (Summer job 1974)
Laborer & Warehouseman (Do not recall address.)

Alcoa Aluminum Company. Alcoa Street, Vernon California. (Summer job 1973)
Laborer & Warehouseman. (Do not recall address.)

8. **Military Service:** Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number and type of discharge received.

I did not serve in the military.

9. **Honors and Awards:** List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

- Appointed Altar Boy, St. Mary's Parish, Los Angeles.
- Elected, class representative, John Muir High School.
- California Scholarship Federation, I graduated high school at age 17.
- Dean's List all eight semesters, California State University at Northridge.
- Political Science Honor Society, California State University at Northridge.
- Magna Cum Laude, B.A. Political Science (1973)
- Recipient, Carl Spaeth Scholarship, Leland Stanford Law School.
- Elected, Student Body Vice President, Stanford Law School (1976).
- Elected, Executive Committee, Los Angeles Superior Court.
- Elected, Vice President, California Judges Association.
- Elected, Vice President, California Latino Judges Association.
- Recipient Certificate of Appreciation Los Angeles County Bar Association.
- Recipient, Certificate of Appreciation, City Attorney's Association of Los Angeles.
- Recipient, Certificate of Appreciation, Glendale Bar Association.
- St. Don Bosco Award for Outstanding Service to the Salesians.
- Commendation, Constitutional Rights Foundation.

10. **Bar Associations:** List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.

- Mexican American Bar Association
- California Latino Judges Association
  Vice President (1999-2000) current Secretary of the Board
- California Judges Association
  Vice President and Executive Board Member (1998-2001)
- Superior Court Judges Association
- Los Angeles County Bar Association
- Federal Energy Bar Association
- Railroad Trial Counsel Association
- Corporate Law Committee, L.A. County Bar Association
- Bench Bar Relations Committee, Los Angeles County Bar

11. **Bar and Court Admission**: List each state and court in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

California Bar Admission Date: 1977
Central District of California: 1984

12. **Memberships**: List all memberships and offices currently and formerly held in professional, business, fraternal, scholarly, civic, charitable, or other organizations since graduation from college, other than those listed in response to Questions 10 or 11. Please indicate whether any of these organizations formerly discriminated or currently discriminates on the basis of race, sex, or religion - either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

- Stanford Chicano Law Students Association
- Stanford Chicano Alumni Association
- Stanford Alumni Association
- Burbank & Glendale YMCA
- Social Member, Oakmont Country Club, Glendale, California
- Associate Member Temple Sinai, Glendale, California

13. **Published Writings:** List the titles, publishers, and dates of books, articles, reports, or other material you have written or edited, including material published on the Internet. Please supply four (4) copies of all published material to the Committee, unless the Committee has advised you that a copy has been obtained from another source. Also, please supply four (4) copies of all speeches delivered by you, in written or videotaped form over the past ten years, including the date and place where they were delivered, and readily available press reports about the speech.

Over the years, I have addressed judges, bar associations and student groups regarding court business and law related issues. I know of only one lecture concerning summary judgments that was video taped. I do not have access to the tape.

14. **Congressional Testimony**: List any occasion when you have testified before a committee or subcommittee of the Congress, including the name of the committee or subcommittee, the date of the testimony and a brief description of the substance of the testimony. In addition, please supply four (4) copies of any written statement submitted as testimony and the transcript of the testimony, if in your possession.

I have not testified before any committee of the Congress.

15. **Health**: Describe the present state of your health and provide the date of your last physical examination.

I have no medical conditions that I believe would interfere with my duties. Over the years I have experienced periodic congestion and upper respiratory conditions. The cause has never been definitively diagnosed. I have been told it may be the result of double pneumonia I contracted as an infant. The respiratory ailment is annoying, not debilitating. In my last two physicals (2001 & 2002), I was found to be mildly anemic. This year I have undergone diagnostic tests to determine the cause. The results indicate a mild ulcer seemingly caused by daily use of aspirin. (I was taking aspirin as a prophylactic measure because of daily vigorous exercise.) My doctor has scheduled additional tests to confirm. Overall, I feel I am in very good health. I run five to nine miles almost every day. Over the years, I have entered and run about 100 races, including ten marathons. In January 2002, I placed first in the CJAC Race for Justice.

16. Citations: If you are or have been a judge, provide:

(a) a short summary and citations for the ten (10) most significant opinions you have written:

California Superior Court Judges do not write opinions. However, referenced below are 10 significant cases I presided over as trial judge. Also enclosed is a copy of a statement of decision I authored in Citizens for Jobs and the Economy v. County of Orange.

- People vs. Chauncey J. Veasley, Dellano Leroy Cleveland, Rajeesh Prasmad Charan. Case No. KA006977. In the referenced double murder capital case, the defendants were charged with two counts of murder, two counts of robbery and conspiracy to commit both. At trial the people alleged that each defendant participated in the execution style murder of victims Quinn Nelson and Charles Hunter after robbing them of drugs. After a six week trial, the jury returned a verdict of guilty as to each defendant and also recommended a sentence of death. At a subsequent sentencing hearing, I sentenced Defendants Veasley and Cleveland to death. However, I rejected the jury's recommendation of death for Defendant Charan and sentenced him to life without the possibility of parole.

- People v. Alfred Martinez Jr., Case No. KA006412. The referenced criminal trial involved one count of P.C. § 664 187 (attempted murder of a police officer.) At trial, the people alleged that Mr. Martinez leaned out the passenger window of a vehicle being pursued by a City of West Covina Police Unit and fired a shotgun at the pursuing officer. Immediately afterwards, Mr. Martinez threw the shotgun and a pair of gloves outside the passenger's window and the driver and Mr. Martinez surrendered. The defendant was convicted after a jury trial. At sentencing, the people alleged that Mr. Martinez was on parole at the time of his arrest and was a member of the Mexican Mafia prison gang.

- People v. Jonas Ferdinand Abad Curato, Case No. KA005514. The referenced criminal litigation involved one count of P.C. § 187 (murder). Evidence offered at trial established that the defendant shot the victim after the defendant and victim quarreled about whether the defendant was being too loud at a party. Testimony showed that the party was being given to celebrate a birthday. The victim, Oliver Dehesa had attempted to persuade Curato to quiet down when he became noisy. The victim also patted defendanut on the back of the head, an action the defendant resented. Curato left the party, but warned he would kill the victim's family one by one. When Curato returned, he shot the victim in the back of the head. After a six-day trial, the jury returned a verdict of guilty.

- People v. John Anthony Wourms, Case No. KA002520. The referenced criminal matter involved one count of P.C. § 451(B) (arson of an inhabited structure.) Evidence adduced at trial established that on October 25, 1989, the defendant set fire to his apartment causing two hundred and fifty-thousand dollars in damage to the structure. The people proved at trial that there had been a long ongoing feud between defendant and his landlord. The fire was set in retaliation for a judgment of eviction and back rent that the landlord had just secured in municipal court. The investigation also revealed that Mr. Wourms had taken out a writer's insurance fire policy immediately before the crime. The defendant was convicted and sentenced in absentia after fleeing the jurisdiction of the court following the close of defendant's case.

- People v. Paul Lassen, Case No. K4003510. The referenced criminal matter involved one count of P.C. § 207A kidnap and one count of P.C. § 243 sexual battery and torture with a stun gun. Trial testimony established that the victim had met the defendant in Kansas State Prison where she was employed as a secretary. The victim subsequently sponsored the defendant's parole in a work release program and the two commenced a relationship. The relationship ended 10 months later after they had relocated to California. The victim testified at trial that on the day of the incident the defendant had flagged her over to the curb while she was driving home from work on a route she used every day. He concocted a story that he needed a ride to his house. When they arrived at the location, he forced her upstairs to the apartment they both had once resided in. There she was bound to a chair with duct tape and rope while the defendant tried to convince her to renew their relationship. When she refused, he carried her to the bedroom and gagged her. As punishment, he tortured her with a powerful electric stun gun. The victim suffered several contact burns from the weapon. The incident was ended when police broke into the residence after being alerted by the victim's current boyfriend. The jury convicted the defendant of both counts. However, the Court of Appeals later reversed the kidnap conviction. The court concluded that defendant's movement of the victim from her vehicle to her apartment was insufficient to support the kidnaping charge.

- Citizens For Jobs and the Economy, et al, Petitioners, Plaintiffs and Respondents, and County of Orange, Defendant, Third Party Plaintiff and Respondent v. Jeffrey C. Metzger, Third Party Defendant, Intervenor and Appellant. Orange

County Superior Court Case No. 00CC0 3 205. Court of Appeal No. D037543. The referenced litigation involves various challenges by proponents of a civilian airport at the El Toro Marine Air Station to measure F (the Safe and Healthy Communities Initiative) which, among other issues, required a two-thirds vote of the electorate on the approval of airport, jail and hazardous waste landfill projects. After motions for summary judgment were filed by the proponents and opponents of the measure, the court found Measure F to be void and unenforceable. (See attached Statement of Decision). This litigation was politically charged and the parties polarized. My decision regarding the infirmities of the measure rendering it unenforceable was affirmed by Court of Appeal in a published decision.

- Metro-Goldwyn Mayer v. The Walt Disney Company, Case No. BC149799. The referenced litigation involved a claim for breach of a licensing agreement. Evidence adduced at trial established that MGM licensed to Disney certain rights for use in theme parks around the world. Under the license agreement, Disney was obligated to return the rights for any country in which it had not developed a movie park within nine years. After nine years, Disney had developed only the Florida park. Disney, however, refused to reconvey to MGM its rights in France. MGM brought the litigation for reconveyance of the European rights, damages and to terminate the entire license agreement because of Disney's breach. Prior to the jury trial, I granted summary adjudication in favor of Disney on MGM's declaratory relief action seeking termination of the entire license agreement. The Court concluded that the European rights were severable from the United States rights. After presentation of the evidence, a jury found that Disney had breached the license agreement and MGM was awarded damages in the sum of $1.5 million.

- Michael Clinton v. Regents of The University of California, Case No. BC218913. The referenced litigation involved a claim of wrongful death arising out of the medical care and treatment provided to decedent Drew Michael by Defendants Richard Reynolds, M.D. and Gary Scott, M.D. at Children's Hospital of Los Angeles. On July 27, 1998, 11-year-old Drew died during a spinal surgery for scoliosis. Plaintiffs contended that the negligence of Defendants caused their son's death. After a two week trial, the jury returned a verdict in favor of defendants.

- MEZ Industries, Inc. v. Pacific National Insurance Company, Case No. BC172220. The referenced litigation involved an action for declaratory relief and breach of contract arising out of the advertising injury provisions of Defendant Pacific National Insurance Policy. The narrow issue presented in the litigation was whether Pacific's policy which provided coverage for "advertising injury" required Pacific to defend plaintiff in an underlying Federal District Court complaint alleging that MEZ had induced others to infringe on four patents. After hearing, the court concluded that the particular policy provisions did not require Pacific to defend the underlying action because there was no potential for coverage and thus the duty to defend was not triggered. The court also

concluded that coverage for inducement for patent infringement would be barred by Insurance Code Section 533. On appeal the opinion authored by Justice Croskey was certified for publication.

- Howard Edleman v. Donald Minkler, M.D. et al, Case No. BC145925. The referenced civil trial involved a claim for medical malpractice for allegedly inappropriate post-surgical care which resulted in a complete loss of Plaintiff's right eye. After a 5 week trial, the jury hung 8-4 in favor of the defendant. Upon retrial, the jury returned a verdict for defendant.

(b) a short summary and citations for all rulings of yours that were reversed or significantly criticized on appeal, together with a short summary of and citations for the opinions of the reviewing court; and

- Cotran v. Rollins Hudig Hall (1998) 17 Cal.4th 93. The issue presented in Cotran was what is the role of the jury in deciding whether misconduct occurred when an employee hired under an implied agreement not to be dismissed except for good cause is fired for misconduct? Does the jury decide whether the acts that led to the decision to terminate happened? Or is its role to decide whether the employer had reasonable grounds for believing they happened and otherwise acted reasonably? At the time of the trial, California Courts of Appeal were divided over the question. The majority of the District Courts of Appeal decisions generally held that the jury's role is to determine whether the employer concluded misconduct occurred "fairly, honestly and in good faith." However the Second District Court of Appeal (Division Seven) decision in Wilkerson v. Wells Fargo Bank (1989) 212 Cal.App.3d 1217 adopted a more expansive view. Wilkerson held that the jury must decide whether the alleged misconduct occurred as a matter of fact, and placed the burden of proving it on the employer. The District Court of Appeal which governs the Los Angeles Superior Court is the Second District Court. I was bound to follow Wilkerson, which at the time was the only published Second District Court of Appeal Decision adopting the broader view. Division One of the Second District heard the Cotran Appeal. Division One disapproved of Division Seven's Decision in Wilkerson and reversed. The California Supreme Court granted plaintiff/respondent's petition because of the conflict between the Courts of Appeal. The Supreme Court adopted a governing standard requiring only that the employer establish that in discharging the employee it acted "fairly, honestly and in good faith." The Supreme Court also disapproved the Wilkerson decision.

- Hyland v. Hughes Aircraft Company LASC No. BC179742 2nd Civil No. B144946. The lawsuit filed in 1997 concerns the entitlement of Virginia Hyland, heir to the estate of Pat Hyland, to be paid under a Letter Agreement dated April 27, 1983, wherein Hughes promised key employees that if Hughes should be sold and if it should implement a program pursuant to which senior executive management was given the right to receive "units of equity" upon sale then Pat Hyland could receive sums under the agreement. Hughes was in fact sold in 1985 and a equity program was instituted for the benefit of senior

executive management. At trial the court granted defendants motion to sever for early resolution of the issue of whether Hyland's claims were barred by the statue of limitations. After presentation of evidence, I granted judgment in favor of defendants finding that Hyland's claims expired no later than 1989. The Court of Appeal reversed. A Petition for review is pending before the California Supreme Court. Given that the matter is still pending under Rules of Judicial Conduct, I cannot comment further.

- Henkle Corporation v. Lloyd's of London, B134742, 88 Cal.App.4th 876 (2001) Not citable superseded by Grant of Review to California Supreme Court. The referenced litigation involves the issue of whether rights to liability insurance coverage may be taken away from a corporate policy holder when it undergoes a corporate reorganization. On motion for summary adjudication I followed California law on this issue as enunciated in General Accident Ins. Co. Cal.App.4th 1444, 1451 and ruled that Rights to insurance are contractual and follow ordinary rules of contractual assignment (including with respect to the policyholder's corporate successor); unlike tort liability, they cannot be altered by "operation of law". I ruled that the mere fact that one company becomes successor to tort liability of another company does not mean that it is put into a contractual relationship with the company's insurers. Rather, unless the new corporate entity was the successor to the corporate policyholder under the corporation law, or unless a corporate policyholder intended to transfer insurance policies to a new corporate entity (and did so with the consent of the insurer), the insurance rights remain with the corporate policy holder. On appeal, the Court of Appeal rejected General Accident Ins., reversing the trial court and holding that insurance rights may be transferred by operation of law. The California Supreme Court has granted Respondents Petition for Review. The matter is still pending and under the Rules of Judicial Conduct, I am not allowed to comment further.

- PMC, Inc., et al., v. Neil Kadish (2000) 78 Cal.App.4th 1368. In this case the majority shareholders of a corporation brought an action for misappropriation of trade secrets against former managers of the corporation who had formed a new, competing corporation. While the action was pending, individuals who had no affiliation with the corporation invested in and became officers and directors of the new corporation and plaintiffs joined them as defendants, seeking to hold them personally liable. This group of defendants brought a motion for summary judgment, asserting that they could not be held liable because the evidence established that they did not know nor did they have reason to know about the alleged misappropriation of trade secrets. I granted summary judgment in their favor. The Court of Appeal reversed. The court held that I erred in granting summary judgment, since a triable issue of material fact existed as to the defendants active participation or approval of the tortious conduct. The Appellate Court's standard of review involving a summary judgment is de novo. No finding of abuse of discretion is required. Upon remand the matter was tried before a jury. The jury found in favor of defendants, concluding that plaintiff failed to prove tortious conduct on the part of any defendant.

- Michaelis v. Schori (1993) 20 Cal.App.4th 133. In this litigation, the Court of Appeal reversed my order denying defendant/physicians' motion to compel arbitration of a minor's claim in a medical malpractice case. According to plaintiff, she consulted defendant Dr. Schori for medical care related to her pregnancy. During her first visit, plaintiff, 17-years-old at the time and living with her parents, signed a binding arbitration agreement, also signed by Dr. Schori. When plaintiff went into labor she checked into the hospital. Dr. Schori told plaintiff that her delivery would be handled by Dr. Bader. According to plaintiff, Dr. Bader never showed up, and the hospital failed to detect complications. Ultimately, the baby was stillborn. Disaffirming the arbitration agreement, the plaintiff sued the doctors and the hospital for malpractice. I denied defendant's petition, finding that the California Code of Civil Procedure section 1295 specifically allows disaffirmance of a contract for medical services which contains a provision for arbitration of any dispute involving medical negligence by a minor, if the minor's parent or guardian has not signed the medical contract. The Court of Appeal held that California Civil Code section 34.5, which deals with the type of treatment for which a minor might be reluctant to seek parental approval (pregnancy care), precludes an unemancipated minor from disaffirming a section 1295 arbitration provision entered into as part of a contract for pregnancy treatment. Prior to Michaelis there was no case law analyzing the two statutes.

- KNB Enterprises v. Matthews (2000) 78 Cal.App.4th 362. In this litigation, the owner of the copyright to erotic photographs of noncelebrity models, brought an action alleging, by right of assignment, the models misappropriation claims under California Civil Code section 3344, against an individual who was alleged to have commercially displayed the photographs on his Internet Web site without authorization. I granted defendant's motion for summary judgment, finding that plaintiff's claim was the equivalent of a copyright infringement claim and barred by the Court of Appeal's decision in Fleet v. CBS (1996) 50 Cal.App.4th 1911. In Fleet the appellate court held that unpaid film actors' claims for misappropriation of name, photograph, or likeness under section 3344 of the Civil Code were preempted by federal copyright law, where the only misappropriation alleged was the film's authorized distribution by the exclusive distributor, CBS. In KNB the Court of Appeal criticized Fleet's "broad language" regarding preemption of the actors' section 3344 claims and limited the language to the facts of that case. The court went on to conclude that a section 3344 claim is preempted under Fleet only where an actor or model with no copyright interest in the work seeks to prevent the exclusive copyright holder from displaying the copyrighted work.

(c) a short summary of and citations for all significant opinions on federal or state constitutional issues, together with the citation for appellate court rulings on such opinions.

- Citizens For Jobs and the Economy, et al, Petitioners, Plaintiffs and Respondents, and County of Orange, Defendant, Third Party Plaintiff and Respondent v.

Jeffrey C. Metzger, Third Party Defendant, Intervenor and Appellant. Orange County Superior Court Case No. 00CC0 3 205. Court of Appeal No. D037543. The referenced litigation involves various challenges by proponents of a civilian airport at the El Toro Marine Air Station to measure F (the Safe and Healthy Communities Initiative) which, among other issues, required a two-thirds vote of the electorate on the approval of airport, jail and hazardous waste landfill projects. After motions for summary judgment were filed by the proponents and opponents of the measure, the court found Measure F to be void and unenforceable. (See attached Statement of Decision). This litigation was politically charged and the parties polarized. My decision regarding the infirmities of the measure rendering it unenforceable was affirmed by Court of Appeal in a published decision.

If any of the opinions or rulings listed were in state court or were not officially reported, please provide copies of the opinions.

See Hyland v. Hughes LASC No. BC 179742 and 2nd Civil No. B144946 attached.

17. **Public Office, Political Activities and Affiliations**:

(a) List chronologically any public offices you have held, federal, state or local, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or nominations for appointed office for which were not confirmed by a state or federal legislative body.

None.

(b) Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

No.

18. **Legal Career**: Please answer each part separately.

(a) Describe chronologically your law practice and legal experience after graduation from law school including:

See chronology below.

(1) whether you served as clerk to a judge, and if so, the name for the judge, the court and dates of the period you were a clerk;

(2) whether you practiced alone, and if so, the addresses and dates;

(3) the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each.

(b) (1) Describe the general character of your law practice and indicate by date if and when its character has changed over the years.

(2) Describe your typical former clients, and mention the areas, if any, in which you have specialized.

a. July 1977 to June 1980:
Criminal Branch Trial Deputy for the office of the City Attorney, Los Angeles. My primary duty was the prosecution of a steady stream and variety of misdemeanor jury and court trials, including drug, theft, violent crimes and driving under the influence of alcohol cases. Additional assignments included staffing master calendar and arraignment courts, evaluation of cases for filing, and law and motion practice.

b. June 1980 to June 1982:
I was assistant supervisor for the Los Angeles City Attorney's Criminal Division, Central Trials Branch. My duties included: organizing and directing the daily operations of central trials, including the supervision of approximately 35 trial deputies and support staff; assigning high visibility, complex and sensitive cases for advanced preparation; evaluating the performance of all personnel assigned to central trials; responding to inquiries from judges and commissioners assigned to the downtown Municipal Courts; advising enforcement agencies concerning prosecution of criminal matters and preparing budgetary recommendations concerning personnel, equipment and facilities.

c. June 1982 to June 1984:
Litigation position in the Liability Section of the Department of Water and Power for the City of Los Angeles where I handled a caseload of approximately 84 Superior Court cases and 66 Municipal Court cases in the personal injury and property damage fields. In addition, I conducted all law and motion, arbitration and appellate proceedings in connection with such litigation, and I instituted actions and cross actions against others who were determined to be liable to the Department of Water and Power.

d. June 1984 to July 1987:
I represented the Department of Water and Power of the City of Los Angeles in both state and federal court involving all aspects of public utility and electric rate litigation. Additionally, I represented the City of Los Angeles, the Public Service Department of the City of

Glendale, the Water and Power Department of the City of Pasadena and the Public Service Department of the City of Burbank before the Federal Energy Regulatory Commission and the Federal Bonneville Power Administration concerning bulk-electric rate issues.

e. July 1987 to December 1988:
General Attorney and Regional Counsel in charge of the Southern California Office of the Southern Pacific Transportation Company Law Department. My responsibilities included: legal counsel to the Superintendent of Railroad Operations and Southern Pacific Police; oversight of all community, government and Native American relations (Morongo Indian Tribe); real estate transactions; California Public Utility Commission hearings; and FELA litigations. In addition, I served as Vice President and General Counsel for Los Angeles Union Terminal Inc. and the Southern Pacific Warehouse Company.

f. December 1988 to Present:
Since 1988, I have served on both the Los Angeles Superior and Municipal Courts, being appointed by Governor George Deukmejian to the municipal court in November 1988 at age 36 and elevated September 1990. In the 14 years I have been on the bench, I have presided in 3 of our districts serving also as Supervising Judge of North Central District from 1994 through 1996. In January 2002, I was appointed Assistant Supervising Judge, Civil Division. Over the years, I have handled class action, insurance coverage, commercial civil and complex criminal litigation including a three-defendant special circumstance case.

(c) (1) Describe whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe each such variance, providing dates.

I appeared in court frequently when I was with the Los Angeles City Attorney's Office. Occasionally, when I represented the Department of Water and Power and Southern Pacific Railroad.

(2) Indicate the percentage of these appearances in

(A) federal courts; 10%
(B) state courts of record; 60%
(C) other courts. 30%

(3) Indicate the percentage of these appearances in:

(A) civil proceedings; 70%
(B) criminal proceedings. 30%

(4) State the number of cases in courts of record you tried to verdict or judgment rather than settled, indicating whether you were sole counsel, chief counsel, or associate counsel.

In approximately 30 cases, I was sole or chief counsel.

(5) Indicate the percentage of these trials that were decided by a jury.

80%

(c) Describe your practice, if any, before the United States Supreme Court. Please supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the U.S. Supreme Court in connection with your practice.

I have never appeared before the United States Supreme Court.

(e) Describe legal services that you have provided to disadvantaged persons or on a *pro bono* basis, and list specific examples of such service and the amount of time devoted to each.

Since 1992, I have worked with the disadvantaged through the Salesian Boys and Girls Club and the Salesian Family Youth Center. We currently operate two centers in the Boyle Heights area of East Los Angeles. The Salesians act as the lead agency in gang, crime and violence reduction in the area. We provide academic, social and recreational services. Our mission is to involve both children and their parents to strengthen the vitally important family unit. We serve all boys and girls on a non-discriminatory basis. Over the years, I have been involved in other pro bono work including St. Mary's Church and LAMP. Finally in 1976, I worked on a project for the Mexican Legal Defense and Education Fund (MALDEF) involving the right of Texas public school officials to require proof of citizenship as a condition for enrollment in public school. The lawyer supervising the project was Joaquin Avila. The projects co-contributor was Raul Martinez.

19. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, and for each provide the date of representation, the name of the court, the name of the judge or judges before whom the case was litigated and the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties. In addition, please provide the following:

See list of cases provided below.

(a) the citations, if the cases were reported, and the docket number and date if unreported;

(b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;

(c) the party or parties whom you represented; and

(d) describe in detail the nature of your participation in the litigation and the final disposition of the case.

1. People v. Huff. I could not locate the case number. The trial judge was Florence Bernstein, now deceased. Opposing counsel was Art Bell, who I believe is also deceased.

   The referenced litigation is significant because it was my very first trial and opposing counsel was noted Attorney Art Bell, author of Search and Seizure Compendium — Bell's Compendium.

   After the litigation, Mr. Bell sent a letter to then City Attorney Burt Pines referencing the litigation. Mr. Bell's letter best describes the litigation and is reprinted here below.

   Mr. Otero is one of your Deputies in the Criminal Division. He's presently assigned to the Van Nuys Office where he gave me a good beating in a 594 case the other day. That's not so unusual. You have a number of good trial Deputies who can do, and have done, that.

   What's unusual is the way Mr. Otero did it. In the first place, he saved the case from being dismissed, by talking the judge into trailing it when nine times out of ten a judge would have thrown it out and chewed out the City Attorney's office for not subpoenaing a key witness. This happened in the trial court after the People had answered ready in the Master Calendar Division. Mr. Otero was able to nurse the case along until three in the afternoon and then until nine the next morning, and then until ten-thirty that day, too. It made me mad as hell, I can tell you. At that stage I really believed my client was innocent.

   Ok, we start a court trial and by noon I'm ready to rest my case, and I have it won, in my opinion. Up speaks Mr. Otero and asks to be able to present rebuttal evidence in the afternoon because he'd just heard of a tie-breaking witness. The judge say OK, and I'm even madder.

   When we come back in the afternoon, Mr. Otero doesn't have the witness he said he would have because the guy is the new owner of the "Victim" bar and can't leave it. What Mr. Otero does come in with is another live witness that neither the police, the City Attorney's Office nor I had discovered before. I'll be damned if Mr. Otero hadn't taken his lunch hour, driven to Woodland Hills, interviewed the bar owner, examined the scene of the crime, found this "phantom" witness, and by God driven him back to Van Nuys for the trial!

After that witness testified and was cross examined by me the best I could, the judge took the case under submission for five days. I don't know if the judge really had some doubt, but I didn't. I knew it was going to be bad news for my client. It was. He was convicted, fined and put on summary probation. Somehow justice had been done, and it was all due to the efforts of Mr. Otero.

Now, maybe that's being more eager than a public servant should be. I mean, it wouldn't work in the U.S. Postal Service. The system wouldn't tolerate that kind of diligence and extra effort. Maybe Mr. Otero hasn't learned that yet. I hope he never does. He made no big deal out of it. He's quiet, unassuming and has an excellent courtroom manner. Anyway, he impressed the hell out of me, and I thought you ought to know about it.

2. Southern California Edison Company v. Department of Water and Power of the City of Los Angeles, et al. Case No. C 301654.

The above-captioned litigation involved an action for injunctive relief, Breach of Contract, Specific Performance, and Declaratory Relief, arising out of a contract whereby plaintiff, Southern California Edison Company (SCE), nominal defendants, San Diego Gas and Electric Company and Pacific Gas and Electric Company and defendant the Los Angeles Department of Water and Power apportioned rights and obligations to sell energy to the California Department of Water Resources (DWR) to transport water from northern to southern California (Feather River Project.)

The contract was entered into in 1966 and provided for the sale of energy to the DWR at 3 mills per Kwh, terminating in 1983. At the time the parties entered into the agreement (1966), all assumed the cost of supplying energy would be less than the contract rate during the term of the Agreement.

Due to market manipulation exerted by the Organization of Petroleum Exporting Countries (OPEC), the Arab oil embargo of 1973 and the Iranian Revolution, LADWP's cost rose in 1979 to approximately 50 mils per Kwh. As result of the 16(+) fold increase, LADWP notified the parties that the Department would not supply at the 3 mill rate. LADWP's justification was unforeseen events resulting in economic impracticability.

Subsequent to the Department's notification, SCE secured an injunction requiring the Department's performance pursuant to the Agreement. Issues presented in the case were whether SCE wrongfully obtained the injunction, whether the privately owned

utilities wrongfully conspired against LADWP to obtain the injunction and whether LADWP was entitled to be excused from performance due to changed circumstances rendering LADWP's participation in the contract impracticable.

I was appointed in 1983 to be lead counsel for LADWP. The Department's economic damages were in excess of $60(+) million. The case involved OPEC experts as well as the history of California electric utilities industry from the 1950s through the 1980s. Settlement was finally reached in 1987, entitling the City to rights in the Palo Verde nuclear power facility and transmission access over SCE's lines. Chief Counsel for LADWP was Edward Farrell. Current address: 2424 Via Pacheco, Palos Verdes Estates 90274. Telephone (310) 377-5112. The case settled prior to trial. Counsel for Southern California Edison was James Montague. Current Address: Office of the Public Defender, 250 E. Main Street, Fl. 6, El Cajon, CA 92020 (619) 441-4397. Counsel for San Diego Gas and Electric was the Honorable Tim Tower. Current Address: San Diego Superior Court, 220 W. Broadway DID 17 Fl. 2, San Diego, CA 92101-3409 (619) 531-3011.

3. Lainer Investments, etc., et al. v. Department of Water and Power of the City of Los Angeles (1985) 170 Cal.App.3d 1;214 Cal.Rptr. 812

The above-captioned appellate matter involved an action for property damage and loss of profits arising from a fire occurring June 21, 1977. Appellants, the Los Angeles Department of Water and Power and the City of Los Angeles were sued by the landlord and tenants of the building which burned down. Respondents claimed breach of contract for failure to provide an adequate supply of water to respondents' fire sprinkler service, negligent creation of a dangerous condition and negligent installation of a dangerous condition.

In the first part of the bifurcated trial, the trial court determined there existed a "contract between the parties under which the City was obligated to provide an adequate supply of water to the fire sprinkler system in respondents' building by means of a special pipe and valve which the City had installed for that purpose at respondents' request."

At the conclusion of the liability phase, the jury rendered a special verdict for respondents based on theories of breach of contract, negligence and maintenance of a dangerous condition. After hearing testimony concerning damages, the jury awarded over $2 million in damages to respondents.

On July 15, 1985, in a unanimous opinion, the Court of Appeal, Second Appellate District, Division 3 filed an opinion reversing

judgment. The Court concurred with appellants; holding that the Department was immune from tort liability under Government Code section 850.2 and 850.4 because the fire service valve constituted fire protection equipment within the meaning of those sections. Further, the court held that "appellants had not entered into an express contract for the purpose of providing fire protection to respondents' property and that liability for fire damage based on an insufficient supply of water could not be implied from the ordinary relationship between appellants and respondents, i.e., distribution of water for public use to consumers at a rate fixed by ordinance."

I represented DWP on the appeal. Co-counsel representing DWP was Diana Mahmud. Metropolitan Water District, 700 N. Alameda St., P.O. Box 54153, Los Angeles, CA 90054 (213) 217-6985, supervising attorney was Terso Rosales, Office of City Attorney, 111 N. Hope Street, P.O. Box 51111, Los Angeles, CA 90051 (213) 367-4645. The case was argued before Justice Danielson, Acting P.J., Justice Arabian and Judge Fidler. Justice Arabian wrote the opinion which was certified for publication. Respondents' Petition for Hearing was denied. Counsel for respondents was Irving L. Halpern of Halpern and Halpern.

4. Linda A. Hess, et al., v. Los Angeles Department of Water and Power, 2 Civil No. 63263

The above-captioned appellate matter involved a wrongful death action arising out of a drowning in the Los Angeles Aqueduct. The Aqueduct, which supplies water from the Owens River to the County and City of Los Angeles is operated and controlled by the Department of Water and Power (LADWP). Respondent, LADWP, was sued by appellants who alleged maintenance of a dangerous condition and failure to post signs warning of the swift moving water within the Aqueduct.

At trial, respondent moved to exclude and the Court excluded certain evidence proffered by appellants on the grounds that its potential prejudice and time consuming nature outweighed its probative valve. (Evid. Code § 352.)

The excluded evidence included prior incidents of injury and drownings, subsequent remedial changes, a report by the Department compiled before the Hess incident which discussed prior drownings and various proposals regarding additional safety precautions. Also excluded were witnesses who would have testified about other drownings in the channel and photographs of safety devices used in other canals.

On December 20, 1983, the Court of Appeal, Second Appellate

District, Division 2 filed its opinion affirming judgment in favor of LADWP. The court concurred with respondent holding that appellants failed to establish that the trial court abused its discretion.

I represented DWP on the appeal and argued the case before Justice Roth, P.J., Justice Gates and Justice Compton. Justice Compton wrote the opinion. Counsel for Appellants was Stephen L. Odgers, Esq., of Buxbaum & Chakmak, 414 Yale Avenue, #B, Claremont, CA 91711-4356, (909) 625-5978.

5. Fine's Food Company v. Department of Water and Power. Case No. Unknown.

The above-captioned litigation involved an action for property damage, food spoilage and loss of profits arising from an explosion and fire occurring at a distributing station owned by the Department of Water and Power. As a result of the explosion, plaintiff and several other Department customers suffered a power outage lasting 12 hours.

The Department was sued by plaintiff, the owner of a market, who alleged breach of contract for failure to provide service, negligent maintenance of equipment and negligence in failing to timely restore service. In addition, counsel for plaintiff argued that the Department did not provide the same quality of service in East Los Angeles as was provided in more prosperous areas of the City.

Evidence offered at trial by the Department, established that the cause of the explosion was the failure of a thyrite resister contained within a voltage regulator. The regulator was purchased by the Department a short time prior to the fire and was inspected prior to placement in service.

In response to plaintiff's contention regarding disparity of service, the Department provided evidence establishing that the Department responded within minutes of the explosion. Department personnel worked diligently to restore service and any delay was caused by danger of "flash over" at the site of the explosion. The case was tried before a jury in 1983. The jury returned a verdict in favor of LADWP. The trial court judge was Judge Hindin, now deceased. Attorney for plaintiff was David W. Cornwell. Address: 3017 Windmill Road, Torrance, CA 90505-7140.

6. U.S. Department of Energy Bonneville Power Administration Docket No. EF 84-2011-006

The above-captioned litigation involved a rate hearing before the

Federal Energy Regulatory Commission, regarding the Federal Bonneville Power Administration's nonfirm 1983 energy rates.

Pursuant to section 7(k) of the Northwest Electric Power Planning and Conservation Act, California Utilities are afforded special review by the Energy Commission as a protection against political pressures from Pacific Northwest utilities. BPA's involvement in the Washington Public Power Supply System (WPPSS) has in recent years increased pressure on BPA to recover these losses from California utilities.

The Department of Water and Power actively participated in the 7(k) hearing in order to protect Los Angeles rate payers from excessive rates proposed by BPA. In the 83 proceeding, I argued on behalf of LADWP that BPA's rates were unduly discriminatory, that Congress enacted 7(k) to prohibit undue price discrimination and that there were no differences in service that justify the difference in rates charged by BPA.

The trial in the referenced matter began on September 11, 1985, and was completed on September 30, 1985, encompassing eleven days of hearings. In the proceeding, I was nominated by counsel for the other California utilities to be lead attorney in the cross-examination of BPA's main witness. The judge who heard the case was Judge Leventhal. Counsel for BPA were James Fama and Susan Akerman. Counsel representing Southern California Edison and Pacific Gas and Electric Company was John D. McGrane, formerly of Reid and Priest, current telephone number (202) 467-7621. Address: 1800 M Street, Washington D.C. 20036.

7. In the matter of the 1985 Bonneville Power Administration Wholesale Power rate and transmission rate and adjustments. BPA WP-85 and TR-85.

The above-captioned litigation matter involved a rate hearing before the Bonneville Power Administration (BPA), regarding BPA's nonfirm 1985 energy rates.

Pursuant to section 7(i) of the Northwest Power Act, BPA is required to sponsor rate hearings prior to adjustments in energy rates. In the 1985 hearings, BPA continued its trend in reallocating costs incurred in the operation of its system from customers in the Pacific Northwest to California utilities.

LADWP actively participated in the 7(i) hearing. The Department challenged BPA's proposed 1985 rates on the grounds that they violated recognized rate making principles and statutory constraints

governing BPA's rate structure.

Trial in the matter began on January 4, 1985, and was completed February 6, 1985, encompassing 20 days of hearings. In the proceeding on behalf of the Department, I sponsored expert testimony and cross-examined BPA witnesses regarding the proposed nonfirm rates. The judge assigned to the matter was Judge Sweeney. Counsel for BPA was James Fama. Counsel representing Southern California Edison Company was John D. McGrane formerly of Reid and Priest, current address: 1800 M St. N.W., Washington, DC 20036 (202) 467-7621.

8. State of California v. Stansbury, Case No. unknown.

The above-captioned criminal proceeding involved one count for violating Penal Code section 242 (battery), arising out of a domestic dispute.

The case is representative of the many minor but important domestic violence matters prosecuted by the City Attorney's Office. It is significant because it brought to my attention the injustice that befalls us all when a court fails to treat domestic violence matters with the seriousness and impartiality accorded other prosecutions.

In this matter, Mr. Stansbury was cited for striking his former live-in girlfriend in a dispute involving the return of her son's furniture. The case was called to trial only after the defendant refused a plea to Penal Code section 415 (disturbing the peace).

During cross-examination of the victim, defense counsel, over counsel's objection, was permitted to inquire if Mr. Stansbury had kicked the victim out of his house because she was seeing another man. When the victim replied that the allegation was not true, defense counsel, again over objection, produced a cassette tape and informed the court and jury that he had evidence that the victim had just perjured herself. The court then called both counsel to the bench and informed the victim that if counsel's representation was correct the court would recommend the perjury allegation be referred to the District Attorney's Office for prosecution.

After hearing the tape, the court concluded that the allegation was not true but refused my request to admonish the jury regarding counsel's representation. After careful deliberation, the jury found Mr. Stansbury guilty of assault. The court, however, imposed only a $50.00 fine with probation to terminate upon payment of the fine. The boy's furniture was not ordered returned.

The victim, her son and our system suffered that day. Justice was not served. The trial judge was Judge Tso, now deceased.

9. State of California v. Southern Pacific Transportation Company, et al., Case No. 87201390.

The above-captioned criminal proceeding involved a grade blocking incident occurring August 19, 1987. The District Attorney alleged that a Southern Pacific conductor refused the request of a police officer and fire captain to move a train for passage of an emergency vehicle. This incident resulted in the filing of numerous charges against Southern Pacific and employees for violations of PUC section 2110, General Order 135 (blocking intersections). The case was of particular significance because it is the first time individuals were charged with violating the PUC Order. Defendants demurred to the complaint on jurisdictional and constitutional grounds.

On January 25, 1988, the court sustained defendants' demurrer without leave to amend. The court held that the application of the order to employees violated the Due Process Clause of the United States and California constitutions in that the employees did not have notice of the law under which they were charged. The District Attorney appealed. The Appellate Department of the Superior Court upheld the sustaining of the demurrer. The case was also noteworthy because of its political overtones. United Neighborhoods Organization (UNO), representatives of various cities, and the United Transportation Union were involved in the litigation.

I represented Southern Pacific and Mr. Roy McRae. The District Attorney assigned to prosecute Mr. James Grodin, Office of District Attorney, 18000 Criminal Courts Building, 210 W. Temple St., Fl. 18, Los Angeles, CA (310) 419-5182. The trial judge was the Honorable Louis Anderson-Smaltz, Dept. M., 117 W. Torrance Blvd., Pier Plaza Upper Level, Redondo Beach, CA 90277 (310) 798-6893.

10. Aetna Life & Casualty Company, et al., v. City of Los Angeles, Case No. WEC 60661.

The above-captioned litigation involved a retrial regarding attorney fees allowing reversal of a $2.2 million attorney's fee award in the matter of Aetna Life and Casualty v. City of Los Angeles (1985) 170 Cal.App.3d 865.

The fee trial encompassed several days of testimony, and involved six expert witnesses. Richard Pearl, the CEB author regarding attorneys fees, Richard Laskin, an eminent domain specialist and Howard Sheppard, an eminent forensic accountant, testified on behalf of

LADWP. The case was tried before the Honorable Lester E. Olsen (Ret.), 540 Continental Ct., Pasadena, CA 91103-3511 (626) 844-3411. Counsel for plaintiffs was Richard Wolf of Parkinson, Wolf, Lazar and Leo. Current Address: Lewis D'Amato, 221 N. Figueroa St., Suite 1200, Los Angeles, CA 90012 (213) 250-1000. Chief Counsel for DWP was Edward Farrell. Telephone number: (310) 377-5112.

20. **Criminal History**: State whether you have ever been convicted of a crime, within ten years of your nomination, other than a minor traffic violation, that is reflected in a record available to the public, and if so, provide the relevant dates of arrest, charge and disposition and describe the particulars of the offense.

I have never been convicted of a crime.

21. **Party to Civil or Administrative Proceedings**: State whether you, or any business of which you are or were an officer, have ever been a party or otherwise involved as a party in any civil or administrative proceeding, within ten years of your nomination, that is reflected in a record available to the public. If so, please describe in detail the nature of your participation in the litigation and the final disposition of the case. Include all proceedings in which you were a party in interest. Do not list any proceedings in which you were a guardian *ad litem*, stakeholder, or material witness.

In 1989/90 I was sued in my capacity as a judge by a pro per plaintiff who filed a RICO complaint. I recall few of the details apart from the fact that the plaintiff sued me because he was displeased with a ruling I had made. The complaint was summarily dismissed on the ground of judicial immunity. In 1987 I filed a personal injury complaint after sustaining property damage and injury following a motor vehicle traffic accident. The matter was resolved immediately after the complaint was filed. No court appearances were required. Finally in 1982 my wife and I filed a small claims action to recover tuition wrongfully by a day care center my son had attended. A default judgment was entered in our favor when we established that the school had been suspended as a corporation for failure to pay state franchise taxes.

22. **Potential Conflict of Interest**: Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts of interest during your initial service in the position to which you have been nominated.

I would comply with Code of Judicial Conduct.

23. **Outside Commitments During Court Service**: Do you have any plans, commitments, or arrangements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

24. **Sources of Income**: List sources and amounts of all income received during the calendar year preceding the nomination, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500. If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.

See attached financial disclosure report for nominees.

25. **Statement of Net Worth**: Complete and attach the financial net worth statement in detail. Add schedules as called for. See attached Financial Statement Net Worth.

26. **Selection Process**: Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts?

Yes.

(a) If so, did it recommend your nomination?

Yes.

(b) Describe your experience in the judicial selection process, including the circumstances leading to your nomination and the interviews in which you participated.

I submitted my application in July 2001.
I was unanimously approved by California's bi-partisan selection committee. Thereafter, I interviewed with Mr. Gerald Parsky and Mr. Erik George. On April 26, I was interviewed by the White House. After undergoing an FBI background check, I was nominated by President Bush on July 13, 2002.

(c) Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how you would rule on such
case, issue, or question? If so, please explain fully.

No.

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		LIABILITIES	
Cash on hand and in banks	$10,000	Notes payable to banks-secured	$65,000
U.S. Government securities-add schedule		Notes payable to banks-unsecured	$0
Listed securities-add schedule	$70,000	Notes payable to relatives	$0
Unlisted securities–add schedule		Notes payable to others	$0
Accounts and notes receivable:		Accounts and bills due	
Due from relatives and friends		Unpaid income tax	$0
Due from others		Other unpaid income and interest	
Doubtful		Real estate mortgages payable-add schedule	$430,000
Real estate owned-add schedule	$700,000	Chattel mortgages and other liens payable	
Real estate mortgages receivable		Other debts-itemize:	
Autos and other personal property	$75,000	1.Tuition University (annually)	$40,000
Cash value-life insurance		2.Tuition High School (annually)	$14,000
Other assets itemize: 401K Retirement funds.		3.Credit card debt.	$10,000
	$300,000 pre tax amount	4.Car Payments. (annual) 5.Property taxes & Ins. (annual) 6.Car Ins.	$4,800 $11,000 $5,000
		Total liabilities	$569,800
		Net Worth and declining as loans for college increase.	$585,200
Total Assets	$1,155,000	Total liabilities and net worth	
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, comaker or guarantor	None	Are any assets pledged? (Add schedule)	No
On leases or contracts	None	Are you defendant in any suits or legal actions?	No
Legal Claims	None	Have you ever taken bankruptcy?	No
Provision for Federal Income Tax	None		
Other special debt	None		

SCHEDULES

I. Listed Securities - $70,000
Washington Mutual Investment Fund
Income Fund of America
California Franklin - tax free

II. Real Estate Owned
Personal residence only $700,000

III. Real Estate Mortgages - Payable
My mortgage of $430,000 is with Chase Manhattan Bank. I also have a line of credit with Chase secured by our personal residence.

With that, we are going to recess until 8 o'clock. I do have pizza back here for everybody who is concerned, so please drop in and have some if you can. With that, we will recess till 8 o'clock.

[Recess from 7:20 p.m. to 8:02 p.m.]

Chairman HATCH. Okay, it is 8 o'clock. We are ready to go again, and hopefully we will not be too long, but whatever time it takes, I want to be fair to the other side, and I know this is an ordeal for the three of you to be here this long. You have been here almost 12 hours—10.5 hours—but we will, hopefully, finish within the near future. We will do our best.

Senator Leahy, do you have any more questions you want to ask?

Senator LEAHY. Mr. Chairman, I understand Senator Durbin was here just a moment ago, and I just do not want to start into his time.

Chairman HATCH. All right.

Senator LEAHY. Dick, why do you not come up here.

Chairman HATCH. Yes, Dick. We will turn to Senator Durbin now for any questions he might have.

Senator DURBIN. Thank you very much.

I would like to ask this question of the three of you. It is an observation which was made several years ago, relative to the issue of racial profiling. I know if I asked you what your position is on racial profiling what you would say, what we would all say. We are opposed to it. It is not just, it is not fair. We certainly do not want it in America.

But I came across some statistics which trouble me, and I have asked virtually every nominee at all sorts of levels, Department of Justice and Judiciary, for a reaction and what they think we should do about the following. I want to make sure I get these numbers right as I give them to you. I am just trying to remember them off the top of my head.

But we have a situation in America today where 12 percent of our population are African-Americans. The Drug Enforcement Administration believes that 11 percent of the drug users in America are African-American, but 35 percent of those arrested for drug violations are African-American, 53 percent of those convicted in State Courts for drug felonies are African-American, and 58 percent of those currently incarcerated in State prison for drug felony are African-Americans.

I would like your reaction to that. You are asking for a major position in the administration of justice, and if we are honest about our opposition to racial profiling, what do these numbers mean in terms of our system of justice, in general terms, and in specific terms, the whole question of minimum mandatory sentencing.

Justice Cook, you have been on the Supreme Court in Ohio. I would like to hear your reaction.

Justice COOK. I have not heard those statistics, but I suppose, like anyone, that is disturbing, and what it tells me is that what I already knew, primarily, is that we have to be vigilant in reviewing cases for the typical issues that would go with profiling would be the probable cause, and the suppression issues, and to see if there is anything in the work that we are doing that would contribute to those statistics if, indeed, the folks, by their race, are being targeted for law enforcement and without justification. I

think that is the only role that I play in that problem with the Supreme Court, but certainly even just as a citizen, I think anybody would be upset to hear those numbers, and to be concerned if there is something that we could be doing.

As I say, I only know that I can be looking carefully at my cases which I actually hope that I already do, but that is, I guess I find those numbers a lot higher than I would have thought.

Senator DURBIN. Mr. Roberts?

Mr. ROBERTS. I think that sort of statistical disparity ought to spark further inquiry. I mean, it sort of points out we may have a potential problem here, and I think you want to find out what is behind the numbers because any statistical grouping that shows that kind of disparity would suggest that there may be a problem not treating people as individuals, and that is sort of at the core of our constitutional liberties, that we don't group people according to characteristics and say, well, you share this characteristic, and so you must be like this, this and this. We treat people as individuals.

No matter how compelling the statistical evidence may be, it shows that whatever group it is, and 99-whatever percent here is, that's not what due process means, that's not what liberty means, that's not what the various protections of the Bill of Rights mean; that you're part of a group that more often than not is subject to this or does this, and therefore we're going to treat you as a member of a group, rather than an individual.

So that type of disparity, I think, is one that ought to concern people, and spark interest, and call people to look to see what's behind the numbers and why that's the case.

Senator DURBIN. Professor Sutton, would you like to comment?

Mr. SUTTON. Well, I agree with all of those comments. They are disturbing statistics, and they do deserve inquiry to find out what's behind them, and I do think it's a very important subject for inquiry. From my own personal experience, my uncle is Lebanese and lives in this country, and his kids, of course, are part Lebanese, and the issue of racial profiling is not lost on them. I know it doesn't relate directly to the issue you raised, but it does relate to the underlying point of potentially making assessments about someone based solely on their background and their appearance, and that deserves a lot of inquiry.

Senator DURBIN. I mentioned minimum mandatory sentences, and there is a lot to be said, and Senator Sessions, for example, has some views on it. We may differ a little bit, but I wonder, I will just tell you my experience in going to a Federal women's prison in Pekin, Illinois, and looking at the prison population, it is an eye-opener.

You will find in that prison women who are generally in their forties and fifties, sitting around knitting afghans, serving 12- to 20-year mandatory sentences because they were ratted out by boyfriends who were trying to find some way to reduce their own culpability for drug crimes.

And when you talk to judges about this, they say, "Why do you do this to us? Why do you put us in this position, where the prosecutor, doing their job, ends up with charging a crime that puts a person in prison at the expense of taxpayers for an incredible pe-

riod of time, and that person being no threat, really no threat to society?"

Professor Sutton, what do you think of mandatory minimum sentencing?

Mr. SUTTON. Well, I think, for quite a few reasons, States, among others, are reconsidering them because of the problem of overflows in prisons and State budgets that are preventing the very thing that you're suggesting is happening, of some form of mandatory minimum, whether it is Federal or State law, and a prison population that, as you suggest, may involve a lot of people that do not belong in prison any more.

I think from the perspective of a judge, it's not as easy to solve that problem as one might like. I do think there's a lot that the legislature, whether it's the national legislature, Congress or State legislatures, but I do agree with you that it's hard to imagine anything worse than someone in prison who really doesn't belong there, could be serving society well, contributing to society, and yet still in prison. That's quite sad.

Senator DURBIN. Mr. Roberts?

Mr. ROBERTS. I guess my first comment would be it strikes me, as a general matter, a quintessential legislative policy judgment, what the sentence for a crime is going to be and whether a judge is going to have discretion in sentencing or whether there's going to be a mandatory minimum. I know there are constitutional issues at the margin, and those have been addressed, in some cases, but it's a policy judgment.

I guess my own reading in the area has led me to think that it's one of those areas where the consequences of the policy judgments are not always apparent. For example, I do know that in many areas, it has had an enormous impact on prosecutorial decisions. It gives great leverage, and you find one concept that a lot of people are pleading to different offenses. And so when you look at someone's record, and you say, "Well, he's never done this before," it turns out he's, in fact, been arrested for it probably four times, but he's not prosecuted because it's easy for the prosecutor to leverage the mandatory minimum to a different plea.

And the situation you discussed as well, where you have co-defendants, I just think the policy consequences are often pretty far downstream. As Mr. Sutton mentioned, we're beginning to see some of those play out, and some people, some legislatures are revisiting the question.

Senator DURBIN. Justice Cook, instead of asking you that question, I'm going to run out of time. I would like to direct one question to you, as I did to Professor Sutton, that really goes to the heart of many of the objections to your nomination.

When I was a practicing attorney fresh out of law school, and our little firm in a down–State town in Illinois represented a railroad, and we had a Federal judge in our hometown who was a railroad dream come true. We would go into his courtroom, he would suck on lemon drops, stare at the ceiling, and rule in our favor on everything. This was perfect, and we made sure that we removed everything to Federal court, and we did a great job representing our railroad.

So there are some judges who come to this with certain feelings and certain inclinations, which become very obvious in the way they do their business every single day.

When I take a look at Professor Sutton and the disability community coming out today, I take a look at letters that we have received, and you have seen them, from women's groups and employee-sponsored groups who, in looking at the totality of your record, think they have detected a disturbing trend, that when it comes to cases that compensate people injured or cases involving employee discrimination, that more often than not, you will be staring at the ceiling and ruling against them.

Now, my friend, Senator DeWine, has pointed out exceptions to that rule, but clearly there are a lot of cases we have gathered here which prove the case. I would like to give you a chance, and you have probably had that chance before, but at this moment to express your defense of your record on the dissenting justice on the Ohio Supreme Court.

Justice COOK. My defense, Senator, is that I—it's a simple defense, and it's an honest one. I take each case and look at the factors that I need to review. I said, obviously, I look at the record, I look at the briefs, study them, I look at the law, and particularly the text, and using logic, and rules, and customs, I come to the conclusion that the law dictates. I rule as the law is, and I think sometimes that is viewed as I'm ruling how I would like to rule or how I would like the law to be, and that's just not the case. I follow the statutes in Ohio.

In honesty, anybody who thoroughly reviews the record would find that the statutes in Ohio, and the general assembly in Ohio, it's a conservative legislature, and I follow the law that they set forth. And I don't know about any patterns. I know that I've read those websites, and you know I just sink because I think I can tell you chapter and verse about each and every one of those cases, and it's some principle of law that dictated where I went, not any antipathy for any party nor any favoring.

I hope that a thorough review of the record would actually show you that that's the case.

Senator DURBIN. Thank you very much.

Thank you, Mr. Chairman.

Chairman HATCH. Thank you, Senator Durbin.

Senator Leahy?

Senator LEAHY. Mr. Roberts, we had, last year we had White House Counsel Fred Fielding testify here, and he said he hoped that the administration had not nominated any liberals to the court. I assured him I suspected that he would not have to stay awake nights worrying about that.

I was wondering, when you worked in President Reagan's White House on judicial selection, did you ever ask potential nominees about his or her views on any issues such as political or ideological views?

Mr. ROBERTS. No, Senator, not at all.

If I remember—I'm trying to remember specific questions—one thing we tried to do was pose hypotheticals, the purpose of which was to put a situation where the legal answer was A, but what this candidate might think we would regard as the politically more ap-

pealing result was B, and if that candidate said B, that would raise concerns with us because we think somebody wouldn't follow the law, but would instead follow politics.

Sometimes we would tend to, at least I did when I would sit down with the folks, focus on particular things in their resume. If they had written an article or a book, we'd say, "Tell us about that. What's that about?" really just to see how their way of reasoning went, but I, at least, never asked about particular cases or issues that might come before the court.

Senator LEAHY. Did you have many candidates give you the political versus the legal answer?

Mr. ROBERTS. Some, yes.

Senator LEAHY. Did they make it through?

Mr. ROBERTS. No. I don't know of a single case where they did. You know, it wasn't—you know, a number of people would do—I, obviously, was fairly junior, and I don't know that my views were regarded as determinative, but we would meet and discuss it, and we would say this is what he did, and he said he'd do this, and you know that would raise concerns because, at least in that situation, we weren't looking for people who were going to follow politics; we were looking for judges who were going to follow the rule of law.

Senator LEAHY. Even if the political result might be something that the Reagan White House might have liked.

Mr. ROBERTS. Well, that's what we tried to come up with in the hypothetical so that they would think—

Senator LEAHY. It is a good way to do it.

Mr. ROBERTS. Oh, you know, they want me to say this—

Senator LEAHY. That is an impressive way of doing it.

Mr. ROBERTS. Well, I don't know how effective it was, but it was I think effective in weeding some people out.

Senator LEAHY. I may—that is very interesting.

When you returned to private practice, you took on the *United Mine Workers* v. *Bagwell* case. That is where, if I recall it right, the union had contempt fines for over $60 million/$64 million, something like that, for strike activities. You were on the side opposed to them, opposed to the union.

I have been told that your fellow D.C. Circuit nominee, your former colleague in the Solicitor General's Office, Miguel Estrada, sought out the opportunity for the Justice Department to intervene on the same side as yours. As I recall, and correct me if I am wrong on these facts, the Supreme Court ruled against your side and said that fines of that magnitude could not constitutionally be imposed by a judge without a jury trial.

Was that sort of the crux of their—

Mr. ROBERTS. My recollection of that case—I recall cases I won a lot more clearly than cases that I lost, but if I'm remembering it—

Senator LEAHY. We all do that.

[Laughter.]

Mr. ROBERTS. If I'm remembering it correctly, I think the fundamental issue was whether the contempt citations in that case were properly characterized as civil contempt or should be regarded as criminal contempt, which would carry with it the additional protec-

tions, and the court, I think we were arguing for civil, and the court ruled in favor of criminal.

Senator LEAHY. The $64 million was they better get a jury in there to—

Mr. ROBERTS. Well, it was a type of civil contempt sanction judges often impose, which was, you know, it's going to be $1,000 or whatever the number—

Senator LEAHY. X number of dollars per day.

Mr. ROBERTS. —$10,000 a day until you come into compliance, and it added up.

Senator LEAHY. Yes.

Mr. ROBERTS. And I was defending, I believe, at that time—I don't remember exactly what the office was, but whoever it was that was enforcing the contempt for the court.

Senator LEAHY. You were on the Bagwell side?

Mr. ROBERTS. I was trying to remember what his office was. I think he was appointed to enforce the contempt citation that the court issued.

Senator LEAHY. What was Mr. Estrada's involvement?

Mr. ROBERTS. If I recall, he was in the Solicitor General's office at the time, and the question—they were participating as an amicus, I think, in the case along with the Deputy Solicitor General Paul Bender. I remember Mr. Bender argued for the Federal Government.

Senator LEAHY. And did you feel he was active in getting the Government to get involved on your side of the case?

Mr. ROBERTS. Well, I don't remember any meetings. I certainly would have—I don't actually remember. I would have contacted the Justice Department and said this is something you should be—for the legal principle, you should be arguing on our side. But I don't remember any particular involvement by Mr. Estrada.

Senator LEAHY. And you have told NPR you support and originalist approach to constitutional interpretation, saying the reason that that is the way it was in 1789 is not a bad one when you are talking about construing the Constitution. Of course, the Constitution in 1789 did not have the Bill of Rights. To get it ratified—you couldn't have gotten it ratified, States wouldn't have ratified it without that. It allowed African-Americans to be enslaved back then. We had the Civil War amendments, like the 14th, which limited State power to make or enforce laws to deny equal protection to people.

So the originalist concept can't be an exact one, can it?

Mr. ROBERTS. No, and I don't remember exactly what the issue was that they were discussing at that point, and I—

Senator LEAHY. First, just tell me what your philosophy is on that.

Mr. ROBERTS. Well, I think I'd have to say that I don't have an overarching, uniform philosophy. To take a very simple example to make the point, I think we're all literal textualists when it comes to a provision of the Constitution that says it takes a two-thirds vote to do something. You don't look at what was the intent behind that, and, you know, given that intent, one-half ought to be enough.

On the other hand, there are certain areas where literalism along those lines obviously doesn't work. If you are dealing with the Fourth Amendment, is something an unreasonable search and seizure, the text is only going to get you so far. And in those situations—

Senator LEAHY. There weren't too many wiretaps in 1789.

Mr. ROBERTS. Exactly. And even basic concepts like commerce, didn't have to deal with air travel and things of that sort. That doesn't mean they're not covered by the Commerce Clause. Our Constitution is flexible enough to accommodate technological changes of that sort. And I think in some areas—for example, the Supreme Court's jurisprudence on the jury trial right, I argued a case in favor of the jury trial right in the Supreme Court, and I learned more history than I thought I'd ever see again after being a history major in college, because what the Supreme Court has said is you look at what happened at common law at the point in time when the Seventh Amendment was adopted. And if it was on the equity side, you don't get the jury. If it was on the law side, you do. So you read a lot of old history. That doesn't mean that that same approach is going to make sense when you're dealing with other provisions of the Constitution.

So I think I'd have to say that I don't have an overarching, guiding way of reading the Constitution. I think different approaches are appropriate in different types of constitutional provisions.

Senator LEAHY. Mr. Chairman, again, as you know, I am very concerned, having three nominees of this nature, that is, controversial, however defined, all at once. We saw what happened with three District Court judges. It took us about 20 minutes to hear them where there was no controversy. By having the three on a day when there are other things going on for all of us, I think it has created a problem. Obviously we are going to want time to get the transcript and to submit written questions. I assume you have no objection to that.

Chairman HATCH. Well, we will have—

Senator LEAHY. We will get the transcript overnight.

Chairman HATCH. If we can have the transcript by 4 o'clock tomorrow, I would feel good about it.

Senator LEAHY. And we get, what, a week then to—

Chairman HATCH. Well, noon if you can do it, but I don't want you to kill yourself. Four o'clock is fine. And then, see, that would be Thursday, and we would have Friday, Monday—

Senator LEAHY. Tuesday, Wednesday—

Chairman HATCH. I think if we could have—

Senator LEAHY. I think because there are so many extremely important ones in here, we ought to have time at least to get the questions out. I am going to urge our side not to be dilatory in any way. I don't think anybody will. But we really should—

Chairman HATCH. If we can have the transcript by tomorrow at 4:00, then that would give the rest of the day and Friday and Monday, and if we can have the questions in by Tuesday at 5 o'clock, then I would hope you could get them answered and right back, because I would like to put you on the markup next Thursday after tomorrow.

Now, it is very likely that somebody on the Committee would put all three of you over—it might be me—to give even additional time to our colleagues. But that is what I have in mind, and I think it is fair. I hope it will work well for you. And we have been chatting about the reasonable time here, and we will work on that basis.

Senator LEAHY. Thank you, Mr. Chairman.

Mr. Sutton, earlier today you said that if you were confirmed as a judge, you would try to see the world through other people's eyes, try and imagine what it would be like to be on the other side of the case that came before you. So imagine you are Pat *Garrett* or J. Daniel *Kimel*, Gina Brancalla, a *West Side* mother, any disabled person, senior citizen, woman, or low-income child. They are coming in knowing that you have been involved in court decisions which denied—I think they would feel—individual remedies for their claims. Can they or their counterparts walk into a court with not Professor Jeffrey Sutton arguing the case as a litigant but Judge Jeffrey Sutton sitting on a three-judge panel or en banc, can they look at you and say—are they going to say, "I'm dead," or are they going to say, "I've got a chance"?

Mr. SUTTON. Well, I can promise you that if I were fortunate enough to be confirmed, I would do everything I could to become the kind of judge that I want to become, and that's a judge that is not thought of as a Republican appointee, a Democratic appointee, someone who worked for a State government, someone who worked in private practice in this or that side of the case. That's the whole objective. That's exactly why one would want to seek the honor of this particular position.

I would hope if someone chose to look at some of my representations that they perhaps didn't care for that they would look at the rest of my representations. And I think if they looked at all of them, by the time they walked into my courtroom, even, if I were lucky enough to be confirmed, the very first day, I think if they looked at all of those, looked at all of the briefs I've worked on, looked at all of my associations, my role in the Equal Justice Foundation, I'm quite confident that they would be comfortable. And I can assure you that this is exactly the task I would want to take on.

As an appellate advocate, it is true, you've got a client to represent and you're obligated to further their interests in every way you can. But even while you're beholden to them and to seeking relief for that particular side of the case, one cannot be an effective advocate if one is a true believer. Those are the worst advocates. The best advocates—and I'm not saying I'm one. I've just tried to be like the best advocates or the advocates that in arguing a case to the court can show that they do appreciate both sides of the case, do appreciate the way nine different Justices might look at an issue. And while I'm sure I've failed at times, I've really worked hard in the cases I've done at the U.S. Supreme Court and in other courts to do that very thing.

So I actually think in some ways appellate advocacy has been helpful training for this very type of job and learning how to see the world through other people's perspectives.

Senator LEAHY. Well, if somebody is coming in there seeking compensation under a law that Congress has passed that allows

compensation if their rights are violated, assuming all the things the jury agrees and so on, are they going to have to worry based on things you have said, positions you have advocated for, and so on, that they are going to have somebody who is going to have a view that Congress didn't have that authority in the first place?

Mr. SUTTON. Absolutely not, and, you know, maybe 1 day if I'm lucky enough to get to the Court of Appeals, I'll prove it and we'll see a dissenting opinion from something I've written and the dissenting opinion cites an article or brief I've advocated. I hope I'll be able to prove that 1 day.

Senator LEAHY. Thank you.

Mr. Chairman, I understand that Mr. Schumer is coming down the hall.

Chairman HATCH. We will be glad to wait until he gets here.

Senator LEAHY. I now submit my other questions for the record, and I appreciate not only the witnesses' time but their families' patience throughout this, and that little jolt of nutritional pizza provided by the chairman, if there is even time we needed something to clog our arteries, it is tonight.

[Laughter.]

Chairman HATCH. That wasn't what I had in mind, but now that you mention it.

Senator LEAHY. And I noticed you ate an equal amount, and so I knew it was safe.

Senator SESSIONS. Mr. Chairman, we will have to get Senator Durbin and Senator Leahy on our bill to reform the minimum mandatory sentences for crack cocaine and provide some better balance that we have worked on that would reduce in a number of ways the severity of the penalties and balance some other equities in that matter. I hope that pretty soon we will bring it up and get some cosponsors. If not, we will have a vote on it, I hope.

Senator LEAHY. I have no question that the disparity between crack and powder cocaine is unjustified. I might be thinking of moving in a slightly different direction than where the Senator from Alabama is.

I would note—and Professor Sutton noted this. If you pick up the Wall Street Journal or the New York Times or even your local papers, and you see article after article about State after State facing real budgetary problems where it was easy to be tough on crime and just have mandatory minimums, suddenly have prisons they can't afford, a prison population they cannot afford, and I voted for some of these mandatory minimums. And I think now in retrospect we hampered the judges too much and perhaps the States too much. And when you get somebody that goes in there at high school age, then they get out 15 years later, saying now go get gainfully employed, you know that is not going to happen.

Senator SESSIONS. It is time to do something about it and express concern. We have got good legislation, I think, that is significant—

Senator LEAHY. I think what you do is raise the floor more than lower the top.

Senator SESSIONS. No, we have a concern that the powder cocaine yuppies are not getting enough sentence, so they have a modest increase in powder and a significant decrease in crack sen-

tences, some other equities that deal with the girlfriend situation, as Senator Durbin mentioned. And all in all, it has received very good reviews and quite consistent with what the Sentencing Commission has asked us to do.

So I think Senator Hatch and I have stepped up to the plate. People have been talking about it. It is a problem. The Federal sentences, as you mentioned, Mr. Roberts, are set by this Congress, and there is no need for the Senators up here to blame you about Federal sentences. We mandate them. And if they are not precisely correct, we ought to alter them and amend them and fix them. And I think it is time to get moving on it. Every year that goes by—

Senator LEAHY. Actually, I tend to agree, and I will look at your legislation.

Senator SESSIONS. I think you will like it.

Senator LEAHY. We should also look at some point—and this is going to be something where it will work only if Democrats and Republicans work together. At some point we have got to look at a basic overhaul. We have federalized far too many crimes. We ought to trust our local and State police—

Senator SESSIONS. Well, you want to federalize violence against women. You want to federalize taking guns on State school grounds—

Senator LEAHY. We federalize—

Senator SESSIONS. —our witnesses who file legal briefs that question some of that.

Senator LEAHY. We federalize carjacking. We federalize so many things. We don't really need to. Actually, you would like the gun laws we have in Vermont. Anybody, unless they have a felony background, can carry a loaded concealed weapon in Vermont with no permit required. Very high incidence of gun ownership. You don't need to register it or anything else. You need no permit to own or carry a weapon, concealed or otherwise. We also have the lowest crime rate in the country. Maybe it is because they figure that everybody is armed.

Chairman HATCH. I think that has something to do with it. You know, don't you just love this? I mean, this philosophical—

Senator LEAHY. We also have—something else we have. We have the second lowest death rate from drunk drivers in Vermont. The lowest is in Utah. But then they don't drink. And—

Chairman HATCH. Once again, one of our quirks.

Senator LEAHY. And I will take some credit for that, for having established the toughest drunk-driving program in the State when I was a prosecutor.

Okay, we have filibustered long enough, Schumer. It is good for you to get back here.

[Laughter.]

Chairman HATCH. We are happy to have you.

Senator LEAHY. We are glad to have you here at 8 o'clock, just as you said.

Chairman HATCH. We are happy to have Senator Schumer here.

Before I turn the microphone over to him, let me just put into the record a letter from Russell J. Redenbaugh, who himself is blind—and he is a member of the United States Commission on

Civil Rights—re: the nomination of Jeff Sutton. This is today's date.

"Dear Senator Hatch: As a three-term member of the United States Civil Rights Commission and the Commission's first and only representative of disabled Americans, I am writing to express my strong support for the nomination of Jeff Sutton to serve on the United States Court of Appeals for the Sixth Circuit. I am familiar with Mr. Sutton's accomplishments in many of the landmark cases he has argued in the highest courts. I agree with some outcomes. I disagree with others. But it is clear to me that those of us who are disabled in America and those of us who seek to protect equal opportunity and equal access for all Americans will be well served by having in the Federal judiciary someone who is so intellectually active on the issues that concern disabled Americans."

"I am also impressed by Jeff Sutton's personal background which shows heartfelt sympathy for ordinary people and the disabled in particular. The interests of the disabled are not easily pursued by partisan tactics and loud noise. The issues are complex. We are not benefited by the mere continuation of past policies or the fighting of old battles. I am well satisfied that Jeff Sutton will make a fine judge and that he will bring to the job of judge the fine mind he has applied as an advocate and a compassionate heart that is so evident. Sincerely, Russell J. Redenbaugh."

I just thought I would put that in the record.

We will turn now to my dear friend and colleague from New York, Senator Schumer.

Senator SCHUMER. Thank you, Mr. Chairman. I know the Committee has been here for such a long time, and I apologize for being later than the 8 o'clock that I had expected to be here. Hopefully we won't have to have meetings like this on into the night into the future, and that is our hope, our sincere hope that we can work together on those issues to prevent this from happening again.

Senator SESSIONS. With all due respect, if the Senator had been here this morning and had his questions, we wouldn't be into the night.

Senator SCHUMER. That is not true.

Senator LEAHY. He was here this morning.

Senator SCHUMER. I asked questions—

Senator SESSIONS. We have been here all day.

Chairman HATCH. Enough is enough. We are going to go with Senator Schumer right now.

Senator SCHUMER. You weren't here to hear my brilliant questioning this morning.

Senator SESSIONS. I heard one round.

Chairman HATCH. Senator Schumer—

Senator SCHUMER. Then you forget very fast.

Chairman HATCH. Senator Schumer, the time is yours.

Senator SCHUMER. Thank you.

So one of the things—more questions for Professor Sutton—that I appreciate here is that you haven't done what some of our other witnesses have done in the case of hear no evil, see no evil, do no evil. You haven't said—you haven't shied away from being critical of all Supreme Court jurisprudence. We have had other nominees who have refused to criticize any Supreme Court case ever. I asked

Mr. Estrada: Name a past case—because he kept saying, well, it might come before him in the future, he doesn't want to judge. So name a past case he was critical of, and he didn't want to even do that. So you are not—I think you have won some points from some of my colleagues I have talked to by not being so Sphinx-like.

But you did mention, for instance, earlier in our dialogue that you disagreed with the *Kiryas Joel* case where you were critical of the Supreme Court's decision not to take cert.

Could you point to one other Supreme Court case you are critical of?

Mr. SUTTON. With *Kiryas Joel*, just to be clear, I wasn't critical of not to take cert, critical of the outcome in the case and specifically the decision not to allow handicapped individuals to obtain an education in a setting where they could be with other members of their religious sect.

Senator SCHUMER. Right. How about another case you are critical of?

Mr. SUTTON. Well, earlier in the day, it came up that—there was a discussion about the ADA, and specifically the question was raised by Senator Feinstein about whether—what my reaction was to the horrendous and egregious history of forced sterilization of those with mental disabilities. And I made the point that there was a rather embarrassing U.S. Supreme Court case by the name if *Buck*, remarkably, written by Justice Holmes—remarkably, because he was otherwise a fairly distinguished jurist. And I made the point that in the *Garrett* brief that has received some criticism—and I understand your perspective and other members of the committee's perspectives on the position of my client in that case. But even in that particular case, where the *Buck* case, remarkably, is still on the books, the State of Alabama agreed to take the position in the Court to say we don't think that is correctly decided. And, you know, it's a sad, sad chapter.

Happily—it would be very difficult to overrule *Buck* now because every—all those laws—

Senator SCHUMER. And you were representing—I am sorry. You were representing Alabama in that situation?

Mr. SUTTON. Exactly. And all of those laws are now off the books.

Senator SCHUMER. How about a case—and it could be a decided case—that you disagree with that you weren't representing anybody, that you as a professor—

Mr. SUTTON. I didn't represent anybody in *Buck*. *Buck* is a 1927 decision.

Senator SCHUMER. I see.

Mr. SUTTON. It's an infamous decisions of the U.S. Supreme Court. It's been criticized in every court it's ever been—

Senator SCHUMER. But you represented Alabama later on when they challenged *Buck*, or on?

Mr. SUTTON. No. I'm making—I didn't do a good job explaining that. I was making the point that in the *Garrett* brief, which is the case about the ADA—

Senator SCHUMER. Oh, I see.

Mr. SUTTON. —we acknowledged this—it's called the eugenics movement.

Senator SCHUMER. Right.

Mr. SUTTON. That it was a very unfortunate, sad chapter in American history. Happily, it's a closed chapter in American history, and if it weren't closed, the ADA would require it to be closed.

Senator SCHUMER. Any others?

Mr. SUTTON. I can't think of any others offhand. I didn't come to the—

Senator SCHUMER. How about *Korematsu*?

Mr. SUTTON. Well, I mean, anyone who's read *Korematsu* would obviously be very uncomfortable with the result. I made another point in the very brief I'm talking about—

Senator SCHUMER. I am just trying to get an idea of your thinking when you're not representing a client, and I don't want to get you into the issue of prospective cases, so I am just asking some cases that you disagree with—

Mr. SUTTON. Yeah.

Senator SCHUMER. I mean, I am sure you would disagree with *Plessy* v. *Ferguson*, right?

Mr. SUTTON. Right. But the point I wanted to make, though—and it's actually the same point we made in the *Garrett* brief—you know, while it's easy today to look back on a case like *Buck*, look back on a case like *Korematsu*, and say, boy, you know, how could that have happened? You know, time has a way of making, you know, yesterday's progressives look like today's Neanderthals. I mean, there's just no doubt that that's true.

The thing I'm a little reluctant to do is to second-guess courts in saying, boy, you know, had I been a judge on that particular case back in that period of time, I would never have f*Allen* into that trap. I think that's Monday morning quarterbacking and unfair.

Senator SCHUMER. Well, that is a different issue. It is a different issue to say at the time I would have ruled differently, then times have changed and things have changed, and I would now disagree with that holding, right?

Mr. SUTTON. That's true, although I must say, you know, unfortunately as a Court of Appeals judge I can't imagine it coming up with these particular cases. But, you know, a Court of Appeals judge is obligated to follow U.S. Supreme Court precedent, for better or worse, and I, of course, would do that, for better or worse.

Senator SCHUMER. But you would—okay. Any others you want to mention?

Mr. SUTTON. No.

Senator SCHUMER. Is it that you can't think of any or you don't want to mention it? Well, I am going to submit that question in writing. Okay. I am going to ask you, just so you can think about it for a while, about cases that you—already decided Supreme Court cases that you might disagree with, and I will assume if you don't submit any that you agree with every one of them that has been decided already.

Mr. SUTTON. Well, that is a big task, but thank you for the opportunity to put it in writing.

Senator SCHUMER. Okay. Well, just give me a few. That is all. I am not asking you to go through every Supreme Court case. I am asking that we try to stop the sort of Sphinx-like behavior we have had with witnesses who don't say anything about anything. I am

not saying you have done that. You have done more than some. I think that is a good question to ask.

Mr. SUTTON. I understand.

Senator SCHUMER. As a way of getting to your thinking. Okay. The next question is—I want to talk a little bit about *Sandoval* because this one I think had really far-reaching opinions—a far-reaching effect. And I believe that you more than most lawyers have been quite successful in persuading this Supreme Court to adopt your ideas. Five Justices on the Court have basically bought into the States' rights jurisprudence that you have been one of the leading advocates of and creators of, really. The ripple effect of that jurisprudence in my judgment has been very powerful. And perhaps the most striking example is *Sandoval* where the Court was dealing with Title VI of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, or national origin in federally funded programs.

The *Sandoval* decision reversed an understanding of law that had been in place for nearly three decades, and it limited private citizens' power to enforce rights protected by Federal laws. The ruling makes it nearly impossible to challenge a range of State practices with an unjustified disparate impact, such as, for instance, disproportionate toxic dumping in minority neighborhoods, or the use of educationally unjustified testing or tracking procedures that harm minority students, the failure to apply appropriate language services in health facilities.

But I believe your arguments in *Sandoval* went even further than the Court went. You argued that neither private citizens nor the Federal Government has the power to enforce disparate impact regulations.

If the Court had adopted your position, in my judgment, it would have gutted the laws and regulations that protect millions of Americans. You would have rendered enforcement of these laws entirely effective. That is why I said earlier this afternoon that you could do a thousand pro bono cases, and it wouldn't undo the damage, in my judgment, that *Sandoval* has done to individual rights and to the ability of this country to be as colorblind as we possibly can.

So I for one am grateful that the Court refused to go as far as you argued that they ought to go, but I worry about what would happen if you were wearing the judicial robes and had the power to make your ideas law, into law. And I worry about, frankly, what Professor Jeffrey Sutton's America would look like if you had the power conferred by a lifetime seat on the Federal bench. I worry that in that America, poor parents couldn't go to court to ensure that their children get basic medical care. I worry that disabled children couldn't go before a judge and ask that she or he enforce the rights of equal educational opportunities. I worry that in that America, senior citizens wouldn't have the right to go to court and seek protection from employment discrimination. Women would have no power to go to court to fight gender discrimination.

I fear that in the America that you see from your reasoning and your jurisprudence that States have rights but people really don't because your argument in *Sandoval* went really far, again, way beyond what even most would concede as a rather conservative Court, conservative majority went with.

So I would just like to know how you allay my concerns about that. I mean, the courts have been a place that individuals seek justice, and I think one of the great things about our jurisprudence over 200 years is they have enabled more and more individuals to seek that type of justice when it is either State government or some other entity stopping them from gaining that justice.

We have a philosophy that seems to be governing here that Government regulation is bad, and if the Government isn't going to protect people, then you at least want to see individuals be able to protect themselves through the rights that have been granted through our judicial process over centuries.

So how would you allay my concerns about that, that individuals, particularly at a time when Government is doing less to protect them, don't have the basic ability as a result of your arguments, you know, if it were to become law, your arguments in *Sandoval* to seek justice, to seek—well, in this case, to seek freedom from discrimination?

Mr. SUTTON. Senator, I know we discussed this a little earlier, and I appreciate your perspective on this, and I think I'm gaining a greater appreciation as time goes on. And I think it's obviously a very important perspective on this.

I would like to say something—and I hope this doesn't irritate you, but I would like to point out that, again, this is not a case I've written about. This was a case where I was an advocate, and I really do feel strongly—I mean, maybe I'm misguided in this, but I do feel strongly that I had an obligation to make all reasonable arguments that I thought would advance my client's cause. I don't think the *Sandoval* decision or brief in any way indicates what I would do as a Court of Appeals judge, and all—

Senator SCHUMER. Did your client in that case urge you to take the argument that individual—you know, to take that extra step in the argument that said individuals couldn't sue? Or did you suggest it to your client? I mean, where did the—*Sandoval* was a State case, basically, and you went further—

Mr. SUTTON. Senator, this may show that I'm not as sensitive as I should be, but I actually thought I was advocating the moderate position, and let me explain what I mean by that. You said that we challenged the validity of the regs and that we said the Federal Government could not enforce the disparate impact regulations against States that had violated the rights of individuals within that State. There was a big debate about whether to challenge the regs. We could have challenged the regs.

As the opinion for the Court indicates, we did not challenge the validity of the regs. I think the reason someone might say that we did—I mean, but the opinion of the Court makes it quite clear. They say the validity of the regs is not in front of us because the State has not challenged them. So even though we could have challenged them, gone that extra step, we did not challenge them.

But you might say, okay, so why is there anything in the brief at all about the regs? Well, the part of *Sandoval* that was difficult was the fact that Section 601—that's Title VI—Section 601 was a provision that the U.S. Supreme Court in *Bakke*, you know, the affirmative action case, where Justice Powell, Justice Brennan, Justice Marshall—and I'm not sure about this, but I think it was also

Justice Blackmun and Justice White. But I know it was Justice Brennan, Justice Marshall, and Justice Powell concluded that Section 601 did not allow for claims for disparate impact, but only for claims for intentional discrimination.

You might, as you're hearing me say that, well, that seems a little counterintuitive. Why in the world were Justice Marshall and Justice Brennan saying 601 didn't reach disparate impact—

Senator SCHUMER. Right.

Mr. SUTTON. —discrimination, which seems like an awfully good idea and something in other cases they might have supported. Well, I don't know why they didn't do that, obviously. One can speculate—and the speculation makes a little sense to me—and this gets to the whole complexity of disparate impact litigations. An interpretation of the Civil Rights Act, Section 601, that allowed that kind of disparate impact claim could have doomed the *Bakke* affirmative action position that Justice Powell, Justice Brennan, Justice Marshall carved out because of the very obvious point that affirmative action could have disparate impacts on other people based on race.

I don't know. Who knows why they did that? But the fact of the matter is those Justices—

Senator SCHUMER. I am not following you. What I was focusing on is that the brief went beyond what the Federal Government can do and talked about individual citizens' rights to deal with disparate impact, not the disparate impact itself, not the argument the regulations—I don't know why—

Mr. SUTTON. Your question has said that we challenged the validity of the regulations, and we didn't challenge the validity of the regulations, and the Federal Government can enforce them against individuals.

In terms of the brief arguing that private individuals could not sue for disparate impact under—

Senator SCHUMER. Did you just argue that they could not sue for disparate impact, or did you argue that they couldn't sue for a broader range of issues under Title VI? I don't know the answer. I am just asking.

Mr. SUTTON. Well, the only thing in the case was the regulations, because under the titles—this part of the brief I don't recall, but I'd be surprised if I didn't—we didn't concede this point, our client didn't concede this point. The point was there's a case called *Canon* which deals with Title IX, and *Canon* says that there is an implied right of action for claims—there is an implied right of action for claims for intentional discrimination, so we would have conceded that point.

I think what you might be—the reason you might be asking this question—and, you know, someone could disagree with this—is the notion that—there's a case called Penhurst and a case called *South Dakota* v. *Dole*, which say before spending clause legislation or other legislation is going to create a cause of action against States, you need a clear statement, and that the argument in *Sandoval* someone might have construed to mean even *Canon* wasn't rightly decided. And that's a pretty good objection. That's, of course, exactly what the Supreme Court said. That's exactly what the Federal Government argued in opposition, and it didn't prevail.

Senator SCHUMER. But what you are saying here is in *Sandoval* your arguments were simply related to the disparate impact regulations, not a general view that individuals didn't have the right to sue?

Mr. SUTTON. No—yeah—no, the disparate impact regulations were all that were at issue. I'm sorry if I didn't get to that more quickly.

Senator SCHUMER. Okay. I just wanted to go back to *City of Berne* again. I don't even know where it is. Where is the *City of Berne*?

Mr. SUTTON. It's in Texas.

Senator SCHUMER. Texas. All right. What I asked you there is—and we didn't get a clear answer. I just want to get an answer to the underlying question, all right? Which is: Did you, the Attorney General, or the Governor decide what position to take in that case? I mean, you were trying to think back, but maybe you have had a chance to think about it.

Mr. SUTTON. When you say "position," the decision whether to file an amicus brief in the U.S. Supreme Court in *City of Berne*?

Senator SCHUMER. And the arguments that were made.

Mr. SUTTON. I guess on the first part of it, clearly it's the Attorney General in Ohio. The State Solicitor job is an appointed position. One reports to the Attorney General. The Attorney General is an elected office holder in Ohio and—

Senator SCHUMER. So did they contact you and say, "We want to argue this case"? Or did you contact them initially to file the brief?

Mr. SUTTON. Well, the point I was making was the Attorney General or people in her corrections staff had already decided to challenge RFRA—

Senator SCHUMER. I didn't ask you that. I asked you: Did they contact you initially? Did they reach out to you? Or did you call them up and say, "Hey, this would be a good idea and I want to help you with this"?

Mr. SUTTON. In terms of our involvement in *City of Berne* itself, I understand. I think my recollection's correct. I think the State of Ohio filed an amicus brief on behalf of States, both at the cert stage, which is to say encouraging the Court to take the case—I think the city had lost at the Fifth Circuit, if my memory's correct—and then filed a brief at the merit stage. So the important point would have been the cert stage, because once you've filed an amicus brief for States at the cert stage, generally you'll follow—

Senator SCHUMER. Your involvement didn't come in until the highest level, right?

Mr. SUTTON. Exactly. We—

Senator SCHUMER. And I am just asking you—I am not asking you how Ohio came up with its position. I am asking did you—initially there would have to be some hook-up between—

Mr. SUTTON. Yes.

Senator SCHUMER. —Professor Sutton and the State of Ohio at this level.

Mr. SUTTON. Right.

Senator SCHUMER. Did you contact them and say, "I'd like to be involved in this, I'm an expert"? Or did they contact you?

Mr. SUTTON. I honestly don't remember. If I were to guess what would have happened, because I—

Senator SCHUMER. If you don't remember, you don't remember.

Mr. SUTTON. Well, I don't, but if I could take an educated guess, because I think it's most likely the case. The educated guess is that what would have happened is—as I said before, the corrections lawyers were challenges RFRA in the lower courts. The corrections lawyers, like all lawyers in the AG offices, work together on consumer affairs, environmental—they coordinate work and they tell each other what they're doing. And my suspicion is that what happened is that corrections officials in our office would have known about the *City of Berne* litigation. Why? Because they were challenging the same law in their cases. And my, again, educated guess is they came to me saying, "Jeff, this is something we ought to try to get involved in." The thing—

Senator SCHUMER. Okay. How many of the cases where you argued on these significant cases—I mentioned four or five before. Are there any where you reached out to the client and said, "I'd like to make this argument, I'd like to get involved" as opposed to them asking you?

Mr. SUTTON. Right. Well, the one that I know I reached out in is the Dale Becker case, and Dale Becker was the prisoner rights case where an inmate in Ohio filed a pro se cert petition. The reason I know I reached out for that one is because when the U.S. Supreme Court grants a cert petition—

Senator SCHUMER. Go ahead. I am listening.

Mr. SUTTON. When the U.S. Supreme Court grants a cert petition for a pro se inmate, for obvious reasons that inmate is not going to be able to argue the case in the U.S. Supreme Court.

Senator SCHUMER. You don't have to give me the whole—so in that one you reached out.

Mr. SUTTON. I did.

Senator SCHUMER. I am going to ask you to respond in writing. Did you reach out and make the initial contact in—you don't have to answer me now. I will do it in writing. But I would like in *Sandoval*, *Garrett*, *Kimel*, and I asked you about *City of Berne* already. Okay? Because in each of these cases, your argument is you were just following what the client wanted. Well, it would be a little different if you reached out to them and said, "Hey, this is a good argument, let's make it." That would be before representing the client.

Let me give you one other follow-up question. I want to follow up here on something Senator Durbin asked. You said you decided to take the *Garrett* case because you wanted to argue before the Supreme Court. That was in reference to what Senator Durbin had asked you. Is there any case you would refuse to take because the potential client's desired outcome was too wrong or too offensive to you?

Mr. SUTTON. Well, that's a difficult question. I would say the *Garrett* case, I want to make sure I'm correct on that, I mean, I was trying to develop a U.S. Supreme Court practice, and it's obviously an honor to be asked to argue a case in the U.S. Supreme Court, and it's just an easy opportunity to accept, and that's certainly what I did. And I was happy to be litigating there.

Chairman HATCH. Would the Senator yield on that point?

Senator SCHUMER. Please.

Chairman HATCH. I have a letter from Bill Pryor, attorney general of the State of Alabama.

"Dear Chairman Hatch, I am writing to correct the record concerning Jeffrey Sutton, nominee to the Court of Appeals for the Sixth Circuit. I understand that it has been reported that Mr. Sutton aggressively pursued the opportunity to work on *Garrett* v. *Alabama*, a case in which the State of Alabama defended itself against a lawsuit brought under the Americans with Disabilities Act."

"I am the person who hired Mr. Sutton to represent Alabama before the Supreme Court of the United States, and I did so solely on the basis that I hold his legal abilities n the highest esteem. Mr. Sutton never solicited this representation. I sought his representation for the State of Alabama. I hope this clears up any confusion in this matter."

I thought that would be something that would help here at this point for both Senator Schumer and you.

Senator SCHUMER. Did somebody reach out to him since Senator Durbin asked the question; is that—

Chairman HATCH. Excuse me. I am not sure what you are saying. He said that—

Senator SCHUMER. That letter is pretty timely, in terms of Senator Durbin's question. Did we get that letter this afternoon?

Chairman HATCH. No, it is dated January 23rd.

Senator SCHUMER. Thanks.

Mr. Chairman, I have some more questions for Mr. Sutton. The hour is late. I am going to submit them in writing.

Chairman HATCH. I appreciate that.

Senator SCHUMER. Because I will not have any other chance to question either Judge Cook or Mr. Roberts, I would like to ask each of them one question tonight.

Chairman HATCH. Sure. Now, we have reserved this time for you, and we are grateful that you came back to do this.

Senator SCHUMER. Well, thank you. I will do it again if you would like to be more grateful to me.

Chairman HATCH. I think once is enough.

[Laughter.]

Chairman HATCH. You are just so accommodating.

Senator LEAHY. There is only so much gratitude to go around.

[Laughter.]

Senator SCHUMER. This is for Mr. Roberts. It is a long day for you, and I am sorry that you have had to sit here through all of this. I know Senator Hatch has argued we are inconveniencing you, and I apologize for that.

I do think, I mean, I have made my point clear that I wish we had had better time, more time, not at 9 o'clock, to question you, and I do not think asking people to come back for such an important appointment is anything undue. Judges ask you to come back and argue cases all of the time, and that is less significant than this, and every lawyer has sat around and waited in the court for the calendar to clear.

But here we are, and I have made my argument and not succeeded, so let me ask each of these questions—one question to each of you.

You have come very highly recommended. You are obviously one of the great legal minds in a city full of great legal minds, and for me, with your situation, just as with Professor Sutton's excellence is not the issue. But I do want to ask you something about these State rights issues we have been discussing all day.

As with Professor Sutton, I am not going to ask you questions based on briefs you wrote for your clients. I want to ask you about some of the things you have said in your personal capacity. I want to read to you an excerpt from an interview you did with Nina Totenberg, I guess well-known to this Committee before I got on it, discussing several States' rights cases from the 1999 Supreme Court term.

I think we have a fair excerpt from that interview, but I will give you a full chance to explain your thoughts, if it is out of context at all, but here is what was said, quote, Mr. Roberts: "Well, I think the three decisions taken as a group are a big deal." I do not know what—you will probably remember this better than—you know it better than I do, that is for sure.

"It's a healthy reminder that we're a country that was formed by States and that we still live under a Federal system. It's the United States of America, and what these cases say is just because Congress has the power to tell individuals and companies that this is what you're going to do, and if you don't do it, people can sue you, that doesn't mean they can treat the states the same way; that the States, as co-equal sovereigns, have their own sovereign powers, and that includes, as everyone at the time of the Constitutional Convention understood, sovereign immunity."

You went on to say, regarding the Congress's exercise of the Spending Clause power—these are all quotes—"Well, so much of what we, what our restrictions are based on, the spending power. You know, even for private citizens, if you accept Federal money, you're covered by Title IX and Title VI, and the basic principle is if you pay the piper, you get to call the tune. And I think the Federal Government could say, if we're giving you money, and it's related to the area in which we're trying to get you to waive sovereign immunity, we can require you to consent to suit as a condition of getting those funds."

The example you gave is a good one. This is you still speaking. "If they get Federal funds for your Probation Department, they can say, 'We're not going to give you those unless you waive sovereign immunity,' and that's quite common. The Federal Government, for example, has sovereign as well. It has waived it."

Then, Nina Totenberg says, "And supposing the Federal Government said, 'If you accept any Federal money—States—you have to abide by the Federal provisions that we, we enact for everybody'?"

Mr. Roberts, "I think that would go too far. The jargon is that the waiver has to be germane to what the funds are for. You may remember a while back the Federal Government said, if we give you highway funds, you've got to raise your drinking age to 21 because we think having these teenage drinkers causes accidents. The court held that that was germane to that purpose, but there

has to be a connection. It can't just be if you take a penny of Federal funds, you've got to waive your sovereign immunity across the board." That is the end of the quote.

What I am trying to figure out here is where all of this appears in the Constitution. For the life of me, I cannot figure it out. I keep going back to this document and looking for the words like "sovereign immunity" and "congruent, and proportional and germane to the purpose," and I do not see any of it.

We keep hearing that the Justices who are advocating these things are strict constructionists, but as far as I can tell, they mostly strictly construe the law in favor of States and big businesses against the interests of average people.

Can you help me understand this? It appears from this interview, you agree with the court's jurisprudence in this area, the majority's recent jurisprudence here. Do you? And, if so, why, when the plain language of the Constitution is either silent or to the contrary?

Mr. ROBERTS. If I'm remembering the radio show, I think it was sort of a wrap-up of the Supreme Court's term, and I think she may have had other people on as well, and they're talking about what's significant. And I thought that the Supreme Court's immunity cases involving the States were indeed significant. That was I think the question before it got to the part you were quoting—is this a big deal? And I thought it was, and I said that.

And then part of the rejoinder was, well, can't we use the spending power to get around this? In other words, if we're serious about it, let's use the spending power. And what I was articulating there was what I understood the state of the law to be which was, as a general matter, the answer is, yes. *South Dakota* v. *Dole* was the highway funds case, but that, again, I'm stating what I understood the law to be, that there is this so-called germaneness requirement.

Senator SCHUMER. Right.

Mr. ROBERTS. So that's what the Supreme Court's precedence—

Senator SCHUMER. Where did it come from? Where in the Constitution did it come from? Let us say the Federal Government made a more sweeping law and said, "If you accept any Federal money, not just highway money, you have to have a 21-year-old drinking age"? Now, that may be very broad power of the Federal Government, but I would like to know where in the Constitution, explicit or derived, it says that the Federal Government cannot do that?

Mr. ROBERTS. I don't know what the Supreme Court's precedence hold. My familiarity with the requirement really was the *South Dakota* case, where they articulated it, and they explained over, for example, over the dissent of Justice Brennan and Justice O'Connor, that this requirement was met. I haven't gone back and read the prior case. I don't know the answer, what the analysis was.

I was just articulating what I understood the law to be for the purposes of the interview.

Senator SCHUMER. Do you have any further thoughts on, I mean, it is an important question. You know the laws much better than I do, but it would seem to me, when you are making such a, you know, you are making a dramatic change, we have had, basically relates to expanded Federal Government power versus reducing

Federal Government power, and that has been the trend in this court, and there has got to be a basis for it.

Mr. ROBERTS. Well, Senator, I was listening, as you always are, with some trepidation when someone says this is what you said. You're waiting for not only the nongrammatical part, but the part that sounds ludicrous, and I have to say—

Senator SCHUMER. I am from Brooklyn. I am used to nongrammatical parts. Do not worry.

Mr. ROBERTS. I have to say I didn't hear anything that I would say, gosh, you know, I wish I hadn't said that.

Senator SCHUMER. I wasn't trying to—

Mr. ROBERTS. I think it is the case that we do have a Federal system, that States have powers and responsibilities, and the Federal Government does as well. Certainly, under the Supremacy Clause, the legislation that you enact is the supreme law of the land, consistent with the Constitution. I appreciate the concern about the sovereign immunity cases. You are quite right. There is no sovereign immunity clause in the Constitution.

On the other hand, the court's cases have been fairly consistent that the Federal Government enjoys sovereign immunity. This body has done much over the years to waive that—the Federal Tort Claims Act, a whole variety of things. But that basic recognition of Federal sovereign immunity has always held firm, and I think it is hard to explain to State Government why do they have it and we don't, and if we had it at the time of the founding, when did we give it up?

The Supreme Court has given some answers. Well, part of it you gave up in the Fourteenth Amendment, in Section 5.

But I do appreciate that it is a difficult area because you're not dealing with a textual provision in the Constitution.

Senator SCHUMER. Do either of the other two witnesses want to comment on that?

Justice COOK. Not I.

[Laughter.]

Senator SCHUMER. Not on Mr. Roberts' grammar, but rather just on the general question I asked. Where does all of this spring?

Mr. SUTTON. I don't know why I'm reengaging.

[Laughter.]

Chairman HATCH. I do not know why either.

[Laughter.]

Mr. SUTTON. I'm a fool. But the one point I just wanted to make, there's no spending clause either, for what it's worth. This comes from Article I, Section 8, and it says, "Congress can provide for the general welfare." And the court, sensibly, A, textually, but sensibly has said, hey, if it's Congress's money, they can tell the States how they want it spent, and if they want to attach conditions, they can.

Senator SCHUMER. So where does this one come from?

Mr. SUTTON. That's my point. There isn't a spending clause.

Senator SCHUMER. I understand, but you just said it sprung from, you know, the clause to protect for the general welfare, right?

Mr. SUTTON. Exactly. I'm just saying there isn't a spending clause, so there's not a textual basis for it. I'm just making the point that the Supreme Court decisions sensibly have said, if Con-

gress raises money to provide for the general welfare, they can attach conditions as to how it's spent.

Senator SCHUMER. Only certain conditions.

Mr. SUTTON. Well, that's what *South Dakota* v. *Dole*—

Senator SCHUMER. This is what Mr. Roberts was talking about in his interview. He was saying there has to be germaneness, there has to be proportionality.

Mr. SUTTON. I don't think he was saying proportionality. I think the germaneness—

Senator SCHUMER. He did not say proportionality. I stand corrected. He was saying—I am going to try to correct the grammar here, although I do not know where you made such egregious mistakes.

But, anyway—

Senator LEAHY. While you are doing that, I just would note for the record that Professor Sutton did not serve in the military, otherwise he would know better than to volunteer at this point.

[Laughter.]

Mr. SUTTON. I deserved that.

Senator SCHUMER. It was brave. Do you have anything you would like to say, Judge Cook, on this?

Justice COOK. I don't, sir.

[Laughter.]

Senator SCHUMER. Just let me say that I was trying to be Dean Martin to your Jerry Lewis on that one.

[Laughter.]

Senator SCHUMER. Let me ask you a question, okay?

Senator SESSIONS. Senator Schumer, on that subject, Blackstone's Commentaries says that "no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him." Then it goes on, "For the same reason, no action lies under a Republican form of Government against the State or Nation, unless the legislature have authorized it, a principle recognized in the jurisprudence of the United States and of individual States."

So that was the classic principle—

Senator SCHUMER. But sovereign immunity is not—

Senator SESSIONS. And as attorney general, I mean, I have relied on it. Every attorney general relies on it. It is not explicitly stated in the Constitution directly, but there is a sense in which if the State can be sued or the Federal Government can be sued, it can be destroyed. So there is some—

Senator SCHUMER. I understand, but that is where we pass from strict constructionism to judicial activism in a certain way, and—

Senator SESSIONS. I do not think the Constitution ever covered everything. This was existing principle at the time.

Senator SCHUMER. Look, I have made that argument for a long time, as you know.

Let me go to Justice Cook.

Chairman HATCH. One last question for Justice Cook.

Senator SCHUMER. It is a very long one—no, it is not.

[Laughter.]

Senator SCHUMER. Justice Cook, it is my understanding that you previously discussed the decision in *Davis* v. *Wal-Mart* with Sen-

ator Kennedy. I would like to return to the case. I am troubled by your dissent.

In that case, a widow, whose husband had been killed on the job, settled a lawsuit against the employer. She then attempted to file a second lawsuit, after learning that the employer had instructed employees to lie about how her husband had been killed. The employer apparently did this in order to wrangle a settlement out of her.

Your colleagues found that this evidence was not only enough to permit the suit to go forward, but that it actually might support punitive damages. Punitive damages are usually reserved for cases where the wrongdoing is blatant. It seems kind of blatant here.

It is my understanding that you explained to Senator Kennedy that your dissent in this case was based on your view that res judicata prevented the widow from filing the suit; is that correct?

Justice COOK. Only because she had previously litigated this matter. She filed a negligence—

Senator SCHUMER. Well, of course.

Justice COOK. Yes. So she had a negligence action that was concluded.

Senator SCHUMER. Right.

Justice COOK. And that this claim was sufficiently related and could have been brought and wasn't.

Senator SCHUMER. So you are relying on res judicata.

Justice COOK. That's right.

Senator SCHUMER. Once an issue is decided, it is final, and to reach the conclusion that the widow could not refile her suit, even after she learned after the company's quite horrible deception.

Another fundamental principle, however, of our legal system is that juries find facts based on the evidence presented, and judges and appellate courts give a great deal of deference to those jury determinations. It is my understanding that to overturn a jury verdict, an appellate court must find that the jury's decision was "against the manifest weight of the evidence." That is, as we all know, a rather high standard.

In *Burns* v. *LCI Communications*, a jury found that employees had suffered age discrimination, and the evidence at trial included statements by the employer that it "wanted to bring in young, aggressive staff members and change out the old folks," and that he did not "want old marathoners in my sales organization. I want young sprinters." This man was not in charge of the Senate.

[Laughter.]

Senator SCHUMER. Despite this evidence, which was enough to convince a jury of age discrimination, you voted to overturn the jury's verdict for the employees. It appears that you substituted your views for those of the jury who actually heard the testimony and saw the evidence of discrimination.

I find it troubling that legal principles constrain you in this case, where you are vindicating an employer, how do you explain the deference to legal principles in the one case, *Davis* v. *Wal-Mart*, you denied the widow's right to her day in court, but your willingness to disregard other important legal principles when a jury has found evidence of discrimination?

Justice COOK. In the *Burns* case that you talked about, the verdict was overturned by the Court of Appeals unanimously and then five of the seven members of the Ohio Supreme Court agreed that the plaintiff had not shown that she had been discriminated against. So we weren't—they agreed that there—there was a disagreement among us, but at least all five members agreed that she had not shown discrimination.

And the facts you're mentioning—you know, the sprinters, et cetera—I have not a great recollection of it, but I think the point was that those comments were made years before, so the plaintiff's effort, which garnered a verdict did not—used evidence that was not related to her. A good majority of the Supreme Court agreed that actually discrimination had not been shown, even though when you cite it, it all sounds pretty awful. But the three judges of the Court of Appeals and five at the Supreme Court agreed.

Senator SCHUMER. In *Burns*.

Justice COOK. Yes.

Senator SCHUMER. Just explain the first case, your ruling in—

Justice COOK. *Wal-Mart*?

Senator SCHUMER. *Wal-Mart*, yes.

Justice COOK. I am getting tired. In *Wal-Mart*, I think we just talked about res judicata was the basis for my dissent, and that's a dissent in *Wal-Mart*, I think.

It was the second matter, after the negligence claim, the widow had the information. She said that she then learned later that the employer had withheld.

Senator SCHUMER. After the second, she did not get the information until—

Justice COOK. No, the record actually showed that she had that information—

Senator SCHUMER. Had it.

Justice COOK. And then didn't bring it. I mean, had it within time to bring it as part of the original negligence claim—

Senator SCHUMER. I see.

Justice COOK. —and failed to do so, and so we determined that it was waived.

Senator SCHUMER. Why did she do that?

Justice COOK. I'm not—

Senator SCHUMER. You do not remember.

Justice COOK. I don't remember.

Senator SCHUMER. I do not quite—you know it better than me, again, but I think the second case, the *Burns* case, at least from what my cursory knowledge is a little different. So I am going to just ask, Mr. Chairman, in the interest of time, that I submit some questions about these two issues, and maybe some others, to Judge Cook in writing.

Chairman HATCH. Thank you, Senator. I would like Senators to submit as many questions as they—submit their questions now. We will have the transcript by tomorrow at 4:00 and any additional questions, have them submitted by 5 o'clock on Tuesday, and then I would like your answers back by Wednesday evening, because I intend to put you on the markup for the Thursday from tomorrow.

Senator SCHUMER. Mr. Chairman?

Chairman HATCH. Yes?

Senator SCHUMER. Could we have a—I mean, I have a bunch of questions.

Chairman HATCH. We have already agreed on this.

Senator SCHUMER. We need to—

Chairman HATCH. It amounts to a week, really. I mean, we are—and nobody is going to press you on this. If we have to put them over for a week, we will do so, but that is what we are going to do.

I just have to say you have been very patient today, and this has been a tough day for you. I apologize that it has taken so long. You have been here really for 12 hours, really the equivalent of 2 days. You have been patient with us, and we appreciate it, and hopefully we can move ahead with your nominations and do so in an expeditious, yet fair to all sides, fashion.

I just caution you, when you get these questions, answer them as quickly as you can, but I am hopeful that you will have all of these questions answered by next Wednesday night.

Now, Senator Leahy?

Senator LEAHY. First, I want to reiterate, I appreciate you moving down here to accommodate especially the disabled people earlier, and I appreciate you accepting our recommendation for that.

I would also note that you have been very fair with the clock on giving Senators on both sides whatever amount of time they needed. I would hope, and I understand the pressures the Chairman was under from his side of the aisle on this, but I would hope that this would not be necessary to have—I do not mind having hearings every day if you want—but not to have three nominees, where there will be three extensive questions on like this at the same time.

Again, we saw what happened with the three District Court judges, there were not extensive questions, and we finished that in 45 minutes or so.

Again, I appreciate, having been there, I appreciate the pressures the Chairman is under, under this, but I would hope that those pressures would lessen as the year goes on and that we might work out something because I think it is important when all Senators who are going to have to vote initially in the Committee can actually have the time to be here to hear the candidates.

Chairman HATCH. Well, thank you, Senator, and we will certainly take that into heavy consideration; in fact, I already have. Next week's hearing will involve only one Circuit Court of Appeals nominee, and I do not know how many District Court. We will decide that. I think three or four District Court nominees.

I just want to thank everybody for their cooperation, the distinguished Senator from New York. I know he has been upset at me, but I care a great deal for him, and he is one of the most astute people on this panel, and I just appreciate his forbearance with me.

Senator SCHUMER. Mr. Chairman, I am not upset at you. I mean, I am just upset at the situation.

Chairman HATCH. I understand, and we are going to—

Senator SCHUMER. It does not do justice to the importance of what we are doing here.

Chairman HATCH. Well, I appreciate that.

With that, I just want to compliment each of you. I do not know when we have had a panel that has been as articulate on some of these constitutional issues as the three of you have been.

Mr. Sutton, you have borne the brunt of most of the questions today. I know that you are probably worn out, but you have done a terrific job, in my opinion, and deserve a lot of credit for your astuteness. I think everybody here acknowledges you are a fine lawyer, if not one of the best, in the whole country.

And, Mr. Roberts, no question about your abilities, and I think everybody here has basically acknowledged that today as one of the great appellate advocates in our country. Both of you are among the greatest appellate advocates we have in this country.

Justice Cook, it is very apparent that you are a very good person, that you understand what the role of a judge really is, and we expect you to abide by that understanding as you serve on the Federal court.

[The biographical information of Justice Cook, Mr. Roberts, and Mr. Sutton follow.]

AMENDED 12/28/02

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

Deborah Louise Cook [sometimes known as Deborah Cook Linton]

2. Address: List current place of residence and office address(es).

Residence: Akron OH 44303
Office: Supreme Court of Ohio, 30 E. Broad St. Columbus OH 44366

3. Date and place of birth.

February 8, 1952, Pittsburgh, PA.

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

Married to Robert F. Linton, attorney/managing partner of Roderick Linton, 1500 One Cascade Plaza, Akron, OH 44308

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

University of Akron from 9/70 to 6/74, B.A. degree granted 6/74.
University of Akron School of Law from 9/75 to 3/78; J.D. degree granted 6/78.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

Employers:

08/74–09/74	**First National Bank (nka First Merit), Akron, OH**
11/74–03/75	**Red Onion Restaurant, Aspen, CO**
11/74–03/75	**Little Nell Restaurant, Aspen, CO**
01/75–03/75	**Donny's Dog House, Aspen, CO**
5/75–12/75	**Akron Beacon Journal, Akron, OH**
6/76–12/90	**Roderick, Myers & Linton, Akron, OH**
2/91–01/95	**State of Ohio, Ninth District Court of Appeals, Akron, OH**
01/95–present	**State of Ohio, Supreme Court of Ohio, Columbus, OH**

Nonprofit organizations and approximate dates of participation:

1983-1986	**Junior League of Akron (Director)**
1984-1987	**Akron Women's Network (Director)**
1984-1986	**Akron Bar Association Foundation (Trustee and President)**
1987-1993	**Akron Area Volunteer Center (Trustee and President)**
1994-1996	**Stan Hywet Hall and Gardens Foundation (Trustee)**
1994-1996	**Summit County United Way (Trustee)**
1999-to date	**Collegescholars, Inc. (Trustee)**
2001 to date	**Akron Art Museum**

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

No

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Honorary Doctor of Laws degree, University of Akron, 1996,

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Fellow of the American Bar Foundation; Fellow and past president of the Akron Bar Foundation (mid 1980's); sustaining member of Akron Bar Association; Ohio State Bar Association; American Bar Association; Ohio Appellate Judges Association, Fellow of the Ohio Bar Foundation, United States Constitutional Law Association, Appellate Lawyers Association, University of Akron Intellectual Property Advisory Council.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

Ohio Appellate Judges Association, Ohio State Bar Association, Akron Bar Association, United States Constitutional Law Association, The Supreme Court Historical Society, Ohio Historical Society.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies that require special admission to practice.

The Ohio Supreme Court, admitted November 1978.
The United States District Court for the Northern District of Ohio, admitted November 1981.
Supreme Court of the United States, admitted February 1999.

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Survey of Ohio Law, Ohio Northern University Law Review, 1995 22 Ohio N.U.L.Rev. 561. (attached)

Survey Ohio Law, Ohio Northern University Law Review, 1999, 25 Ohio N.U.L.Rev. 415. (attached)

Outline of remarks given occasionally during campaigns regarding the role of judges. (attached)

13. Health: What is the present state of your health? List th date of your last physical examination.

Very good -- last physical examination 12/02

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

January 1991 to December 1994 -- Judge, Ohio Court of Appeals, Ninth District, with general appellate jurisdiction [elected by voters in District with population of approximately one million.]

January 1995 to December 2000 -- Justice, Supreme Court of Ohio with certiorari jurisdiction in addition to certain original and appellate jurisdiction assigned by statute. [elected statewide in November 1994]

January 2001 to present -- Justice, Supreme Court of Ohio [reelected statewide in November 2000]

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

Minton v. Honda of Am. Mfg., Inc. (1997), 80 Ohio St.3d 62, 684 N.E.2d 648 (Cook, J., dissenting); abrogated by *Geier v. American Honda Motor Co., Inc.* (2000), 529 U.S. 861, 120 S.Ct. 1913, 146 L.Ed.2d 914. [Airbag/implied pre-emption]

Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ. (1998), 83 Ohio St.3d 229, 699 N.E.2d 463 (Cook, J., dissenting); certiorari granted and judgment reversed by *Central State University v. American Ass'n of University Professors, Central State University Chapter* (1999), 526 U.S. 124, 119 S.Ct. 1162, 143 L.Ed.2d 227; opinion on remand, *Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ.* (1999), 87 Ohio St.3d 55, 717 N.E.2d 286 (Cook, J.). [Equal Protection/rational basis review]

State v. Reiner (2000), 89 Ohio St.3d 342, 731 N.E.2d 662 (Cook, J., concurring in part and dissenting in part); certiorari granted and judgment reversed by *Ohio v. Reiner* (2001), --- S.Ct. ---, 2001 WL 262448. [Fifth Amendment privilege against self-incrimination]

City of Seven Hills v. Aryan Nations (1996), 76 Ohio St.3d 304, 667 N.E.2d 942 (Cook, J.). [Strict scrutiny of Seven Hills picketing ordinance related to Demjanjuk's return]

Sutowski v. Eli Lilly & Co. (1998), 82 Ohio St.3d 347, 696 N.E.2d 187 (Cook, J.). [Rejecting market-share liability concept in DES cases]

Rice v. CertainTeed Corp. (1999), 84 Ohio St.3d 417, 704 N.E.2d 1217 (Cook, J.). [Punitive damages may be awarded under Ohio employment discrimination statute]

Dresher v. Burt (1996), 75 Ohio St.3d 280, 662 N.E.2d 264 (Cook, J., dissenting). [Application of US Supreme Court's *Celotex* case; summary judgment]

Kulch v. Structural Fibers (1997), 78 Ohio St.3d 134, 677 N.E.2d 308 (Cook, J., dissenting); certiorari denied, (1997), 522 U.S. 1008, 118 S.Ct. 586, 139 L.E.2d 423. [Expansion of retaliatory discharge remedies for "whistleblowers" beyond those prescribed by statute.]

Johnson v. BP Chemicals, Inc. (1999), 85 Ohio St.3d 298, 707 N.E.2d 1107 (Cook, J., dissenting). [Unconstitutionality of employer intentional tort statute]

NCR Corp. v. U.S. Mineral Products Co. (1995), 72 Ohio St.3d 269, 649 N.E.2d 175 (Cook, J.).

2) A SHORT SUMMARY OF AND CITATIONS FOR ALL APPELLATE OPINIONS WHERE YOUR DECISIONS WERE REVERSED OR WHERE YOUR JUDGMENT WAS AFFIRMED WITH SIGNIFICANT CRITICISM OF YOUR SUBSTANTIVE OR PROCEDURAL RULINGS:

[Note: participated in deciding over one thousand appeals in four years.]

A. 9th District Opinions Authored by Cook, J., and Reversed

***Turner v. Turner* (Aug. 14, 1991), Lorain App. No. 91CA004961, 1991 WL 156563.** Judgment reversed by 67 Ohio St.3d 337 (1993).

- Opinion by Cook, J. Cacioppo, J., concurring; Quillin, P.J., dissenting without opinion. Affirmed summary judgment in favor of defendant in a negligence action brought by son against mother. Summary judgment on basis that plaintiff's affidavit failed to "show affirmatively that the affiant *** is competent to testify" on whether defendant breached duty of care.
- Supreme Court reversed and remanded to trial court. Held that visual impairment does not affect witness competency under Evid.R. 601 and therefore cannot be a basis for deciding not to consider affidavit. Also held that a moving party cannot get summary judgment when his affidavit in support of summary judgment is inconsistent with earlier deposition.

***Local 330, Akron Firefighters Assn., (AFL-CIO) v. Romanoski* (Sept. 9, 1992), Summit App. No. 15514, 1992 WL 224486.** Judgment reversed by 68 Ohio St.3d 596 (1994).

- Opinion by Cook, J., joined by Cacioppo, P. J., and Reese, J. Firefighters believed that fire chief's assignments of certain employees constituted appointments or promotions outside established procedure. Trial court granted summary judgment in favor of Firefighters. Ninth District reversed, deciding that the assignments did not alter any employee's civil service classification or status, pay rights, or privileges; thus there were no "promotions" or "appointments" according to Civil Service procedures.
- Ohio Supreme Court reversed, holding that fire chief could not temporarily assign certain classified employees to serve as acting lieutenants or acting captains without approval of civil service commission.

***State v. Johnson* (Nov. 4, 1992), Summit App. No. 15065, 1992 WL 328492.** Judgment reversed by 71 Ohio St.3d 332 (1994).

- Opinion by Cook, J. Quillin and Cacioppo, JJ, concurring. Affirmed aggravated-murder conviction and death sentence. Defendant had been convicted of two death specifications: R(2929.04(A)(5)(prior purposeful homicide conviction) and (A)(7) (kidnapping and/or rape). Supreme Court reversed convictions and remanded to trial court.
- Supreme Court held that defendant's prior 2d degree murder conviction in Florida could not form basis for "prior homicide" specification because Florida statute did not require purpose to kill.

***Campbell v. Rockynol Retirement Community* (Dec. 15, 1993), Summit App. No. 16286, 1993 WL 526611.** Judgment reversed by 71 Ohio St.3d 144 (1994).

- Opinion by Cook, P.J. Dickinson, J., concurring and Reece, J., concurring in part. Affirmed summary judgment (for employer) on an RC 4112.99 employment discrimination claim on statute-of-limitations grounds. Also found the appeal frivolous under App.R. 23 and ordered appellant to pay $250 in atty fees to appellee. (The appellant did not even cite to the controlling authority from Ninth District in his brief.)
- Supreme Court summarily reversed on authority of *Cosgrove v. Williamsburg of Cincinnati Mgt. Co., Inc.* (1994), 70 Ohio St.3d 281, which held that RC 4112.99 is subject to a six-year SOL. *Cosgrove* was decided nine months after the Ninth District issued its decision; the Ninth District had relied on controlling precedent from its own district.

***Reid, Johnson, Downes, Andrachik & Webster v. Lansberry*, (Aug. 12, 1992), Summit App. No. 15449, 1992 WL 194287.** Judgment reversed by 68 Ohio St.3d 570 (1994).

- Opinion by Cook, J. Baird, P.J., and Reece, J., concurring. Case involved fee dispute for legal services performed by law firm that the client had allegedly discharged. Trial court had allowed only quantum meruit recovery by law firm. Ninth District reversed on basis of a guaranty agreement executed after client changed attorneys.
- Supreme Court reversed in 4-3 decision. The court held that quantum meruit doctrine controlled and not the guaranty contract. The law firm was not allowed to condition the return of case file to client on the client signing the guaranty contract.

***Adamsky v. Buckeye Local School Dist.* (Feb. 23, 1994), Medina App. No. 2258-M, 1994 WL 64699.** Judgment reversed by 73 Ohio St.3d 360, 653 N.E.2d 212 (1995).

- Opinion by Cook, J. Plaintiff in personal injury suit appealed trial court's dismissal of complaint on statute-of-limitations grounds. Ninth District affirmed, deciding that statute of limitations contained in R.C. 2744.04 was constitutional as applied to minors.
- Ohio Supreme Court reversed, finding R.C. 2744.04 was unconstitutional as applied to minors on Equal Protection grounds, applying "rational basis" test.

B. Ninth District Opinions <u>Joined</u> by Justice Cook and Reversed.

***Allen v. R.G. Industrial Supply Co.* (Oct. 9, 1991), Summit App. No. 15005, 1991 WL 207865.** Reversed by 66 Ohio St.3d 229.

- Opinion by Baird, P.J. Cook, J., concurring; Cacioppo, J., concurring only in judgment. Affirmed summary judgment in favor of defendants on a personal injury complaint. Primary reason for affirmance was accord and satisfaction: plaintiff had cashed check from defendants' insurer but had refused to sign release form accompanying it.
- Supreme Court reversed finding genuine issues of material fact on the issue of accord and satisfaction.

***City of Akron v. Rowland* (April 8, 1992), Summit App. No. 15307, 1992 WL 74200.** Judgment reversed by 67 Ohio St.3d 374 (1993).

- Opinion by Quillin, P.J., joined by Cook, J., and Cacioppo, J. Ninth District affirmed conviction for loitering for the purpose of engaging in drug-related activity, holding that the ordinance was neither unconstitutionally vague nor overbroad.
- Ohio Supreme Court reversed in a 4-3 decision authored by Wright, J., holding that the Akron ordinance could only be interpreted as impermissibly vague or overbroad.

***Wright v. Bloom* (Jan. 27, 1993), Summit App. No. 15665, 1993 WL 20980.** Judgment reversed by 69 Ohio St.3d 596 (1994).

- Opinion by Baird, P.J., joined by Cook, J. Reece, J., dissented. Wright sought declaratory judgment seeking funds on deposit in certain joint and survivorship accounts to be declared as assets of the estate. Trial court granted summary judgment to Wrights, and the Ninth District affirmed, applying Ohio Supreme Court decision *State v. Thompson* (1981).
- Ohio Supreme Court reversed, clarifying *Thompson* and resolving a conflict among the districts as to its proper interpretation. The Ohio Supreme Court held that survivorship rights under a joint and survivorship account of the co-party or parties (to the sums remaining on deposit at the death of the depositor) may not be defeated by extrinsic evidence that the decedent did not intend to create in such surviving party or parties a present interest in the account during the decedent's lifetime.

***SER Boggs v. Springfield Local Sch. Dist. Bd. of Edn.* (Jan. 19, 1994), Summit App. No. 16451, 1994 WL 18649.** Judgment reversed by 72 Ohio St.3d 94 (1995).

- Opinion by Reece, J. Cook, P.J., and Quillin, J., concurring. Denied relators' petition for writ of mandamus, which sought reinstatement to former positions in school district. (Relators were bus drivers and bus mechanics)
- Ohio Supreme Court reversed, holding that relators' complaint overcame Civ.R. 12(B)(6) by alleging facts that (if true) showed legal duty on part of the Board deciding that the court of appeals failed to take all factual allegations as true.

***State v. Brooks* (July 13, 1994), Summit App. No. 16192, 1994 WL 362143.** Judgment reversed by 75 Ohio St.3d 148 (1996).

- Opinion by Quillin, J., with Reece, P.J., and Cook, J., concurring. Ninth District affirmed conviction and death sentence, deciding that trial court did not deny defendant a fair trial with improper instructions in penalty phase. Appellant had not objected, so the appellate panel applied plain error doctrine.
- Ohio Supreme Court affirmed convictions but remanded for re-sentencing, deciding that appellant had not waived error for purposes of plain error rule because counsel requested a proper instruction before the judge read the faulty one, and that the erroneous instruction undermined the reliability of the sentence.

***Fisher v. Neusser* (July 20, 1994), Summit App. No. 16491, 1994 WL 376842.** Judgment reversed by 74 Ohio St.3d 506 (1996).

- Opinion by Quillin, J., with Cook, J., concurring and Reece, P.J., concurring in judgment only. The Ninth District invalidated an Akron municipal taxation ordinance as applied to lottery winnings. Held that lottery winnings were "intangible income" under R.C. 718.01(A)(4) and thus exempt from municipal taxation.
- Ohio Supreme Court reversed, holding that "intangible income" does not include gambling winnings, and that lottery winnings were properly included under definition of gambling winnings.

***Ross v. Tom Reith, Inc.* (Sept. 14, 1994), Lorain App. Nos. 93A5752, 93CA5805, 1994 WL 500858,** reversed by 71 Ohio St.3d 729 (1995), and ***Cyrus v. Henes* (1993), 89 Ohio App.3d 172,** reversed by 70 Ohio St.3d 640 (1994).

- Both opinions by Reece, J, with Quillin and Cook, JJ., concurring. Both cases affirmed the trial court's ruling in premises-liability actions that plaintiffs were time-barred by ten-year statute of repose. *Ross* held that plaintiffs had a reasonable amount of time to institute action after the slip-and-fall at issue in the case. *Cyrus* held that a gas conversion unit was an "improvement to real property" under RC 2305.131 and therefore subject to the statute of repose.
- Supreme Court summarily reversed on authority of *Brennaman v. R.M.I. Co.* (1994), 70 Ohio St.3d 460, which had declared the ten-year repose statute unconstitutional on right-to-remedy grounds.

***State v. Westfall* (Sept. 28, 1994), Summit App. No. 16663, 1991 WL 527883.** Judgment reversed by 71 Ohio St.3d 565 (1995).

- Opinion by Baird, J.; Cook and Dickinson, JJ, concurring. Trial court had granted postconviction relief to defendant convicted of involuntary manslaughter on grounds that a minor misdemeanor could not form predicate for involuntary manslaughter. Ninth Distist relied on *res judicata*; defendant had fully litigated that basis on his direct appeal. Even though supervening decision by Supreme Court had changed law in defendant's favor on this point, Ninth Distist relied on principles of finality.
- Supreme Court reversed summarily. The court simply granted the discretionary appeal and reversed on authority of *State v. Collins* (1993), 67 Ohio St.3d 115, which had held that minor misdemeanor may not serve as underlying predicate offense for RC 2903.04(B) involuntary manslaughter.

(3) CITATIONS FOR SIGNIFICANT OPINIONS ON CONSTITUTIONAL ISSUES

A. Ohio Supreme Court Opinions

Seven Hills v. Aryan Nations (1996), 76 Ohio St.3d 304, 667 N.E.2d 942
State ex rel. Patterson v. Indus. Comm. (1996), 77 Ohio St.3d 201, 672 N.E.2d 1008
State v. Lovejoy (1997), 79 Ohio St.3d 440, 683 N.E.2d 1112
Buckeye Community Hope Found. v. Cuyahoga Falls (1998), 81 Ohio St.3d 559, 692 N.E.2d 997
AL Post 763 v. Ohio Liquor Control (1998), 82 Ohio St.3d 109, 694 N.E.2d 905
Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State (1998), 83 Ohio St.3d 229, 699 N.E.2d 463. Majority reversed by United States Supreme Court. See [1999], 87 Ohio St.3d 55, 717 N.E.2d 286).
SER Pizza v. Rezcallah (1998), 84 Ohio St.3d 116, 702 N.E.2d 81.
Johnson v. BP Chemicals, Inc. (1999), 85 Ohio St.3d 298, 707 N.E.2d 1107
Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State (1999), 87 Ohio St.3d 55, 717 N.E.2d 286
Maumee v. Weisner (1999), 87 Ohio St.3d 295, 720 N.E.2d 507
State v. Arnett (2000), 88 Ohio St.3d 208, 724 N.E.2d 793
Humphrey v. Lane (2000), 89 Ohio St.3d 62, 728 N.E.2d 1039
SER Bray v. Russell (2000), 89 Ohio St.3d 132, 729 N.E.2d 359
McKimm v. Ohio Elections Comm. (2000), 89 Ohio St.3d 139, 729 N.E.2d 364
State v. Reiner (2000), 89 Ohio St.3d 342, 731 N.E.2d 662
State v. Sullivan (2000), 90 Ohio St.3d 502, 739 N.E.2d 788
State v. Murphy (2001), 91 Ohio St.3d 516, 747 N.E.2d 765
State v. Scott (2001), 92 Ohio St.3d 1, 748 N.E.2d 11
Holeton v. Crouse Cartage Co. (2001), 92 Ohio St.3d 115, 748 N.E.2d 1111.

Wampler v. Higgins (2001), 93 Ohio St.3d 111, 752 NE2d 962.
State v. Issa (2001), 93 Ohio St.3d 49, 72, 752 NE2d 904, 928.
DeRolph v State, (2001) 93 Ohio St.3d 309, 760 N.E.2d 351
DeRolph v State, (2001) 93 Ohio St.3d 628, 758 N.E.2d 1113
State v. Burnett, (2001) 93 Ohio St. 3d 419, 755 N.E.2d 857
State v. Thompson, (2002) 95 Ohio St.3d 264, 767 N.E.2d 251
State v. Hayden, 96 Ohio St.3d 211, 773 N.E.2d 502 (2002)
DeRolph v. State, (2002), 97 Ohio St.3d ___, 2002-Ohio-6750, ___ N.E.2d ___
State v. Lott, (2002) 97 Ohio St.3d 303, 2002-Ohio-6625, ___ N.E.2d ___
State v. Walls, (2002) 96 Ohio St.3d 437, 2002-Ohio-5059, 773 N.E.2d 1018
Wallace v. Ohio Dept. of Commerce, Div. of State Fire Marshal, 96 Ohio St.3d 266, 2002-Ohio-4210, 773 N.E.2d 526

B. Ninth District Court of Appeals Decisions

State v. Adams (1991), 74 Ohio App.3d 140, 598 N.E.2d 719
State v. Brown (May 1, 1991), Lorain App. Nos. 90CA004836, 90CA004838, 1991 WL 70817
State v. Jacobs (May 15, 1991), Summit App. No. 14881, unreported, 1991 WL 81647
State v. Plant (May 15, 1991), Summit App. No. 2599, 1991 WL 81650
State v. Noland (June 19, 1991), Lorain App. No. 90CA004917, unreported, 1991 WL 116310
Smith v. Akron City Hospital (Sept. 4, 1991), Summit App. No. 14980, unreported, 1991 WL 172911
State v. Stafford (July 14, 1993), Lorain App. No. 92CA005476, unreported, 1993 WL 263083
Hudson v. South (1994), 99 Ohio App.3d 208, 650 N.E.2d 172
State v. Riley (Dec. 14, 1994), Lorain App. No. 16582, unreported, 1994 WL 700080
State v. Stevens (Dec. 30, 1994), Summit App. No. 16582, unreported, 1994 WL 721859
State v. Bilder (1994), 99 Ohio App.3d 653, 651 N.E.2d 502

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.
I have only sought election to judicial office.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;
No.
2. whether you practiced alone, and if so, the addresses and dates;
No.
3. the dates, names and addresses of law firms or offices, companies or

governmental agencies with which you have been connected, and the nature of your connection with each;

Roderick Linton from 1976 to 1991
1500 One Cascade Plaza, Akron OH 44308

Prior to assuming judicial office, I worked with only one law firm. Roderick Linton (formerly Roderick, Myers & Linton), Akron's oldest law firm, has had from 15-30 attorneys at any given time during my tenure with the firm from 1978 through 1990. About 70% of the firm's work involves litigation in state and federal courts in Northeast Ohio.
I started with the firm as a law clerk in 1976 working part-time [and full-time during school breaks] until I finished law school in March 1978. The firm then hired me as an associate. My hiring marked the first time this old-line firm had hired a woman as an attorney. In 1983 I became the first female partner in the firm's century of existence.

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

During my initial years with the firm, I worked for several of the partners. I appeared in bankruptcy, common pleas, state appellate and federal district courts. I worked primarily with two partners. One represented a national bank and that work occupied about 40% of my time. The other partner had a diverse business and business litigation practice. Representative clients of this managing partner and the work assigned to associates included: claims litigation for FirstEnergy Company (formerly Ohio Edison), employment and claims litigation for K-Mart, Yellow Freight Co. claims litigation and workers compensation, Ryan Homes, Inc., and Price Brothers Inc., and the Summit County Medical Society.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

Typical former clients included: Ohio Edison [nka FirstEnergy], Kmart, Akron National Bank [nka National City Bank], Ryan Homes, Aetna Insurance, Shand-Morehand Insurance Co., Empire Insurance, Stallion Oil Company, Yellow Freight Trucking, Akron Area Board of Realtors.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

I appeared frequently in courts around Northeast Ohio throughout my years with the law firm.

2. What percentage of these appearances was in:
(a) federal courts;
(b) state courts of record;

(c) other courts.

My court appearances were divided between state and federal courts with state court percentage being about 70% and federal courts, approximately 30%.

3. What percentage of your litigation was:
   (a) civil;
   (b) criminal.

My practice was 100% civil in nature.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I estimate the number of cases in courts of record tried to verdict or judgment in my 12 years of practice to be 50. I estimate that I was "first chair" 75% of the time and "second chair" 25% of the time.

5. What percentage of these trials was:
   (a) jury;
   (b) non-jury.

Of those trials, I conservatively estimate that 80% were non-jury and 20% were jury.

18. Litigation: Describe the ten most significant litigated matters that you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

   (a) the date of representation;
   (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
   (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Because I have been out of the private practice of law for more than twelve years, and because my firm has destroyed all the closed files I worked on (the files would have been between ten and twenty four years old), I am relegated to searching for reported cases that list my name as counsel. This method only produced a handful of cases and I have listed them below.

***Barker v. Scovill, Inc., Schrader Bellows Div.* (1983), 6 Ohio St.3d 146.**
Barker v. Scovill, Inc., Schrader Bellows Div. (June 9, 1982), Summit App. No. 10553,unreported, 1982 WL 5036.

Following her termination of employment, appellee-plaintiff Jean C. Barker brought an age discrimination suit against her former employer, appellant-defendant Scovill, Inc. During staff cuts, forty-nine-year-old Barker had refused a lower paying job and had left the company. While she was not replaced, Barker's duties were absorbed primarily by a twenty-two year-old employee and Scovill's remaining staff. The trial court found that Scovill, Inc. had discriminated against Barker in violation of R.C. 4101.17, which precluded age discrimination.

Scovill, Inc. appealed to the Ninth District Court of Appeals. The court of appeals reversed the decision of the trial court and entered judgment in favor of the company. In so doing, the court held that, even assuming that Barker had been terminated, she had failed to demonstrate as required that she had been replaced by a younger person outside the protected age group. Further, the appellate court found that the company had articulated a non-discriminatory reason for the termination that Barker had failed to prove was pretextual.

Barker then appealed to the Ohio Supreme Court. A majority of that court affirmed the court of appeals, holding that because she had elected termination with severance pay, Barker had not been discharged. The majority further found that Barker had failed to prove that she had not been dismissed for a legitimate reason. The dissent explained that because the record indicated a substantial evidentiary basis for the trial court's factual determinations, both appellate courts overstepped their limited roles.

I represented Barker throughout the trial and appellate proceedings.
(Trial judge: Glen Morgan)
(Court of Appeals Panel: Quillin, Mahoney, and Victor, JJ.)
(Ohio Supreme Court majority: Locher, Frank D. Celebrezze, William B. Brown, Sweeney, Holmes, and Clifford F. Brown, JJ. Dissent: James P. Celebrezze, J.)

Clients:	Plaintiff-appellee (in court of appeals), appellant (in Ohio Supreme Court) Jean C. Barker
Co-counsel:	none
Counsel for other party:	Timothy J. Sheeran and L. Lee Boatright Squire, Sanders & Dempsey, 1800 Union Commerce Bldg. Cleveland, OH 44115 (216) 479-8605

Pedler v. Aetna Life Ins. Co. (1986), 23 Ohio St.3d 7; ***Pedler v. Aetna Life Ins. Co.*** (May 15, 1985), Summit App. No. 11965, unreported, 1985 WL 10793

The plaintiff in this case sought supplemental life insurance under an additional policy purchased by her husband. Prior to his death, the husband had been the CEO of a company that held a group life insurance policy with Aetna Life Insurance Company. The man had enrolled in a supplemental life insurance program through his employment. Aetna denied the supplemental coverage, relying on language in the insurance plan that rendered employees with less than two years of service ineligible for the additional

coverage. The trial court granted summary judgment in favor of the plaintiff, finding that Aetna was estopped from denying coverage.

The court of appeals reversed that decision, finding that the estoppel doctrine did not apply because the plaintiff's husband had sufficient information to have known that he was ineligible for supplemental life coverage. The plaintiff then appealed to the Ohio Supreme Court. In a March 26, 1986 opinion, that court affirmed the court of appeals. The Supreme Court held that because the insured knew or should have known of his ineligibility, Aetna did not have to pay the additional insurance. I participated in the proceedings in the court of appeals. The Ohio Supreme Court granted discretionary review and I briefed and argued the cause before that court.

(Court of Appeals Panel: George, Baird, and Quillin, JJ.)
(Ohio Supreme Court majority: Douglas, Celebrezze, Sweeney, Locher, Holmes, and Wright. Dissent: Clifford F. Brown, J.)

Clients:	Appellee Aetna Life Insurance Co.
Co-counsel:	Robert F. Orth (retired) Roderick Linton One Cascade Plaza, 15th Floor Akron, Ohio 44308 (330) 434-3000
Counsel for other parties:	Oscar A. Hunsicker, Jr. Brouse & McDowell 500 First Nat'l Tower Akron, Ohio 44308 (330) 535-5711

Adair v. Wozniak (1986), 23 Ohio St.3d 174.
Adair v. Wozniak (May 15, 1985), Summit App. No. 11923, unreported, 1985 WL 10784.

Various officers of Houk Machine Company, Inc. and their wives filed a complaint against several individuals and a bank alleging conspiracy to defraud the company of its personal property in connection with the sale and lease-back of its equipment. The trial court granted summary judgment for the defendants, finding that the plaintiffs had no standing to sue individually for the alleged injuries. The court of appeals reversed, holding that standing existed because the plaintiffs had personally guaranteed loans made to Houk Machine.

Both parties appealed to the Ohio Supreme Court in a case of first impression. In an April 30, 1986 opinion, a majority of that court reversed in part and affirmed in part, finding that a plaintiff shareholder does not have an independent cause of action where there is no showing that he has been injured in any capacity other than in common with all other shareholders as a consequence of the wrongful actions of a third party directed toward a corporation. The majority reasoned that the shareholders had no standing to sue even when the shareholders had personally guaranteed corporate obligations, because the guarantees were indirect to the corporation's right of action.

I participated in the summary judgment proceedings in the trial court, the proceedings in the appeals court, and argued the case before the Ohio Supreme Court. My participation in this case ended with the opinion of the Court.
(Appellate panel: Judges Quillin, George, and Mahoney)
(Ohio Supreme Court majority: Celebrezze, C.J., Sweeney, Locher, Holmes, and C. Brown, JJ. Dissent: Douglas, J.).

Clients:	Plaintiff-appellees Harold Adair, Jon and Judy Houk, Clifford and Elaine Houk, and Sylvester and Henrietta Houk
Co-counsel:	Robert F. Linton and Lawrence R. Bach One Cascade Plaza, 15th Floor Akron, Ohio 44308 (330) 434-3000
Counsel for other parties:	David M. Best 4900 West Bath Road Akron, Ohio 44333 (330) 665-1855 John W. Solomon Brouse McDowell First National Tower 106 S. Main St. Akron, Ohio 44308 (330) 535-5711

Delker v. Ohio Edison Co. (1989), 47 Ohio App.3d 1.

This case involved the granting of a motion for summary judgment and an appeal by an employee from that summary judgment rendered in favor of his employer, Ohio Edison. The employee had hurt his knee while getting dressed in an employee's locker room at Edison's facility. Ohio Edison argued that the employee's injury occurred after his work period had ended. The Ninth District Court of Appeals (Reece, Cacioppo, Baird, JJ.) reversed, finding genuine issues of material fact concerning whether the employee's injury occurred in the course and scope of his employment. I represented Ohio Edison at the trial level and briefed and argued the case in the court of appeals.

Clients:	Ohio Edison Company
Co-Counsel:	None
Counsel for Other Parties:	John Anthony Bull P.O. Box 12633 Columbus, OH 43212 (614) 487-1106

Turowski v. Johnson (1990), 68 Ohio App.3d 704

An attorney acting as the administrator of decedent's estate filed wrongful death claims against Ohio Edison and other defendants. The complaint alleged that Ohio Edison

had engaged in willful, wanton, reckless, and malicious conduct in erecting a utility pole 31 inches from the curb. The car in which the decedent had been a passenger had collided with the pole, killing the passenger and the intoxicated driver.

The trial court granted summary judgment in favor of Ohio Edison after the estate was unable to supply any facts or law as to why Ohio Edison should have been liable. The company then moved for attorney fees for frivolous conduct. The trial court denied the motion, finding that the action had been "warranted under existing law."

Ohio Edison appealed the denial of attorney fees to the Ninth District Court of Appeals. In a unanimous decision issued on July 25, 1990, the court of appeals reversed and remanded, holding that the trial court had abused its discretion in ruling that "an action that has no basis in law or fact" was not frivolous. I represented Ohio Edison and argued the cause before the court of appeals.
(Court of Appeals Panel: Baird, Quillin, and Cirigliano, JJ.)

Clients:	Appellant Ohio Edison Company
Co-counsel:	Matthew Oby -former associate who reported to me Oldham & Dowling 195 South Main St. Akron, Ohio 44308 (330) 762-7337
Counsel for other party:	Kenneth Turowski, pro se 88 South Portage Path Akron, Ohio 44302 (330) 836-2292

Austin v. Firestone Tire & Rubber Co. (March 6, 1985), Summit App. No. 11757, unreported, 1985 WL 10723.

Ethel Austin sued Firestone as a surviving spouse of her husband Charles, seeking to recover expenses under the company insurance plan. Though Ethel and Charles had been divorced since 1978, they resumed cohabitation in 1979 and held themselves out as husband and wife until Charles's death in 1981. Soon after filing the complaint, Austin filed a motion for summary judgment and interrogatories. Firestone filed a motion to dismiss and motion to strike, and answered the interrogatories. Austin refiled her motion for summary judgment, and the trial court granted her motion—determining that she was entitled to all benefits as Charles's surviving spouse.

Firestone appealed, arguing that the trial court erred in granting Austin's motion for summary judgment because genuine issues of material fact remained. On March 6, 1985, the Summit County Court of Appeals agreed, deciding that Firestone's answers to the interrogatories raised an issue as to whether Ethel was the surviving spouse and eligible for benefits. Accordingly, the court of appeals remanded the cause for further proceedings (Judges Baird, Ford, and Quillin). I represented Ethel Austin throughout the proceedings.

Client:	Plaintiff-Appellee Ethel Austin	
Co-Counsel:	None	
Counsel for Other Party:	Robert K. Lewis 200 Granger Rd#52 Medina, OH 44256 (877) 433-5025	Gregory L. Hammond 101 Callan Avenue San Leandro, CA (510) 352-5000

Austin v. Firestone Tire & Rubber Co. (April 30, 1986), Summit App. No. 12413, unreported, 1986 WL 5113.

This matter arose out of the same set of facts described in Austin v. Firestone Tire & Rubber Co., above. The trial court decided that my client was the common-law-wife and surviving spouse of Charles Austin, and that she was entitled to the benefits in question. Firestone appealed, claiming that federal law (ERISA) pre-empted state law in this case, and that the trial court could not under federal law declare that Ethel was Charles's surviving spouse. Firestone also claimed that the trial court should have dismissed my client's claim due to a failure to exhaust administrative remedies, and that the trial court erred when it decided that my client had established by clear and convincing evidence the elements of a common-law marriage.

On April 30, 1986, the Summit County Court of Appeals unanimously affirmed the trial court's decision (Judges Quillin, Mahoney, and Baird). On October 17, 1986, the court of appeals granted Firestone's motion for a stay of execution of judgment pending appeal to the United States Supreme Court. See Austin v. Firestone Tire & Rubber Co. (October 17, 1986), Summit App. No. 12413, unreported, 1986 WL 11914 (Judges Mahoney and Baird). I represented Ethel Austin throughout the proceedings.

Client:	Plaintiff-Appellee Ethel Austin	
Co-Counsel:	None	
Counsel for Other Party:	Robert K. Lewis 200 Granger Rd. #52 Medina, OH 44256 (877) 433-5025	Gregory L. Hammond 101 Callan Avenue San Leandro, CA (510) 352-5000

Kyer v. K Mart Corp. (April 29, 1987), Summit App. No. 12865, unreported, 1987 WL 10926.

In this case, Mr. Kyer, an employee of K Mart, sued K Mart following his termination. K Mart terminated Kyer in early 1985 for "Failure to maintain minimum production * * *," but Kyer claimed that K Mart had breached an implied contract of employment with Kyer and had made material representations designed to induce detrimental reliance on his part.

In its interrogatories, the jury decided that Kyer was hired under an "at will" contract. The jury had been instructed that it need not answer remaining interrogatories based on that answer. Kyer appealed, contending that he was deprived of the opportunity to put probative evidence before the jury, that the trial court erred in its jury instructions, and that the trial court erred in failing to enter default judgment or impose sanctions against K Mart. The Summit County Court of Appeals unanimously affirmed the judgment of the trial court on April 29, 1987 (Judges Cacioppo, Quillin, and Baird). I represented K Mart as trial counsel and on appeal.

Client:	Defendant-Appellee K Mart Corporation
Co-Counsel:	None
Counsel for Other Party:	Peter T. Zackaroff 5399 Lauby Rd., Suite 230 North Canton, OH 44720

(330) 966-0095

Aylward v. Ohio Edison Co. (July 5, 1989), Summit App. No. 13961, unreported, 1989 WL 73742.

This case arose out of an accident caused by an Ohio Edison truck. After Ohio Edison admitted liability, the case proceeded to a jury trial on damages. Ohio Edison appealed the jury's award of $17,000 in damages for aggravation of the plaintiff's pre-existing neck injury. The Ninth District Court of Appeals (Mahoney, Baird, Reece, JJ.) affirmed, rejecting Ohio Edison's claim that the damage awarded was unsupported by competent medical testimony. I represented Ohio Edison at trial and on appeal.

Client:	Ohio Edison Company
Co-Counsel:	None
Counsel for other parties:	Bradford M. Gearinger Scanlon & Gearinger 1100 First National Tower Akron, OH 44308 (330) 376-4558

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

Beyond the practice of law and my judicial duties, I have served as a Commissioner on the Ohio Commission for Dispute Resolution and Conflict Management. I have also served on the Technology committee of the Ohio Courts' Futures Commission. I chaired Ohio's Commission on Public Legal Education. I also have taught continuing legal education seminars on oral argument and brief writing.

20. State whether you have ever been convicted of a crime, within ten years of your nomination, other than a minor traffic violation, that is reflected in a record available to the public, and if so, provide the relevant dates of arrest, charge and disposition and describe the particulars of the offense.

No.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

I have an Ohio state pension and deferred compensation that I will be entitled to upon my departure/retirement from my employment with the Ohio judiciary.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

I do not foresee that my existing professional circumstances or personal financial circumstances will present conflicts of interest.
In the event that any personal asset would present an impediment to fulfilling my duties, I would divest myself of such asset.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.
No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)
See attached AO-10 Financial Disclosure Report.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).
See attached net worth statement.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

I have been the candidate in five judicial campaigns.

FINANCIAL STATEMENT -- NET WORTH
Provide a complete, current financial net worth statement that itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			LIABILITIES	
Cash on hand and in banks	766502		Notes payable to banks-secured	0
U.S. Government securities-add schedule	0		Notes payable to banks-unsecured	0
Listed securities-add schedule	3133910		Notes payable to relatives	0
Unlisted securities--add schedule	250000		Notes payable to others	0
Accounts and notes receivable:	0		Accounts and bills due	0
Due from relatives and friends	0		Unpaid income tax	0
Due from others	0		Other unpaid income and interest	0
Doubtful	0		Real estate mortgages payable-add schedule	0
Real estate owned-add schedule	300000		Chattel mortgages and other liens payable	0
Real estate mortgages receivable	0		Other debts-itemize:	0
Autos and other personal property	200000			
Cash value-life insurance	0			
Other assets itemize:				
Annuity	50000			
Deferred compensation account	132642			
			Total liabilities	0
			Net Worth	4403054
Total Assets	4403054		Total liabilities and net worth	4403054
CONTINGENT LIABILITIES	0		GENERAL INFORMATION	
As endorser, comaker or guarantor			Are any assets pledged? (Add schedule)	No
On leases or contracts			Are you defendant in any suits or legal actions?	No
Legal Claims			Have you ever taken bankruptcy?	No
Provision for Federal Income Tax	Qrtly estimate paid qrtly.			
Other special debt	0			

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

I have consistently devoted time to volunteering. What follows is a non-exhaustive list:

I am a founder/trustee with my husband of Collegescholars, Inc., a mentored college scholarship program for twenty 6/7th graders, all of whom attend Jennings Middle School in Akron. Our friends and family serve as mentors for weekly mentoring sessions. And we have an activity most Saturday mornings. I devote an average of four hours weekly to the scholars and mentoring activities, as I have since the spring of 1999.

I volunteered soliciting contributions from businesses for the United Way of my county. I thereafter served as a member of the Board of Trustees for one year before beginning my judicial career. I continue to work with United Way through its Tocqueville Society.

I chaired for two years the Junior Leadership Akron project. That role required about 8 hours per month of my time during each school year.

I volunteered for six months at the Safe Landing Shelter, two hours per week.

I served as a Commissioner for the Dispute Resolution Commission for two years. It targeted truancy mediation for disadvantaged students.

I served as a Board member and then President of the Akron Volunteer Center. That service encompassed at least three years.

I delivered Mobile Meals on Sundays for approximately one year.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization that discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?
No.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).
No, there is no selection commission for Ohio. White House counsel's office contacted me some months after the election of 2000 based on recommendations from the Governor of Ohio and others. I interviewed, completed the FBI forms and other questionnaires and was nominated on 5/9/01.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.
No.

5. Please discuss your views on the following criticism involving "judicial activism."
The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped-many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

The role of courts is to interpret law, not to make law or impose judges' personal preferences in the guise legal scholarship. Law is a discipline and judges must decide issues with proper decision-making tools including statutes, rules and analysis of decisional law. Legal reasoning is to be rooted in a concern for legitimate process rather than preferred results.

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. **Full name (include any former names used).**

John Glover Roberts, Jr.

2. **Address: List current place of residence and office address(es).**

Residence:

Bethesda, MD

Office:

Hogan & Hartson L.L.P.
555 13th Street, N.W.
Washington, D.C. 20004

3. **Date and place of birth.**

January 27, 1955
Buffalo, New York

4. **Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).**

Married to Jane Sullivan Roberts, July 27, 1996.

Spouse's maiden name: Jane Marie Sullivan
Spouse's occupation: Attorney
Spouse's employer: Shaw Pittman
2300 N Street, N.W.
Washington, D.C. 20037

5. **Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.**

Attended Harvard College, 1973-1976 (entered with sophomore standing). Awarded A.B. summa cum laude June 17, 1976.

Attended Harvard Law School, 1976-1979. Awarded J.D. magna cum laude June 7, 1979.

6. Employment Record: **List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.**

Summer 1977: Law clerk, Ice, Miller, Donadio & Ryan, Indianapolis, Indiana.

Summer 1978: Law clerk, Carlsmith, Carlsmith, Wichman & Case (now Carlsmith, Ball, Wichman, Case & Ichiki), Honolulu, Hawaii.

June 1979 - June 1980: Law clerk to Judge Henry J. Friendly, United States Court of Appeals for the Second Circuit. At the time Judge Friendly also served as the Presiding Judge of the Special Railroad Reorganization Court, a three-judge district court.

July 1980 - August 1981: Law clerk to then-Associate Justice William H. Rehnquist, Supreme Court of the United States.

August 1981 - November 1982: Special Assistant to Attorney General William French Smith, United States Department of Justice.

November 1982 - May 1986: Associate Counsel to the President, White House Counsel's Office.

May 1986 - October 1989: Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004. I joined the firm as an associate and was elected a general partner of the firm in October 1987.

October 1989 - January 1993: Principal Deputy Solicitor General, United States Department of Justice.

January 1993 - Present: Partner, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004.

7. **Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.**

No.

8. **Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.**

Harvard College honors:

William Scott Ferguson Prize, 1974, for "the outstanding essay submitted by a Sophomore concentrating in History."

Edwards Whitaker Scholarship, 1974, awarded to first-year students who "show the most outstanding scholastic ability and intellectual promise as indicated by distinction in studies and general achievement."

John Harvard Scholarship, 1974, 1975, 1976, "in recognition of academic achievement of the highest distinction."

Detur Prize, 1976, based on cumulative academic record.

Election to Phi Beta Kappa, 1976.

Bowdoin Essay Prize, 1976, for "the best dissertation submitted in the English language."

A.B. degree awarded summa cum laude, 1976. Honors thesis on British domestic politics, 1900-1914.

Harvard Law School honors:

Editor, Harvard Law Review, volumes 91-92. Managing Editor, volume 92.

J.D. degree awarded magna cum laude, 1979.

9. **Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.**

I am a member of the following organizations:

United States Judicial Conference Advisory Committee on Appellate Rules
D.C. Circuit Judicial Conference, 1991, 1992, 1998, 2000
Fourth Circuit Judicial Conference, 1995
American Law Institute (elected October 1990)
American Academy of Appellate Lawyers (elected August 1998)
Edward Coke Appellate Inn of Court
State and Local Legal Center, Legal Advisory Board
Georgetown University Law Center, Supreme Court Institute, Outside Advisory Board
National Legal Center for the Public Interest, Legal Advisory Board
Supreme Court Historical Society

10. Other Memberships: **List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.**

I do not belong to any organizations that are active in lobbying before public bodies. Other organizations to which I belong:

Phi Beta Kappa
Republican National Lawyers Association
Lawyers Club
Metropolitan Club
Robert Trent Jones Golf Club

11. Court Admission: **List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.**

District of Columbia Court of Appeals, December 18, 1981.

United States Court of Federal Claims, December 3, 1982.

United States Court of Appeals for the Federal Circuit, December 3, 1982.

Supreme Court of the United States, March 2, 1987.

United States Court of Appeals for the District of Columbia Circuit, March 31, 1988.

United States Court of Appeals for the Ninth Circuit, October 17, 1988.

United States Court of Appeals for the Fifth Circuit, November 4, 1988.

United States Court of Appeals for the Eleventh Circuit, May 31, 1995.

United States Court of Appeals for the Third Circuit, November 3, 1995.

United States District Court for the District of Columbia, February 5, 1996.

United States Court of Appeals for the Tenth Circuit, April 10, 1996.

United States Court of Appeals for the Seventh Circuit, June 21, 1996.

United States Court of Appeals for the Fourth Circuit, November 24, 1997.

United States Court of Appeals for the Sixth Circuit, June 3, 1998.

United States Court of Appeals for the Eighth Circuit, February 5, 1999.

United States Court of Appeals for the Second Circuit, September 30, 1999.

12. Published Writings: **List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.**

Publications: "The Takings Clause," Developments in the Law -- Zoning, 91 Harvard Law Review 1462-1501 (1978) (unsigned student note).

Comment, "Contract Clause -- Legislative Alteration of Private Pension Agreements," 92 Harvard Law Review 86-99 (1978) (unsigned student note).

Comment, "First Amendment -- Media Right of Access," 92 Harvard Law Review 174-185 (1978) (unsigned student note).

"New Rules and Old Pose Stumbling Blocks in High Court Cases," The Legal Times, February 26, 1990 (also reprinted in various affiliated publications), co-authored with E. Barrett Prettyman, Jr.

"Article III Limits on Statutory Standing," 42 Duke Law Journal 1219 (1993).

"Riding the Coattails of the Solicitor General," The Legal Times, March 29, 1993.

"The New Solicitor General and the Power of the Amicus," The Wall Street Journal, May 5, 1993.

"The 1992-93 Supreme Court," 1994 Public Interest Law Review 107.

"Forfeitures: Does Innocence Matter?," The Legal Times, October 2, 1995.

"Thoughts on Presenting an Effective Oral Argument," School Law in Review (1997).

I have attached copies of the foregoing items.

Addresses: Brookings Institution, October 3, 1983, on Giving Legal Advice to the President.

Indiana University School of Law, 1984 Harriss Lecture series, January 20, 1984, on Federal Court Jurisdiction.

Maryland Association of County Attorneys, December 7, 1989, on Appellate Advocacy.

District of Columbia Bar Association, Section on Administrative Law, September 19, 1990, on Supreme Court Environmental Cases.

American Bankruptcy Institute, December 7, 1991, on Supreme Court Bankruptcy Cases.

American Academy of Appellate Lawyers, February 5, 1994, Kansas City, MO, on Supreme Court practice.

Elderhostel, Rockville, MD, November 14, 1996, on Supreme Court oral arguments.

D.C. Copyright Law Society, March 16, 1998, on Feltner v. Columbia Pictures.

Bureau of National Affairs, Supreme Court Constitutional Law Seminar, Washington, D.C., September 11, 1998, on Supreme Court oral arguments.

D.C. Bar Administrative Law Section, September 24, 1998, on NCUA v. First National Bank & Trust Co.

Alabama Bar Institute for Continuing Legal Education, 36th Annual Southeastern Corporate Law Institute, Point Clear, Alabama, April 24, 1999, on recent Supreme Court cases.

Arizona Bar Appellate Practice Section, June 25, 1999, on the certiorari process.

National Mining Association, Lake George, NY, September 10, 1999, on amicus briefs.

Republican National Lawyers Ass'n, Washington, D.C., April 3, 2000, on cases pending before the Supreme Court.

Cosmetics, Toiletries, and Fragrances Ass'n, Napa Valley, CA, April 26, 2000, on the First Amendment and commercial speech.

Symposium, Bicentennial Celebration of the Courts of the District of Columbia Circuit, Washington, D.C., March 9, 2001, panelist on Constitutional Confrontations in the District of Columbia Circuit Courts.

I also regularly participate in press briefings sponsored by the National Legal Center for the Public Interest and the Washington Legal Foundation upon the opening of a new Supreme Court term or the Court's rising for the summer.

I did not speak from a prepared text on any of the foregoing occasions, and am not aware of any press reports on these addresses.

In addition, on June 11, 1999, I appeared before the Subcommittee on Commercial and Administrative Law of the House Judiciary Committee with former Senators George Mitchell and Robert Dole and former Solicitor General Drew Days to discuss the report of the Joint Project on the Independent Counsel Statute sponsored by the American Enterprise Institute and the Brookings Institution. A copy of the hearing transcript is attached.

I also recall appearing before a subcommittee of the House Judiciary Committee to discuss crime legislation sometime in 1993, but am advised that the hearing transcript was never published. I did not have prepared remarks on that occasion.

13. **Health: What is the present state of your health? List the date of your last physical examination.**

Excellent. March 26, 2001.

14. **Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.**

None.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

Not applicable.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

06/79 - 06/80	Law Clerk to Judge Henry J. Friendly. United States Court of Appeals for the Second Circuit. Appointed.
07/80 - 08/81	Law Clerk to Justice William H. Rehnquist. Supreme Court of the United States. Appointed.
08/81 - 11/82	Special Assistant to the Attorney General. United States Department of Justice. Appointed.
11/82 - 05/86	Associate Counsel to the President. White House Counsel's Office. Appointed.
10/89 - 01/93	Principal Deputy Solicitor General. United States Department of Justice. Appointed.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. **whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;**

2. **whether you practiced alone, and if so, the addresses and dates;**

3. **the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;**

After graduation from law school, I served as a law clerk to Judge Henry J. Friendly, United States Court of Appeals for the Second Circuit, 40 Foley Square, New York, NY 10007. At the time, Judge Friendly also served as Presiding Judge of the Special Railroad Reorganization Court, a three-judge district court. I clerked for Judge Friendly from June 1979 to June 1980.

I next served as a law clerk to then-Associate Justice William H. Rehnquist, Supreme Court of the United States, One First Street, N.E., Washington, D.C. 20543. I served in that capacity from July 1980 to August 1981.

After completing my clerkship with Justice Rehnquist, I accepted appointment as a Special Assistant to Attorney General William French Smith, United States Department of Justice, Tenth and Constitution Avenues, N.W., Washington, D.C. 20530. I served in that capacity from August 1981 to November 1982.

I left the Department of Justice in November 1982 to accept appointment as Associate Counsel to the President, White House Counsel's Office, 1600 Pennsylvania Avenue, N.W., Washington, D.C. 20500.

I left the White House Counsel's Office in May 1986 to join the Washington law firm of Hogan & Hartson as an associate. I was elected a general partner of the firm in October 1987. Hogan & Hartson is now located at 555 13th Street, N.W., Washington, D.C. 20004.

I resigned my partnership in the firm in October 1989 to accept appointment as Principal Deputy Solicitor General, United States Department of Justice, Tenth and Constitution Avenues, N.W., Washington, D.C. 20530.

I left the Solicitor General's Office in January 1993 to return to my present position as a partner at Hogan & Hartson.

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

For the past 15 years, in both the private and public sectors, I have had an intensive federal appellate litigation practice, with an emphasis on Supreme Court litigation. During that time I orally argued 33 cases before the Supreme Court, in addition to arguments before the United States Courts of Appeals for the District of Columbia, Federal, Second, Fourth, Fifth, Sixth, Ninth, and Tenth Circuits, as well as the District of Columbia and Maryland Courts of Appeals. The subject matter of these cases covered the full range of federal jurisdiction, including administrative law, admiralty, antitrust, arbitration, banking, bankruptcy, civil rights, constitutional law, environmental law, federal jurisdiction and procedure, First Amendment, health care law, Indian law, interstate commerce, labor law, and patent and trade dress law.

In addition to presenting oral argument and briefing the cases on the merits, the Supreme Court practice consists of seeking and opposing Supreme Court review, seeking and opposing stays pending such review, preparing amicus curiae briefs on behalf of clients interested in pending Supreme Court matters, helping to prepare other counsel to argue before the Court, and counseling clients on the impact of specific Supreme Court rulings.

The Court of Appeals aspect of my federal appellate practice has involved appearances in every federal circuit court of appeals, although the largest number of my Court of Appeals arguments has been before the Court of Appeals for the D.C. Circuit. I have not specialized in any particular substantive area, but instead in the preparation of appellate briefs and the presentation of appellate oral argument.

The nature of my practice was essentially the same during my time at Hogan & Hartson and when I served as Principal Deputy Solicitor General, although of course during the latter period my sole client was the United States. As Principal Deputy Solicitor General, my duties included presenting oral argument before the Supreme Court and preparing and filing briefs on the merits on behalf of the United States, its agencies and officers, subject to the supervision of the Solicitor General

and with the assistance of subordinates in the Office of the Solicitor General. I also supervised the preparation and filing of petitions for and briefs in opposition to certiorari, and engaged in an active motions practice seeking or opposing stays or other relief from the Supreme Court. In addition to this actual litigation before the Court, my duties included participating in the government's determination whether to appeal adverse decisions in the lower courts. Any such appeal, whether from a district court to an appellate court or from a circuit court to the Supreme Court, requires the approval of the Solicitor General.

Immediately prior to joining Hogan & Hartson for the first time in 1986, I served in counseling and advisory roles in the federal government. My duties as Associate Counsel to the President involved reviewing bills submitted to the President for signature or veto, drafting and reviewing executive orders and proclamations, and generally reviewing the full range of Presidential activities for potential legal problems. I participated in drafting and reviewed various documents embodying Presidential action under certain trade, aviation, asset control, and other laws. I played a role in the Presidential appointment process, reviewing the Federal Bureau of Investigation background reports and ethics disclosures of prospective appointees.

My duties as Special Assistant to Attorney General William French Smith were also of an advisory nature, focusing on particular matters of concern to the Attorney General. I also served as a speechwriter and represented the Attorney General throughout the Executive Branch and before state and local law enforcement officials.

I was fortunate to have two appellate clerkships immediately after law school. Judge Henry J. Friendly is justly remembered as one of this Nation's truly outstanding federal appellate judges. The clerkship on the Supreme Court for then-Associate Justice Rehnquist the following year was an intensive immersion in the federal appellate process at the highest level.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

Clients of Hogan & Hartson for whom I rendered substantial legal services included large and small corporations, state and local governments, trade and professional organizations, nonprofit associations, and individuals. Some recent examples

are the States of Alaska and Hawaii, the National Collegiate Athletic Association, Litton Industries, Inc., the Credit Union National Association, Pulte Corporation, and Intergraph Corporation.

From October 1989 to January 1993, my sole client was the United States, its agencies and officers. With minor exceptions, the Office of the Solicitor General is the exclusive representative of the federal government before the Supreme Court. I accordingly represented a wide variety of departments, agencies, and other entities within the federal government. In doing so, I worked with each of the litigating divisions in the Department of Justice. Also included among my clients were individual officers of the United States or its agencies sued in Bivens actions.

My clients during my service as Associate Counsel to the President included the President of the United States and members of the White House staff. As Special Assistant to the Attorney General, my client was the Attorney General.

For the past 15 years, I have specialized in federal appellate litigation.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

I have appeared in federal court frequently over the past 15 years, arguing over 55 cases before the Supreme Court of the United States, the Court of Appeals for the District of Columbia Circuit, and various other federal circuit courts of appeals. The public service positions I held prior to 1986 did not involve court appearances, although my two clerkships necessarily afforded intensive exposure to the appellate process.

2. What percentage of these appearances was in:

(a) federal courts;
(b) state courts of record;
(c) other courts.

Approximately 95 percent of my appearances have been in federal court, and approximately 5 percent in state courts of

record, including the District of Columbia Court of Appeals (the local court for the District of Columbia).

3. **What percentage of your litigation was:**

(a) civil;
(b) criminal.

Approximately 95 percent civil, 5 percent criminal.

4. **State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.**

As noted, my practice is primarily an appellate one, and my appearances in court have typically been to argue appeals. I have personally argued over 55 cases leading to a final appellate judgment. I have, however, also appeared on occasion in trial courts.

5. **What percentage of these trials was:**

(a) jury;
(b) non-jury.

One trial proceeding in which I served as an associate counsel was before a jury, although my participation in the case did not involve work before the jury itself.

18. **Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:**

(a) the date of representation;

(b) the name of the court and the name of the judge or judges before whom the case was litigated; and

(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. United States v. Halper, 490 U.S. 435 (1989). While in private practice, I was appointed by the Supreme Court to file a brief and present oral argument in support of the judgment below in this case. See United States v. Halper, 488 U.S. 906 (1988) (order of appointment). Mr. Halper, the appellee, had proceeded pro se in the lower court; I was the only counsel briefing and arguing in the Supreme Court against the appellant, the United States. I handled the case on a pro bono basis.

The question presented was whether the Double Jeopardy Clause barred the imposition of civil penalties under federal law against an individual who had been convicted and punished under federal criminal law for the same conduct. Mr. Halper had been convicted of filing false Medicaid claims, had paid a fine, and served a sentence of imprisonment. The government thereafter sought to impose civil penalties under the False Claims Act for the same false Medicaid claims. It was at the time generally assumed that the Double Jeopardy Clause applied only to successive criminal prosecutions, and had no applicability in the civil context.

In briefing and arguing the case, I sought to distinguish the strong line of precedent holding that the Double Jeopardy Clause did not apply to civil cases. My argument distinguished that aspect of the Clause forbidding successive prosecutions -- which did not apply to civil cases -- from that aspect of the Clause forbidding successive punishments -- which, I argued, had no such limitation.

In a unanimous opinion authored by Justice Blackmun, the Court agreed with this analysis. 490 U.S. 435 (1989). The case was important in establishing that the protections of the Double Jeopardy Clause are not limited to the criminal context, and the decision had a significant effect on the government's imposition of sanctions in a wide range of areas. It was later sharply restricted, however, if not overruled, in Hudson v. United States, 522 U.S. 101 (1997).

I had no co-counsel assisting me. Arguing for the United States was Assistant to the Solicitor General Michael R. Dreeben, Department of Justice, Washington, D.C. 20530, (202) 514-2217.

2. United States v. Kokinda, 497 U.S. 720 (1990). I participated in the briefing and presented argument before the

Supreme Court on behalf of the United States in this criminal case, which involved a challenge to Postal Service regulations making it a misdemeanor to solicit funds on "postal premises," defined to include the exterior walkways adjacent to and surrounding a suburban post office building, but not the public sidewalks alongside the street. The United States Court of Appeals for the Fourth Circuit had struck down the convictions of two individuals for soliciting contributions for their organization on the walkway, holding that such activities could not be banned consistent with the First Amendment.

The Supreme Court ruled in the government's favor and reversed. Writing for a plurality of four Justices, Justice O'Connor agreed with us that the postal walkway was not a public forum, but instead government property set aside to facilitate particular government business -- in this case, the handling of the mails. Since solicitation of contributions to organizations by private individuals would interfere with the conduct of postal business and since the regulation did not discriminate on the basis of viewpoint, Justice O'Connor concluded that the ban on solicitation was valid. Justice Kennedy concurred, relying on our alternative argument that the ban was a valid time, place, and manner restriction.

Other counsel on the brief with me were Solicitor General Kenneth W. Starr, Assistant Attorney General Edward S.G. Dennis, Jr., Assistant to the Solicitor General Amy L. Wax, and Thomas E. Booth, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Counsel for the opposing parties was Jay Alan Sekulow, American Center for Law & Justice, P.O. Box 64429, Virginia Beach, VA 23467, (757) 226-2489.

3. Lujan v. National Wildlife Federation, 497 U.S. 871 (1990). The issue in this case concerned the limitations on standing for those who seek to challenge federal land use decisions. The Court of Appeals for the District of Columbia Circuit had allowed an organization to challenge over a thousand individual land use decisions affecting millions of acres of public land on the basis of the affidavits of two individuals asserting an interest in the decisions. As Acting Solicitor General, I authorized and participated in the preparation of a petition for certiorari seeking Supreme Court review on behalf of the Department of the Interior. The Court granted our petition, and I participated in the briefing on the merits and presented oral argument on behalf of the government.

We contended that the general allegations of injury that the two individuals had presented were not specific enough to entitle them to mount a broad-based challenge to the thousands of agency decisions affecting millions of acres about which they complained. The Court, in a 5-4 decision, agreed with our analysis. Justice Scalia, writing for the majority, held that vague and conclusory allegations of injury did not suffice to confer a right to challenge an entire agency program, and that the federal courts could not "presume" the specific facts necessary to establish adequate injury. Justice Blackmun, for the dissenters, argued that the affidavits should have sufficed at the summary judgment stage.

Co-counsel for the United States assisting me were Assistant Attorney General Richard Stewart, Deputy Solicitor General Lawrence G. Wallace, Assistant to the Solicitor General Lawrence Robbins, Peter Steenland, Anne Almy, Fred Disheroon, and Vicki Plaut, Department of Justice, Washington, D.C. 20530, (202) 514-2217. E. Barrett Prettyman, Jr., Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5685, argued the case for the respondent.

4. Interstate Commerce Commission v. Boston & Maine Corporation, 503 U.S. 407 (1992). This case involved Amtrak's Montrealer service between Washington, D.C. and Montreal, Canada. The question presented was whether the Interstate Commerce Commission could approve Amtrak's exercise of eminent domain authority under the Rail Passenger Service Act, when Amtrak intended to reconvey the subject property to another railroad, which had agreed to rehabilitate and maintain the line for Amtrak. The Commission construed the statute as authorizing such a transaction.

The D.C. Circuit reversed, concluding that the Commission had misconstrued the statute. In particular, the court reasoned that Amtrak did not have authority to condemn property it did not intend to keep, but rather intended to transfer to a third party. While the case was pending on rehearing, Congress acted to overturn the D.C. Circuit decision, amending the law to make clear that Amtrak may subsequently convey property it has condemned to a third party. Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, 104 Stat. 4658, § 9. The amendment specified that it was applicable to pending cases. The D.C. Circuit nonetheless denied rehearing.

As Acting Solicitor General, I authorized the filing and participated in the preparation of a petition for certiorari on

behalf of the Commission and the United States. After the Supreme Court granted our petition, I participated in the briefing on the merits, and orally argued the case before the Court. Our argument focused on the failure of the D.C. Circuit to give effect to the clearly expressed intent of Congress in the amendment of the statute.

The Supreme Court agreed with our position and reversed the D.C. Circuit, 6-3. Justice Kennedy's opinion for the majority relied on deference to the ICC's construction of the statute it has been charged with administering. Justice White, writing for the dissenters, criticized the majority for adopting a post hoc rationalization to fill a gap in the agency's reasoning and logic.

With me on the brief were Deputy Solicitor General Lawrence G. Wallace and Assistant to the Solicitor General Michael R. Dreeben, Department of Justice, Washington, D.C. 20530, (202) 514-2217, as well as General Counsel Robert S. Burk, Deputy General Counsel Henri F. Rush, and Attorney Charles A. Stark, Interstate Commerce Commission (now the Surface Transportation Board), 1925 K Street, N.W., Washington, D.C. 20423, (202) 565-1558. Arguing for the opposing party was Irwin Goldbloom, Latham & Watkins, 1001 Pennsylvania Avenue, N.W., Washington, D.C. 20004, (202) 637-2200.

5. National Collegiate Athletic Ass'n v. Smith, 525 U.S. 459 (1999). After the Court of Appeals for the Third Circuit ruled against the NCAA in this case, I was retained to seek Supreme Court review, and to brief and argue for the NCAA on the merits in the event the Court elected to hear the case. The Third Circuit had ruled that Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. -- which applies only to organizations that receive federal financial assistance -- applied to the NCAA, because it received dues payments from entities that receive federal financial assistance. We argued in our petition for certiorari that hinging coverage on such indirect receipt of financial assistance conflicted with Supreme Court precedent, and the Supreme Court granted review.

The issue on the merits was what it meant to "receiv[e] Federal financial assistance" under the terms of the statute. We argued in our briefs that the Supreme Court had developed a contract theory of coverage with respect to legislation, such as Title IX, enacted pursuant to Congress' Spending Clause powers. Under that theory, entities that knowingly and voluntarily accept federal funding are subject to the restrictions that come

with it. The necessary implication of this theory is that coverage under the statute is limited to direct recipients of the funding -- those who knowingly entered into a bargain by accepting the funding -- and does not "follow[] the aid past the recipient to those who merely benefit from the aid." United States Department of Transportation v. Paralyzed Veterans of America, 477 U.S. 597, 607 (1986). The NCAA, we argued, was accordingly not covered simply because its dues-paying members were.

In a unanimous opinion written by Justice Ginsburg, the Supreme Court agreed with our position. The Court explained that, at most, the NCAA's "receipt of dues demonstrates that it indirectly benefits from the federal assistance afforded its members. This showing, without more, is insufficient to trigger Title IX coverage." 525 U.S. at 468. The Court rejected the respondent's efforts to distinguish the controlling Supreme Court precedent, and vacated the Third Circuit's judgment.

Appearing on the briefs with me in this case were Martin Michaelson, Gregory G. Garre, and Lorane F. Hebert of Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, John J. Kitchin and Robert W. McKinley of Swanson, Midgley, Gangwere, Kitchin & McLarney, 922 Walnut Street, Suite 1500, Kansas City, MO 64106, (816) 842-6100, and Elsa Kircher Cole, General Counsel, National Collegiate Athletic Association, One NCAA Plaza, 700 West Washington Street, Indianapolis, IN 46204, (317) 917-6222. Representing the respondent was Carter Phillips, Sidley & Austin, 1722 Eye Street, N.W., Washington, D.C. 20006, (202) 736-8000.

6. Rice v. Cayetano, 528 U.S. 495 (2000). I was retained by the State of Hawaii to brief and argue this case after a petition for certiorari was granted to review what for the State had been a favorable decision by the Court of Appeals for the Ninth Circuit. That court had upheld a Hawaiian statute providing that only Native Hawaiians could vote for the trustees who administered certain trusts established to benefit Native Hawaiians. The issue before the Supreme Court was whether such a restriction violated the Fourteenth and Fifteenth Amendments as racial discrimination.

On behalf of the State, we defended the state law and favorable Court of Appeals decision by arguing that the classification drawn by the statute was not drawn on the basis of race. Instead, the statute simply restricted the franchise to beneficiaries of the underlying trusts. The petitioner had

not challenged those trusts, and it was rational to limit voting to those most directly affected by how the trusts were administered.

We also argued that the classification was not based on race but instead on the congressionally-recognized political status of Native Hawaiians as an indigenous people. This ground had been relied on by the Supreme Court and other courts to uphold classifications involving Native Americans in the lower 48 states and Native Alaskans, and we argued that the same rationale should apply to the indigenous people of the Hawaiian Islands.

The Court rejected our arguments, 7-2. Justice Kennedy, writing for the majority, rejected our attempted analogy between Native Hawaiians and other Native Americans, reasoning that Congress had not dealt with Native Hawaiians as members of politically-organized tribes, as was the case with respect to other Native Americans. The majority also rejected our argument that the classification should be regarded as being based on beneficiary status rather than race. Justice Breyer, joined by Justice Souter, concurred in the result, also rejecting the analogy to Native American classifications on the ground that Native Hawaiians were not organized into tribes. Justice Stevens, joined by Justice Ginsburg, dissented, arguing that the Hawaiian statute should be upheld in light of the unique history of Hawaii and the analogy to principles of American Indian law.

On the brief with me were Gregory G. Garre and Lorane F. Hebert of Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Attorney General Earl I. Anzai and Deputy Attorneys General Girard D. Lau, Dorothy Sellers, and Charleen M. Aina of the State of Hawaii, 425 Queen Street, Honolulu, Hawaii 96813, (808) 586-1360. Counsel for petitioner was Theodore B. Olson, Gibson, Dunn & Crutcher, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

7. TrafFix Devices, Inc. v. Marketing Displays, Inc., 121 S. Ct. 1255 (2001). The issue in this patent and trade dress case was whether the subject matter of a utility patent can be protected as trade dress after the patent expires. Marketing Displays had patented a dual-spring base design that made road signs more resistant to wind. TrafFix Devices copied and improved upon the design after Marketing Displays' patent expired. The Sixth Circuit Court of Appeals concluded that the distinctive appearance of the Marketing Displays sign stand design could be protected from such copying as trade dress. I

was retained by TrafFix Devices to seek Supreme Court review and brief and argue the case on the merits if review were granted. We argued in our petition for certiorari that the Sixth Circuit decision conflicted with other circuit court decisions and Supreme Court precedent, and the Supreme Court granted review.

In our briefs on the merits and in oral argument before the Court, I argued that the ruling below was inconsistent with the basic "patent bargain" recognized by the Supreme Court: society grants a patent holder the exclusive rights to his invention for a limited period of time, on the condition that the right to practice the invention becomes public property when the patent expires. Allowing the patent holder to extend the period of exclusive use after the expiration of the patent, under the guise of trade dress, would deprive the public of the benefit of this bargain. We also explained that this was the basis for the trade dress "functionality" doctrine, barring protection for functional features.

The Supreme Court agreed with our position in a unanimous opinion authored by Justice Kennedy. The Court explained that the sign stand design was functional, as evidenced by the fact that it had qualified for and enjoyed patent protection. Because the design was functional, the Court ruled, it could not qualify for trade dress protection.

Co-counsel with me on our briefs were Gregory G. Garre, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Jeanne-Marie Marshall and Richard W. Hoffmann, Reising, Ethington, Barnes, Kisselle, Learman & McCulloch, P.C., 201 W. Big Beaver, Suite 400, Troy, Michigan 48084, (248) 689-3500. John A. Artz, Artz & Artz, P.C., 28333 Telegraph Road, Suite 250, Smithfield, Michigan 48034, (248) 223-9500, argued for the respondent.

8. United States v. Chrysler Corporation, 158 F.3d 1350 (D.C. Cir. 1998). I was retained by Chrysler in this case to appeal a district court decision requiring it to conduct an automobile recall. The main issue on appeal was whether the National Highway Traffic Safety Administration ("NHTSA") had provided automobile manufacturers with adequate notice of what was required by a motor vehicle safety standard before seeking a recall on the ground that the manufacturer had failed to comply with the standard.

I participated in the briefing and presented oral argument before the D.C. Circuit. We first had to address the

government's argument that the case was moot, because Chrysler had acquiesced in the recall while pursuing its appeal. We contended that Chrysler's continuing reporting obligations under the terms of the recall sufficed to establish an ongoing legal controversy. On the merits, we argued that a regulated entity must receive "fair notice" of the standards it must meet, as a matter of both administrative regularity and constitutional due process, before an agency can penalize the regulated party for failure to comply. We then explained why, on the specific facts of this case, NHTSA had failed to give adequate notice of how certain testing procedures were to be conducted to test compliance with agency standards.

In a published opinion authored by Chief Judge Edwards and joined by Judges Silberman and Randolph, the court rejected the government's mootness argument, agreed with our contentions on the merits, reversed the district court, and held that Chrysler was not subject to the recall order.

I was assisted by Gregory G. Garre of Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Erika Z. Jones, Mayer, Brown & Platt, 1909 K Street, N.W., Washington, D.C. 20006, (202) 263-3000. Irene M. Solet, U.S. Department of Justice, Washington, D.C. 20530, (202) 514-3542, argued the case for the United States.

9. KenAmerican Resources, Inc. v. International Union, UMWA, 99 F.3d 1161 (D.C. Cir. 1996). The issue in this case concerned the scope of an agreement to arbitrate. An arbitrator had ruled that certain coal companies owned by an individual stockholder were subject to arbitration because another company also owned by that same individual had subscribed to an arbitration agreement purporting to bind nonsignatory parents, subsidiaries, and affiliates. I was retained by the companies to overturn that result. I argued the case before the district court, lost on summary judgment, and appealed to the D.C. Circuit.

I participated in the briefing on appeal and presented oral argument before the Court of Appeals. We contended that the district court erred in deferring to the arbitrator on the issue of arbitrability and that the court should decide that issue de novo. On the merits, we relied heavily on the agreement documents and explained that the company that had signed the arbitration agreement had carefully limited the scope of its agreement in a manner that did not include the other companies owned by the common sole shareholder.

In a published opinion authored by Judge Silberman and joined by Judges Ginsburg and Rogers, the D.C. Circuit agreed with our arguments and reversed the district court decision enforcing the arbitration award. The Court of Appeals agreed that the lower court had erred in deferring to the arbitrator on the issue of arbitrability, and agreed with our construction of the agreements limiting the scope of the arbitration clause. The court not only reversed the grant of summary judgment in favor of the Union but directed that summary judgment be entered in favor of our clients.

Co-counsel in the case were Daniel F. Attridge, Donald Kempf, John S. Irving, Jr., and Gary Brown of Kirkland & Ellis, 655 Fifteenth Street, N.W., Suite 1200, Washington, D.C. 20005, (202) 879-5000, and Jonathan Franklin, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5766. John R. Mooney, Mooney, Green, Gleason, Baker, Gibson & Saindon, P.C., 1920 L Street, N.W., Suite 400, Washington, D.C. 20036, (202) 783-0010, argued the appeal for the Union.

10. Litton Systems, Inc. v. Honeywell, Inc., 238 F.3d 1376 (Fed. Cir. 2001). This case was the third published opinion in a long-running, multi-billion dollar patent and state law dispute between Litton and Honeywell over proprietary interests in laser gyroscope navigational systems for aircraft. Litton had won a $1.2 billion jury verdict on patent and state tort grounds, but the district court entered judgment for Honeywell notwithstanding the verdict. The Federal Circuit reversed and remanded for a new trial. The district court did not hold a new trial but instead once again entered judgment for Honeywell. I was retained to overturn that result.

I participated in the briefing and presented oral argument before the Federal Circuit. The patent law issue concerned whether Litton was estopped from arguing that Honeywell's technology infringed by equivalents, because Litton had amended its patent claims allegedly to exclude all but its precise embodiment of the invention. The answer turned on technical questions involving the operation of the respective ion guns used by Litton and Honeywell to create the perfectly-reflective mirrors employed in ring laser gyroscopes. The state law issues turned on whether there was sufficient evidence in the record to support the jury's finding that Honeywell had interfered with Litton's agreements with the inventor of the pertinent technology.

Our patent claims became moot after oral argument, when the Federal Circuit issued an en banc opinion in another case holding that the doctrine of equivalents was not available at all to a patentee who had amended his claims. The Federal Circuit, however, issued a published opinion agreeing with our position on the state law claims. The opinion was authored by Chief Judge Mayer and joined by Judge Rader. Judge Bryson concurred in part and dissented in part. The Court reversed the district court's grant of judgment for Honeywell, concluding that the lower court had erred in resolving disputed issues of fact. The case was remanded for a new trial on the state law claims.

I was assisted by Catherine Stetson of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5491, Frederick Lorig and Sidford Brown, Bright & Lorig, 633 West 5th Street, Los Angeles, California 90071, (213) 627-7774, and Rory Radding, Stanton Lawrence, and Carl Bretscher, Pennie & Edmonds LLP, 1667 K Street, N.W., Washington, D.C. 20006, (202) 496-4400. Richard G. Taranto, Farr & Taranto, 1220 19th Street, N.W., Suite 800, Washington, D.C. 20036, (202) 775-0184, argued for appellee Honeywell.

19. **Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived).**

Prior to first joining Hogan & Hartson in 1986, the significant legal activities I pursued generally did not involve litigation. My duties as Associate Counsel to the President and Special Assistant to Attorney General William French Smith are discussed in the response to question 17b. Among the more significant of those activities were the review of legislation submitted to the President, as well as the drafting and review of executive orders, Presidential proclamations, and other Presidential documents.

Significant non-litigation legal activities since 1986 have focused on improving the quality of appellate practice before the Courts of Appeals and the Supreme Court. In addition to involvement with the American Academy of Appellate Lawyers and the recently-established Edward Coke Appellate Inn of Court, I regularly participate in moot court programs designed to improve

the advocacy of those presenting cases before the Supreme Court, in particular the programs sponsored by the State and Local Legal Center and the Georgetown University Law Center Supreme Court Institute. I have also assisted the American Bar Association in presenting its programs on appellate advocacy, appearing as an advocate in its programs, and I write and speak regularly on the subject.

I have also been active in the area of legal reform. I have participated in the work of the American Law Institute, and currently serve on the United States Judicial Conference Advisory Committee on Appellate Rules. Another example of such activity was my work on the bipartisan Joint Project on the Independent Counsel Statute sponsored by the American Enterprise Institute and the Brookings Institution, co-chaired by former Senators Robert Dole and George J. Mitchell.

JOHN G. ROBERTS, JR.

SENATE QUESTIONNAIRE UPDATE -- PUBLIC

Part I, Question 12: Add to the list of addresses the following:

Environmental Law Seminar, Harvard Law School, Cambridge, Massachusetts, January 17, 2002, on Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, S. Ct. No. 00-1167.

John F. Kennedy School of Government, Masters Program visit to Washington, D.C., January 24, 2002, on Supreme Court practice.

American Academy of Appellate Lawyers, New Orleans, Louisiana, February 8, 2002, on Supreme Court practice, with E. Barrett Prettyman, Jr., and Seth Waxman.

Georgetown University Law School, Supreme Court Institute, May 16, 2002, 1992 Supreme Court law clerk program, on the 1992 Supreme Court term.

Brigham Young University and J. Reuben Clark Law School, Rex E. Lee Conference on the Office of the Solicitor General of the United States, Provo, Utah, September 12-13, 2002, with 19 other alumni of the Office.

I did not speak from a prepared text on any of these occasions and am not aware of any press reports on my remarks. I understand that the proceedings of the Rex E. Lee Conference are to be but have not yet been transcribed.

In addition, the proceedings of the D.C. Circuit Bicentennial Symposium have now been reported at 204 F.R.D. 499-638.

Part I, Question 17.b.1:

In the first paragraph, "For the past 15 years" should be changed to "For the past 17 years." Also in the first paragraph, "I orally argued 33 cases before the Supreme Court" should be changed to "I orally argued 39 cases before the Supreme Court."

Part I, Question 17.c.1:

Change "over the past 15 years, arguing over 55 cases" to "over the past 17 years, arguing over 65 cases."

Part I, Question 17.c.4:

Change "over 55 cases" to "over 65 cases."

Part II, Question 4:

An updated financial disclosure report is attached.

Part II, Question 5:

An updated net worth statement is attached.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. **List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.**

I will be entitled under the Hogan & Hartson partnership agreement to an amount reflecting my interest in matters pending at the firm at the time of my departure. That amount is calculated based on a set formula specified in the agreement. It is based on percentage ownership interest in the firm and is a set amount at time of departure. I also participate in a fully-vested, defined contribution retirement plan and 401(k) plan at Hogan & Hartson. These plans are administered by an independent trustee, and funds are invested in a range of broadly diversified mutual funds at the election of the individual.

2. **Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.**

I will resolve any conflict of interest by recusing myself from the matter presenting the conflict, following the Judicial Conference Guidelines relating to recusal. I will recuse myself from any matter involving my law firm or former clients for whom I did work, for the periods specified in the Guidelines.

3. **Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.**

No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more. (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

I have attached a copy of the financial disclosure report required by the Ethics in Government Act of 1978.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

Copy attached.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

Executive Committee, D.C. Lawyers for Bush-Quayle '88.

Lawyers for Bush-Cheney.

I was a member of these organizations, but did not have any substantive responsibilities.

AO-10
Rev. 1/2001

FINANCIAL DISCLOSURE REPORT
FOR NOMINEES

Report Required by the Ethics in Government Act of 1978, (5 U.S.C. App., §§101-111)

1. Person Reporting (Last name, first, middle initial)	2. Court or Organization	3. Date of Report
ROBERTS, JOHN G., JR.	U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT	5/13/01
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	**5. Report Type** (check appropriate type)	**6. Reporting Period**
U.S. CIRCUIT JUDGE - NOMINEE	✓ Nomination, Date 5/9/01 ___ Initial ___ Annual ___ Final	1/1/00 - 5/13/01
7. Chambers or Office Address	**8.** On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations.	
HOGAN & HARTSON L.L.P. 555 13TH STREET N.W. WASHINGTON, D.C. 20004	Reviewing Officer _____ Date _____	

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.

I. POSITIONS. *(Reporting individual only; see pp. 9-13 of Instructions.)*

	POSITION	NAME OF ORGANIZATION/ENTITY
	NONE (No reportable positions.)	
1	PARTNER	HOGAN & HARTSON L.L.P.
2	ADVISORY BOARD	STATE & LOCAL LEGAL CENTER, GEORGETOWN UNIV.
3		LAW CENTER SUPREME COURT INSTITUTE, NATIONAL LEGAL CENTER FOR THE PUBLIC INTEREST (ALL UNPAID FOR NONPROFIT ORGS.)

II. AGREEMENTS. *(Reporting individual only; see pp. 14-16 of Instructions.)*

	DATE	PARTIES AND TERMS
	NONE (No reportable agreements.)	
1	2001	HOGAN & HARTSON PARTNERSHIP AGREEMENT SETS FORMULA FOR PAYOUT TO DEPARTING LAWYER FOR HIS OWNERSHIP INTEREST IN FIRM. RETIREMENT AND 401(K) PLANS ARE DEFINED CONTRIBUTION, FULLY VESTED, AND INVESTED IN MUTUAL FUNDS SELECTED BY INDIVIDUAL
2		
3		

III. NON-INVESTMENT INCOME. *(Reporting individual and spouse; see pp. 17-24 of Instructions.)*

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
	NONE (No reportable non-investment income.)		
1	1999	HOGAN & HARTSON L.L.P.	$715,598
2	2000	HOGAN & HARTSON L.L.P.	$766,616
3	2001	HOGAN & HARTSON L.L.P.	$111,111.57
4	1999, 2000, 2001	SHAW PITTMAN (WIFE'S LAW FIRM)	$
5			$

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting: JOHN G. ROBERTS, JR.

Date of Report: 5/13/01

IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children. See pp. 25-27 of Instructions.)

	SOURCE	DESCRIPTION
	☐ NONE (No such reportable reimbursements.)	
1	EXEMPT	
2		
3		
4		
5		
6		
7		

V. GIFTS. *(Includes those to spouse and dependent children. See pp. 28-31 of Instructions.)*

	SOURCE	DESCRIPTION	VALUE
	☐ NONE (No such reportable gifts.)		
1	EXEMPT		$
2			$
3			$
4			$

VI. LIABILITIES. *(Includes those of spouse and dependent children See pp. 32-33 of Instructions.)*

	CREDITOR	DESCRIPTION	VALUE CODE*
	☒ NONE (No reportable liabilities.)		
1			
2			
3			
4			
5			
6			

*Value Codes: J=$15,000 or less; K=$15,001-$50,000; L=$50,001-$100,000; M=$100,001-$250,000; N=$250,001-$500,000; O=$500,001-$1,000,000; P1=$1,000,001-$5,000,000; P2=$5,000,001-$25,000,000; P3=$25,000,001-$50,000,000; P4=$50,000,001 or more

FINANCIAL DISCLOSURE REPORT — Name of Person Reporting: JOHN G. ROBERTS, JR. — Date of Report: 5/13/01

VII. Page 1 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-37 of Instructions.)*

	A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amt. Code1 (A-H)	B. Income during reporting period (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. Gross value at end of reporting period (2) Value Method Code3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	D. If not exempt from disclosure (2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
	NONE (No reportable income, assets,					EXEMPT				
1	AGILENT		NONE	J	T					
2	AOL		NONE	O	T					
3	ASTRAZENECA	A	DIV	J	T					
4	AT & T	A	DIV	J	T					
5	BECTON DICKINSON	A	DIV	J	T					
6	BLOCKBUSTER	A	DIV	K	T					
7	BOEING	A	DIV	J	T					
8	CISCO		NONE	K	T					
9	CITIGROUP	A	DIV	K	T					
10	COCA COLA	A	DIV	J	T					
11	CORVIS		NONE	J	T					
12	CP	A	DIV	J	T					
13	DELL		NONE	M	T					
14	DISNEY	A	DIV	K	T					
15	FIRST VA BANKS	A	DIV	J	T					
16	FREDDIE MAC	A	DIV	K	T					
17	GILLETTE	A	DIV	J	T					

1	Income/Gain Codes: (See Col. B1, D4)	A=$1,000 or less F=$50,001 - $100,000	B=$1,001-$2,500 G=$100,001-$1,000,000	C=$2,501-$5,000 H1=$1,000,001-$5,000,000	D=$5,001-$15,000 H2=More than $5,000,000	E=$15,001-$50,000
2	Value Codes: (See Col. C1, D3)	J=$15,000 or less N=$250,001-$500,000 P3=$25,000,001-$50,000,000	K=$15,001-$50,000 O=$500,001-$1,000,000	L=$50,001- $100,000 P1=$1,000,001-$5,000,000 P4=More than $50,000,000	M=$100,001-$250,000 P2=$5,000,001-$25,000,000	
3	Value Method Codes: (See Col. C2)	Q=Appraisal U=Book value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market	

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting: JOHN G. ROBERTS, JR.

Date of Report: 5/13/01

VII. Page 2 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-57 of Instructions.)*

	A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amt. Code1 (A-H)	B. Income during reporting period (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. Gross value at end of reporting period (2) Value Method Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	D. If not exempt from disclosure (2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
	NONE (No reportable income, assets, or transactions)									
18	HELEN OF TROY		NONE	J	T					
19	HELLER FINANCIAL	A	DIV	J	T					
20	HEWLETT-PACKARD	A	DIV	K	T					
21	HILLENBRAND	A	DIV	K	T					
22	INTEL	A	DIV	L	T					
23	IRISH INV FUND	B	DIV	J	T					
24	JDS UNIPHASE		NONE	J	T					
25	JNJ	A	DIV	J	T					
26	LORAL		NONE	J	T					
27	LUCENT	A	DIV	J	T					
28	MERCK	A	DIV	K	T					
29	MICROSOFT		NONE	N	T					
30	MOTOROLA	A	DIV	J	T					
31	NIKE	A	DIV	J	T					
32	NOKIA	A	DIV	L	T					
33	NOVELLUS		NONE	J	T					
34	PMC SIERRA		NONE	J	T					
35	PGO		NONE	J	T					

1 Income/Gain Codes: (See Col. B1, D4) A=$1,000 or less; B=$1,001-$2,500; C=$2,501-$5,000; D=$5,001-$15,000; E=$15,001-$50,000; F=$50,001-$100,000; G=$100,001-$1,000,000; H1=$1,000,001-$5,000,000; H2=More than $5,000,000

2 Value Codes: (See Col. C1, D3) J=$15,000 or less; K=$15,001-$50,000; L=$50,001-$100,000; M=$100,001-$250,000; N=$250,001-$500,000; O=$500,001-$1,000,000; P1=$1,000,001-$5,000,000; P2=$5,000,001-$25,000,000; P3=$25,000,001-$50,000,000; P4=More than $50,000,000

3 Value Method Codes: (See Col. C2) Q=Appraisal; R=Cost (real estate only); S=Assessment; T=Cash/Market; U=Book value; V=Other; W=Estimated

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting: JOHN G. ROBERTS, JR.

Date of Report: 5/13/01

VII. Page 3 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-57 of Instructions.)*

	A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amt. Code1 (A-H)	B. Income during reporting period (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. Gross value at end of reporting period (2) Value Method Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	D. If not exempt from disclosure (2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
	NONE (No reportable income, assets, or transactions)									
36	PFIZER	A	DIV	J	T					
37	PROCTOR GAMBLE	A	DIV	J	T					
38	PSNRY		NONE	J	T					
39	SCHLUMBERGER	A	DIV	J	T					
40	SCIENTIFIC ATLANTA	A	DIV	K	T					
41	STATE STREET	A	DIV	K	T					
42	TEXAS INSTRUMENTS	A	DIV	M	T					
43	TMO		NONE	K	T					
44	WCOM		NONE	J	T					
45	XMSR		NONE	L	T					
46	WASHINGTON REIT	A	DIV	K	T					
47	PARADIM INC PFD	A	DIV	J	W					
48	AMER CENT GR FUND	B	DIV	J	T					
49	DAVIS SEK REAL EST FUND	A	DIV	J	T					
50	FIDELITY CONTRAFUND	C	DIV	K	T					
51	FIDELITY FREEDOM 2010	A	DIV	J	T					
52	FIDELITY LOW PRICED	D	DIV	M	T					
53	FIDELITY MAGELLAN	D	DIV	N	T					

1 Income/Gain Codes: A=$1,000 or less; B=$1,001-$2,500; C=$2,501-$5,000; D=$5,001-$15,000; E=$15,001-$50,000; F=$50,001- $100,000; G=$100,001-$1,000,000; H1=$1,000,001-$5,000,000; H2=More than $5,000,000. (See Col. B1, D4)

2 Value Codes: J=$15,000 or less; K=$15,001-$50,000; L=$50,001- $100,000; M=$100,001-$250,000; N=$250,001-$500,000; O=$500,001-$1,000,000; P1=$1,000,001-$5,000,000; P2=$5,000,001-$25,000,000; P3=$25,000,001-$50,000,000; P4=More than $50,000,000. (See Col. C1, D3)

3 Value Method Codes: Q=Appraisal; R=Cost (real estate only); S=Assessment; T=Cash/Market; U=Book value; V=Other; W=Estimated. (See Col. C2)

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting: JOHN G. ROBERTS, JR.

Date of Report: 5/13/01

VII. Page 4 **INVESTMENTS and TRUSTS -- income, value, transactions** *(Includes those of spouse and dependent children. See pp. 34-57 of Instructions.)*

	A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amt. Code1 (A-H)	B. Income during reporting period (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. Gross value at end of reporting period (2) Value Method Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	D. Transactions during reporting period — If not exempt from disclosure (2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (If private transaction)
	NONE (No reportable income, assets, or transactions)									
54	FIDELITY OTC	D	DIV	K	T					
55	FIDELITY OVERSEAS	C	DIV	K	T					
56	FIDELITY SELECT ENERGY		NONE	J	T					
57	FRANKLIN MUT BEAC Z	C	DIV	J	T					
58	FRANKLIN MUT DISC Z	B	DIV	J	T					
59	GAM GLOBAL C FUND	A	DIV	J	T					
60	JANUS ENT FUND		NONE	K	T					
61	JANUS FUND	B	DIV	K	T					
62	JANUS WW FUND	C	DIV	K	T					
63	MERCURY HW INT'L FUND	C	DIV	K	T					
64	LORD ABBETT DEV GR FUND	A	DIV	K	T					
65	PUTNAM NEW OPP FUND		NONE	J	T					
66	PUTNAM VOYAGER FUND		NONE	J	T					
67	SELIGMAN OMM A FUND	C	DIV	J	T					
68	TRRAY FUND	C	DIV	L	T					
69	TR PRICE EURO STOCK	A	DIV	J	T					
70	TR PRICE SCI + TECH	C	DIV	J	T					

1	Income/Gain Codes: (See Col. B1, D4)	A=$1,000 or less F=$50,001 - $100,000	B=$1,001-$2,500 G=$100,001-$1,000,000	C=$2,501-$5,000 H1=$1,000,001-$5,000,000	D=$5,001-$15,000 H2=More than $5,000,000	E=$15,001-$50,000
2	Value Codes: (See Col. C1, D2)	J=$15,000 or less N=$250,001-$500,000 P3=$25,000,001-$50,000,000	K=$15,001-$50,000 O=$500,001-$1,000,000	L=$50,001 - $100,000 P1=$1,000,001-$5,000,000 P4=More than $50,000,000	M=$100,001-$250,000 P2=$5,000,001-$25,000,000	
3	Value Method Codes: (See Col. C2)	Q=Appraisal U=Book value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market	

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting: JOHN G. ROBERTS, JR.

Date of Report: 5/13/01

VII. Page 5 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-57 of instructions.)*

	A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amt. Code1 (A-H)	B. Income during reporting period (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. Gross value at end of reporting period (2) Value Method Code3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	D. If not exempt from disclosure (2) Date: Month-Day	D. If not exempt from disclosure (3) Value Code2 (J-P)	D. If not exempt from disclosure (4) Gain Code1 (A-H)	D. If not exempt from disclosure (5) Identity of buyer/seller (if private transaction)
	NONE (No reportable income, assets,									
71	VANGUARD INT'L GR	C	DIV	K	T					
72	VANGUARD SM CAP INDEX	D	DIV	L	T					
73	PILGRIM VV EM FUND		NONE	J	T					
74	ALLFIRST BANK M. MKT	E	INT	O	T					
75	ARK MONEY MKT	A	DIV	J	T					
76	CMA MONEY FUND	C	DIV	L	T					
77	C. SCHWAB MONEY MKT	A	DIV	J	T					
78	C. SCHWAB MUNI M FUND	C	DIV	L	T					
79	FIRST UNION CHECKING	A	INT	J	T					
80	CHEVY CHASE BANK	A	INT	J	T					
81	1/8 INTEREST IN COTTAGE, KNOCKLONG, LIMERICK, IRE.	A	RENT	J	W					
82	HOLAN & HARTION L.L.P. INVESTMENT FUND	A	INT	J	W					
83	SHAW PITTMAN INVESTORS - 2000 L.L.C.	A	INT	J	W					
84										
85										
86										
87										

1	Income/Gain Codes: (See Col. B1, D4)	A=$1,000 or less F=$50,001 - $100,000	B=$1,001-$2,500 G=$100,001-$1,000,000	C=$2,501-$5,000 H1=$1,000,001-$5,000,000	D=$5,001-$15,000 H2=More than $5,000,000	E=$15,001-$50,000
2	Value Codes: (See Col. C1, D3)	J=$15,000 or less N=$250,001-$500,000 P3=$25,000,001-$50,000,000	K=$15,001-$30,000 O=$500,001-$1,000,000	L=$30,001 - $100,000 P1=$1,000,001-$5,000,000 P4=More than $50,000,000	M=$100,001-$250,000 P2=$5,000,001-$25,000,000	
3	Value Method Codes: (See Col. C2)	Q=Appraisal U=Book value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market	

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting: JOHN G. ROBERTS, JR.

Date of Report: 5/13/01

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)

IX. CERTIFICATION.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app., § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature: John G. Roberts, Jr. Date: 5/13/01

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. App., § 104.)

FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure
Administrative Office of the
United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, D.C. 20544

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in banks	700	000	00	Notes payable to banks—secured		0	
U.S. Government securities—add schedule		0		Notes payable to banks—unsecured		0	
Listed securities—add schedule	2,107	021	21	Notes payable to relatives		0	
Unlisted securities—add schedule	2	000	00	Notes payable to others		0	
Accounts and notes receivable:		0		Accounts and bills due		0	
Due from relatives and friends		0		Unpaid income tax		0	
Due from others		0		Other unpaid tax and interest		0	
Doubtful		0		Real estate mortgages payable—add schedule	270	272	27
Real estate owned—add schedule	435	000	00	Chattel mortgages and other liens payable		0	
Real estate mortgages receivable		0		Other debts—itemize:		0	
Autos and other personal property	18	000	00				
Cash value—life insurance	11	911	06				
Other assets—itemize:	778	615	76				
SEE SCHEDULE							
				Total liabilities	270	272	27
				Net Worth	3,782	275	76
Total Assets	4,052	548	03	Total liabilities and net worth	4,052	548	03
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor		0		Are any assets pledged? (Add schedule.)		NO	
On leases or contracts		0		Are you defendant in any suits or legal actions?		NO	
Legal Claims		0		Have you ever taken bankruptcy?		NO	
Provision for Federal Income Tax		0					
Other special debt		0					

FINANCIAL NET WORTH STATEMENT--SCHEDULES

John Glover Roberts, Jr.

Listed Securities

Held in brokerage acct. (detail attached)	$1,899,842.17

Other Listed Securities

Allied Capital	$865.00
Blockbuster Inc.	18,300.00
Texas Instruments	114,808.08
AT&T	6,570.00
Avaya	324.66
Canadian Pacific	7,860.00
Coca-Cola	9,058.00
First Virginia	6,586.50
Lucent	3,456.00
NCR	562.80
State Street	21,050.00
Washington REIT	17,738.00

Unlisted Security

Paradim Inc. REIT Preferred	$2,000.00 (cost)

Real Estate Owned

Personal residence:	Bethesda, MD Est. value: $425,000
Wife's 1/8 interest in cottage (parents, brother, aunt and uncle own rest):	Knocklong, Limerick Ireland Est. value: $10,000

Real Estate Mortgage Payable

On personal residence: Fleet Mortgage
$270,272.27 balance
30-yr. fixed, 8.125%

Other Assets

Mutual Fund	Value
Fidelity Contrafund	$32,560.97
Fidelity Freedom 2010	2,038.06
Fidelity Low-Priced	109,959.55
Fidelity Magellan	278,718.32
Fidelity OTC	37,417.88
Fidelity Overseas	29,209.21
Janus Fund	16,455.27
Janus Enterprise	15,617.88
Janus Worldwide	28,900.57
Pilgrim Worldwide Emerging	5,390.49
American Century Growth	10,988.95
Davis Series Real Estate Fund	12,394.00
Franklin Mutual Discovery Z	5,622.00
Franklin Mutual Beacon Z	11,324.00
GAM Global C	8,579.00
Lord Abbett Dev Growth	16,525.00
Fidelity Select Energy	14,749.86
Seligman Comm A	13,519.00
TR Price European Stock	8,220.20
TR Price Sci & Tech	7,916.49
Putnam Voyager	6,214.48
Putnam New Opportunities	5,696.58
CMA Money Fund	86,848.00
Hogan & Hartson L.L.P. Investment Fund	3,750.00
Shaw Pittman Investors-2000 L.L.C.	10,000.00

Description	Quote Symbol	Total Market Value
Stocks		
AGILENT TECHNOLOGIES INC(M)	A	$ 8,894.28
AOL TIME WARNER INC(M)	AOL	646,400.00
ASTRAZENECA PLC ADR F(M)	AZN	12,735.36
SPONSORED ADR		
1 ADR REP 1 ORD		
AVAYA INC(M)	AV	118.32
ODDLOT TENDER OFFER		
EXP:05/08/01		
BECTON DICKINSON & CO(M)	BDX	6,470.00
BOEING CO(M)	BA	12,360.00
CISCO SYSTEMS INC(M)	CSCO	40,752.00
CITIGROUP INC(M)	C	49,150.00
CORVIS CORP(M)	CORV	1,370.00
DELL COMPUTER CORP(M)	DELL	167,936.00
DISNEY WALT HLDG CO(M)	DIS	18,150.00
FREDDIE MAC VOTING SHS(M)	FRE	26,320.00
GILLETTE CO(M)	G	2,836.00
HELEN OF TROY LTD(M)	HELE	3,080.00
HELLER FINANCIAL INC A(M)	HF	1,340.22
CLASS A		
HEWLETT-PACKARD COMPANY(M)	HWP	34,116.00
HILLENBRAND INDS INC(M)	HB	15,150.00
INTEL CORP(M)	INTC	98,912.00
IRISH INVESTMENT FUND(M)	IRL	7,530.00

(M) Assets held in margin account

E4C2902-013591 315420

Description	Quote Symbol	Total Market Value
JDS UNIPHASE CORPORATION(M)	JDSU	$ 2,139.00
JOHNSON & JOHNSON(M)	JNJ	9,648.00
LORAL SPACE & COMMUN LTD(M)	LOR	2,370.00
LUCENT TECHNOLOGIES INC(M)	LU	4,004.00
MERCK & CO INC(M)	MRK	15,194.00
MICROSOFT CORP(M)	MSFT	271,000.00
MOTOROLA INCORPORATED(M)	MOT	13,995.00
NIKE INC CLASS B(M)	NKE	4,181.00
NOKIA CORP SPON ADR F(M) 1 ADR REP 1 NOKIA CORPS	NOK	54,704.00
NOVELLUS SYSTEMS INC(M)	NVLS	16,545.00
P M C SIERRA INC(M)	PMCS	4,160.00
PAC CENTY CYBERWKS ADR F(M) SPONSORED ADR 1 ADR REP 10 ORD	PCW	778.80
PETRO GEO SVCS A/S ADR F(M) 1 ADR REP 1 ORD	PGO	2,174.00
PFIZER INCORPORATED(M)	PFE	12,990.00
PROCTER & GAMBLE CO(M)	PG	6,005.00
PT PASIFIK SATELIT ADR F(M) NUSANTARA; SPONSORED ADR 1 ADR REP 3 ORD	PSNRY	3,000.00
SCHLUMBERGER LTD F(M)	SLB	6,630.00
SCIENTIFIC ATLANTA INC(M)	SFA	23,092.00
SYNGENTA AG ADR F(M) SPONSORED ADR 1 ADR REP 1/5 ORD	SYT	333.96

(M) Assets held in margin account

E4C2902-013591 315421
2013168 045666

Description	Quote Symbol	Total Market Value
TEXAS INSTRUMENTS INC(M)	TXN	$ 15,480.00
THERMO ELECTRON CORP(M)	TMO	31,948.32
TRANSOCEAN SEDCO FOREX F(M)	RIG	1,031.32
WORLDCOM INC(M)	WCOM	3,650.00
XM SATELLITE RADIO HLDGS(M) CLASS A	XMSR	52,500.00
Total Market Value of Stocks		**$ 1,711,173.58**
Stock Funds		
MERCURY HW INTERNATIONAL(M) ♀ VALUE CL I FUND	MIVIX	$ 39,353.80
TORRAY FUND(M)	TORYX	55,735.71
VANGUARD INTL GROWTH POR(M) ♀ TFOLIO	VWIGX	35,535.34
VANGUARD SMALL CAP INDEX(M) FUND	NAESX	58,043.74
Total Market Value of Stock Funds		**$ 188,668.59**

(M) Assets held in margin account
♀ Dividends paid on this security will be automatically reinvested

E4C2902-013591 315422

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

Jeffrey Stuart Sutton.

2. Address: List current place of residence and office address(es).

Residence: Bexley, Ohio.

Office: Jones, Day, Reavis & Pogue, 41 S. High Street, Suite 1900, Columbus, Ohio 43215.

3. Date and place of birth. **10/31/60; Dhahran, Saudi Arabia.**

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

Married; Margaret Kelly Southard; mother and homemaker.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Williams College (1979-1983; BA 1983).
The Ohio State University College of Law (1987-1990; LLB 1990).

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

Williams College (assistant varsity soccer coach) 1983.
Piper & Marbury (paralegal) 1984-1985.
The Columbus Academy (teacher) 1985-1987.

Emens, Hurd, Kegler & Ritter (summer associate) 5/88-8/88.
Jones, Day, Reavis & Pogue (summer associate and clerk) 5/89-8/90.
The Ohio State University College of Law (research assistant to Professor Howard Fink) 1989-1990.
United States Court of Appeals, Second Circuit (law clerk to Judge Thomas J. Meskill) 1990-1991.
The Supreme Court of the United States (law clerk to the Honorable Lewis F. Powell, Jr. (Ret.)) 1991-1992.
The Supreme Court of the United States (law clerk to the Honorable Antonin Scalia) 1991-1992.
Jones, Day, Reavis & Pogue (associate) 9/92-6/95.
The Ohio State University College of Law (adjunct professor of law) 1994- present.
State Solicitor of Ohio -- 6/95-12/98.
The Federalist Society -- Columbus Chapter (board member) 1998 (est.)- present.
Jones, Day, Reavis & Pogue (of counsel and partner) 12/98 - present.
The Jeffrey Company (director) 6/99-present.
The Federalist Society -- Separation of Powers and Federalism practice group (officer) 1998 (est.)- present.
The Ohio Supreme Court Committee on Dispute Resolution (board member) 1999-2001.
ProMusica Chamber Orchestra of Columbus (board member) 1999-present.
Williams College Central Ohio Alumni President -- 1994(est.)-present.
The Equal Justice Foundation (board member) 2000-present.
The Ohio State University College of Law Alumni Association (President) 2000-present.
Williams College Alumni Society (board member) 2000-present.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

No.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Order of the Coif.
Williams College - Lehman scholar (chosen on the basis of leadership and achievement in extra-curricular, service-related, and academic areas).

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Columbus Bar Association.
Ohio Bar Association.
American Bar Association.
The Federalist Society (Columbus Chapter -- executive committee; Separation of Powers and Federalism practice group (officer) - 1998-present).

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

I do not belong to any organizations that are active in lobbying before public bodies.

I currently belong to the following organizations: Broad Street Presbyterian Church, the Federalist Society, the Equal Justice Foundation, the Columbus Bar Association, the Columbus Athletic Club, the Columbus Club, and the Columbus Country Club.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

U.S. Supreme Court (1994).
Ohio Supreme Court (1990).
U.S. Court of Appeals for the Sixth Circuit (1993).
U.S. District Court, Southern District of Ohio (1993).
U.S. Court of Appeals for the Fifth Circuit (1994).
U.S. Court of Appeals for the Seventh Circuit (2000).

U.S. District Court, Central District of Illinois (6/00).
U.S. Court of Appeals for the Second Circuit (2001).

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

"Supreme Court 2000 - A Review and Preview," The Federalist Paper (Summer 2000) (attached).

"Federalism 2000: A Review of the Supreme Court's Federalism Decisions," Review of Federalism & Separation of Powers Law (Fall 2000) (attached).

"Application of Hostile Work Environment Claims to Independent Contractors," speech and handout prepared for Fifth Annual EPLI Forum (Feb. 7-8, 2000) (NYC) (attached).

"Justice Powell's Path Worth Following," The Columbus Dispatch (10/24/98) (attached).

"Gangs' Rights Don't Compare With Citizens,'" The Columbus Dispatch (12/14/98) (attached).

"*City of Boerne v. Flores*: A Victory for Federalism," Federalism and Separation of Powers News (Fall 1997) (attached).

"Supreme Court Highlights," The Federalist Paper (November 1994) (attached).

Note, "Measuring Damages Under the United Nations Convention on the International Sale of Goods," 50 Ohio St. L.J. 737 (1989) (attached).

"Guide to the Ohio Rules of Civil Procedure," (1992) (student researcher).

In addition, I have given numerous speeches to local bar associations, Ohio judges (through the Ohio Judicial College), The Federalist Society, and Continuing Legal Education seminars regarding the United States Supreme Court and the Ohio Supreme Court. In each of these instances, I either spoke from informal notes or spoke extemporaneously.

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent; 1998.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I have not served as a judge.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

Not applicable.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

State Solicitor of Ohio -- 1995-1998. Appointed position. I have not run for elective public office.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

United States Court of Appeals, Second Circuit (law clerk to the Honorable Thomas J. Meskill - 1990-1991).
The Supreme Court of the United States (law clerk to the Honorable Lewis F. Powell, Jr., Associate Justice (ret.) 1991-1992).
The Supreme Court of the United States (law clerk to the Honorable Antonin Scalia, Associate Justice - 1991-1992).

2. whether you practiced alone, and if so, the addresses and dates;

I have never been a sole practitioner.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

Jones, Day, Reavis & Pogue (interim clerk) 5/90-8/90. 41 South High Street, Columbus, OH 43215.
Jones, Day, Reavis & Pogue (associate) 9/92-6/95. Columbus, OH
State Solicitor of Ohio -- 6/95-12/98. 30 East Broad St., 17th Floor, Columbus, OH 43215.
The Ohio State University College of Law (adjunct professor) 1994-present. 55 West 12th Ave., Columbus, OH 43210.
Jones, Day, Reavis & Pogue (of counsel and partner) 12/98 - present. Columbus, OH.

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

Appellate practice; constitutional law; commercial litigation; teaching.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

As State Solicitor of Ohio, I regularly defended various State agencies in state and federal courts, and often wrote *amici curiae* briefs on behalf of groups of States at the United States Supreme Court. Most of my cases involved statutory interpretation and constitutional claims arising under state and federal law. In view of the nature of the job, I concentrated on appellate work and specifically cases in the United States Supreme Court, the Sixth Circuit and the Ohio Supreme Court, but also handled several trial-level cases as well.

As a lawyer at Jones Day, I have continued to represent States in the United States Supreme Court -- frequently in the area of federalism. In addition, both before becoming State Solicitor and after, I have had an extensive practice at Jones Day on behalf of commercial and individual litigants that has run the gamut from constitutional law to straight appellate practice to run-of-the-mill business disputes. Throughout my tenure at Jones Day, I also have had a substantial motions practice, involving discovery disputes, evidentiary issues, dispositive motions and trial-level procedural matters.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

I have appeared frequently in court. I have argued 9 cases in the United States Supreme Court, 12 cases in the Ohio Supreme Court, 6 cases in the United States Courts of Appeal, and numerous cases in the state and federal trial courts.

2. What percentage of these appearances was in:
   (a) federal courts; 70% (est.)
   (b) state courts of record; 25% (est.)

(c) other courts. 5% (est.)

3. What percentage of your litigation was:
(a) civil; 80% (est.)
(b) criminal. 20% (est.)

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

Appeals:

United States Supreme Court
Arguments and merits briefing -- 9 cases (by the end of this Term) (chief counsel).
Other merits briefs and amicus briefs -- roughly 30 briefs (chief counsel).
Other merits briefs and amicus briefs -- roughly 5 briefs (associate counsel).

Federal Courts of Appeals
Arguments and merits briefing -- 6 cases (chief counsel).
Other merits briefs and amicus briefs -- roughly 5 briefs (chief counsel).
Other merits briefs and amicus briefs -- roughly 5 briefs (associate counsel).

State Supreme Courts
Arguments and merits briefing -- 12 cases (chief counsel).
Other merits briefs and amicus briefs -- roughly 10 cases (chief counsel).
Other merits briefs and amicus briefs -- roughly 10 cases (associate counsel).

State Courts of Appeals
Arguments and merits briefing -- 2 cases (chief counsel).

State and Federal Trial Courts:

Trials -- 10 cases (chief counsel).
5 cases (associate counsel).

5. What percentage of these trials was:
(a) jury;
(b) non-jury. 100%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

(i) *Hohn v. United States*, 524 U.S. 236 (1998). Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), an appeal from the denial of a habeas corpus petition may not be taken unless a circuit justice or judge issues a certificate of appealability. The Eighth Circuit rejected Mr. Hohn's application for a certificate of appealability from a rejected habeas claim, and he sought review before the United States Supreme Court. At issue before the Court was whether it had jurisdiction under the AEDPA to review denials of applications for certificates of appealability by a circuit judge or a court of appeals panel. Because Mr. Hohn and the United States (the defendant in the case) believed that the Court had jurisdiction to review the Eighth Circuit's decision, the Court *sua sponte* appointed an *amicus curiae* to argue the contrary position. I was invited to brief and argue the jurisdictional point in 1997 on behalf of the Court, and ultimately lost this statutory interpretation question 5-4.

Co-Counsel: None.
Opposing Counsel: Matthew Roberts, Solicitor General's Office, Department of Justice, Washington, D.C. 20530 (202) 514-2217;

Eileen Penner, Mayer, Brown & Platt, 1909 K Street, N.W. Washington, D.C. 20006-1101 (202) 263-3000.

(ii) *Gatton v. Goff*, 86 Ohio St.3d 1 (1999). This case involved a challenge to the Ohio pilot school vouchers program, which was designed to give low-wealth, inner-city children an option of attending private secular and sectarian schools with public funds. Plaintiffs attacked the validity of the program on federal and state constitutional grounds, and brought the challenge in state court. From 1996 to 1998, I led the State's defense of the case at all three levels of the state courts and argued the case on behalf of the State in each stage. Ultimately, the Ohio Supreme Court rejected plaintiffs' claim that the program violated the Establishment Clause of the United States Constitution, and also rejected plaintiffs' claim that the program violated state constitutional prohibitions against aid to religious schools and the state constitution's uniformity clause. The Court, however, did find a violation of the State Constitution's single-subject requirement. The state legislature, however, amended the legislation to correct this deficiency.

Co-counsel: Sharon Jennings, Assistant Attorney General, 30 E. Broad Street, 15th Floor, Columbus, OH 43215 (614) 644-7250. Opposing counsel: Robert H. Chanin, Bredhoff & Kaiser, 805 Fifteenth Street, N.W., Suite 1000 Washington, D.C. 20005 (202) 842-2600; Marvin E. Frankel, Kramer, Levin, Naftalis & Frankel, LLP, 919 Third Avenue New York, New York 10022 (212) 715-9100.

(iii) *City of Boerne v. Flores*, 521 U.S. 507 (1997). The city of Boerne, Texas challenged the validity of the Religious Freedom Restoration Act ("RFRA") on the ground that it exceeded Congress's enforcement powers under section 5 of the Fourteenth Amendment. At the United States Supreme Court in 1996 and 1997, I filed an *amici curiae* brief on behalf of roughly a dozen States asking the Court to grant certiorari in the case, then filed a brief on the merits on behalf of the States as well. I was given 15 minutes by the Court to argue on behalf of the *amici* States. Ultimately, the Court invalidated RFRA on the ground that it was not a proportionate and congruent exercise of the national legislature's section 5 powers.

Co counsel: Robert C. Maier, Todd Marti, Assistant Attorneys General, State Office Tower, 30 E. Broad Street, 17th floor, Columbus, OH 43215-3428 (614) 466-8980.
Opposing counsel: Douglas Laycock, Associate Dean for Research, University of Texas School of Law, 727 East 26th Street, Austin, Texas 78705 (512) 471-5151; Walter Dellinger, O'Melveny & Myers, 555 13th Street, NW, Washington, D.C. 20004-1109 (202) 383-5300.

(iv) *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000). At stake was whether Congress permissibly abrogated the States' constitutional immunity from suit under section 5 of the Fourteenth Amendment when it enacted the Age Discrimination Employment Act ("ADEA"). When the case reached the United States Supreme Court in 1999, I argued on behalf of the State defendants (two Florida agencies and one Alabama agency) that while the plaintiffs could bring injunction actions to enforce the ADEA against their state employers, they could not bring money-damages actions against them in light of the Tenth and Eleventh Amendments. The Court ultimately ruled that Congress had failed to show a pattern and practice of constitutional violations by the States against their elderly citizens that would justify this exercise of section 5 power.

Co-counsel: Louis F. Hubener, Amelia Beisner, Assistant Attorneys General, The Capitol FL-01, Tallahassee, FL 32399-1050 (850) 414-3300 and Bill Pryor, Attorney General of Alabama, Alice Ann Byrne, Jack Park, Assistant Attorneys General, State House, 11 South Union Street, Montgomery, AL 36130 (334) 242-7300.
Opposing counsel: Barbara Underwood, Deputy Solicitor General, Department of Justice, Washington, D.C. 20530 (202) 514-2217; Jeremiah A. Collins, Bredhoff & Kaiser, 1000 Connecticut Avenue, N.W., Suite 1300, Washington, D.C. 20036 (202) 833-9340.

(v) *Garrett v. Alabama Bd. of Regents* (U.S. Supreme Court Feb. 21, 2001). Like *Kimel*, this case involved a section 5 challenge to the abrogation provision of a federal law -- in this instance the Americans with Disabilities Act ("ADA"). Last year, I argued the case at the United States Supreme Court on behalf of the state defendants (a state university and an Alabama state agency) and contended that Congress had not established the requisite predicate for imposing money-damages remedies on non-

consenting States. The Court ultimately refused to enforce the abrogation provision of the ADA against State defendants. Reasoning that Congress could freely create ADA injunction claims against state employers under *Ex Parte Young*, the Court held that the legislature could not do the same with respect to money-damages actions -- in view of the absence of a pattern and practice of constitutional violations of the rights of state employees.

Co-counsel: Bill Pryor, Attorney General of Alabama, Margaret L. Fleming, Assistant Attorney General, State House, 11 South Union Street, Montgomery, AL 36130 (334) 242-7300.
Opposing counsel: Seth P. Waxman, Solicitor General, U.S. Department of Justice, 950 Pennsylvania Avenue, N.W., Washington D.C. 20530 (202) 514-2202; Michael Gottesman, Georgetown University Law School, 600 New Jersey Avenue, N.W., Washington, D.C. 20001 (202) 662-9408.

(vi) *American Civil Liberties Union of Ohio v. Capitol Square Review and Advisory Board*, 20 F.Supp.2d 1176 (S.D. Ohio 1998). in 1997, plaintiffs challenged the validity of the Ohio Motto ("With God All Things Are Possible") under the Establishment Clause of the United States Constitution. I led the State's defense of the claim, and was first chair of the bench trial in the case. The district court (Graham, J.) upheld the validity of the motto, reasoning that it was not dissimilar to the national motto ("In God We Trust") and reasoning further that such non-sectarian and general references to God were found in virtually every major religion and accordingly could not be an establishment of any one of them. After I returned to Jones Day, a Sixth Circuit panel reversed Judge Graham's decision 2-1. Just recently, however, a 9-4 decision by the *en banc* Court written by Judge Nelson upheld the district court's decision. *See* 2001 FED App. 0073P (March 16, 2001). At the *en banc* stage, I filed a brief *amici curiae* on behalf of Franklin County, Ohio and the Jewish Policy Center, arguing that the state motto should be upheld.

Co-counsel: David M. Gormley, Ohio Attorney General's Office, 30 E. Broad Street, 17th Floor, Columbus, OH 43215 (614) 466-8980.
Opposing counsel: Mark B. Cohn, McCarthy, Lebit, Crystal & Haiman, 1800 Midland Building, 101 Prospect Avenue, West Cleveland, OH 44115 (216) 696-1422.

(vii) *Ohio Civil Rights Commission v. Case Western Reserve University*, 99 Ohio St.3d 1 (1996). Case Western University's medical school denied admission to Cheryl Fischer on the ground that she was blind and therefore could not properly complete all requirements of the medical school curriculum. She claimed that the medical school's decision discriminated on the basis of disability under state law and filed an action to that effect before the Ohio Civil Rights Commission. When the Civil Rights Commission granted her relief, it fell to the Ohio Attorney General's office to defend the Commission's decision through the state courts. As State Solicitor, I argued the case at the Ohio Supreme Court in 1996 and ultimately lost by a 4-3 vote. A plurality of three Justices determined that an accommodation of Ms. Fischer's disability would fundamentally alter the medical school's program, and the fourth justice concurred in the judgment.

Co-counsel: Thomas A. Downie, Gary, Naegele & Theado, 446 Broadway Lorain, OH 44052-1797 (440) 244-4809.
Opposing counsel: Mark J. Valponi, Kelley, McCann & Livingstone, 3500 BP Tower, 200 Public Square Cleveland, OH 44114-2302 (216) 241-3141.

(viii) *DeRolph v. State of Ohio*, 78 Ohio St.3d 193 (1997); 89 Ohio St.3d 1 (2000); 98 Ohio Misc.2d 1 (1999). For nearly ten years, the State of Ohio has defended a claim that its system for funding public schools violates the State Constitution's "thorough and efficient" clause. Primarily, the claimants have contended that the funding system places undue reliance on local property taxes and does not provide an adequate education to lower-wealth school districts. Since 1996, I have defended the case on behalf of the State in two instances at the Ohio Supreme Court and in one instance during a remand trial at the state court of common pleas. The State did not prevail in any of these instances.

Co-counsel: Lynne Ready, Assistant Attorney General, 30 E. Broad Street, 15th Floor, Columbus, OH 43215 (614) 644-7250.
Opposing counsel: Nicholas A. Pittner, Bricker & Eckler, 100 South Third Street, Columbus, OH 43215 (614) 227-2300.

(ix) *Becker v. Montgomery* (pending at the United States Supreme Court). Dale Becker, an inmate at the Chillicothe, Ohio Correctional Institute, filed a *pro se* section 1983 action against a variety of state officials regarding the conditions of his confinement. When he lost the case in federal district court, he appealed to the Sixth Circuit. Because he allegedly did not sign his notice of appeal, the Sixth Circuit *sua sponte* dismissed the appeal as jurisdictionally barred in an unpublished decision. No. 99-00825 (May 12, 2000). Mr. Becker filed a *pro se* certiorari petition, and the Supreme Court granted review. The Court appointed me to argue Mr. Becker's case pro bono, which I did on April 16, 2001. I will present two arguments on his behalf -- one, that the signature requirement is met by typing one's name on the notice of appeal as opposed to writing it in pen and ink and, two, that the signature requirement at all events is not jurisdictional in nature.

Co-counsel: Ronald E. Laymon, Chad A. Readler, Jones, Day, Reavis & Pogue, 1900 Huntington Center, 41 S. High Street, Columbus, OH 43215 (614) 469-3939; David Gormley, 30 E. Broad Street, 17th Floor, Columbus, OH 43215 (614) 466-8980.
Opposing counsel: Stewart A. Baker, Steptoe & Johnson, 1330 Connecticut Avenue, N.W., Washington, D.C. 20036 (202) 429-3000.

(x) *Alexander v. Sandoval* (United States Supreme Court -- decided on April 24, 2001; lower court decision -- 197 F.3d 484 (11th Cir. 1999)). Plaintiffs brought a class action against the Alabama Department of Public Safety and its Director. They claimed that the State's decision to give driver-license examinations only in English violated Title VI of the Civil Rights Act of 1964, which prohibits discrimination by recipients of federal funding on the basis of national origin. The State lost at the trial and appellate courts, and last year hired me to argue the case at the United States Supreme Court. At issue is whether the legislature may *imply* a right of action against a state defendant (as opposed to creating one expressly) and whether Congress meant in this instance to create a private right of action for violation of agency regulations promulgated under Title VI. The Court recently ruled for the State, concluding that Congress did not mean to create a private right of action to enforce regulations promulgated by a federal agency.

Co-counsel: Bill Pryor, Attorney General of Alabama, Margaret L. Fleming, Assistant Attorney General, State House, 11 South Union Street, Montgomery, AL 36130 (334) 242-7300.
Opposing counsel: J. Richard Cohen, Southern Poverty Law Center, 400 Washington Avenue, P.O. Box 2087, Montgomery, AL 36102 (334) 264-0286; Eric Schnapper, University of Washington School of Law, 1100 N.E. Campus Parkway, Seattle, WA 98105 (206) 616-3167.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived).

a. I was hired by a Fortune 100 company to lead a six-lawyer review of its litigation practices in general and its discovery practices in particular.

b. Since 1994, I have been teaching seminars on the federal and state constitutional law at The Ohio State University College of Law, and lecturing extensively on both subjects to local bar associations, continuing legal education classes, and state court judges.

c. I have testified before Congress regarding the impact of *City of Boerne v Flores* and before the Ohio General Assembly regarding *DeRolph v. State of Ohio*.

d. From 1995 to the present, both while I was the State Solicitor of Ohio and while practicing at Jones Day, I have spent a considerable amount of time working with state lawyers who have cases pending before the United States Supreme Court. I have assisted them both by organizing and participating in moot courts to prepare state attorneys for their oral arguments and by helping them to edit their merits briefs.

e. Since being appointed to the Ohio Supreme Court Committee on Alternative Dispute Resolution, I have devoted time to developing better ADR procedures in Ohio and to developing my own ADR practice.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

a. I currently receive exceedingly modest dividends from two stocks (amounting to no more than $10/year).
b. At Jones Day, I have a capital account. Should I become a judge, the firm will return it to me within three years.
c. At Jones Day, I have a 401 retirement plan.
d. Through the State of Ohio, I have deferred compensation and retirement plans.
e. I have not otherwise made any arrangements to be compensated in the future for any financial or business interest.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

In the event I become a judge, I will establish a procedure for screening cases to determine whether they present a conflict of interest. That procedure will account for cases involving Jones Day and cases involving my former clients. I will ensure that this procedure complies with the Judicial Code, and will ensure that all compensation and capital accounts from Jones Day are paid to me within three years of my initial service on the bench.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

See attached financial disclosure report.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

See attached net worth statement.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

No.

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in banks	est.	10	000	Notes payable to banks-secured	est	3	500
U.S. Government securities-add schedule	no			Notes payable to banks-unsecured	no		
Listed securities--AT&T; Wendy's	est.	1	500	Notes payable to relatives	no		
Unlisted securities--add schedule	no			Notes payable to others -- Jones Day partner loan		30	000
Accounts and notes receivable:	no			Accounts and bills due (except monthly bills)	no		
Due from relatives and friends	no			Unpaid income tax	no		
Due from others	no			Other unpaid income and interest	no		
Doubtful	no			Real estate mortgages payable--Norwest Mortgage Company (30 year fixed)		166	200
Real estate owned-residence	est.	275	000	Chattel mortgages and other liens payable	no		
Real estate mortgages receivable	no			Other debts-itemize:	no		
Autos and other personal property	est.	35	000				
Cash value-life insurance	no						
Other assets itemize:							
Trust in which wife is beneficiary (est. market value)	est.	306	000				
Jones, Day, Reavis & Pogue (401K and Keogh)	est.	70	000				
Children's College Savings Accounts	est.	15	000	Total liabilities		199	700
State of Ohio Deferred Compensation	est.	23	000	Net Worth		636	300
Ohio State Teachers Retirement System	est.		500				
Ohio Personal Employees Retirement System	est.	20	000				
Fidelity IRA Accounts	est.	80	000				
Total Assets		836	000	Total liabilities and net worth			
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor	no			Are any assets pledged? (Add schedule)	no		
On leases or contracts	no			Are you defendant in any suits or	no		

				legal actions?			
Legal Claims	no			Have you ever taken bankruptcy?	no		
Provision for Federal Income Tax	no						
Other special debt	no						

AO-10
Rev. 1/2001

FINANCIAL DISCLOSURE REPORT
NOMINATION FORM

Report Required by the Ethics in Government Act of 1978, (5 U.S.C. App., §§101-111)

1. Person Reporting *(Last name, first, middle initial)*	2. Court or Organization	3. Date of Report
Sutton, Jeffrey S.	U.S. Court of Appeals	5/14/01

4. Title *(Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)*	5. Report Type (check appropriate type)	6. Reporting Period
U.S. Court of Appeals Judge	_X_ Nomination, Date 5/9/01 ___ Initial ___ Annual ___ Final	1/1/00 to 4/30/01

7. Chambers or Office Address	8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations.
Jones, Day, Reavis & Pogue 41 S. High Street, Suite 1900 Columbus, Ohio 43215	Reviewing Officer _____ Date _____

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.

I. POSITIONS. *(Reporting individual only; see pp. 9-13 of Instructions.)*

	POSITION	NAME OF ORGANIZATION/ENTITY
☐	NONE (No reportable positions.)	
1	Partner	Jones, Day, Reavis & Pogue
2	Director	The Jeffrey Company
3	Director	ProMusica Chamber Orchestra of Columbus
4	President	The Ohio State University College of Law Alumni Society
5	Director	The Equal Justice Foundation
6	Officer	The Federalist Society -- Separation of Power and Federalism Practice Group
7	Adjunct Faculty	The Ohio State University College of Law
8	President	Williams College – Central Ohio Alumni Organization
9	Board Member	Williams College – Executive Committee of the Alumni Society
10	Director	Ohio Supreme Court Committee on Dispute Resolution
11	Consultant	The Ohio Judicial College

II. AGREEMENTS. *(Reporting individual only; see pp. 14-16 of Instructions.)*

	DATE	PARTIES AND TERMS
☐	NONE (No reportable agreements.)	
1	1995	Public Employees' Retirement System; unvested retirement account.
2	1997	State Teacher's Retirement System; unvested retirement account.
3	1992	Jones, Day, Reavis & Pogue – Keogh and 401 Accounts.

III. NON-INVESTMENT INCOME. *(Reporting individual and spouse; see pp. 17-24 of Instructions.)*

	DATE	SOURCE AND TYPE	GROSS INCOME
☐	NONE (No reportable non-investment income.)		
1	1999	Ohio Attorney General	$ 13,364
2	1999	Jones, Day, Reavis & Pogue	$ 190,000
3	1999	The Jeffrey Company	$ 29,600
4	2000	Jones, Day, Reavis & Pogue	$ 240,000
	2000	The Jeffrey Company	(est.) 27,000
	2001	Jones, Day, Reavis & Pogue	330,000
5	2001	The Jeffrey Company	$ (est.) 27,000

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Jeffrey S. Sutton	4/4/01

IV. REIMBURSEMENTS – transportation, lodging, food, entertainment.
(Includes those to spouse and dependent children. See pp. 25-27 of Instructions.)

	SOURCE	DESCRIPTION
☐	NONE (No such reportable reimbursements.)	
1	Exempt	
2		
3		
4		
5		
6		
7		

V. GIFTS. *(Includes those to spouse and dependent children. See pp. 28-31 of Instructions.)*

	SOURCE	DESCRIPTION	VALUE
☐	NONE (No such reportable gifts.)		
1	Exempt		$
2			$
			$
4			$

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting: Jeffrey S. Sutton

Date of Report: 5/14/01

VII. Page 3 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-57 of Instructions.)*

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure*	B. Income during reporting period (1) Amt. Code1 (A-H)	B. Income during reporting period (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. Gross value at end of reporting period (2) Value Method Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	D. Transactions during reporting period (2) Date Month-Day	D. Transactions during reporting period (3) Value Code2 (J-P)	D. Transactions during reporting period (4) Gain Code1 (A-H)	D. Transactions during reporting period If not exempt from disclosure (5) Identity of buyer/seller (if private transaction)
☐ NONE (No reportable income, assets, or transactions)					Exempt				
25 Bristol Myers common stock	A	Div.	J	T					
26 Cisco common stock	A	Div.	J	T					
27 Citigroup common stock	A	Div.	J	T					
28 Comcast common stock	A	Div.	J	T					
29 Dell common stock	A	Div.	J	T					
30 Du Pont common stock	A	Div.	J	T					
31 Exxon common stock	A	Div.	J	T					
32 GE common stock	A	Div.	J	T					
33 Harley Davidson common stock	A	Div.	J	T					
34 Home Depot common stock	A	Div.	J	T					
35 Intel common stock	A	Div.	J	T					
36 IBM common stock	A	Div.	J	T					
37 JP Morgan common stock	A	Div.	J	T					
38 Merck common stock	A	Div.	J	T					
39 Microsoft common stock	A	Div.	J	T					
40 Schlumberger Ltd. common stock	A	Div.	J	T					
41 Solectron common stock	A	Div.	J	T					

1 - Income/Gain Codes: (See Col. B1, D4) A-$1,000 or less; B-$1,001-$2,500; C-$2,501-$5,000; D-$5,001-$15,000; E-$15,001-$50,000; F-$50,001-$100,000; G-$100,001-$1,000,000; H1-$1,000,001-$5,000,000; H2-More than $5,000,000

2 - Value Codes: (See Col. C1, D3) J-$15,000 or less; K-$15,001-$50,000; L-$50,001-$100,000; M-$100,001-$250,000; N-$250,001-$500,000; O-$500,001-$1,000,000; P1-$1,000,001-$5,000,000; P2-$5,000,001-$25,000,000; P3-$25,000,001-$50,000,000; P4-More than $50,000,000

3 - Value Method Codes: (See Col. C2) Q-Appraisal; R-Cost (real estate only); S-Assessment; T-Cash Market; U-Book value; V-Other; W-Estimated

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Jeffrey S. Sutton	5/14/01

VII. Page 4 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-57 of Instructions.)*

A Description of Assets (including trust assets)	B Income during reporting period (1) Amt. Code1 (A-H)	B (2) Type (e.g., div., rent or int.)	C Gross value at end of reporting period (1) Value Code2 (J-P)	C (2) Value Method Code (Q-W)	D Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	D If not exempt from disclosure (2) Date Month-Day	D (3) Value Code2 (J-P)	D (4) Gain Code1 (A-H)	D (5) Identity of buyer/seller (if private transaction)
Place "(X)" after each asset exempt from prior disclosure									
☐ NONE (No reportable income, assets, or transactions)					Exempt				
42 Sprint common stock	A	Div.	J	T					
43 Tyco common stock	A	Div.	J	T					
44 Wal-Mart common stock	A	Div.	J	T					
45 Wells Fargo common stock	A	Div.	J	T					
46 Worldcom common stock	A	Div.	J	T					
47 AT&T Corp.	A	Int.	J	W					
48 Du Pont	A	Int.	J	W					
49 Household Finance Corporation	A	Int.	K	W					
50 U.S. Treasury Bills	B	Int.	K	W					
51 Armada Money Market Fund	A	Int.	J	W					
52									
53									
54									
55									
56									
57									
58									
59									

1 Income/Gain Codes: A=$1,000 or less B=$1,001-$2,500 C=$2,501-$5,000 D=$5,001-$15,000 E=$15,001-$50,000
(See Col. B1, D4) F=$50,001-$100,000 G=$100,001-$1,000,000 H1=$1,000,001-$5,000,000 H2=More than $5,000,000

2 Value Codes: J=$15,000 or less K=$15,001-$50,000 L=$50,001-$100,000 M=$100,001-$250,000
(See Col. C1, D3) N=$250,001-$500,000 O=$500,001-$1,000,000 P1=$1,000,001-$5,000,000 P2=$5,000,001-$25,000,000
P3=$25,000,001-$50,000,000 P4=More than $50,000,000

3 Value Method Codes: Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash Market
(See Col. C2) U=Book value V=Other W=Estimated

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting: Jeffrey S. Sutton

Date of Report: 5/14/01

VII. Page 5 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-57 of Instructions.)*

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure*	B. Income during reporting period (1) Amt. Code1 (A-H)	B. Income during reporting period (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. Gross value at end of reporting period (2) Value Method Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	D. Transactions during reporting period (2) Date: Month-Day	D. Transactions during reporting period (3) Value Code2 (J-P)	D. Transactions during reporting period (4) Gain Code1 (A-H)	If not exempt from disclosure (5) Identity of buyer/seller (if private transaction)
☐ NONE (No reportable income, assets, or transactions)					Exempt				
60									
61									
62									
63									
64									
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1 Income Gain Codes: (See Col. B1, D4) A=$1,000 or less; B=$1,001-$2,500; C=$2,501-$5,000; D=$5,001-$15,000; E=$15,001-$50,000; F=$50,001-$100,000; G=$100,001-$1,000,000; H1=$1,000,001-$5,000,000; H2=More than $5,000,000

2 Value Codes: (See Col. C1, D3) J=$15,000 or less; K=$15,001-$50,000; L=$50,001-$100,000; M=$100,001-$250,000; N=$250,001-$500,000; O=$500,001-$1,000,000; P1=$1,000,001-$5,000,000; P2=$5,000,001-$25,000,000; P3=$25,000,001-$50,000,000; P4=More than $50,000,000

3 Value Method Codes: (See Col. C2) Q=Appraisal; R=Cost (real estate only); S=Assessment; T=Cash Market; U=Book value; V=Other; W=Estimated

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Jeffrey S. Sutton	5/14/01

III. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)

IX. CERTIFICATION.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app., § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature Jeffrey S. Sutton Date 5/14/01

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. App., § 104.)

FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure
Administrative Office of the
United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, D.C. 20544

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

I am currently a board member of the Equal Justice Foundation, which is devoted to providing legal services to the poor. (15-25 hours a year). In addition, I have handled several cases on a pro bono basis for the disadvantaged. These include the *Becker* case mentioned above, in which my client is an inmate in the Chillicothe Correctional Institute (200 hours); a certiorari petition filed on behalf of Joseph Kelly, also an inmate, last year (75 hours); a Sixth Circuit direct appeal on behalf of an inmate (50 hours); a district court habeas corpus petition (50 hours); an *amicus curiae* brief in the Ohio Supreme Court in support of Ohio's hate-crime law on behalf of the Anti-Defamation League, the NAACP and the Ohio Human Rights Bar Ass'n in *Ohio v. Wyannt* (50 hours), among others. All told, I devote roughly 100-200 hours per year to pro bono legal work. Through my church and the Christmas in April program, I have also been involved in other projects designed to serve the disadvantaged.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

No. I recently withdrew from two dinner groups -- the 41 Club and the Review Club. Both are informal groups that meet roughly six times a year at various locations to have dinner and to hear talks by members or outside speakers about topics of current interest. They do not have any formal or to my knowledge informal admission policies, but to my knowledge all members are men. I had been a member of the Review Club for roughly a year and a member of the 41 Club for 2-3 years.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts?

Not for the Sixth Circuit. If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

I indicated to each of the Ohio Senators that I would be interested in serving as a judge on the Sixth Circuit, and I conveyed the same information to other Ohio political leaders. Eventually I was asked to interview for the position at the White House. I then filled out a series of forms and was nominated on May 9, 2001.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the

imposition of far-reaching orders extending to broad classes of individuals;

c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

The United States Constitution establishes three branches of the National Government -- a legislative branch, an executive branch and a judicial branch. In doing so, it delegates to the political branches authority to make and implement the law and to the judicial branch authority to interpret that law. At the same time that Article III delegates authority to the federal courts to interpret federal statutes and the Constitution, it also restricts the types of disputes that they may resolve. To possess jurisdiction over a matter, federal courts must be presented with a real case or controversy, which involves parties who have a concrete interest (e.g., standing) in the litigation, which concerns parties who possess adverse interests in resolving the dispute, and which is ripe for resolution. In exercising this jurisdiction, the federal courts are not only expected to give effect to the law that Congress has enacted but also to adhere to precedent (*stare decisis*) in doing so. When Congress imposes affirmative constitutional duties upon governments and society, federal courts have an obligation to enforce those mandates -- whenever they are asked to do so in the context of cases or controversies over which they otherwise have jurisdiction.

Jeffrey Stuart Sutton

ADDENDUM TO
I. BIOGRAPHICAL INFORMATION (PUBLIC) FORM

6. Employment Record:

Change:

The Federalist Society -- Columbus Chapter (board member) 1998 (est.) - 2001 -- no longer a board member.

ProMusica Chamber Orchestra of Columbus (board member) 1999-6/01 -- no longer a board member.

10. Other Memberships:

Additions:

Lifetime Fitness

Change:

The Columbus Athletic Club -- no longer a member.

11. Court Admissions:

U.S. Court of Appeals, Fourth Circuit	active	6/30/94
U.S. Court of Appeals, Eighth Circuit	active	10/15/02
U.S. Court of Appeals, Eleventh Circuit	active	10/9/02

13. Health:

Excellent; 2002.

17. Legal Career:

C. 1. Over the last two years, I have continued practicing in a variety of areas and as a result have made many additional court appearances. These include three additional U.S. Supreme Court arguments: *United States v. Sandra L. Craft*, 122 S. Ct. 1414 (2002); *City of Columbus, et al. v. Ours Garage and Wrecker Service, et al.*, 122 S. Ct. 2226 (2002); *Bellaire v. Peabody Coal, et al. and Holland v. Bellaire Corp.* (pending). They also include numerous other trial, State Supreme Court and intermediate appellate arguments.

II. **FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)**

5. **Financial Net Worth Statement (See Attached)**

III. **GENERAL (PUBLIC)**

1. I continue to do a considerable amount of pro bono work. Over the last two years, this has included the following cases, among other projects:

Fox v. Ohio (a capital case) (200 hours); *D'Ambrosio v. Ohio* (a capital case) (50 hours); *National Coalition for Students with Disabilities v. Taft* (an effort to vindicate the voting rights of the disabled) (200 hours); Equal Justice Foundation work; and several other criminal appeals (50-100 hours).

ADDENDUM JEFFREY S. SUTTON

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in banks	est.	20	000	Notes payable to banks-secured	no		
U.S. Government securities-add schedule	no			Notes payable to banks-unsecured	no		
Listed securities--AT&T; Wendy's	est.	1	500	Notes payable to relatives	no		
Unlisted securities--add schedule	no			Notes payable to others -- Jones Day partner loan		95	000
Accounts and notes receivable:	no			Accounts and bills due (except monthly bills)	no		
Due from relatives and friends	no			Unpaid income tax	no		
Due from others	no			Other unpaid income and interest	no		
	no			Real estate mortgages payable--Norwest Mortgage Company (30 year fixed)		518	000
Real estate owned-residence	est.	610	000	Chattel mortgages and other liens payable	no		
Real estate mortgages receivable	no			Other debts-itemize:	no		
Autos and other personal property	est.	35	000				
Cash value-life insurance	no						
Other assets itemize: Unpaid firm distributions	est.	200	000				
Trust in which wife is beneficiary (est. market value)	est.	250	000				
Jones, Day, Reavis & Pogue (401K and Keogh)	est.	100	000				
Children's College Savings Accounts	est.	15	000	Total liabilities		613	000
State of Ohio Deferred Compensation	est.	23	000	Net Worth		747	500
Ohio State Teachers Retirement System	est.	1	000				
Ohio Personal Employees Retirement System	est.	20	000				
Fidelity IRA Accounts	est.	85	000				
Total Assets		1 360	500	Total liabilities and net worth	1	360	500
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor	no			Are any assets pledged? (Add schedule)	no		
On leases or contracts	no			Are you defendant in any suits or	no		

				legal actions?			
Legal Claims	no			Have you ever taken bankruptcy?	no		
Provision for Federal Income Tax	no						
Other special debt	no						

Chairman HATCH. So, with that, we will recess until further notice, and thank you all for being here, and I will move us as fast as I can on these nominations.

Thanks so much.

[Whereupon, at 9:28 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

[Additional material is being retained in the Committee files.]

QUESTIONS AND ANSWERS

February 6, 2003

The Honorable Orrin G. Hatch
Chairman, Senate Committee on the Judiciary
The United States Senate
Washington D.C.

Dear Mr. Chairman:

I hereby submit my responses to written questions posed by Senators Leahy, Kennedy, Biden, Feingold, Edwards and Grassley.

Sincerely,

S/DC

Deborah Cook

Copy: The Honorable Patrick J. Leahy

RESPONSES OF DEBORAH COOK TO FOLLOW UP QUESTIONS FROM SENATOR PATRICK LEAHY

1. **As we discussed at your hearing, I would like to know how many of your cases from the appellate court were accepted by the Ohio Supreme Court for review.**

   Although I have tried using Ohio Supreme Court resources to determine the answer to your question, Senator, the technology to allow a search of this sort did not exist when I served on the appellate court. Unfortunately, I find that I am unable to say just how many were accepted.

2. **In answer to a question at your hearing about the large number of times you have written in dissent from the majority of the Ohio Supreme Court, you explained that you are often, "somehow designated to write the dissent for other members of the court." Why do you think you have been assigned such a high number of dissents to write? You also mentioned that the high number of dissents had something to do with the fact that members of your court live in, "various parts of the state." How does that affect your proclivity to dissent from the majority of your Court?**

   My colleagues operate on a daily basis from distant offices. Thus we do not have ready access to each other for conferring about our differences of opinion, and dissents are our method of starting a discussion. Dissents can and do convince justices to change their vote.

   I write more than others because I strive to keep the work moving. The court does not assign dissents. Because my work is usually up-to-date, I find that I circulate my dissents in advance of others. My dissenting opinions are often joined by other justices who had not yet begun to draft a dissent at the time mine is circulated.

3. **At your hearing, Senator DeWine noted some cases where you ruled in favor of an employee in an employment case. I would like to know if there are any cases, either at the Ohio Court of Appeals or the Ohio Supreme Court level, in which you dissented in favor of an employee in either an employment case or in a workers' compensation case.**

   I have been unable to recall a case during my seven-year tenure where the majority of the Ohio Supreme Court decided an employment case in favor of an employer. The exception seems to be the plurality opinion in *Byrnes v LCI*. Thus, I lacked occasions to offer a dissent in favor of an employee.

   I did, however, join majority opinions that favored employees including: *Rice v. CertainTeed* (1999), 84 Ohio St.3d 417 (awarding punitive damages in civil

employment discrimination action); *Ruckman v. Cubby Drilling* (1998), 81 Ohio St.3d 117 (holding that drilling company workers injured in auto accident on way to drilling site were entitled to workers compensation); and *State ex rel Highfill v. Industrial Commission* (2001), 92 Ohio St.3d 525 (affirming an award for violation of specific safety requirement).

4. **At your hearing I asked you about the case of Gliner v. Saint-Gobain Norton Industrial Ceramics Corp., 732 N.E.2d 389 (Ohio 2000), and I mentioned that I was concerned about your vote to overturn a jury's determination. This was a case where a jury determined there was sufficient evidence to find that the plaintiffs were victims of discrimination, but the appellate court overturned that finding. A majority of the Ohio Supreme Court disagreed, and found that the appellate court applied the wrong legal standard in trying to substitute its judgment for the jury's. Your answer at the hearing seemed to focus on the fact that the appellate court wrote a long opinion and that the Supreme Court wrote a short one. But it doesn't take much space to explain that the standard you advocated was simply wrong, and that the jury verdict must stand unless reasonable minds could come to only one conclusion -- that the employer was not liable. Can you explain why you believe that in this case there was no way reasonable minds could conclude there was discrimination?**

   Ohio follows federal jurisprudence in the area of discrimination law. In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2002), the United States Supreme Court established parameters for federal appellate courts reviewing the application of Fed. R. Civ. Proc. 50 to McDonnell Douglas cases, and emphasized its determination not to "insulate an entire category of employment discrimination cases from review under Rule 50." The majority opinion applied a "some evidence" standard instead of the appropriate Civ. Rule 50 standard in the manner the recently announced *Reeves* decision counsels. My view was that the majority failed to apply the standard of review correctly, thereby insulating the case as the United States Supreme Court warned against. My opinion for the three dissenting judges pointed out that the court of appeals thoroughly analyzed the matter according to the established *Reeves* approach, while the majority decided the case without any analysis.

5. **Again, in Byrnes v. LCI Communications, 672 N.E.2d 145 (Ohio 1996), your position discounts the jury's verdict, and sets up a very difficult situation for victims of employment discrimination. The plaintiffs in this case produced powerful evidence of age discrimination through statements made by the employer about the relative merits of having a younger staff. The employer said he wanted "to bring in young, aggressive staff managers and change out the old folks," that "some of the older folks there could no longer contribute," and said that a certain worker was, "too old to grasp the**

concepts that he was looking for," and that he didn't, "want old marathoners in my sales organization . . . I want young sprinters."

Despite these blatant statements of age discrimination, and despite a $7.1 million jury verdict for the employees, the opinion you were a part of said this evidence was not enough to prove discrimination because it was more than a year before the adverse employment actions, was not specifically about the employees in question, and was not purportedly made in the context of the decision making about these employees. Essentially, you rejected the possibility that circumstantial evidence could be used to prove a discriminatory motive, and discounted the very strong evidence otherwise available to the plaintiff.

It seems to me that the logical extension of this position would be a new rule making inadmissible even the most blatant and obnoxious discriminatory statements, as long as they do not specifically mention the plaintiff within the year before the adverse action. How can that be right under current anti-discrimination law? And how do you defend your vote to disregard the judgment of the jury?

Five of seven justices agreed that the plaintiff could not recover in this case. This opinion did not set forth any admissibility rule at all. Rather, the court engaged in typical insufficiency of the evidence analysis. Consistent with anti-discrimination laws, the analysis required the employee to establish a causal link or nexus between the statements and the termination. The employees failed to do this. The Chief Justice and I therefore joined Justice Stratton's opinion finding that there was insufficient evidence of a causal link or nexus between alleged discriminatory statements or conduct and the prohibited act of discrimination. In reversing, the plurality opinion noted that only one of the remarks related specifically to either of the plaintiffs, and that that remark was not voiced by the individual who terminated the plaintiffs. The alleged discriminatory statements were distant in both fact and time; indeed, many of the comments were made years before plaintiffs Byrnes and Otto were even employed at LCI. Moreover, the comments related to the position of administrative secretary and marketing executive, while Byrnes and Otto were employed at the executive level. Overall, we thought that the remarks had no connection to plaintiffs and therefore could not support the inference that their discharges were the result of discriminatory intent.

6. **In Russell v. Industrial Commission of Ohio, 696 N.E. 2d 1069 (Ohio 1998), you were severely criticized by the majority for advocating an approach that ignored the plain language of the statute and relevant precedent. At issue in that case was the payment of workers' compensation benefits. The plaintiff in this case argued that those benefits could not be terminated until a hearing was held and that he should not have to repay benefits already paid him**

before the hearing. A majority of your Court agreed with him, saying that the opinion you wrote:

> **[L]acks statutory support for its position [and] has been unable to cite even the slightest dictum from any case to support its view . . . . [T]he dissent's argument, which has not been raised by the commission, the bureau, the claimant's employer, or any of their supporting amici, is entirely without merit. Id. at 1073-74.**

This is pretty harsh criticism from your colleagues, and their majority opinion is quite emphatic that you got the law wrong. Do you think it was proper to deny workers a meaningful opportunity at a hearing to determine if they are still injured? And how did you think it fair to require the repayment of possibly years' worth of benefits after the resolution of a dispute over eligibility?

I believe that I properly applied the facts to the law in this case. However, my limited function as a judge in this case did not include deciding which payment scheme I would favor, or which payment scheme was more fair. Instead I interpreted the statute as it was passed by the General Assembly. That interpretive process led to the conclusion that I reached.

7. **I am also concerned about the criticism you received from your colleagues in a case case about compensation for injured workers called Bunger v. Lawson, 696 N.E.2d 1029 (Ohio 1998). In that case, you dissented from the majority's common sense approach regarding available remedies for a convenience store employee, Rachel Bunger, who suffered serious psychological trauma as the result of being robbed at gunpoint. She alleged that her employer was negligent in not having a working alarm system, a properly functioning telephone, or a key to lock the door to prevent re-entry by the robber, and filed both a workers' compensation claim and a tort action, both of which failed. The lower court held that she could not receive workers' compensation because her psychological injury was not a result of a physical injury, but they also held that she could not sue under her only other avenue of recourse, a tort action, because her psychological injury happened during the course of her work.**

   On appeal, the majority of the Supreme Court of Ohio clearly saw that such a resolution was unfair to the worker and contrary to the law. They said that Ms. Bunger could pursue a tort remedy, and called the interpretation of the law you endorsed, "an absurd interpretation that seems borrowed from the pages of Catch-22." They said your view of the law was "nonsensical," and said that it, "leads to an untenable position that is unfair to employees." Id. at 1031.

You discussed this case with Senator Kennedy at your hearing, but I did not find your answer satisfactory. In your answer, you said you believed that the law in Ohio provides for compensability that is "narrower than immunity." In other words, it is the Catch-22 that the majority talks about – workers can be left out in the cold with no compensation for a genuine injury. Your response to that dilemma was that, "that's exactly how the law was written, and that is my job, to read it precisely."

Justice Cook, why were you not required to go beyond the problem presented by the "nonsensical" legal position presented and interpret the law in accordance with basic notions of fairness and justice? Why did you ignore one of the basic canons of statutory construction, applicable in Ohio, requiring, "the courts . . . to avoid an unreasonable or absurd result, or unreasonable, absurd, or ridiculous consequences." (85 Oh. Jur. § 289)?

I based my dissent in this case on the fact that a legislative body has wide latitude in determining the state's public policy, and as a result, I respectfully do not believe that this would be viewed as a legal absurdity. It may be a policy choice with which some may disagree and even disdain. It is nonetheless within permissible bounds and I believe that it is the role of a democratically elected body such as the General Assembly and not the court to balance all the competing interests and determine the rules that necessarily dictate a certain outcome. I therefore felt bound to uphold the legislative choice.

8. **In a case about the possibility of recovery on a tort-based claim, Vance v. Consolidated Rail Corp., 642 N.E. 2d 776 (Ohio 1995), you were the lone dissenter, voting to deny the possibility of recovery to a worker. In this case, the Ohio Supreme Court was asked to reverse the appellate court's decision to vacate a jury's verdict in favor of a railway worker claiming negligent infliction of emotional distress under the Federal Employers' Liability Act (FELA). Relying on a subsequently decided case on point in the Supreme Court of the United States, the Ohio Supreme Court majority found that the plaintiff met the threshold standard for bringing these sorts of claims under FELA, namely that he fell within the "zone of danger," or was, "placed in immediate risk of physical impact by Conrail's negligence. . . [because] important safety devices were denied to him, . . . a fellow employee came at him with a chipping hammer, and . . . a fellow employee attempted to run him over." Id. at 283. The majority's explanation tracked the language of the U.S. Supreme Court almost exactly. ("Under this test, a worker within the zone of danger of physical impact will be able to recover for emotional injury caused by fear of physical injury to himself, whereas a worker outside the zone will not." Consolidated Rail Corp v. Gottshall, 512 U.S. 532, 556 (1994)).**

The majority read the clear language of the plaintiff's complaint to describe a claim for negligent infliction of emotional distress by the defendant

employer because of a failure to provide a safe work environment, and held that under Gotshall the claim could survive. But you misstated the nature of the complaint, turning it into an action finding fault with the "intentional acts of a co-employee," and insisted that, "such claims may be brought under FELA . . .only when there is a physical injury, not a purely emotional injury." Vance, 642 N.E. 2d at 242.

Can you explain why this is not a misreading of Gottshall, which seems to allow for emotional injuries under FELA, when it says:

> **A right to recover for negligently inflicted emotional distress was recognized in some form by many American jurisdictions at the time FELA was enacted and this right is nearly universally recognized among the States today. Moreover, we have accorded broad scope to the statutory term "injury" in the past in light of FELA's remedial purposes. We see no reason why emotional injury should not be held to be encompassed within that term, especially given that "severe emotional injuries can be just as debilitating as physical injuries." We therefore hold that, as part of its "duty to use reasonable care in furnishing its employees with a safe place to work," a railroad has a duty under FELA to avoid subjecting its workers to negligently inflicted emotional injury. 512 U.S. at 550 (citations omitted).**

And further when it explains:

> **The injury we deal with here is mental or emotional harm (such as fright or anxiety) that is caused by the negligence of another and that is not directly brought about by a physical injury, but that may manifest itself in physical symptoms. 512 U.S. at 544 (citations omitted).**

With all due respect, I do not believe that my opinion was a misreading of *Gottshall.* According to the holding in that case, recovery for negligently inflicted, purely emotional injuries, is limited to "zone of danger" situations. In the *Vance* case, however, the plaintiff premised his claim on a hostile work environment produced by sporadic, intentional incidents of harassment by various co-workers. Because these acts are not within the narrow limits of a "zone of danger" test, i.e., fright caused by imminent physical peril, there was not a cognizable claim for negligent infliction of emotional distress. In my view, the incidents such as the rat in the lunch box, the scratched car, the taunting etc. did not meet the "zone of danger" standard.

The two incidents involving threats of physical peril, the chipping hammer incident and the co-worker trying to run down Vance with a vehicle in the yard, are intentional acts and thus did not fit the *Gottshall* constraints. The railroad had a duty to avoid subjecting Vance to negligently inflicted emotional injury as defined by the "zone of danger" test.

Both the majority and concurring opinions considered the applicability of a theory of negligent supervision to this case. In my view, that theory failed for two reasons. First, limitation of the purely emotional claims to "zone of danger" scenarios is the import of the *Gottshall* decision. Second, even if one could recover for purely emotional injuries under a negligent supervision theory, Vance did not present evidence that either the chipping hammer incident or the attempted rundown was committed through employer negligence. Vance offered no evidence that the employer had notice of this behavior, thereby triggering the employer's duty to discipline or discharge such employee. Of critical importance is the fact that, in most of the incidents, no culprit was even identified. Rather, it is only by evidence of a "pervasive" attitude in the company that the majority holds the employer to the nebulous duty "to deal with the problems" in Vance's work environment.

9. **In Johnson v. BP Chemicals, 707 N.E.2d 1107 (Ohio 1999), your view of the legislature's attempt to insulate employers from suit leaves almost no room for recovery by injured workers. In this case, a majority of the Ohio Supreme Court held unconstitutional a state statute creating virtual immunity for employers from lawsuits alleging intentional torts in the workplace. Explaining that the Ohio legislature had, "created a cause of action that is simply illusory," the majority found that the statute could not survive the Ohio Constitution's mandate that permitted the General Assembly to create laws that further, "the comfort, health, safety and general welfare of all employees." Id. at 1113-14.**

Your dissent takes a narrow view of the Ohio Constitution's concern for workers, and seems to say that the legislature is permitted to deny any and all remedies to certain employees. Of the constitutional mandate relied upon by the majority, you wrote, "[t]his section does not say that the General Assembly may pass only laws that provide for the comfort, health, safety and general welfare of all employees. It also does not say that no law may ever be passed that does not provide for the comfort, health, safety, and general welfare of employees. There is nothing in this grant of authority that can properly be read as a limitation on authority." Id. at 1116. In addition, you do not follow the clear precedent of a 1991 case, Brady v. Safety-Kleen Corp., 576 N.E.2d 722 (Ohio 1991), on which the majority relies in this ruling.

How do you explain yet another ruling that disfavors workers?

In writing my dissent, my intent was not to disfavor workers but rather to uphold the work of the legislature that sought to carry out the public will through enacting tort reform legislation. I expressed no view as to the wisdom of that legislation or the balancing of interests that it encompassed. I challenged the majority's reasoning for determining that the enactment was unconstitutional.

10. **In Davis v. Wal Mart, 756 N.E. 2d 657 (Ohio 2001), you were the sole dissenter against a widow whose husband's employer had lied in order to get her to accept a smaller settlement. The plurality in this case wrote that, "[i]n order for our legal system to work, pursuant to our rules of procedure, a litigant must have the ability to investigate and uncover evidence after filing suit. The intentional concealment or destruction of evidence not only violates the spirit of liberal discovery but also reveals a shocking disregard for orderly judicial procedures and traditional notions of fair play. Damage is caused not only to the parties to the suit, but also to the judicial system and the public's confidence in that system. Wal-Mart harms the sanctity of the judicial system and makes a mockery of its search for the truth." Doesn't your position just reward corporate defendants for concealing evidence?**

    With all due respect, I do not believe that my dissenting view in this case rewards corporate defendants who conceal evidence. Mrs. Davis won her intentional tort case against Wal-Mart for the wrongful death of her husband. The jury awarded her damages of $2 million and awarded her prejudgment interest on that amount based on the egregious conduct of the employer on the subject of workplace safety. It is only with respect to her second, later-filed case that I dissented.

    After the trial court entered judgment for Mrs. Davis, she brought a spoliation claim against Wal-Mart. Because that claim arose out of a common nucleus of operative facts as in the intentional tort case that she won, Mrs. Davis' later claim reasonably was determined by the trial court to be barred by the doctrine of res judicata.

    Though Mrs. Davis argued that her cause was not barred because Wal-Mart had hidden evidence, her spoliation complaint focused on (1) "Exhibit A," which Davis admittedly discovered before her first intentional tort case went to trial, and (2) a Sam's Club claims file, which Davis admittedly obtained in conjunction with her motion for prejudgment interest in the intentional tort case.

11. **In Norgard v. Brush Wellman, Inc., 766 N.E.2d 977 (Ohio 2001), you rejected what I thought was the right approach by the majority, and wrote a dissent in a case about the statute of limitations for bringing an intentional tort action against one's employer. Here, the plaintiff worked in contact with beryllium, and developed chronic beryllium disease over the period of time he was employed with defendant. While he knew he had the disease, was studied by doctors paid for by worker's compensation, and even received counseling at the recommendation of the company physician for the effect of his illness on his life, Norgard did not know until years after first falling ill that the company had withheld important information about exposure levels, air-sampling and ventilation problems. The majority said that it was upon learning this latter information that the clock began to run on the employee's ability to bring suit against the employer for an intentional tort. They explained that, "this holding is consistent with the rationale underlying a**

statute of limitations and the discovery rule. Its underlying purpose is fairness to both sides....[I]f a plaintiff is unaware that his or her rights have been infringed, how can it be said that he or she slept on those rights? To deny an employee the right to file an action before he or she discovers that the injury was caused by the employer's wrongful conduct is to deny the employee the right to bring any claim at all." You rejected this common sense approach, saying that the period began to run years before, when the employee contracted the illness in question. Why is that not a reward to the company for its intentional bad behavior?

I believe that our legal system does hold employers accountable for unlawful conduct. I based my dissent in this case on a legitimate jurisprudential rule. Enforcement of statutes of limitations and appropriate accrual dates for application of discovery rules protect individuals and employers alike from stale claims.

The law fairly protects injured workers from a deceiving employer by providing that the limitations period does not begin until an employee knows that he/she has been injured and its cause. In this case, the majority's rule rests the date of accrual on a plaintiff's recognition of his or her legal rights. In dissent I pointed out that was fundamentally flawed and contrary to the United States Supreme Court ruling in *Rotella v. Wood*, 528 U.S. 549 (2002), in which the court observed in an analogous context: "[I]n applying a discovery accrual rule, we have been at pains to explain that discovery of the injury, not discovery of the other elements of a claim, is what starts the clock...."

12. **In Humphrey v. Lane, 728 N.E.2d 1049 (Ohio 2000), you dissented from a majority decision finding that a state prison violated a Native American prison guard's rights for firing him because he refused to cut his hair due to his religious beliefs. The majority found that the Ohio Constitution gives state citizens broader rights than the federal Constitution after Justice Scalia's majority decision in Smith v. Employment Division, 494 U.S. 872 (1990), because Ohio interference with free exercise of religion requires a compelling state interest and least restrictive means. The Ohio Supreme Court found that less restrictive means were available to the state to enforce its interest in uniformity (for example, the guard could wear his hair tucked under a cap). Why did you reject the conclusion that the Ohio Constitution is broader than the U.S. Constitution on this point, and why did you not believe that it would be less restrictive to permit the guard to tuck his hair under his cap rather than violate sincerely held religious beliefs?**

Here the Ohio Supreme Court declined to align Ohio's jurisprudence with that of the federal courts following *Smith*. To support its departure from the Supreme Court's free exercise jurisprudence, the majority cited the textual differences between Ohio's Constitution and the First Amendment. But just one year before,

in *Simmons-Harris v. Goff* (1999), 86 Ohio St.3d 1, the Ohio high court determined that even though the text of Section 7, Article I of the Ohio Constitution is "quite different" from the First Amendment, Ohio's religion clauses are, nevertheless, the "approximate equivalent" of those found in the Bill of Rights. Accordingly, the Ohio Supreme Court adopted the federal *Lemon* test for Establishment Clause claims asserted under the Ohio Constitution because the Lemon test is "a logical and reasonable method by which to determine whether a statutory scheme establishes religion." *Id.* at 10, 711 N.E.2d at 211. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971). My dissenting view was that Ohio's Free Exercise Clause should be analyzed according to the *Smith* rationale for the same reason that our *Simmons-Harris* decision applied *Lemon* to Ohio's Establishment Clause. *Smith* reasoned that the application of the compelling-state-interest test to all free-exercise claimants is neither logical nor reasonable.

13. I was concerned about an opinion you wrote denying a legal remedy to victims of exposure to DES. Sutowski v. Eli Lilly & Company, 696 N.E.2d 187 (Ohio 1998). You wrote that plaintiffs claiming damage to their reproductive systems due to in utero exposure to DES, a drug known to cause cancer and reproductive disorders, could not rely on the market-share theory, a theory virtually invented for DES cases where hundreds of companies manufactured the drug but the victims would have no idea by whose drug they were affected.

The dissenters were outraged by this opinion and criticized you in quite harsh terms. Justice Douglas in dissent explained that, "[t]he majority . . . rings the death knell for most of the DES litigation in Ohio." Id. at 193. He continued, "[t]he majority's holding in this case is not only contrary to general notions of fairness and equity, but it is also predicated on numerous misstatements and misapplications of law. . . the majority quite simply does not wish to recognize market-share liability and, to that end, it has concocted a rationale to support its predetermined conclusion that market-share liability is not a viable theory of recovery in Ohio." Id. Douglas further said that the majority, "selectively quoted," from a prior Ohio case, "to create the impression that the General Assembly is the only appropriate body to recognize the market-share liability theory in DES litigation. The majority then uses that misguided impression as a platform for launching into a tortured analysis of Ohio's Products Liability Act. It is here that the majority's shell game becomes most deceptive." Id. at 197. He went on to explain why there is no reason not to recognize the market-share theory consistent with Ohio law, and added that the majority's one sentence "expression[] of condolences will ring hollow indeed, particularly when the victims of DES read the flummery set forth in the majority decision." Id. at 200.

Also in dissent, Justice Pfeifer expressed serious disagreement with your majority opinion, saying:

> **It is unconscionable that any profoundly injured woman of the estimated four hundred thirty thousand Ohio women who took DES should be prohibited from successfully pursuing constitutionally protected compensation for injuries done simply because she can only trace the harm to a group of manufacturers of the same product. . . . With their answer to the certified question [in this case], the majority is more comfortable shielding the defendant drug companies than with applying a theory of recovery that would allow the plaintiffs to go forward with their case. The majority's decision has the perverse effect of protecting a defendant class that undeniably manufactured, released, and profited from a horribly defective product while denying a chance of recovery to a class of injured women that undeniably did nothing wrong, except suffer the consequences of the ingestion of the defendants' defective drugs. The right-to-remedy clause has been turned on its head and the majority has effectively given these defendants the equivalent of a common-law right-immunity. DES-injured women will have to content themselves with knowing that they 'engender sympathy.' Id. at 201 (emphasis added).**

Again, it seems you have worked hard to reinterpret legal decisions in a way that disallows compensation to the injured. How else can you explain the case?

I don't believe my record can be construed to suggest that I seek to reinterpret legal decisions in a way that disallows compensation to the injured. The Ohio Supreme Court decision in this case declining to alter Ohio's traditional tort principles for such cases by eliminating the need to show a defendant's fault, is a defensible jurisprudential decision. Indeed, it corresponds with more than half of the states that have considered the subject of market-share liability.

RESPONSES OF DEBORAH COOK TO QUESTIONS FROM SENATOR GRASSLEY

1. **Have you ever expressed views on the False Claims Act, its *qui tam* provisions, or of the rights of whistleblowers? If so, please provide me with those views and the circumstances under which they were expressed.**

   I have never expressed my personal view on the False Claims Act, its qui tam provisions or the rights of whistleblowers. I have, however, participated in Ohio Supreme Court cases involving state whistleblower protection legislation. One such case is discussed below in response to Question #4.

2. **What are your views on the constitutionality of the *qui tam* provisions of the False Claims Act?**

   I have not yet been called upon to form a judicial judgment on the constitutionality of any aspect of this Act. Any view of its constitutionality that I would adopt in a judicial opinion would be based on the precedent from the Sixth circuit and from the U.S. Supreme Court.

3. **Do you agree with the view that the False Claims Act and its *qui tam* provisions should be given a broad and expansive reading and that such was intended by Congress in enacting the FCA and the 1986 Amendments thereto?**

   I believe that it is customary for appellate judges to give remedial legislation a broad reading. Furthermore, Congressional acts deserve a strong presumption of constitutionality and I believe that these standards should apply to the FCA and its qui tam provisions.

4. **Would you please explain your dissent in *Kulch v. Structural Fibers, Inc.*?**

   My view in the *Kulch* case was that the General Assembly intended that the statutory scheme to protect whistleblowers was the exclusive remedy available to this plaintiff. In my dissent I concluded that Ohio Revised Code section 4113.52 was the exclusive Ohio remedy, having supplanted existing Ohio common law remedies. I differed with the rationale of the majority opinion that hinged on no more than a contrary legislative preference; the court simply deemed the statutorily provided remedy not "ample or complete" and my view was that it was up to the General Assembly, and not the court, to determine that. Any suggestion that my opinion in this case evinces hostility toward whistleblower protections is unfounded and simply untrue.

Submitted 2/5/03

Deborah Cook, Justice

RESPONSES OF DEBORAH COOK TO QUESTIONS FROM SENATOR KENNEDY

Question #1

You stated at your hearing that "consensus is the first objective" in deciding a case as a judge. (R. 299). Moreover, you stated that in deciding cases you merely "attempt[] to do a precise reading of the law." (R. 299). Nonetheless, you have authored more than 300 dissents while on the Ohio Supreme Court, more than any other justice on the court. Moreover, you frequently dissent alone. Your fellow justices seem unable to make sense of many of your dissents, calling your reasoning such things as "an absurd interpretation that seem borrowed from the pages of catch-22." Bunger v. Lawson, 696 N.E.2d 1029, 1031 (Ohio 1998). In another case, the majority of the court said that your dissent "lacks statutory support for your position and that you have been unable to cite even the slightest dictum" to support your view. State ex rel. Russell v. Indus. Comm., 696 N.E.2d 1069, 1074 (Ohio 1998). Your rating by the Ohio Chamber of Commerce, which tracks your votes for employers in cases affecting the environment, workers' rights and civil rights, is extraordinary: in many cases a 100% rating.

Dissents are an important part of the judicial process. Indeed they often serve a critical role in the development of the law. However, consensus-building is also very important, and is often essential to the development and maintenance of a coherent body of law, and your consistent, prolific dissents in favor of business interests are disturbing to me. What steps do you take to achieve consensus on the Ohio Supreme Court and do you believe that, in light of your record of dissents, you would be able to reach consensus with other judges as a member of the Sixth Circuit?

Response:
I respectfully submit that my experience on the Ohio Supreme Court with dissenting opinions indicates nothing more than my effort to espouse a reasoned view regarding which side of the dispute at bar is better supported by the relevant body of legal doctrine. Consensus is always a goal of mine and I attempt to build that consensus by carefully articulating my view of the case in light of the facts and the law. Many times my colleagues have decided to join my view. Other times the dissent serves to outline for the bench and the bar a contrary reading of the relevant decisional law or statutory language that led the dissenting justices and me down a different path. On several occasions, my dissents have been vindicated by a decision of the United States Supreme Court.

Courts value consensus among their members as a way of reaching a better decision. If dissents are resolved by judges' efforts to reach a better-analyzed opinion, one that satisfies difficult questions for more of the participating judges, then consensus has served the law.

I will continue to make such efforts to achieve consensus if I am confirmed.

Background for Questions #2 through #5

In Russell, you argued that worker's compensation benefits terminate, even retroactively, without a hearing, as soon as a non-attending physician says the claimant has reached maximum medical improvement ("MMI"). That case turned on Ohio Revised Code 4123.56, which states that "payments shall be for a duration based upon the medical

reports of the *attending* physician. If the employer disputes the attending physician's report, payments may be terminated *only upon application and hearing by a district hearing officer*." As the majority stated, and the court had held many times before, this language means that, regardless of when the claimant actually reaches maximum medical improvement, he or she is eligible to receive benefits until MMI is determined by a hearing officer. Id. at 1071.

You, however, would have denied benefits and made the claimant subject to recoupment, because the next section of R.C. 4123.56 states that, "payment shall not be made for the period in which any employee has . . . reached the maximum medical benefit." Id. at 1076 (Cook, J., dissenting). You read this language to mean that even if a claimant is determined to be eligible to receive benefits payments, he may be ineligible to keep them. Id. Thus, the claimant would be subject to recoupment back to the date on which he was determined at the hearing to have reached MMI. To reach this conclusion, you would have overturned a long line of Ohio cases, but you do not assail two cases central to, and sufficient for, the majority's position, State ex rel. MTD Products, Inc. v. Indus. Comm., 669 N.E.2d 846 (Ohio 1996) and AT&T Technologies v. Indus. Comm., 623 N.E.2d 63 (Ohio 1993). See Russell, 696 N.E.2d at 1074. You also rely on an argument that was not raised either in the courts below, or in the Supreme Court itself. Id.

Question #2

What is your view of the role of stare decisis and why would it not have precluded your overturning the cases you would have overturned in Russell?

Response:
My view of stare decisis is that predictability and the rule of law depend on courts respecting precedent, and I am therefore bound by it. But courts nevertheless should be vigilant in retreating from erroneously decided cases or precedent that has, due to intervening changes in the law, lost its legal underpinning. In the *Russell* case, I posited in dissent that the court should reconsider *State ex rel. McGinnis v. Indus. Comm.* (1991), 58 Ohio St.3d 81, 568 N.E.2d 665 because the cases it relied upon do not, in my view, justify the decision.

Question #3

In light of the fact that this argument was not raised by any party or any amici, at any level in the litigation, why did your consideration of it not constitute a departure from Ohio practice?

Response:
In my view, the arguments made by the state fairly encompassed the position I espoused in dissent on behalf of myself and the Chief Justice. The majority's decision disregarded three workers' compensation tenets: *Indus. Comm. V. Dell* (1922), 104 Ohio St. 389, 135 N.E. 669 prohibition against fund misapplication; the prohibition against claimant windfalls pronounced in *State ex rel. Wireman v. Indus. Comm.* (1990), 49 Ohio St.3d 286, 551 N.E.2d 1265; and the "some evidence" rule. In addition, it essentially renders meaningless the prerequisites to TTD compensation set down in *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630, 23 O.O.3d 518, 433 N.E.2d 586.

Question #4

How do you respond to the contention that your reading of 4123.56 would lead to the absurd result that a hearing officer would be allowed to order recoupment back to the date of a nonattending physician's report, but that same hearing officer would not have the power to actually terminate compensation?

Response:

My reading of the statutes was an attempt to objectively decide the case. In my dissent I offered an analysis with which the majority disagreed. In our view the language of R.C. 4123.56(A) conflicted with the majority's position. It stated: "[P]ayments shall be for a duration based upon the medical reports of the attending physician. If the employer disputes the attending physician's report, payments may be terminated only upon application and hearing by a district hearing officer * * *. Payments shall continue pending the determination of the matter, however *payment shall not be made for the period in which any employee has * * * reached the maximum medical improvement.*" (Emphasis added.)

The recoupment provisions of R.C. 4123.511(J), in correlation with the above-emphasized language, are directed at claimants who have been "found to have received compensation to which the claimant was not entitled". R.C. 4123.511(J) demonstrates a legislative expectation that compensation will be repaid by claimants who do not meet the eligibility criteria. Non-eligibility criteria dictated the right to recoupment. I opined that the payment of continued benefits pending a hearing to determine eligibility does not equate with eligibility. A claimant may be eligible to receive payments, but later determined to be ineligible to retain those payments. This analysis included a view regarding how this was a sensible legislative approach to accommodate the reality that the system does not permit instantaneous hearings. My dissent was nothing more than an attempt to effectuate the will of the General Assembly, the body properly charged with the duty of weighing the competing interests and making determinations of policy.

Question #5

Ordering recoupment of benefits often leads to economic hardship for families, because the funds to be recouped (and which the family was entitled to receive) very often went immediately to meeting day-to-day needs that are so critical when a family member is on disability. You have stated before that your legal reasoning does not take into account the effect on the individual litigants. Indeed, you have stated that "I don't think I deserve any blame for the legislation that I am asked to construe or interpret." (R. 323). If your reading of a statute would result in extreme hardship to one litigant (as it often has), would that lead you to conclude that that reading of the statute at issue was likely not what the legislature intended?

Response:

Certainly if statutory language accommodates two equally reasonable interpretations and one of the two interpretations avoids individual hardship without imposing unfairly on other parties, that reading would be the preferred one.

Question #6

In Norgard v. Brush Wellman, Inc., 766 N.E.2d 977 (Ohio 2002), the defendant corporation withheld information concerning the amounts of Beryllium to which its employees were exposed, its knowledge of the flaws in its air sampling program, and its ventilation problems. Your dissent in this case would have held the suit time-barred, because in your opinion the defendant's deceit was not sufficient to toll the statute of limitations. Id. at 982. In reaching this conclusion, you explain that the justifications of the "discovery" rule for tolling statutes of limitations do not cover the set of facts in that case. Id. In undertaking this analysis, your legal reasoning included a weighing of the policy implications behind the discovery rule. Moreover, in describing this case, you said that "my considered judgment and I think reasoned judgment was that that was beyond the discovery rule and the particular statute of limitations here." (R. 335). You later state that you wanted to avoid "contorting the law of statute of limitations beyond the scope of its justification[.]" (R. 334).

As you have stated in describing this opinion and others, the legal decision-making process often requires judges to examine and weigh policy considerations. Understanding what policy considerations a particular judge finds important is therefore critical to the confirmation process. What would inform the policy considerations you would undertake and if confirmed?

Response:
When the decisional process allows for consideration of policy, as is the case when faced with ambiguous statutory language, I would generally restrict my policy considerations to those that the parties brief for the court.

Background for Questions #7 and #8

In DeRolph v. Ohio, 728 N.E.2d 993 (Ohio, 2000) you were confronted with overwhelming evidence that state funding of public schools was woefully inadequate. In fact much of the evidence in that case showed that children were attending schools that were in dangerous disrepair, with poor sanitation and few, if any, resources for education. The majority cited binding precedent for the point that when a school district is starved for funds, or lacks teachers, buildings, or equipment," those condition violate the Ohio Constitution's guarantee of a "thorough and efficient" education. See, e.g., Miller v. Korns, 140 N.E. 773, 776 (Ohio 1923); Cincinnati School Dist. Bd. of Edn. v. Walter, 390 N.E.2d 813, 825 (Ohio 1979).

Your dissent does not address the cases it would overturn, and instead merely states that the constitutional provision at issue is too vague to be self-executing. You analogize

the provision to another provision of the Ohio Constitution that says that "all citizens possess inalienable rights to life, liberty, property, happiness, and safety." DeRolph, 728 N.E.2d at 1036. Your dissent was harshly criticized, and in particular it was said that if your position had prevailed it would have turned "200 years of constitutional jurisprudence, dating back to Marbury v. Madison, on its head." Id. at 1028.

Question #7

Why did you feel that stare decisis did not require you to vote with the majority to give effect to the education provision of the Ohio Constitution?

Response:
The evidence in this case indeed showed that some schools in Ohio were in a deplorable state. But my dissenting view proceeded from the premise that the parties to the case stipulated that every one of the school districts in the state of Ohio met minimum state requirements. I viewed the policy decisions as to what funding was necessary, beyond the set state minimums, as being textually committed by the Ohio Constitution to the General Assembly.

The majority of the court did not hinge its decision on stare decisis. The prior decision in Ohio found the funding scheme constitutional. In fact, the majority of the court of appeals relied on *Cincinnati School Dist. Bd. of Edn. v. Walter* (1979), 58 Ohio St.2d 368, 12 O.O.3d 327, 390 N.E.2d 813, and found that the current system of school funding was constitutional. Justice Sweeney's majority deemed the *Walter* case not controlling. Justice Sweeney said "we reject appellees' contention that *Walter* is controlling. The equal yield formula challenged in *Walter* was repealed shortly after the case was decided. Moreover, *Walter* involved a challenge to only one aspect of school funding. In contrast, the case at bar involves a wholesale constitutional attack on the entire system."

Question #8

Does your analogy to the "life, liberty, property, happiness and safety" language of the Ohio Constitution signify that you would hold similar language on the U.S. Constitution unenforceable in some contexts?

Response:
My opinions in the many *DeRolph* decisions did not hold that the provisions of the constitution were unenforceable. Rather, I viewed the exercise by the majority as untenable because there existed no jurisprudentially sound basis for deciding the questions of quality and budgeting that the case presented.

Background for Questions # 9 and #10

Few, if any, of your opinions from the Ohio Supreme Court have dealt with abortion rights. Your views on this important matter are not well-known, yet your nomination to the Sixth Circuit has been endorsed by Ohioans For Life, an anti-choice group.

Question #9

As an appellate judge, you would be constrained by binding Supreme Court

precedent, including Roe v. Wade and its progeny. However, circuit courts play an important role in the protection of abortion rights, and your views on this line of cases are therefore important. What is your view of the abortion rights and their continued vitality?

Response:

Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791 (1992), affirmed the court's decision in *Roe v. Wade* and upheld a woman's right to an abortion. These decisions are settled law and I will follow *Casey* and other Supreme Court cases protecting the reproductive rights of women.

Question #10

Have you had any contact with members or representatives of Ohioans For Life or other anti-choice groups concerning your nomination to the Sixth Circuit, or in the process of your prior judicial campaigns? If so, what views did you express with respect to abortion rights?

Response:

I do not believe that I ever met anyone from this organization in my prior judicial campaigns. I did not seek the endorsement of this group and indeed did not even know at the time that I had received it. Nor have I discussed my nomination to the Sixth Circuit with any of these groups or expressed views regarding abortion rights.

RESPONSES TO QUESTIONS FROM SENATOR BIDEN TO DEBORAH COOK

1. I would like to ask you about your dissent in Humphrey v. Lane. In that case, you alone on the Ohio Supreme Court would have allowed the state Department of Corrections to fire a long-time Native American employee because his religious beliefs prohibited him from cutting his hair to conform to the Department's grooming policy. For years, Mr. Humphrey had been permitted to wear his hair tucked up under his uniform cap without any problem, until an administrator insisted that he cut his hair, although doing so would violate his sincerely held religious beliefs.

When Mr. Humphrey wore his hair under his uniform cap, as he did whenever he was on duty, it was "impossible to tell" – those were the words of the trial judge – that his hair was not short. You alone would have allowed the state to fire Mr. Humphrey if he refused to cut his hair, even though the trial judge found as a factual matter that it was not necessary for him to cut his hair to satisfy the state's interest in having a grooming policy.

As I understand your dissent in this case, you do not believe that the government needs to have a "compelling interest" before it can make an individual violate his or her sincerely-held religious beliefs in order to make that person conform to a so-called "neutral" law, even when the government's interest can be satisfied by some lesser means. This was the same view adopted in a federal case, the Smith case, by Justice Scalia and a majority of the U.S. Supreme Court, and subsequently rejected by a substantial bipartisan majority of Congress, which passed the Religious Freedom Restoration Act to overturn it. Why would you have allowed Mr. Humphrey to be fired without examining whether the state had a compelling interest in its grooming policy? Could that interest be satisfied without requiring him to cut his hair in violation of his religious beliefs?

Response:

Here the Ohio Supreme Court declined to align Ohio's jurisprudence with that of the federal courts following *Smith*. To support its departure from the Supreme Court's free exercise jurisprudence, the majority cited the textual differences between Ohio's Constitution and the First Amendment. But just one year before, in *Simmons-Harris v. Goff* (1999), 86 Ohio St.3d 1, the Ohio high court determined that even though the text of Section 7, Article I of the Ohio Constitution is "quite different" from the First Amendment, Ohio's religion clauses are, nevertheless, the "approximate equivalent" of those found in the Bill of Rights. Accordingly, the Ohio Supreme Court adopted the federal *Lemon* test for Establishment Clause claims asserted under the Ohio Constitution because the Lemon test is "a logical and reasonable method by which to determine whether a statutory scheme establishes religion." *Id.* at 10, 711 N.E.2d at 211. *See Lemon v. Kurtzman* (1971), 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745. In *Humphrey*, my dissenting view was that Ohio's "Free Exercise" Clause should be analyzed according to the *Smith* thinking for the same reason that our *Simmons-Harris*

decision applied *Lemon* to Ohio's "Establishment Clause." *Smith* reasoned that the application of the compelling-state-interest test to all free-exercise claimants is neither logical nor reasonable.

2. An appellate court judge must give deference to the factual findings of a trial court judge, the only judge who sees and hears the witnesses and evidence first hand. Here, the trial court found as a matter of fact that Mr. Humphrey could wear his hair tucked up under his cap and that it would be impossible to tell that his hair was long. All of your colleagues on the Ohio Supreme Court gave deference to that factual finding. Why did you disagree with them, and with the trial court?

Response:
My difference with the majority centered on whether the Ohio Constitution's "religion clauses" should be interpreted independently from or coextensively with the United States Constitution, and as a corollary to that, what level of scrutiny was appropriate to apply to this state regulation. I did not disagree with the trial court's factual findings. The trial court's factual finding would not have changed the result dictated by *Smith*.

3. Suppose the state of Ohio determined that the consumption of alcohol in any public place, in any amount, is a harmful thing, and by law made the state totally "dry" –that is, it prohibited the serving and consumption of alcohol in any public place. This would be a neutral law, not one aimed at any religious practices, but it would have the effect of prohibiting the use of wine at communion in churches, and for holiday rituals in synagogues, not to mention many other religious uses. Suppose the religious institutions sue the state, and invoke the same religious liberty provisions of the Ohio Constitution that Mr. Humphrey invoked. As I understand your position in Mr. Humphrey's case, if it had been adopted, the Ohio courts would have to rule against the churches, would they not?

Response:
This hypothetical presents a somewhat different issue with the addition of the religious institutions (presumably seeking injunctive relief) citing infringement on organized religious practices. In the absence of state constitutional grounds, the *Smith* decision would be one of the cases that informs the resolution of this case. I am unable to say whether Ohio courts would necessarily rule against the churches. My approach to deciding that question would be to review the record of proceedings, the contesting briefs, and the existing law to fully consider the case and its implications.

4. **Your dissent specifically acknowledges that the rule you wanted to adopt "could, at times, disadvantage religious minorities whose belief systems are inadvertently offended by generally applicable laws." How can you assure the American people that if confirmed to the Sixth Circuit, you will protect the constitutional rights of minorities, when they are threatened?**

Response:
I will do my best to follow the law. It is the law that assures all citizens that they will be treated fairly. I believe that my tenure as a state court judge indicates that I am committed to following both the Constitution and legislative enactments and that I faithfully attempt, in every case before me, to apply the relevant law to the facts of the case.

RESPONSES OF DEBORAH TO QUESTIONS FROM SENATOR EDWARDS

1. **Can you name any cases in which you dissented in favor of an injured employee in a claim brought against his or her employer?**

   I do not recall a case during my tenure where the majority ruled against an injured employee (except the plurality opinion in *Byrnes v. LCI*) and thus I have lacked occasion to dissent in favor of employees.

   I have, however, joined majority opinions that favored employees including: *Rice v. CertainTeed* (awarding punitive damages in civil employment discrimination action); *Ruckman v. Cubby Drilling* (holding that drilling company workers injured in auto accident on way to drilling site were entitled to workers compensation); and *State ex rel Highfill v. Industrial Commission* (affirming an award for violation of specific safety requirement).

2. **In *Bunger v. Lawson*, Rachel Bunger, who was working alone late at night at a Dairy Mart, was traumatized when the store was robbed at gunpoint. Because the Ohio Workers' Compensation statute does not cover psychological injury, it rejected Rachel Bunger's claim, so she sued in state court to collect money for psychological damage, including the counseling she had to go through. The premise of Workers' Compensation is to remove certain cases from the courts and to compensate injured employees through a kind of insurance paid for by employers. Based on that premise, injuries that are not covered, and that are therefore not "insured" by employers, may be redressed by suits by workers. The Supreme Court majority upheld Ms. Bunger's right to sue for her injuries. However, you dissented, using reasoning that was criticized by Justice Stratton, known as the court's second most conservative judge. You said that, even though Ms. Bunger's injury was not covered by Workers' Comp, she could not sue in state court. In other words, she had no remedy at all for her injury.**

   Justice Stratton stated, specifically, that the General Assembly had not enacted the provision you "wrote in" to your dissent: "An employee who sought compensation for a psychological injury under the system advocated by the appellees would be in a Catch-22 situation.... If employers want immunity under the workers' compensation system from civil actions for an employee's psychological injuries, employers should urge the General Assembly to include psychological injuries in the definition of "injury" in [the relevant statute].... Until it is... the employer should not be immune from civil liability for its negligence." What led you to conclude that the Legislature intended plaintiffs like Bunger to have no remedy at all?

You based your dissent on a 1939 case, in response to which the General Assembly amended the law to exempt employers from liability for suits related to an occupational illness, silicosis. Why do you find this case to be relevant in rejecting Bunger's claim today? What made you believe that Bunger's psychological injury constituted a "bodily condition" that rendered her claim not viable, when that amendment had been enacted to preclude suits for silicosis?

As stated in my *Bunger* dissent, *Triff v National Bronze & Aluminum Foundry Co.* (1939), 135 Ohio St. 191, 20 N.E.2d 232, bears on this case because there the Ohio Supreme Court took the same view that the court takes in *Bunger*. The Ohio General Assembly, however, met the *Triff* decision with an amendment to G.C. 1465-70 (now R.C. 4123.74) expanding the immunity/exclusivity provision. That amendment added the phrase "bodily condition" to obviate the *Triff* analysis, which had been pinned to the defined term "injury." The amendment read in part: "[Employers] shall not be liable * * * for any injury, disease, or bodily condition, whether such injury, disease or bodily condition is compensable under this act or not * * * ." Like the majority in *Triff*, the *Bunger* majority held that there is a right to maintain a common-law negligence suit upon claims for any kind of disability not caused by an "injury" as defined in R.C. 4123.01. According to the majority, "[s]ince psychological injuries are not included within the definition of 'injury' used in the statutory chapter, those injuries cannot be included in the chapter's grant of employer immunity from suit for any 'injury' suffered by an employee." The language of the immunity statute and the history of the jurisprudence on the subject contradicted the majority because, with the addition of the phrase "bodily condition," the analysis hinging on the statutory definition of "injury" lost persuasiveness.

Until *Bunger*, the only type of industrial injuries excepted from the constraint of R.C. 4123.74 had been those intentional torts where the employers' conduct had been determined to be outside the course and scope of employment and thus outside the scope of the Act, precluding the employer from availing itself of any of the protections afforded by the Act, such as the immunity provision in R.C. 4123.74. Because Bunger's psychiatric condition was a "bodily condition, received or contracted * * * in the course of and arising out of [her] employment," R.C. 4123.74 immunizes her employer from liability "at common law or by statute." Industrially caused psychiatric conditions unrelated to an injury or occupational disease do not, by definition, constitute compensable injuries, yet are "bodily conditions" arising from employment and therefore fall within the ambit of R.C. 4123.74.

3. **Please explain why you thought it appropriate that employers such as the one in *Bunger* gets a windfall by not having to insure against injury while**

not being liable in tort while, on the other hand, the injured employee gets nothing.

In writing the dissent in *Bunger*, I did not choose the law that imposed the "Catch-22". It was the Ohio General Assembly that determined by statutory definitions that an employee could suffer a "bodily condition" that is not compensable as an "injury" yet an employer would be immune from suit by that employee based on the work-related "bodily condition" suffered. The Ohio statutes at bar in the *Bunger* case explicitly provided employer immunity that was broader than the employee compensability definitions. My dissent expresses no judgment regarding the wisdom of such legislation, just an honest reading of it.

Responses to Senator Russ Feingold
Questions for Justice Deborah Cook

1. **In *Davis v. Wal-Mart*, the majority of your court held that the widow of a forklift operator killed on the job could reinstate her wrongful death suit against Wal-Mart because the company had instructed its employees to lie in order to stop her from finding evidence that would have increased the company's liability.**

   You dissented, stating that because the case had already been settled, Mrs. Davis could not sue even though critical information had been intentionally withheld from her by Wal-Mart.

   How is it possible that Wal-Mart should have won this case when it had engaged in such reprehensible conduct?

   Mrs. Davis won her intentional tort case against Wal-Mart for the wrongful death of her husband. The jury awarded her damages of $2 million and awarded her prejudgment interest on that amount based on the egregious conduct of the employer on the subject of workplace safety. It is only with respect to her second, later filed case that I dissented.

   After the trial court entered judgment for Mrs. Davis, she brought a spoliation claim against Wal-Mart. Because that claim arose out of a common nucleus of operative facts as in the intentional tort case that she won, Mrs. Davis' later claim reasonably was determined by the trial court to be barred by the doctrine of res judicata. Though Mrs. Davis argued that her cause was not barred because Wal-Mart had hidden evidence, her spoliation complaint focused on (1) "Exhibit A," which Davis admittedly discovered before her first intentional tort case went to trial, and (2) a Sam's Club claims file, which Davis admittedly obtained in conjunction with her motion for prejudgment interest in the intentional tort case.

   Do you believe that justice was done in this case?

   I believe that my dissenting view accords with justice under the law. Finality of judgments, as embodied in the doctrine of res judicata, is an important aspect of our justice system, and judges are bound to apply that doctrine where applicable.

2. **During your tenure as a Judge, there were thirty-seven employment cases, *Davis v. WalMart* being one of them, in which the Supreme Court of Ohio issued decisions on the merits. It is my understanding that you have never dissented from any decision of the Court in which the majority decision was**

favorable to an employer. At the hearing, you expressed some doubt about these statistics.

a. **Please list any case in which the majority of the court issued a decision favorable to an employer from which you dissented.**

I do not recall a case during my tenure where the majority ruled against an injured employee (except the plurality opinion in *Byrnes v. LCI*) and thus I have lacked occasion to offer dissents in favor of employees. I did, however, join majority opinions that favored employees including: *Rice v. CertainTeed* (awarding punitive damages in civil employment discrimination action); *Ruckman v. Cubby Drilling* (holding that drilling company workers injured in auto accident on way to drilling site were entitled to workers compensation); and *State ex rel Highfill v. Industrial Commission* (affirming an award for violation of specific safety requirement).

b. **According to this same analysis, in cases involving lawsuits against an employer you dissented twenty-three times to support the employer's position when a majority of your court ruled in favor of the employee. You were the lone dissenter in over half of those cases. A list of these cases is attached as Exhibit A. Are these statistics accurate?**

I do not decide cases on any basis other than legitimate appellate principles of review, irrespective of the types of parties at bar. I have written and joined opinions that "favored" employers, and I have joined opinions that "favored" employees. *See, e.g., Gibson v. Meadow Gold; Conley v. Brown.*

I cannot verify or contest the statistics you cite. I have been unable to confirm the numbers on which your question is based and therefore do not know whether the statistics are accurate.

My approach to deciding cases is an objective effort to determine which side of a dispute is better supported by the relevant body of legal doctrine, not the identity of who wins or loses in the end.

3. **In *Norgard v. Brush Wellman*, your dissent would have enforced a statute of limitations against an employee even though the employer intentionally lied or withheld information preventing the employee from discovering the employer's wrongdoing.**

a. As a judge, what legal rights, if any, do you believe people should have when an employer hides information about the cause of an employee's death or serious physical injury?

In Ohio, until an employee knows that he/she has been injured and its cause, limitation periods do not begin to run. *O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St.3d 84, 4 OBR 335, 447 N.E.2d 727, *paragraph two of the syllabus.*

b. When a company, as in the cases of *Norgard* and *Wal-Mart*, engages in intentional misconduct towards their employees and uses the legal system to avoid accountability, what recourse should the employees have?

An employee's recourse is the legal system. Our legal system holds employers accountable for unlawful conduct. Enforcement of statutes of limitations and appropriate accrual dates for application of discovery rules protect individuals and employers alike from stale claims. Likewise, the res judicata doctrine benefits both employees and employers by insuring finality of judgments.

4. **In the case of *Bunger v. Lawson Co.*, a majority of your court ruled that an employee had a cause of action for psychological injury against her employer and that, because psychological injury is not considered an injury according to the Ohio's Worker's Compensation statute, it is not among the class of injuries from which employers are immune from suit. You dissented, which would have left the employee with no remedy at all for her injuries.**

Please explain your reasoning for the "Catch-22" you would have imposed in this case?

In writing the dissent in *Bunger*, I did not choose the law that imposed the "Catch-22". It was the Ohio General Assembly that determined by statutory definitions that an employee could suffer a "bodily condition" that is not compensable as an "injury" yet an employer would also be immune from suit by that employee based on the work-related "bodily condition" suffered. The Ohio statutes at bar in the *Bunger* case explicitly provided employer immunity that was broader than the employee compensability definitions. My dissent expresses no judgment regarding the wisdom of such legislation but simply reflects an honest reading of it.

5. **In your dissent in *Bray v. Russell*, you argued that a statute giving the Ohio Parole Board the broad power to decide criminal cases that arise in prison and to then add time to a prisoner's sentence based on the results of these decisions was constitutional. Though the majority of your court found the**

statute to be unconstitutional, you disagreed arguing that the statute dealt with a disciplinary proceeding, rather than a criminal proceeding.

Based on your dissent in the case, what rights and protections, if any, do you believe a convicted prisoner should have in defending himself from an allegation of criminal misconduct while in prison?

In *Bray v. Russell,* the prisoner challenged the statutory scheme as being violative of the doctrine of separation of powers. That is the sole question upon which I offered an opinion. My dissent applied the appropriate analytical framework for assessing separation-of-powers challenges and concluded that since the "bad time" is imposed as a part of the original sentence, and since the administration of bad time does not interfere with the judicial function, it does not offend the separation-of-powers doctrine of the Ohio or United States Constitution. My dissenting view was joined by Justice Douglas and comports with United States Supreme Court precedent.

If I were presented with a case where a prisoner claimed that the prison-imposed rules violated her constitutional rights, I would evaluate that claim according to the appropriate precedent for deciding such claims.

6. **In your dissent in *Williams v. Aetna Finance Co.*, you state: "[T]he majority appears to stress the disparity of bargaining power between the parties and arbitration costs as reasons for nullifying the agreement to arbitrate as unconscionable. These factors, however, if by themselves deemed to render arbitration provisions of a contract unconscionable, could potentially invalidate a large percentage of arbitration agreements in consumer transactions.**

   a. **Do you believe that the interest in arbitration is so compelling that it should override the interest of consumers who have entered into agreements that they might not have made had they known the legal ramifications of their actions?**

I joined the majority in deciding that Mrs. Williams had established her claim of a civil conspiracy and that her verdict, including $1.5M in punitive damages, should stand. I opined in partial dissent that the majority's decision that the contract between Mrs. Williams and ITT was unenforceable lacked analysis under the two prongs of procedural and substantive unconsionability.

b. Are there any circumstances under which you would find a contract provision unenforceable based on principles of equity notwithstanding a general legislative policy supporting such a contract?

Yes. Though state and federal legislation favors enforcement of agreements to arbitrate, both R.C. 2711.01(A) and Section 2, Title 9, U.S.Code permit a court to invalidate an arbitration agreement on equitable or legal grounds that would cause any agreement to be revocable. One such ground is unconscionability.

7. **In the case of *Southwest Ohio Regional Transit Authority v. Amalgamated Transit Union Local 627*, the majority upheld an arbitrator's interpretation of a Union's Collective Bargaining Agreement to reinstate a union employee after he was automatically discharged under the agreement's drug policy because the automatic discharge was in conflict with other portions of the agreement.**

In your lone dissent you acknowledge that the Supreme Court, in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, stated that arbitrators may certainly interpret Collective Bargaining Agreement provisions, yet you state that the arbitrator's interpretation of the agreement should not be upheld.

a. **Do you disagree with the authority of the Supreme Court that it is the responsibility of an arbitration panel to interpret a Collective Bargaining Agreement if they are given the authority to do so under the agreement?**

No. The exception to this general rule, however, is that any interpretation must draw its essence from the bargaining agreement itself.

b. **If it is not the province of the arbitration panel to decide these issues, then who should decide the meaning of a Collective Bargaining Agreement?**

A court is obliged to correct a decision of an arbitration panel that does not draw its essence from the collective bargaining agreement. As I wrote in dissent, quoting *Mountaineer Gas Co. v. Oil, Chem. & Atomic Workers Internatl. Union* (C.A.4, 1996), 76 F.3d 606, 610, the arbitration panel here "ignored the unambiguous language of the Drug Policy and fashioned a modified penalty that appealed to [its] own notions of right and wrong. * * * By fashioning [a] new remedy and infusing [its] personal feelings and sense of fairness into the award, the [panel] created an award that failed to draw its essence from the CBA." *Id.*, 76 F.3d at 610. As the United States Supreme Court noted in *United Steelworkers of America*, though

arbitrators may certainly interpret CBA provisions, they cannot disregard them, and "[do] not sit to dispense [their] own brand of industrial justice." *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.* (1960), 363 U.S. 593, 597, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424, 1428.

c. Why was the Ohio legislative policy in favor of arbitration powerful enough to override the equities in the *Williams* case, yet not strong enough to prevent you from interfering with the arbitrator's decision when it came out in favor of the union employee in the *Southwest Ohio* case?

The dissenting views in both cases emanate from the principle of sanctity of contract supporting the upholding of contractual arrangements unless another overriding principle prevents enforcement of the contract terms. I therefore believe that the dissents in these two cases are consistent.

February 12, 2003

The Honorable Orrin G. Hatch
Chairman, Senate Committee on the Judiciary
The United States Senate
Washington D.C.

Dear Mr. Chairman:

I hereby submit my responses to written questions posed by Senator Durbin.

Sincerely,

Deborah Cook

Cc: The Honorable Patrick J. Leahy

Responses of Justice Deborah Cook
To the Questions from Senator Richard J. Durbin

1. You have authored over 300 dissents, many of which were sole dissents. Several of your own colleagues on the Ohio Supreme Court have accused you of taking positions that are unreasonable and unfair. In *Bunger v. Lawson* (1998), the majority called your dissent – which would deny remedies for a convenience store employee suffering serious psychological trauma after being robbed at gunpoint – "nonsensical" and "an absurd interpretation that seems borrowed from the pages of Catch-22." In *Russell v. Industrial Commission of Ohio* (1998), a workers compensation case in which you voted to deny a hearing to an injured worker, the majority stated that your dissent, "lacks statutory support for its position" and "unable to cite even the slightest dictum from any case to support its view .... [the] dissent's argument, which has not been raised by the commission, the bureau, the claimant's employer, or any of their supporting amici, is entirely without merit." To my mind, these accusations represent something more than an honest difference of opinion. They suggest that a majority of your own colleagues believe that you are a results-oriented judicial activist. In light of the strong language your colleagues have used to describe your legal reasoning, how can this Committee have confidence that you won't be a results-oriented judicial activist on the Sixth Circuit?

In my view, an impartial analysis of the majority opinions and the corresponding dissents in *Bunger v. Lawson Co.* (1998), 82 Ohio St.3d 463, 696 N.E.2d 1029 and *State ex rel. Russell v. Indus. Comm.* (1998), 82 Ohio St.3d 516, 696 N.E.2d 1069, would support my jurisprudential position in each and confirm that my dissents were not results-oriented judicial activism.

In writing the dissent in *Bunger*, I did not choose the law that imposed the "Catch-22". It was the Ohio General Assembly that determined by statutory definitions that an employee could suffer a "bodily condition" that is not compensable as an "injury" yet an employer would nevertheless be immune from suit by that employee for the work-related "bodily condition" suffered. The Ohio statutes at bar in the *Bunger* case explicitly provided employer immunity that was broader than the employee compensability definitions. My dissent expresses no judgment regarding the wisdom of such legislation, just an honest reading of it. Indeed, the fact that this claimant was left without compensation from his employer for his psychological injury seems a harsh result. I based my dissent in this case, however, on the fact that a legislative body has wide latitude in determining the state's public policy. It may be a policy choice with which some may disagree and even disdain. It is nonetheless within permissible bounds and I believe that it is the role of a democratically elected body such as the General Assembly and not the court to balance all the competing interests and determine the rules that necessarily dictate a certain outcome. I therefore felt bound to uphold the legislative choice.

The same rationale applies to *Russell*. There, I wrote in dissent because I believed that my view properly applied the facts to the law. My limited function as a judge in this case

did not include deciding which payment scheme I would favor, or which payment scheme was fairer. Instead I interpreted the statute as it was passed by the General Assembly. That interpretive process led to the conclusion that I reached.

2. You testified at your nomination hearing that the general assembly in Ohio is "a conservative legislature." (Transcript page 376.) Please explain what you meant by this statement and describe specifically those ways in which you believe it is conservative.

My comment was in response to questioning over my having dissented fairly often to Ohio Supreme Court majority opinions. My characterization of the Ohio General Assembly as conservative meant nothing more than that the labor organizations, trial lawyers, and criminal defense organizations in Ohio quite often disfavored the policy choices codified by that body. My impetus to dissent from majority opinions in many of the cases that the Senators questioned me about emanated from my considered judgment to uphold laws that these organizations sought to overturn. Examples include *Bunger*, *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St.3d 134, 677 N.E.2d 308, and *Genaro v. Cent. Transport, Inc.* (1999), 84 Ohio St.3d 293, 703 N.E.2d 782. The point I had hoped to make was that any implication that I disfavored particular persons or causes is simply not true. My decisions, including dissents, reflect an honest application of the law to the facts. If the laws enacted by the General Assembly restrict relief for work-related psychological injuries (*Bunger*), causes of action for intentional torts (*Johnson v. BP Chemicals, Inc.*, 85 Ohio St.3d 298, 707 N.E.2d 1107 (1999)), or remedies for whistleblowers (*Kulch*), as Ohio law did, my role is to uphold that law in the absence of a legitimate constitutional impediment.

3. As you know, your nomination is opposed by several organizations in Ohio that are very familiar with your record. A coalition of women's groups and employment lawyers organizations wrote to this Committee and said the following:

> **"Justice Cook's anti-worker voting record is becoming legendary in Ohio. Her opinions, with rare exceptions, espouse positions which would undermine the enforcement of state and federal civil rights laws. What is most striking about Justice Cook's career on the bench, particularly her tenure on our state Supreme Court, is her heartlessness. She repeatedly displays a cold indifference to the most tragic situations confronted by the individuals who appear before her. Worse, she routinely adopts strained or extreme legal propositions to deny meaningful relief to those most in need of justice from our courts."**

(a) What is your response to these statements?

I simply do not believe that a fair and neutral review of my record would lead one to these conclusions. These statements address

themselves to results of cases and attribute such results to the personal feelings and choices of the jurist. The statements appear to ignore the role of the law in judicial decision-making.

(b) **Why do you think so many organizations have opposed your nomination?**

The nomination process can be turned into an ideological battle in which the records of the nominees involved are mischaracterized. I believe that my record reflects balanced decision-making and a steadfast commitment to following the law. Critics of any judge regularly employ a results-oriented view of cases that ignores the requirement that judges follow the law that governs that particular case.

4. During the 2000 presidential campaign, President Bush pledged that he would appoint "strict constructionists" to the federal judiciary, in the mold of Supreme Court Justices Clarence Thomas and Antonin Scalia. These Justices have voted to limit Congress's power to provide redress for victims of rape and domestic abuse, combat discrimination against individuals with disabilities and against individuals who are 40 and over, and protect our water sources from pollution.

(a) **How would you describe the judicial philosophy of Justices Scalia and Thomas?**

I would hesitate to describe the judicial philosophy of any sitting Supreme Court justice. I understand that both Justices Scalia and Thomas describe themselves as textualists.

(b) **How would you describe your own judicial philosophy, and how do you believe it is different from or similar to Justices Scalia and Thomas?**

As stated above, I hesitate to describe the philosophy of sitting justices. My judicial philosophy is to follow the law without regard for my personal beliefs or inclinations, while respecting precedent, separation of powers, and my limited role as a judge as distinguished from that of a policy maker.

(c) **As a judge, would you interpret the Constitution strictly according to its original understanding in 1789?**

When presented with a case involving constitutional interpretation, I would evaluate the issues according to the appropriate precedent set forth by the United States Supreme Court.

(d) **Do you think that the Supreme Court's most important decisions in the last century – *Brown v. Board of Education, Miranda v. Arizona, Roe v. Wade* – are consistent with strict constructionism? Why or why not?**

If strict constructionism means that rights do not exist unless explicitly mentioned in the Constitution, then the cases you mention likely would not be consistent with that label.

5. In your 2000 campaign for re-election to the Ohio Supreme Court, you were endorsed by an organization called Ohio Right to Life.

(a) **What if anything did you do to secure that endorsement?**

I do not believe that I ever met anyone from this organization in my prior judicial campaigns. I did not seek the endorsement of this group and indeed did not even know at the time that I had received it.

(b) **What if any communications did you have with Ohio Right to Life?**

I do not believe that I had any.

(c) **Did you publicize this endorsement in any of your campaign literature?**

No, I did not.

(d) **Please list the published and unpublished cases you have ruled on involving abortion rights, and provide copies of the unpublished decisions.**

Cleveland Bar Assn. v. Cleary, 93 Ohio St.3d 191, 2001-Ohio-1326, 754 N.E.2d 235.

Medical Planning Services v. Tri-County Christian Community of Greater Akron, 1992 WL 112583.

6. I know that you will "apply the law" in the area of abortion rights but I would like to know your personal views of the issue.

(a) **Do you believe in and support a constitutional right to privacy, and that such a right encompasses a woman's right to have an abortion?**

The Supreme Court has decided that there exists a constitutional right to privacy. Further, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992), affirmed the court's decision in *Roe v. Wade* and upheld a woman's right to an abortion. These decisions are settled law and I will follow *Casey* and other Supreme Court cases protecting the reproductive rights of women.

(b) **Do you believe that *Roe v. Wade* was correctly decided?**

Because my role as a judge is to apply the law without allowing my personal preferences to affect my judgment, it follows that my personal opinion on the legal analysis of United States Supreme Court decisions bears no importance to my duties to uphold the Constitution and the laws of the United States.

7. Some people believe that mandatory minimum sentencing is costly and unjust, and that it has failed to deter crime or target drug kingpins. They believe that mandatory sentences have exacerbated racial and gender inequalities, and sent record numbers of women and people of color to prison. Do you agree with this assessment? If so, how do you recommend addressing it?

Certainly, everyone would agree that our nation's laws must apply to all individuals equally, without targeting individuals based on race, gender, sexual orientation, or other characteristics. The statistics Senator Durbin cited on this subject at the hearing suggest that the matter ought to have a high priority with legislative policy-makers.

In my role as a jurist, I must follow the minimum sentencing laws properly enacted by the legislature. I do not believe that I have a sufficiently thorough knowledge of the various arguments being presented to legislative bodies regarding this problem to offer any reasoned policy recommendations.

8. The legal profession puts a strong emphasis on service to our communities and to those in our society who are disadvantaged.

(a) **Can you cite examples in your career as a lawyer and judge that show you have a demonstrated commitment to equal rights and that you are devoted to continuing the progress made on civil rights, women's rights, and individual liberties?**

In my decade as a practicing lawyer, I regularly accepted referral of clients who were without resources. These clients often needed legal assistance with protecting rights to pension benefits, continued employment, personal property and protection from discrimination.

One such referral produced a judgment of the Ohio Supreme Court construing a newly enacted age discrimination statute. *Barker v. Scovill, Inc.* (1983), 6 Ohio St.3d 146, 6 OBR 202, 451 N.E.2d 807. My client was Jean Barker who claimed age discrimination in her discharge from employment.

As a judge I have worked to faithfully uphold laws protecting these rights. In, *In re Bicknell*, 96 Ohio St.3d 76, 2002-Ohio-3615, 771 N.E.2d 846, for example, I concluded that Ohio's name change statute does not preclude same-sex partners from changing their name; the statute required only that applicants for a name change set forth a reasonable and proper cause in the application. Similarly, in *State v. Thompson, State v. Thompson*, 95 Ohio St.3d 264, 2002-Ohio-2124, 767 N.E.2d 251, I wrote the lead opinion declaring unconstitutional an Ohio statute that criminalized homosexual solicitation, as a restraint on speech that by implication violated equal protection.

In my personal endeavors, I work to promote equal rights and individual liberties with the youngsters in our Collegescholars program and members of their families.

(b) **In your experience as a lawyer and state court judge, how would you assess the quality of legal representation provided to indigent criminal defendants? As a federal judge, what steps would you take to assure that all defendants received competent counsel?**

My law practice was exclusively civil and I lacked any experience during that part of my career on the subject of the quality of representation of indigent criminals. As a judge, I saw mostly acceptable levels of representation by appellate counsel appointed to represent indigent defendants. In fact, the work of the Ohio Public Defenders office ranks very high in evaluations of criminal defense efforts.

If confirmed, my efforts at the circuit court would be to faithfully consider all claims of ineffective assistance of counsel whether the cases involve public defenders or private attorneys. It would be my duty to ensure that all defendants receive competent counsel by applying the test the United States Supreme Court set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Moreover, if competent representation is lacking, it would be appropriate to review the standards for appointment of appellate counsel for representation of indigent defendants at the Sixth Circuit.

SUITE THIRTEEN HUNDRED
WEST TOWER
555 THIRTEENTH STREET NW
WASHINGTON, DC 20004-1109

February 5, 2003

BY MESSENGER

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
104 Hart Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed are my responses to the written questions I received from Senators Biden, Feingold, Feinstein, and Kennedy in connection with my pending nomination.

Respectfully,

John G. Roberts, Jr.

Enclosures

cc: The Honorable Patrick J. Leahy
Ranking Member
United States Senate
433 Russell Senate Office Building
Washington, D.C. 20510

RESPONSES FROM JOHN G. ROBERTS, JR.
TO FOLLOW-UP QUESTIONS FROM SENATOR JOSEPH R. BIDEN, JR.

1. As a lawyer for the Reagan Administration, you were in the position of enforcing its policy of "color blindness" with regard to addressing problems of discrimination and segregation, which were then, and remain today, a serious problem in this country, and one that you are very likely, as a D.C. Circuit judge, to address. At that time, you supported a policy that rejected busing as a way to resolve the problem of segregated schools, indicating that it was a poor remedy and did not effectively deal with the underlying goal of improving educational opportunity for all. Is that your personal belief today? If so, how do you reconcile the country's extreme disparities in funding between poor and rich (and often, minority and white) school districts, even within the same state, with that position?

RESPONSE: I served as a Special Assistant to Attorney General William French Smith from 1981-1982, and Associate Counsel to the President from 1982-1986. I would not describe my responsibilities in those positions as "enforcing [a] policy of 'color blindness.'" I had no enforcement responsibilities in those positions. It was Attorney General Smith's view that busing had in many instances failed to achieve its intended goal of desegregating public schools and eradicating the consequences of segregation, and that other means -- including magnet schools, proper drawing of attendance zones, and considered location of new school construction -- should be tried instead. I do not recall that this was grounded in any "color blindness" view, because race certainly may be taken into account in devising remedies for de jure segregation.

I do not think it would be appropriate for me to discuss my personal beliefs concerning the relative effectiveness of particular desegregation remedies. As you note, issues in this area may come before the D.C. Circuit. For example, I am aware that there is extensive litigation across the country addressed to the concern noted in the last sentence of the question -- the disparity in funding levels between different school districts. If I am confirmed and am presented with such issues, I would be guided by applicable Supreme Court precedent and not any personal beliefs.

2. You were also involved in the Reagan Administration's response to the Supreme Court's decision in Bolden, which made it significantly harder for plaintiffs to bring successful claims that their rights under the Voting Rights Act had been violated. The Court had said that, even though the statute contained no language suggesting it, Voting Rights plaintiffs had to show discriminatory intent. Congress, which had not intended such a barrier for plaintiffs, was working to amend the Act, but the Reagan Administration was at odds with Congress. In one memo you wrote to Assistant Attorney General Brad Reynolds, you mention "the difficulties involved in switching to an effects test under Section 2." What were the difficulties? And why, if Congress had not intended it, did you think the Administration should insist on a showing of discriminatory intent in order for a plaintiff to prevail?

RESPONSE: I do not recall the memorandum to which this question refers, nor do I have a copy of it. At the time I served as a Special Assistant to Attorney General William French Smith, and was involved in certain assignments for him with respect to legislative reactions to the decision in City of Mobile v. Bolden, 446 U.S. 55 (1980). The plurality opinion in City of Mobile v. Bolden stated that Section 2 of the Voting Rights Act was coterminous with the Fifteenth Amendment, a statement with which dissenting Justice Marshall agreed. 446 U.S. 55, 61 (1980); id. at 105 n.2 (Marshall, J., dissenting). The Bolden plurality further stated that "[o]ur decisions * * * have made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose." Id. at 62 (citing Wright v. Rockefeller, 376 U.S. 52, 56-57 (1964); Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960); Guinn v. United States, 238 U.S. 347, 359, 365 (1915)).

When legislation was proposed to overturn Bolden, I recall that one concern Attorney General Smith had was that an "effects test" might -- no matter how strong the disclaimers -- be applied in such a way as to lead to proportional racial representation, a result he considered contrary to democratic principles. Justice O'Connor referred to such concerns in her concurring opinion in Thornburgh v. Gingles, 478 U.S. 30, 84 (1986) (noting that, in amending Section 2, Congress intended to allow vote dilution claims but to avoid proportional representation, but that "[t]here is an inherent tension between what Congress wished to do and what it wished to avoid, because any theory of vote dilution must necessarily rely to some extent on a measure of minority voting strength that makes some

reference to the proportion between the minority group and the electorate at large."). The issues with which Attorney General Smith was concerned involved what form the legislative response to Bolden should take, not any effort to oppose Congressional intent.

3. The original, unamended Section 2 opposed by the Reagan administration, which was passed by the House by a vote of 389 to 24 and cosponsored by 62 senators, promoted the "totality of the circumstances" test that the Court had used until Bolden to determine whether or not a measure was discriminatory. What, if anything, was wrong with that standard?

RESPONSE: The "totality of the circumstances" test was introduced by Congressional amendment into Section 2 in 1982, and was explained and applied by the Supreme Court in Thornburgh v. Gingles, 478 U.S. 30, 36-38, 43-45 (1986). As a D.C. Circuit judge I would be obligated to, and would, apply the controlling authority of Thornburgh. I therefore do not believe that it would be appropriate for me to offer my personal view on the "totality of the circumstances" test.

4. In Rust v. Sullivan (1990), even though the only question before the Supreme Court involved whether the government could censor recipients of government funding for family planning services from discussing abortion, you argued in a brief as Deputy Solicitor General that "[w]e continue to believe that Roe was wrongly decided and should be overruled." You further argued that "the Court's conclusions in Roe ... find no support in the text, structure, or history of the Constitution." Intervening in a case such as this is at the discretion of the Solicitor General. Were you involved in the decision to intervene? If so, what role did you play and what position did you advocate?

RESPONSE: Rust v. Sullivan did not involve a discretionary decision to intervene. The respondent in the case was Dr. Louis W. Sullivan, Secretary of Health and Human Services. Petitioners had succeeded in securing Supreme Court review of a decision in the Secretary's favor by the Second Circuit, and it was the obligation of the Office of the Solicitor General to represent the Secretary before the Supreme Court.

5. In Bray v. Alexandria, you argued on the Bush Administration's behalf that Operation Rescue protestors, who acknowledged that their goal was to "rescue" fetuses by

physically preventing women from entering family planning clinics that provided abortions, could not possibly be considered to be engaging in invidious discrimination. Do you believe that to be true? If so, at what point do acts that affect only one segment -- a protected segment -- of the population, count as such discrimination?

RESPONSE: Bray concerned the scope of 42 U.S.C. § 1985(3). In Griffin v. Breckinridge, 403 U.S. 88, 102 (1971), the Supreme Court had previously held that § 1985(3) requires "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." As the brief for the United States explained, that issue implicated the interests of the United States, both because various Acts of Congress excluding abortion services from federal programs would be subject to equal protection challenge if the Court were to rule that opposition to abortion is a form of gender-based discrimination, and because federal officers and employees are sued under 42 U.S.C. § 1985(3). See Brief at 1-2 & n.1.

The Federal Government argued that abortion protestors' actions were not driven by animus against women as a class, but instead were aimed at the abortion process itself, and accordingly could not be the basis for a § 1985(3) claim. The Supreme Court agreed that the actions of the protestors were not the result of animus against "women in general." Bray, 506 U.S. 263, 269 (1993). The Court explained, in language responsive to the last sentence of the question:

> [The animus requirement] does demand * * * at least a purpose that focuses upon women by reason of their sex -- for example (to use an illustration of assertedly benign discrimination), the purpose of "saving" women because they are women from a combative, aggressive profession such as the practice of law. The record in this case does not indicate that petitioners' demonstrations are motivated by a purpose (malevolent or benign) directed specifically at women as a class * * *. Given this record, respondents' contention that a class-based animus has been established can be true only if one of two suggested propositions is true: (1) that opposition to abortion can reasonably be presumed to reflect a sex-based intent, or (2) that intent is irrelevant, and a class-based animus can be determined solely by effect. Neither proposition is supportable.

Id. at 270. The Court further explained the distinction between targeting a certain class, and targeting an activity that only that class can engage in:

> The approach of equating opposition to an activity (abortion) that can be engaged in only by a certain class (women) with opposition to that class leads to absurd conclusions. On that analysis, men and women who regard rape with revulsion harbor an invidious antimale animus. Thus, if state law should provide that convicted rapists must be paroled so long as they attend weekly counseling sessions; and if persons opposed to such lenient treatment should demonstrate their opposition by impeding access to the counseling centers; those protesters would, on the dissenters' approach, be liable under § 1985(3) because of their antimale animus.

Id. at 273 n.4. If confirmed as a circuit judge, I would be bound to follow Supreme Court precedent in this area, without regard to my personal views. Nothing about my personal views would prevent me from doing so.

6. You also argued that such acts did not violate women's right to freely travel from state to state, even though many of the women involved had come from other states only to obtain abortions at the blocked clinics. Do you personally agree with this position? What is your reason for taking such a position? At what point would that type of activity cross the line into violating the right to travel freely? Would you take the same position if a group of KKK members physically blocked the entrance to a hotel on the border of Mississippi, preventing African Americans from Alabama from staying there? Why?

RESPONSE: In Bray, the brief for the Federal Government argued that the right to interstate travel is not violated simply because the actions of a private individual incidentally affect a party who has engaged in interstate travel. Instead, the brief explained that the right to travel is implicated only where there is an unequal distribution of rights and benefits among residents and nonresidents, or where it is proven that "a defendant intended to violate [the right to travel] as one of his principal goals." Because the abortion protestors attempted to disrupt the abortion activities related to residents and nonresidents alike, the Federal Government argued that the right to interstate travel was not implicated in that case.

The majority of the Supreme Court accepted the government's view on this issue, recognizing that the "federal guarantee of interstate travel * * * protects interstate travelers against two sets of burdens: 'the erection of actual barriers to interstate movement' and 'being treated differently' from intrastate travelers.'" Bray, 506 U.S. at 276-277. The Court held that the right to interstate travel is not implicated simply because an interstate traveler is "incidentally affected" by the acts of a group of private individuals. Id. at 275.

If I were to be confirmed as a circuit judge, I would follow the Supreme Court precedent in this area. Nothing about my personal views would prevent me from doing so. I do not think I should answer hypothetical questions in areas that may come before me were I to be confirmed.

7. I'd like to ask you about the Freedom of Access to Clinic Entrances Act, passed by Congress on the heels of the Bray decision to protect clinics from the sort of harassment at issue in the Bray decision. At the time FACE passed, about a year after the Supreme Court decision in Bray, did you have an opinion as to its constitutionality? If so, what was that opinion?

RESPONSE: I do not recall having any opinion concerning the constitutionality of the Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. § 248, at the time that it was passed. I do note, however, that the Supreme Court's decision in Bray was concerned with the scope of 42 U.S.C. § 1985(3), rather than with any constitutional issue per se, and that the FACE Act differs from Section 1985(3) in critical respects. In particular, nothing in the FACE Act would appear to require any showing of "class-based, invidiously discriminatory animus," unlike Section 1985(3), as interpreted by the Supreme Court in Griffin v. Breckinridge, 403 U.S. 88, 102 (1971). Moreover, I am aware that several federal courts of appeal have held that the enactment of the FACE Act was a valid exercise of Congress's authority under the Commerce Clause. See, e.g., Norton v. Ashcroft, 298 F.3d 547 (6th Cir. 2002); Hoffman v. Hunt, 126 F.3d 575 (4th Cir. 1997); Terry v. Reno, 101 F.3d 1412 (D.C. Cir. 1996); United States v. Soderna, 82 F.3d 1370 (7th Cir. 1996); United States v. Dinwiddie, 76 F.3d 913 (8th Cir. 1996); United States v. Wilson, 73 F.3d 675 (7th Cir. 1995). Furthermore, I am aware that the FACE Act has been upheld against a variety of other constitutional challenges. See, e.g., United States v. Wilson, 154 F.3d 658 (7th Cir. 1998)

(rejecting First Amendment challenge); Terry v. Reno, 101 F.3d 1412 (D.C. Cir. 1996) (rejecting overbreadth challenge to FACE Act); United States v. Unterburger, 97 F.3d 1413 (11th Cir. 1996) (rejecting First and Tenth Amendment challenges). However, given that particular constitutional challenges to the FACE Act could come before me as a judge if I were to be confirmed, I do not believe I should express any views on the Act other than to note that I would apply the binding precedent of the Supreme Court in assessing any such challenge.

8. Do you continue to believe that Roe was wrongly decided? Why or why not?

RESPONSE: I do not believe that it is proper to infer a lawyer's personal views from the positions that lawyer may advocate on behalf of a client in litigation. To the extent the question about my "continuing" belief is based on the Federal Government's brief in Rust v. Sullivan, nothing about what my personal views were or are should be inferred from the fact that my name appears on the Federal Government's brief, as one of nine lawyers, in that case.

The Supreme Court's decision in Roe is binding precedent, and if I were to be confirmed as a circuit judge, I would be bound to follow it, regardless of any personal views. Nothing about my personal views would prevent me from doing so.

9. In one case for which you wrote an amicus brief while in private practice, Bragg v. West Virginia, you represented the National Mining Association. This case centered on the practice of "mountaintop removal," a term describing a certain type of mining for coal. The Fourth Circuit panel held that after the states had approved a plan to implement the statute, the federal government was no longer involved. Do you agree with that argument? The court also held that the state was immune from suit under the Eleventh Amendment. Do you agree with that argument?

RESPONSE: As you note, the amicus brief prepared in Bragg v. West Virginia was submitted on behalf of a client, the National Mining Association. My role as an attorney in that case -- as it has been in all cases in which I have served as counsel -- was to advocate my clients' positions, not to express my personal views. I do not believe I should express any personal views about the correctness of the Fourth Circuit's decision in Bragg, since the issues raised in that case continue to be actively litigated in the other circuits, see, e.g.,

Pennsylvania Federation of Sportsmen's Clubs, Inc. v. Hess, 297 F.3d 310 (3d Cir. 2002), and could come before me in some form were I to be confirmed. I would note, however, that the amicus brief on behalf of the National Mining Association in Bragg did not raise the Eleventh Amendment argument that the Fourth Circuit adopted there.

10. You represented the United States as amicus curiae in Withrow v. Williams, arguing that a state prisoner should not be able to raise a claim of a violation of the Miranda rule in a habeas corpus proceeding. The Court rejected this argument, holding that Miranda claims may be raised in habeas proceedings. What was your reasoning in arguing that Miranda should not apply to habeas corpus proceedings? Did you personally agree with this argument?

Response: The brief of the Solicitor General in Withrow v. Williams, 507 U.S. 680 (1993), argued that the Supreme Court's reasoning in Stone v. Powell, 428 U.S. 465 (1976) -- which held that a federal court should not entertain a Fourth Amendment claim raised by a state prisoner in a habeas petition where the petitioner had been afforded a full and fair opportunity to present the claim in State proceedings -- applied with equal force when a prisoner raised a Miranda claim in a habeas petition. The Stone Court weighed "the utility of the [Fourth Amendment's] exclusionary rule against the costs of extending it to collateral review," and concluded that the benefits of extending the rule to the habeas forum were "small in relation to the costs." 428 U.S. at 489, 493.

The Solicitor General's Withrow brief argued that the same result should obtain when a prisoner sought to raise Miranda claims on habeas review. Quoting the Supreme Court's decision in Duckworth v. Eagan, 492 U.S. 195, 209 (1989), the brief noted that the Miranda rule "'is not, nor did it ever claim to be, a dictate of the Fifth Amendment itself.'" The brief further argued that, just like the Court's decisions weighing the benefit of the exclusionary rule against its costs, decisions interpreting the scope of the Miranda requirements engaged in much the same cost-benefit assessment. The Solicitor General's brief accordingly argued that the cost-benefit analysis the Court had performed in Stone should be applied to Miranda, and with the same outcome.

That argument won four votes. The Withrow majority rejected the Solicitor General's argument that Stone's reasoning applied with equal force when Miranda claims were raised on

habeas review. See 507 U.S. at 687-695. As a D.C. Circuit judge I would be obligated to, and of course would, apply Withrow as controlling precedent. I therefore do not believe that it would be appropriate for me to comment on whether I personally agree with the argument raised by the Solicitor General in his brief, but ultimately rejected by a majority of the Supreme Court.

11. What was your view as to the recent Dickerson case, which upheld the constitutional support for Miranda, and how do you square it with your views in Withrow?

RESPONSE: If I am confirmed as a D.C. Circuit judge I would be obligated to, and would, apply Dickerson as controlling precedent. I therefore do not believe that it would be appropriate for me to offer my personal view on the case. The Dickerson Court affirmed the constitutional basis of the Miranda decision, while "conced[ing] that there is language in some of our opinions" supporting the contrary view. 530 U.S. 428, 438 (2000). That language formed, of course, the basis for the Federal Government's argument in Withrow and the attempted analogy to Stone v. Powell. I do not see how Dickerson can be squared with the Government's brief in Withrow; the argument in that brief would not have been plausible had Dickerson been on the books.

RESPONSES FROM JOHN G. ROBERTS, JR.
TO FOLLOW-UP QUESTIONS FROM SENATOR RUSSELL D. FEINGOLD

1. As a student, you wrote a law review note on the takings clause that was published in the Harvard Law Review in 1978. One of your arguments was that the emotional attachment property owners have for their property should be considered in determining the appropriate level of compensation. Do you still hold that view on the takings clause?

RESPONSE: I have reviewed the note in question, 91 Harv. L. Rev. 1462-1501 (1978), and can find no place where I argued that the emotional attachment property owners have for their property should be considered in determining the appropriate level of compensation. I do not recall thinking that then and do not believe now that the law requires considering emotional attachment in determining just compensation. The note stated that "current rules regarding what constitutes just compensation are fairly well established and uniformly applied. Generally, the state must pay the property holder the fair market value of the property taken." Id. at 1498. In any event, I would, if confirmed as a circuit judge, follow Supreme Court precedent in this area, as in any other. I would not follow my student note; no one else has.

2. Could you please discuss your assessment of the current state of the law on the takings clause? Could you include a discussion of what factors a court must consider in determining if a takings has occurred and in determining an appropriate level of compensation.

RESPONSE: The current state of the law on the Takings Clause is comprehensively set forth in the Supreme Court's recent decision in Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 122 S. Ct. 1465 (2002). I was retained in that case by the Tahoe Regional Planning Agency to argue before the Supreme Court that the agency's moratorium on development to preserve the pristine character of Lake Tahoe did not constitute a taking of property. Development interests on the other side argued that the moratorium was a per se taking for which

compensation was automatically required. The Court agreed, 6-3, with the agency's position.

In Tahoe, the Supreme Court reaffirmed that there are essentially two classes of takings: those in which the "government physically takes possession of an interest in property," id. at 1478, and those in which the government enacts "regulations prohibiting private uses" of property. Id. at 1479. In the first category of outright physical takings, the government "has a categorical duty to compensate the former owner." Id. at 1478. In the latter category of regulatory takings, the Supreme Court has consistently held that government action constitutes a taking only "if regulation goes too far." Id. at 1480. The Supreme Court in Tahoe emphasized that it has resisted adopting "any set formula for determining how far is too far, choosing instead to engage in essentially ad hoc, factual inquiries." Id. at 1481 (quotations omitted). Among the ad hoc, factual inquiries the Court considers are "the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001).

The Court in Tahoe also explained that "the separate remedial question of how compensation is measured once a regulatory taking is established" was first addressed in a dissenting opinion by Justice Brennan and then later endorsed by the Court in First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987): "[O]nce a court finds that a police power regulation has effected a 'taking,' the government entity must pay just compensation for the period commencing on the date the regulation first effected the 'taking,' and ending on the date the government entity chooses to rescind or otherwise amend the regulation." 122 S. Ct. at 1482 (quotation omitted). Just compensation is typically measured by fair market value. See, e.g., Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 474 (1973).

3. Based on your extensive review of the history of the takings clause, do you think the courts should be more or less accepting of environmental regulation under the takings clause?

RESPONSE: I would of course follow Supreme Court precedent in the takings area, as in any other, if I were to be confirmed as a circuit judge. I would be bound to follow that precedent whether I personally regarded it as overly accepting or insufficiently accepting of environmental regulation. The Supreme Court's recent decision in Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 122 S. Ct. 1465 (2002), in which I argued for the government agency against a takings claim brought by property developers, shows a robust regard for the need for government regulators to be afforded broad flexibility in undertaking vital environmental measures. In other cases the Court has found that regulatory efforts have triggered the constitutional prohibition on uncompensated takings of private property. The Court's "regulatory takings jurisprudence * * * is characterized by 'essentially ad hoc, factual inquiries,' designed to allow 'careful examination and weighing of all the relevant circumstances.'" Tahoe, 122 S. Ct. at 1478 (citation omitted). Because the analysis is so heavily dependent on the specific facts of particular cases, generalizations about the state of the jurisprudence in this area are ill-advised.

4. In your note you wrote, "On the other hand, where the zoning measure is seen as making changes of only minimal or dubious advantage, the property holder sacrificed will take small comfort in the social benefits his burden has created." Could you provide examples of zoning changes of a minimal or dubious advantage?

a. Is there a difference between zoning rules which are enacted because of environmental concerns versus zoning rules that enacted because of other concerns like housing and transportation? If so, what are the differences?

b. As a judge, how would you determine if a zoning measure is of "minimal or dubious" advantage?

RESPONSE: The note did not provide specific examples of regulations with "minimal or dubious" benefits, although at a later point it did reference one possible category of such regulations, "where a zoning board prohibits without cause a given use while permitting identical uses in the immediate vicinity." 91 Harv. L. Rev. 1493. The passage quoted in the question was intended to convey the notion

currently embodied in the Court's multi-factor balancing test, that one of the "complex of factors" to be considered in answering whether regulation gives rise to a taking is the "character of the government action." Palazzolo v. Rhode Island, 121 S. Ct. 2448, 2457 (citing Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)). The purposes of the challenged regulation are one factor to be considered in the balancing test, and a more compelling purpose -- such as preserving the pristine nature of Lake Tahoe, see Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 122 S. Ct. 1465 (2002) -- may permit even very strict regulation without compensation, where a less compelling purpose would not. This is not to say that some areas of regulation are more important than others, but that the purposes of the regulation have to be considered in the analysis.

The point of the passage was not to suggest intrusive judicial scrutiny of the public benefits underlying particular regulations. Indeed, the note specifically expressed the concern that, in a balancing test, "the scope of the public benefit may be insufficiently appreciated" and that "courts that apply the balancing analysis often slight the public need for regulatory measures." 91 Harv. L. Rev. 1482 n.105. The note concluded that "[t]o bring vitality to the balancing analysis, courts might assume a greater willingness to recognize the compelling weight of the public concerns behind challenged regulations." Id.

5. You also wrote that "the regulated party may even regard himself as sharing in the social benefits of the regulation."

a. How would you determine if the regulated party shares in the social benefits of the regulations?

b. What, if any, obligations should be imposed on the government when the regulated party does not share in the social benefit of the regulation? For example, if the regulated party does not share in the government's desire through zoning regulation to protect a wetlands area from being turned into a parking lot should the government face a higher burden to justify the regulation?

RESPONSE: The Supreme Court's recent decision in Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional

Planning Agency, 122 S. Ct. 1465 (2002), captures to a considerable extent the point I was trying to make in the quoted passage from the note. Excessive development in the Lake Tahoe basin gave rise to what was called a "race to develop," as landowners rushed to develop their property before the imposition of what were anticipated to be stricter controls to preserve the unique character of the Lake, which was particularly vulnerable to run-off caused by development. The government agency imposed a moratorium on development, while a comprehensive land use plan was being developed. When the moratorium was challenged as a taking, one of the arguments I advanced for the agency opposing the takings claim was that the very parties challenging the regulation benefited from it in a direct way. What made their property so desirable and valuable was the pristine character of the Lake. Without the moratorium, that would have been irretrievably lost, and all the property holders would have suffered.

Justice Stevens, in his opinion for the Court in Tahoe, accepted this contention. He explained that the moratorium "protects the interests of all affected landowners" and that "property values throughout the Basin can be expected to reflect the added assurance that Lake Tahoe will remain in its pristine state." Id. at 1489.

This is not to say, of course, that regulation must benefit affected property owners to avoid a requirement of compensation. That is not the law. It is instead to recognize that, in some cases, the most compelling argument against a takings claim is to show that the value of the affected property itself depends to some extent on the regulatory regime.

RESPONSES FROM JOHN G. ROBERTS, JR.
TO FOLLOW-UP QUESTIONS FROM SENATOR DIANNE FEINSTEIN

1. In Griswold v. Connecticut, the Supreme Court recognized the constitutional right to privacy. It went on to reaffirm and expand this right in Eisenstadt v. Baird. Following from these decisions, the Supreme Court then recognized constitutional protections for a woman's right to choose in Roe v. Wade.

(a) Do you believe in and support a constitutional right to privacy?

(b) Please explain your understanding of a constitutional right to privacy?

(c) Do you believe the constitutional right to privacy encompasses a woman's right to have an abortion?

RESPONSE: If confirmed as a circuit judge, I would be bound by Supreme Court precedent recognizing the constitutional right to privacy. Nothing in my personal views or beliefs would prevent me from applying that precedent fully and faithfully.

The Supreme Court's cases have recognized the right to privacy in a variety of contexts. The Court explained in Griswold v. Connecticut that the First Amendment "has a penumbra where privacy is protected from governmental intrusion." 381 U.S. 479, 482 (1965). Even before Griswold the First Amendment had been construed to protect, among other things, the "'freedom to associate and privacy in one's associations.'" NAACP v. State of Alabama, 357 U.S. 449, 462 (1958). Griswold further observed that other constitutional amendments -- the Third, Fourth, and Fifth, supported by the Ninth -- similarly created "zones of privacy" protected from "governmental invasions." Id. at 484. The Griswold Court held that the state law at issue there -- which forbade the use of contraceptives -- concerned "a relationship lying within the zone of privacy created by several constitutional guarantees," and improperly "sought to achieve its goals by means having a maximum destructive impact upon that relationship." Id. at 485. The Court accordingly held the law unconstitutional. Id.

The Court in Eisenstadt v. Baird, 405 U.S. 438 (1972), invoked Griswold in striking down, as a violation of the Equal

Protection Clause, a state law permitting married couples to obtain contraception but forbidding single people to do the same. The Court stated in Eisenstadt that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Id. at 453.

In Roe v. Wade, the Court stated that "[t]he Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." 410 U.S. 113, 152 (1973). The Roe Court further observed that "the right has some extension to activities relating to marriage, * * * procreation, * * * contraception, * * * family relationships, * * * and child rearing and education." Roe, 410 U.S. at 153 (citing cases). The Court concluded in Roe that "[t]his right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or * * * in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Id.

And in Planned Parenthood v. Casey, the Court observed that "[i]t is settled now, as it was when the Court heard arguments in Roe v. Wade, that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood." 505 U.S. 833, 849 (1992) (citing cases).

2. In Rust v. Sullivan, even though the question before the Supreme Court involved government funding for family planning services, you argued in a brief as Deputy Solicitor General that "[w]e continue to believe that Roe was wrongly decided and should be overruled." You further argued that "the Court's conclusions in Roe ... find no support in the test structure, or history of the Constitution."

(a) Mr. Roberts, do you continue to believe that Roe was wrongly decided?

(b) Do you continue to believe that Roe should be overruled?

(c) Do you continue to believe that the Supreme Court's decision in Roe have no support in the text, structure or history of the constitution?

(d) Do you believe the holding of Roe v. Wade is the settled law of the land?

RESPONSE: I do not believe that it is proper to infer a lawyer's personal views or beliefs from the arguments advanced by that lawyer on behalf of a client. The argument advanced in the Rust brief reflected the existing position of the Federal Government, as reflected in briefs filed in five previous cases. The Rust brief noted that the views expressed in those briefs continued to be the position of the administration. If that position were accepted, the challenge to the federal program in Rust would fail, which was why the position was noted in that case by the attorneys charged with the responsibility to defend the challenged federal program.

Roe is the settled law of the land. If I am confirmed as a circuit judge, I would be bound to follow it. Nothing about my personal beliefs would prevent me from doing so.

RESPONSES FROM JOHN G. ROBERTS, JR.
TO FOLLOW-UP QUESTIONS FROM SENATOR EDWARD M. KENNEDY

1. In recent years, Supreme Court decisions have undermined key aspects of our anti-discrimination laws that protect state employees. There is grave concern that the Family and Medical Leave Act may suffer the same fate -- just a few weeks ago, the Court heard a case on implementation of the FMLA, which has been so important to women and their families.

In a June 1999 interview on NPR's Talk of the Nation, you said the following about similar "federalism" cases:

> "What these cases say is, just because Congress has the power to tell individuals and companies that this is what you're going to do, and if you don't do it, people can sue you, that doesn't mean they can treat the states the same way."

Mr. Roberts, if you are confirmed, you will be called upon to review federal statutes. I am concerned that you believe Congress has very narrow authority in this area and in many other areas. Here's what you also said:

> "You know, we've gotten to the point these days where we think the only way we can show we're serious about a problem is if we pass a federal law, whether it's the Violence Against Women Act or anything else. The fact of the matter is, conditions are different in different states and state laws can be more relevant is I think exactly the right term - more attuned to the different situations in New York as opposed to Minnesota. And that's what the federal system is based on."

Mr. Roberts, in your opinion, when may Congress pass legislation binding on the states?

RESPONSE: In its seminal decision in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819), the Supreme Court established the bounds of Congress's legislative authority: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are

appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." Congress's lawmaking authority is accordingly very broad, including its authority to pass legislation binding on the States.

That broad authority is subject, as the quoted language from Chief Justice John Marshall confirms, to the other provisions of the Constitution. In a series of recent cases, the Supreme Court has ruled that the Eleventh Amendment precludes Congress from subjecting States to certain private rights of action for money damages. As noted in the question, the Court just recently heard argument in Nevada Department of Human Resources v. Hibbs, No. 01-1368, which presents the question whether the States are immune from damages awards under the Family Medical Leave Act. I participated in a moot court under the auspices of the Georgetown Law School Supreme Court Institute to help prepare counsel for the private party, plaintiff Hibbs, for her Supreme Court argument defending the FMLA against the assertion of state immunity under the Eleventh Amendment. If I were to be confirmed as a circuit judge, I would of course be bound to follow the Supreme Court's precedents, both on the breadth of Congress's power to legislate and on the Eleventh Amendment.

2. Mr. Roberts, many believe that although the Supreme Court is trying to limit congressional authority, the Spending Clause can be used to support federal civil rights legislation. I know you are quite familiar with this area of law because you represented the National Beer Wholesalers' Association and filed a brief in the Dole v. South Dakota case, which guides Congress' Spending Clause authority. The central argument in your brief focused on the 21st Amendment, but you also wrote:

> "Amicus recognizes that this Court, like the court below, has stated that broad proposition that a condition on the grant of Federal funds does not deny rights to the States, because the States may decline the funds . . . while the proposition in its most general terms may have been valid when first announced, it requires reexamination in light of present-day realities. Federal spending practices and state budgets have changed dramatically in the half century and today many if not all States are no longer "entirely free" to turn down funds absolutely

> essential to their economies. Congress knows this to be true. The States know it to be true. This Court need not be blind to the realities that shape the conduct of the other actors in the constitutional scheme, and need not characterize conditions on the receipt of Federal funds as "coercive" before recognizing that a State may well be forced to forfeit constitutional prerogatives . . ."

Mr. Roberts, every nominee that comes before the Judiciary Committee pledges to follow Supreme Court precedent. Accordingly, I assume you'll follow Dole, but given your concern that the "coercion" standard may not be the best way to determine when Congress can condition the States' receipt of federal money, please describe the manner in which you will *interpret* this element of the Dole test?

RESPONSE: The counsel of record on the brief to which this question refers was E. Barrett Prettyman, Jr. At the time the brief was filed, I was an associate working with Mr. Prettyman. In addition, I do not believe it is proper to infer a lawyer's personal views from the views he has advanced in litigation on behalf of a client.

In any event, you are correct that I would follow the Supreme Court precedent of South Dakota v. Dole, 483 U.S. 203 (1987), and not the arguments advanced in the amicus brief. I would also follow Supreme Court precedent on how the coercion element discussed in Dole should be interpreted. Dole stated that "[o]ur decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" 483 U.S. at 211 (quoting Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937)). The facts that Steward -- the only case cited by the Dole Court in its discussion of this issue -- rejected a coercion claim, and that the amicus brief quoted in the question could cite no more favorable authority, suggest the heavy burden one advancing such a claim would bear.

3. In Rust v. Sullivan, although the only question before the Supreme Court pertained to government funding for family planning services, as Deputy Solicitor General, you argued in a brief that "[w]e continue to believe that Roe was wrongly decided and should be overruled." You went on

to argue that "the court's conclusions in Roe . . . find no support in the text, structure, or history of the Constitution."

Mr. Roberts, the question of Roe's constitutionality was not before the Court -- the issue was the constitutionality of implementing regulations governing Title X grant recipients put forth by the Secretary of Health and Human Services. It appears that you could have addressed the core issue without making the argument that Roe should be overturned.

Why did you feel it necessary to make that argument?

Do you continue to believe that Roe should be overturned?

RESPONSE: I appeared as one of nine government attorneys on the brief for the federal respondent in Rust v. Sullivan. The purpose of that brief was to defend the challenged Health and Human Services program. The program was challenged on the ground that regulations issued under the program impermissibly burdened the abortion right. It was the position of the Federal Government at that time, as expressed in briefs filed in five previous cases cited in the Rust brief, that Roe should be overruled. As explained in the Rust brief, "[i]f Roe is overturned, petitioner's contention that the . . . regulations burden the right announced in Roe falls with it." Br. for Resp. at 13.

I do not believe it is proper to infer a lawyer's personal views from the position taken on behalf of a client. Roe is binding precedent and, if I were confirmed as a circuit judge, I would be bound to follow it. Nothing in my personal views would prevent me from doing so.

4. Mr. Roberts, during a June 24, 1999, interview on NPR's Talk of the Nation, you said the following: "[t]he reason that that's the way it was in 1789 is not a bad one when you're talking about construing the Constitution."

Do you support an "originalist" approach to constitutional interpretation?

If not, would you describe the underlying theory that guides your approach to constitutional interpretation?

RESPONSE: I would of course follow any applicable Supreme Court precedent if called upon to interpret a particular provision of the Constitution. In some areas, for example interpretation of the Seventh Amendment right to a jury trial, the Court has taken what might be described as an "originalist" approach -- whether the right attaches has much to do with historical practice at the time the Seventh Amendment was adopted. See, e.g., Feltner v. Columbia Pictures Television, Inc., 523 U. S. 340 (1998). In other areas the Court's analysis is not so tightly tied to historical practice. I do not have an all-encompassing approach to constitutional interpretation; the appropriate approach depends to some degree on the specific provision at issue. Some provisions of the Constitution provide considerable guidance on how they should be construed; others are less precise. I would not hew to a particular "school" of interpretation but would follow the approach or approaches that seemed most suited in the particular case to correctly discerning the meaning of the provision at issue.

SUITE THIRTEEN HUNDRED
WEST TOWER
555 THIRTEENTH STREET NW
WASHINGTON, DC 20004-1109

February 11, 2003

BY MESSENGER

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
104 Hart Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed are my responses to the written questions I received from Senator Schumer in connection with my pending nomination.

Respectfully,

John G. Roberts, Jr.

Enclosures

cc: The Honorable Patrick J. Leahy
Ranking Member
United States Senate
433 Russell Senate Office Building
Washington, D.C. 20510

RESPONSES FROM JOHN G. ROBERTS, JR.
TO FOLLOW-UP QUESTIONS FROM SENATOR CHARLES E. SCHUMER

1. When Chief Justice Rehnquist was advising President Nixon on judicial nominations, he said that judges who are strict constructionists are generally hostile to civil rights plaintiffs. Do you agree with Chief Justice Rehnquist's characterization? Why or why not? How do you define strict constructionism? Would you describe yourself as a strict constructionist? How would you describe your legal or judicial philosophy?

RESPONSE: I am not familiar with the quotation or the context in which it was made. Whether it is correct to say that "strict constructionists" are "hostile to civil rights plaintiffs" depends, of course, on the meaning of both quoted phrases. If by "strict constructionist" one means a judge who strictly adheres to what the Framers intended, including by giving a broad and expansive meaning to those provisions the Framers intended to bear such an expansive construction, then there is no reason to suppose such a judge would be "hostile to civil rights plaintiffs." I believe Justice Black, for example, considered himself a strict constructionist when it came to the First Amendment. It was his famous view that when the Framers wrote in that Amendment that "Congress shall make no law," they meant "NO LAW." Such a view is obviously not hostile to First Amendment claims.

But if by "strict constructionist" one means a judge who superimposes on the Constitution a narrow and crabbed reading -- no matter what the interpretive evidence to the contrary -- that is a different story. My concern with such a judge, however, would be that he or she was likely to get it wrong, whether that benefits or disadvantages civil rights plaintiffs in any given case. A narrow and crabbed reading of provisions affording defenses to civil rights claims may be beneficial, not hostile, to civil rights plaintiffs. The question ought to be not whether the reading was strict or broad, but which reading more accurately reflects the intent of the draftsmen in any particular instance.

My own judicial philosophy begins with an appreciation of the limited role of a judge in our system of divided powers. Judges are not to legislate and are not to execute the laws. As Chief Justice Marshall explained in Marbury v. Madison, however, "[i]t is, emphatically, the province and duty of the judicial department, to say what the law is." That duty arises from the constitutional responsibility to decide particular cases, which Marshall identified as the basis for independent judicial review -- the unique American contribution to political science. My judicial philosophy accordingly insists upon some rigor in ensuring that judges properly confine themselves to the adjudication of the case before them, and seek neither to legislate broadly nor to administer the law generally in deciding that case.

Deciding the case calls for an appreciation of both the strengths and shortcomings of the adversary system, adherence to precedent and reliance on the traditional tools of the judicial craft, and an openness to the wisdom offered by colleagues on a panel. It also requires an essential humility grounded in the properly limited role of an undemocratic judiciary in a democratic republic, a humility reflected in doctrines of deference to legislative policy judgments and embodied in the often misunderstood term "judicial restraint." That restraint does not mean that judges should not act against the popular will -- the Framers expected them "calmly to poise the scales of justice," as Judge William Cranch put it, even "in dangerous times." But it does mean that, in doing so, they should be ever mindful that they are insulated from democratic pressures precisely because the Framers expected them to be discerning the law, not shaping policy. That means that judges should not look to their own personal views or preferences in deciding the cases before them. Their commission is no license to impose those preferences from the bench.

2. If confirmed, what Supreme Court Justice, living or dead, would you most want to emulate in terms of judicial philosophy or approach to constitutional questions?

RESPONSE: There is no Supreme Court Justice I would seek to emulate in terms of judicial philosophy or approach to constitutional questions. As a general matter, I admire the judicial restraint of Holmes and Brandeis, the intellectual rigor of Frankfurter, the common sense and

pragmatism of Jackson, the vision of John Marshall. But I would not say that there is one Justice's judicial philosophy that I would strive to copy. The reason is that I do not believe that beginning with an all-encompassing, categorical judicial philosophy or uniform approach to constitutional questions is the best way of faithfully construing the Constitution. In particular, different approaches may be better suited to different constitutional provisions. To take one extreme example to illustrate the point, it seems clear that a literalist or textualist approach is the only suitable one for construing a provision like Article I, section 7, clause 3, requiring a "two thirds" vote to override a veto. Not even the most ardent believer that changing societal norms should inform constitutional interpretation would suggest that, in light of such changing norms, two-thirds ought to be read as three-fifths. At the same time, an approach focusing solely on the constitutional text sheds only limited light on what constitutes an "unreasonable" search or seizure prohibited by the Fourth Amendment.

In some substantive areas, Supreme Court precedent defines the appropriate approach. The Court has held, for example, that the right to a jury trial under the Seventh Amendment turns significantly on historical practice at the time the Amendment was adopted. See Feltner v. Columbia Pictures, Inc., 523 U.S. 340 (1998). A lower-court judge who generally eschewed a historical approach to constitutional questions would not be free to disregard that precedent.

3. What two current Supreme Court Justices do you believe have the most divergent judicial philosophies? How would you characterize the judicial philosophies of each (e.g., strict constructionist, originalist, etc.)? Of the two you name, in terms of judicial philosophy, which Justice do you anticipate you will more closely approximate and why?

RESPONSE: I do not believe that a nominee should, as part of the confirmation process, compare and critique the judicial philosophies of the sitting Justices. I would be bound to follow decisions of the Court no matter which Justice authored them, and no matter which philosophy they may be said to reflect. Moreover, in that I currently represent several parties with active matters awaiting decision from the Court. My ethical obligation to those clients counsels restraint in anything that might appear to

be criticism of the Court, or adherence to an approach contrary to their interests.

For the reasons set forth in my response to Question 2, I do not think there is any overarching judicial philosophy that I anticipate following if I were to be confirmed as a circuit judge.

4. How do you define judicial activism? Please provide us with an example of judicial activism in either a state or federal case that has not been reversed.

RESPONSE: I understand "judicial activism" to refer to a judge who has transgressed the limited role assigned to the judicial branch under the Constitution, and has either undertaken to exercise the legislative function by imposing his own personal policy preferences under the guise of legal interpretation, or has arrogated to himself the executive function by imposing his policy views of how the law should be administered.

I believe the opinion for the California Supreme Court in Johnson v. Goodyear Mining Company, 127 Cal. 4, 59 P. 304 (1899), is an example of what I consider judicial activism. The question presented was the constitutionality of a state law requiring all corporations doing business in the state to pay their employees at least once a month, and giving the employees a lien for wages owed and for attorney's fees in case of a suit to collect the wages. The court held that the law violated the state constitution:

> The corporation and the laborer are prohibited from making any contract whereby wages are to become due for a longer period than one month as a condition of employment, or by which the laborer is to be paid in anything except money or negotiable checks. The working man of intelligence is treated as an imbecile. Being over 21 years of age, and not a lunatic or insane, he is deprived of the right to make a contract as to the time when his wages shall become due.

In my view, the analysis reflects the imposition of the justices' own views of social and economic policy, disregarding the legislative determination that a

particular social problem existed warranting remedial legislation.

5. Please identify three Supreme Court cases that have not been reversed and which you have not previously criticized publicly where you are critical either of the Court's holding or reasoning and please discuss the reasons for your criticism.

RESPONSE: I do not believe that it is appropriate for a judicial nominee to criticize binding Supreme Court precedent as part of the confirmation process. If I were to be confirmed as a circuit judge, I would of course be bound to follow Supreme Court precedent, regardless of whether I personally agree with it.

A judge should come to a case before him unencumbered by any commitments beyond that embodied in the judicial oath. As the ABA Model Code of Judicial Conduct states, a prospective judge "shall not ... make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of office ... [or] make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." Criticism of Supreme Court precedent that a nominee would be bound to apply fully and faithfully, as part of the confirmation process, is at least in considerable tension with this basic principle. Once it were accepted that a nominee could be asked to criticize binding precedent, he could presumably be asked whether he agrees with particular precedents, all in an effort to attempt to discern how the nominee would decide particular cases. As Lloyd Cutler recently testified, however, "[c]andidates should decline to reply when efforts are made to find out how they would decide a particular case."

6. In Morrison v. United States, a 5-4 Supreme Court held that despite years worth of hearings and well-substantiated findings proving that violent crime against women costs the country between $5-$10 billion each year in health care, criminal justice, and other social costs, Congress did not adequately establish the effect of violence against women on interstate commerce to justify the use of Commerce Clause powers. The four Justice minority disagreed, arguing that the Court should show deference to Congress' ample findings and uphold the Violence Against Women Act as

a rational response to the national threat posed by gender-motivated violence.

Do you agree with the majority's conclusion or the minority's and why?

Please do not answer merely by restating the holding of Morrison. I understand that no matter what position you state here, you will follow the law as defined by the Supreme Court. I am asking this question to better understand the legal and judicial philosophy you will bring with you to the bench if you are confirmed.

RESPONSE: For the reasons set forth in my response to Question 5, I do not think it is appropriate for me to indicate whether I agree with the majority or minority in Morrison v. United States. It is of course for Congress to decide as a policy matter the objects and means of federal legislation, not the courts. As Chief Justice Marshall explained as long ago as McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819), "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

At the same time, the claim that Congress has exceeded constitutional limits is not one the courts may decline to decide. Even the dissenters in Morrison recognized that. See 529 U.S. at 651 n.19. These competing principles have typically been reconciled by a healthy deference to legislative determinations that the object of legislation is within constitutional bounds, a principle embodied in the notion of judicial restraint. Articulating when that deference goes too far and becomes abdication, and when it fails to go far enough and becomes judicial activism, has been the central problem accompanying the development of independent judicial review -- the one uniquely American contribution to political science. It has bedeviled our most gifted legal commentators. See, e.g., Alexander Bickel, The Least Dangerous Branch. I certainly do not hold the solution, but would note that the proper degree of deference is more likely to be struck the more a judge unfailingly bears in mind his constitutionally limited role, and the essential humility that is indispensable to a proper discharge of judicial functions.

7. What law review article or book (other than original legal documents such as the Constitution) has most influenced your views of the law? How has it influenced your views?

RESPONSE: No single publication has had an overarching influence on my view of the law. If I had to select one publication as the most influential, it would be Hart and Wechsler's The Federal Courts and the Federal System (2d ed. 1973), edited by Professors Bator, Mishkin, Shapiro, and Wechsler. That certainly is the book I have always had within reach of my desk at work since graduation from law school. I was struck during law school by the rigorous analytic process the book brought to bear on the most fundamental issues surrounding federal courts. As a casebook (albeit one with extensive, and probing, commentary), The Federal Courts and the Federal System does not offer definitive answers to those basic questions, but instead subjects them to a sort of written Socratic dialogue that reveals the underlying premises and suppositions of various positions. The authors and editors of the book are able to demonstrate that analytic process at the highest levels. I have long regarded the book as a model of the analytic rigor a good judge should bring to the issues he or she is asked to decide.

SUITE THIRTEEN HUNDRED
WEST TOWER
555 THIRTEENTH STREET NW
WASHINGTON, DC 20004-1109

May 6, 2003

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
104 Hart Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed are my responses to the written questions I received from Senators Leahy, Kennedy, Kohl, and Durbin in connection with my pending nomination.

Respectfully,

John G. Roberts, Jr.

Enclosures

cc: The Honorable Patrick J. Leahy
Ranking Member
United States Senate
433 Russell Senate Office Building
Washington, D.C. 20510

RESPONSES FROM JOHN G. ROBERTS, JR.
TO QUESTIONS FROM SENATOR EDWARD M. KENNEDY

Just so we fully understand what you said at the hearing, would you confirm, deny or revise the following summary:

1. You may have strong opinions about the correctness of such decisions as Brown, Miranda, and Roe v. Wade, and you may have clear opinions about whether they were examples of judicial activism or strict constructionism as you understand and apply those terms, but you are unwilling to share any of those opinions with us.

RESPONSE: It is my understanding that it is not appropriate for nominees to answer questions seeking their personal views on the correctness of binding Supreme Court precedent. If confirmed, the nominee would be bound to follow the precedent, regardless of whether he personally viewed the precedent as correct, and regardless of whether he personally viewed the precedent as "activism" or "strict constructionism."

For a nominee to offer personal views on binding Supreme Court precedent is improper for several reasons. If such a practice were to be accepted, Senators can be expected to have lists of precedents in areas of particular interest to them, and to quiz nominees on those precedents, in an effort to obtain a forecast of how the nominee will vote on particular questions. As Justice Ginsburg explained in declining to comment at her confirmation hearing on the correctness of Supreme Court precedent:

> **I sense that I am in the position of a skier at the top of [the] hill, because you are asking me how I would have voted in Rust v. Sullivan (1991). Another member of this committee would like to know how I might vote in that case or another one. I have resisted descending that slope, because once you ask me about this case, then you will ask me about another case that is over and done, and another case. [Hearing, at 494.]**

For a nominee to offer a personal view that, say, the Smith case was wrongly decided also compromises the position of that nominee in subsequent cases in which the applicability of the Smith precedent is at issue. A litigant arguing for the application or extension of Smith before a judge who -- as a nominee -- has explained that he thinks Smith was wrongly decided may well conclude that he has not been treated fairly if the judge rejects those arguments. Lawyers researching cases will not confine themselves to the applicable precedents, but instead feel compelled to scour the transcripts of confirmation hearings, to determine what the judges hearing their appeal think, as individuals, about the correctness of the pertinent precedents. This would undermine the ideal to which Justice Breyer referred during his confirmation hearing for the Supreme Court: "Why is it that judges wear black robes? I have always thought that the reason that a judge wears a black robe is to impress upon the people in the room that a particular judge is not speaking as an individual."

As I mentioned at my hearing, I have reviewed the transcript of Justice Ginsburg's hearing. She repeatedly declined to comment on her personal views of Supreme Court precedent, citing "the best interests of the Supreme Court." Hearings, at 495. See, e.g., id. at 474 ("[D]o you agree that Maher and Harris, those two cases, were decided correctly? Judge Ginsburg. I agree that those cases are the Supreme Court's precedent. I have no agenda to displace them, and that is about all I can say.") (emphasis added); id. at 542 ("You have cited a decision of the U.S. Supreme Court. I have tried religiously to refrain from commenting on a number of Court decisions raised in these last couple of days."); id. at 557 ("I avoided commenting on Supreme Court decisions when other Senators raised that question, so I must adhere to that position."). Indeed, Justice Ginsburg specifically declined to comment on whether a specific Supreme Court decision was an example of judicial activism:

> My question to you, Judge Ginsburg, is, Do you believe with Justice White that the Supreme Court's decision in the Buckley case was an example of judicial activism into an area that Congress itself should have ruled on?

> Judge Ginsburg. That falls in the same category as the prior question [in response to which Justice Ginsburg "adhere[d]" to her position of "avoid[ing] commenting on Supreme Court decisions"]. You are inviting comment on Supreme Court opinions, or separate opinions, in an area live with business. [Hearing, at 558.]

I believe it appropriate to adhere to the approach taken by Justice Ginsburg in "the best interests" of the federal judiciary.

2. Although it is widely recognized that you were selected through a process which is philosophically, if not ideologically, based, you are unwilling, beyond your generalized commitment to follow binding Supreme Court precedents, to tell us anything meaningful about whether, in your exercise of what you concede is a broad range of judicial discretion, you will or will not live up to the expectations of those who selected you.

RESPONSE: I cannot speak to "the expectations of those who selected" me. I would hope that those involved in the selection process would expect me to be a good judge, one who faithfully discharged the obligation in the judicial oath to "administer justice without respect to persons, and do equal right to the poor and to the rich." 28 U.S.C. § 453. If confirmed, I fully intend to do everything in my power to live up to those expectations.

With respect to the process by which I was selected, I was never asked any questions along the lines of the ones I have considered improper to answer during the confirmation process. And I must respectfully disagree that I have been unwilling to offer anything meaningful about my judicial philosophy, beyond a commitment to follow binding Supreme Court precedent. I discussed judicial activism, judicial restraint, and my judicial philosophy in response to Question III.5 of the Senate Questionnaire. I answered questions on those subjects at each of my Judiciary Committee hearings. See, e.g., January 29, 2003 hearing at 181, 197, 199-200, 377-378, 381-383, 417-420; April 30, 2003 Hearing at 28-31, 36-37, 40-43, 56-57, 89-91. And I discussed those subjects at considerable length in responses to both the first round of written follow-up questions, see Senator Kennedy questions 1, 4; Senator

Schumer questions 1, 2, 4; Senator Durbin questions 8, 9, 10, and the second round of written follow-up questions, see Senator Leahy question 2; Senator Kohl question 4.

**RESPONSES FROM JOHN G. ROBERTS, JR.
TO QUESTIONS FROM SENATOR PATRICK J. LEAHY**

1. As an attorney in private practice, I am sure that a routine part of your day is spent reviewing conflict of interest checks circulated in your law firm. In your financial disclosure report, you indicate that you own several hundred thousand dollars of Microsoft Corporation stock. I also understand that you served as counsel to the state plaintiffs in the governmental antitrust case against Microsoft, briefing and arguing the states' appeal in the federal Court of Appeals for the District of Columbia Circuit.

A. I am curious about whether you owned Microsoft stock when you argued against the company on behalf of the states?

B. If so, can you provide the Committee with assurances that the possible conflicts of interest suggested by that situation were resolved to the satisfaction of your clients?

C. A few years ago several newspapers reported incidents of federal judges who had failed to recuse themselves from cases involving corporations in which they were invested. In the wake of this controversy some citizens called for all judges to post their financial holdings on the Internet to ensure that they would not preside over a case that involved a conflict of interest. This proposal was never implemented but it highlights the need for all judges to be aware of their own potential conflicts of interest and to be vigilant in recusing themselves as required by statute. If confirmed, what procedures would you implement in your chambers to avoid conflicts of interest considering your current financial holdings?

RESPONSES:

A. Yes.

B. I advised Iowa Attorney General Tom Miller, my client contact in the matter, about the stock ownership at the outset of the engagement. I had purchased the stock ten years ago and have had no transactions involving it since that time.

C. I understand that the judges on the D.C. Circuit provide the Clerk's Office with a complete list of their financial holdings and any other relationships presenting a conflict of interest. See 28 U.S.C. § 455 (specifying circumstances requiring disqualification of a judge). The Clerk's Office then screens incoming cases to ensure that no case posing a conflict is routed to a judge. As a second layer of protection, D.C. Circuit rules require parties to disclose all entities with an interest in the litigation on a form at the beginning of each filing. See D.C. Cir. Rules 12(f), 15(c), 26.1. The judges can then double-check that disclosure to ensure that they do not participate in a case presenting a conflict. I would follow these procedures, and would also make my clerks aware of my conflicts list, as an additional layer of scrutiny to ensure conflicts are avoided.

2. If you are confirmed, how would you engage in statutory interpretation? What do you believe is the proper way to determine congressional intent? Do you believe that legislative history plays a role in such assessments?

RESPONSE: The Supreme Court has provided ample guidance on how to engage in statutory interpretation. The task begins, of course, with the language chosen by Congress. As a unanimous Supreme Court has explained, however, "Over and over we have stressed that '[I]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" United States National Bank of Oregon v. Independent Insurance Agents of America, 508 U.S. 439, 455 (1993) (quoting United States v. Heirs of Boisdore, 49 U.S. (8 How.) 113, 122 (1849)). As the Court put it, "Statutory construction 'is a holistic endeavor,' and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter." Id. (quoting United Savings Assn. of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371 (1988)).

The process by which a statute evolved -- its legislative history -- is an appropriate source for guidance in construing ambiguous statutory language. See, e.g., NLRB v. Bell Aerospace Co., 416 U.S. 267, 274 (1974) (referring to "the importance of legislative history"). This includes committee reports and other legislative materials, which can help furnish an informed understanding of what Congress was trying to accomplish in a statute. Such materials must be handled with care and with an appreciation of the nature of the legislative process. For example, committee reports generally carry more weight than the remarks of a single legislator, and comments by the opponents of legislation as to its meaning are not as probative as the comments of supporters. And, of course, the principal use of legislative history is to clarify ambiguity -- not to contradict plain statutory language. The over-all guiding principle was articulated by chief Justice Marshall nearly two centuries ago: In the attempt "to discover the design of the legislature," we must "seize every thing from which aid can be derived." United States v. Fisher, 2 Cranch 358, 386 (1805).

In a case in which the court is called upon to rule on the validity of an agency's construction of a statute in a regulation, the familiar two-step Chevron analysis applies. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-843 (1984). Under step one, if the court determines that "Congress has directly spoken to the precise question at issue," then the inquiry is at an end, "for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. If Congress has not directly spoken to the precise question at issue, but has instead left it to the agency to fill in the gaps in the statutory scheme, a reviewing court "does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. at 843. The D.C. Circuit has considerable experience and precedent in applying the Chevron approach.

RESPONSES FROM JOHN G. ROBERTS, JR.
TO QUESTIONS FROM SENATOR HERBERT KOHL

1. Court Secrecy. Mr. Roberts, at your initial confirmation hearing in January, I asked you about the use of so-called protective orders in product liability cases. I am concerned that the frequent use of these orders to seal the terms of settlements too often results in threats to public health and safety being kept secret. When I asked if you thought it was proper for courts to seal settlements in these circumstances, you responded that you had not studied the law in this area and were therefore reluctant to express an opinion about this issue.

Have you now had an opportunity to educate yourself regarding this issue? Do you now have an opinion as to the advisability of judges ordering settlements sealed which may affect the public health or safety?

RESPONSE: I have looked into this issue since the first hearing. What I have learned is that, under established D.C. Circuit precedent, "a district court's decision to seal (or not to seal) court records [is reviewed] for abuse of discretion." EEOC v. National Children's Ctr., Inc., 98 F.3d 1406, 1409 (D.C. Cir. 1996) (quoting Johnson v. Greater Southeast Community Hosp. Corp., 951 F.2d 1268, 1277 (D.C. Cir. 1991)). Yet in exercising its discretion, a district court must recognize that "the starting point in considering a motion to seal court records is a 'strong presumption in favor of public access to judicial proceedings.'" Id. (quoting Johnson, 951 F.2d at 1277). And with respect to consent decrees, "this presumption is especially strong." Id.

To determine whether the strong presumption in favor of public access can be overcome in any given case, the D.C. Circuit examines six factors: (1) the need for public access; (2) the extent of previous public access to the documents; (3) the fact that someone has objected to disclosure, and the identity of that person; (4) the strength of any property and privacy interests asserted; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced during the judicial proceedings. See id.

(citing United States v. Hubbard, 650 F.2d 293, 317-322 (D.C. Cir. 1980)). Certainly in a case in which continued secrecy represented a threat to public health and safety, as expressed in your question, the presumption in favor of public access would be particularly compelling, and the need for such access would carry particular weight in the appropriate exercise of discretion.

2. Antitrust Settlements - Tunney Act. Mr. Roberts, when the Justice Department reaches a settlement with a party against which it has filed an antitrust lawsuit, that settlement must be submitted for public comment and reviewed by the trial judge under the Tunney Act. In recent years, many judges have taken the view that a court's authority to review an antitrust settlement under the Tunney Act is quite limited and, as long as it is in the "reaches of the public interest," it must be approved by the court. Some are concerned that such a relaxed standard of review prevents a court from carefully examining the terms of antitrust consent decrees to determine if they are truly in the public interest.

What is your view of the proper standard that a district judge should apply to reviewing antitrust settlements under the Tunney Act?

RESPONSE: In the D.C. Circuit, a district court is to "make an independent determination as to whether or not the entry of a proposed consent decree [is] in the public interest." United States v. Microsoft Corp., 56 F.3d 1448, 1458 (quoting S. Rep. No. 93-298, at 5 (1973)). This standard reflects an understanding that "Congress, in passing the Tunney Act, intended to prevent 'judicial rubber stamping' of the Justice Department's proposed consent decree." Id. (quoting H.R. Rep. No. 93-1463, at 8 (1974)). "In determining whether the decree is in the public interest," the D.C. Circuit has directed district courts to consider the factors expressly identified by the Tunney Act:

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial. [Id. (quoting 15 U.S.C. § 16(e)).]

The D.C. Circuit has also instructed district courts to scrutinize proposed modifications to a consent decree under the Tunney Act differently depending on the circumstances. In particular, "changes opposed by a decree party -- at least when that party is the United States -- may be denied unless there is 'a clear showing of grievous wrong evoked by new and unforeseen conditions.'" United States v. Western Elec., 969 F.2d 1231, 1235 n.7 (D.C. Cir. 1992) (quoting United States v. Swift & Co., 286 U.S. 106, 119 (1932)).

3. Media Ownership. Mr. Roberts, last year you represented Fox Television in its challenge to the FCC's media ownership limits. These rules limited the number of television stations a company could own as well as prohibited cross ownership between cable television systems and broadcast television stations. This lawsuit resulted in the rules being struck down.

I am very concerned regarding the increasing level of concentration in our nation's media, and the dangers this poses for diversity of expression. Many believe that the FCC's ownership limits are essential to maintaining competition in our media, and to preserve the diversity of viewpoints so essential to the marketplace of ideas.

What is your view regarding the permissibility of government imposed ownership limits on media properties? Should those of us who believe in the importance of maintaining diversity of expression and reasonable media ownership limits be worried about your views on these issues in light of your representation of the petitioners in Fox Television v. FCC?

RESPONSE: In the case of Fox Television Stations, Inc. v. FCC, 280 F.3d 1027 (D.C. Cir. 2002), I represented petitioner National Broadcasting Company, Inc. -- not Fox Television. Petitioners Fox, NBC, Viacom, and CBS were required to file a single joint brief, but each entity was separately represented. The case primarily concerned

Section 202(h) of the Telecommunications Act of 1996, in which Congress required the FCC to review biennially its ownership rules, "determine whether any of such rules are necessary in the public interest as the result of competition," and "repeal or modify any regulation it determines to be no longer in the public interest." The FCC decided not to repeal or modify the national television station ownership rule or the cable/broadcast cross-ownership rule, and the D.C. Circuit ruled that the decision to retain the rules was arbitrary and capricious. The Court remanded the broadcast ownership rule to the FCC for further consideration, but vacated the cable/broadcast cross-ownership rule. The FCC is currently engaged in a comprehensive review of various of its ownership rules, partly in response to the court's decision.

You have asked whether "those of us who believe in the importance of maintaining diversity of expression and reasonable media ownership limits be worried about your views on these issues in light of your representation of the petitioners in Fox Television v. FCC." The answer is no. Views advanced by a lawyer representing a client -- the capacity in which I participated in the Fox Television case -- should not be ascribed to the lawyer as his personal views. That has been a guiding principle of American law since before the founding, exemplified by Boston patriot John Adams's vigorous defense of the British soldiers facing charges arising from the Boston Massacre. My duty in Fox Television v. FCC was to zealously represent my client's interests - not to express my personal views on the question presented. When I served in the Office of the Solicitor General, I was on the other side of the fence - representing the FCC in defending rather than challenging its rules - and represented my client at that time just as zealously. See, e.g., FCC v. Action for Children's Television, No. 91-952 (S. Ct. 1991).

4. **Federalism.** Mr. Roberts, in 1999 you gave an interview to NPR in which you indicated that you supported several recent Supreme Court decisions which limited the ability of citizens to sue state government in federal court. You stated that these decisions were "a healthy reminder that we're a country that was formed by states and that we still live under a federal system." He added that just because Congress has created rights enforceable against private citizens and companies, "that doesn't mean they can treat the states the same way; that the states as

co-equal sovereigns have their own sovereign powers, and that includes . . . sovereign immunity."

The federal courts have played a historic role in enforcing federal laws with respect to actions of state and local government, in areas ranging from employment discrimination, voting rights, and school desegregation, for example. I believe that the role played by federal courts has been essential in ensuring all Americans, regarding of race, religion or gender, receive equal protection of the law. Do you agree? Should your statements with regard to federalism and in support of decisions restricting the rights of individuals to sue local and state government in federal court cause us concern?

RESPONSE: I agree completely with the statement that the "federal courts have played a historic role in enforcing federal laws with respect to actions of state and local government, in areas ranging from employment discrimination, voting rights, and school desegregation, for example." I also agree completely that "the role played by federal courts has been essential in ensuring all Americans, regardless of race, religion or gender, receive equal protection of the law."

I do not have a transcript of the radio interview to which you refer, but I recall my comments as being more descriptive than "supportive" of the decisions in question. In any event, nothing in my comments casts any doubt on the vital role of the federal government in vindicating national interests, including most prominently in the area of civil rights. We do live in a federal system, but the Supreme Court recognized long ago, in the words of Justice Story: "The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by 'the people of the United States.' There can be no doubt, that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary; * * * and to give them a paramount and supreme authority." Martin v. Hunter's Lessee, 1 Wheat. 304 (1816). That principle was tested under fire and confirmed during the Civil War, and reaffirmed in the Constitution's Civil War amendments. The Supreme Court has recognized that those enactments empower Congress, among other things, to

override state sovereign immunity when it acts pursuant to Section 5 of the 14th Amendment. The scope of that authority is currently an issue before the Supreme Court in Nevada Department of Human Resources v. Hibbs, No. 01-1368 (argued January 15, 2003). I participated in a moot court to help prepare Hibbs's counsel, who is arguing against the assertion of state sovereign immunity in that case.

RESPONSES FROM JOHN G. ROBERTS, JR.
TO SUPPLEMENTAL QUESTIONS FROM SENATOR RICHARD J. DURBIN

1. At your April 30 hearing, you stated in an answer to Senator Kennedy: "My clients and their positions are liberal and conservative across the board. I have argued in favor of environmental restrictions and against takings claims. I have argued in favor of affirmative action. I've argued in favor of prisoners' rights under the Eighth Amendment. I've argued in favor of antitrust enforcement." Please set forth the names of all cases in which you have made such arguments and provide copies of the principal briefs you filed in those cases.

RESPONSE: The leading case in which I argued in favor of environmental restrictions and against takings claims is Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 122 S. Ct. 1465 (2002). I was retained in that case by the Tahoe Regional Planning Agency, after certiorari was granted, to argue before the Supreme Court that the agency's moratorium on development in the area around Lake Tahoe did not constitute a taking under the Fifth Amendment. Development interests on the other side argued that the moratorium was a per se taking for which just compensation was required. The Supreme Court agreed with my client's position, 6-3.

Another example of a case in which I argued in favor of environmental regulation was Michigan v. Environmental Protection Agency, 213 F.3d 663 (D.C. Cir. 2000), cert. denied, 532 U.S. 904 (2001). That case concerned the validity of the EPA's decision during the Clinton Administration to issue the NOx SIP Call Rule, which required certain States to revise their Clean Air Act implementation plans to reduce NOx emissions that were contributing significantly to the inability of other downwind States to attain clean air standards for ozone. I represented a group of intervenors, including companies that provided electric service in the Northeastern United States, the New England Council, Associated Industries of Massachusetts, and the New Jersey Chamber of Commerce. These intervenors argued in favor of the EPA rule. The court agreed with my clients' position, and we successfully

opposed the effort of the States that had sued the EPA to obtain Supreme Court review.

I argued in favor of affirmative action in Rice v. Cayetano, 528 U.S. 495 (2000). I was retained in that case by the State of Hawaii to defend a Hawaiian statute providing that only Native Hawaiians could vote for the trustees who administered certain trusts established for the benefit of the Native Hawaiian people. The trusts were part of a series of state and federal statutes specifically designed to benefit Native Hawaiians, who had historically been discriminated against since the arrival of western powers to the Islands. Those laws were challenged by non-Native Hawaiians as violating the Fourteenth and Fifteenth Amendments. The Supreme Court ruled against the State, 7-2, with Justices Stevens and Ginsburg dissenting. I continue to assist the State of Hawaii in related litigation pending in District Court and the Ninth Circuit.

I argued in favor of prisoners' rights under the Eighth Amendment in Hudson v. McMillian, 503 U.S. 1 (1992). I argued orally before the Supreme Court in that case on behalf of the United States as amicus curiae supporting petitioner Keith Hudson, an inmate in the Louisiana state penitentiary at Angola who had been beaten by guards. (I had not worked on the brief.) The Fifth Circuit had held that although the guards' conduct was "clearly excessive and occasioned unnecessary and wanton infliction of pain," Hudson nonetheless had no Eighth Amendment claim because his injuries were "minor" and thus did not "constitute a significant injury." The Supreme Court agreed with the position of the United States that Hudson had proved his Eighth Amendment claim and was entitled to damages, 7-2, with Justices Thomas and Scalia dissenting.

I argued in favor of antitrust enforcement in the leading case of United States v. Microsoft Corporation, 253 F.3d 34 (D.C. Cir.) (en banc), cert. denied, 122 S. Ct. 350 (2001). I was retained in that case by the state plaintiffs to argue the case orally before the en banc D.C. Circuit. (I had not worked on the brief.) The issues in the case concerned whether Microsoft had violated the antitrust laws in maintaining its operating system monopoly, monopolizing the browser market, and illegally tying its browser to its operating system; whether the district court abused its discretion in evidentiary and procedural rulings and in ordering a structural remedy; and

whether extrajudicial comments by the district judge required vacatur of the judgment or removal of the judge. The en banc court affirmed in part, reversed in part, and remanded in part.

In addition, I have represented plaintiffs in antitrust cases urging enforcement of the antitrust laws on several occasions, including CSU v. Xerox Corporation, 203 F.3d 1322 (Fed. Cir. 2000), cert. denied, 531 U.S. 1143 (2001); Park Avenue Radiology Associates, P.C. v. Methodist Health Systems, Inc., 198 F.3d 246 (6th Cir. 1999); and American Professional Testing Service, Inc. v. Harcourt Brace Jovanovich, 108 F.3d 1147 (9th Cir. 1997).

2. Mr. Roberts, by all accounts you are one of the most accomplished lawyers in the country and one of the most knowledgeable about our legal system. Let me ask you about one of the most basic rights of our legal system - the constitutional right to counsel. A recent article by Anthony Lewis in the New York Times discussed the 40th anniversary of the case Gideon v. Wainwright. He noted the fact that Jose Padilla and Yaser Esam Hamdi, two U.S. citizens, are being detained by the U.S. government as "enemy combatants" and denied access to counsel.

A. Do you believe that it is appropriate to deny access to counsel to Mr. Padilla and Mr. Hamdi?

B. Do you believe it is ever appropriate to deny the right to counsel to U.S. citizens? In what instances?

C. In the state of Illinois, 13 people on death row were released between 1987 and 2000 after they were found to be innocent. Four of the 13 were represented by counsel who were later disbarred or suspended from the practice. Do you believe that indigent criminal defendants in the United States have meaningful access to counsel?

RESPONSE: The Supreme Court just recently reaffirmed that "It is * * * the controlling rule that 'absent a knowing and intelligent waiver, no person may be imprisoned for any offense * * * unless he was represented by counsel at his trial.'" Alabama v. Shelton, 535 U.S. 654, 662 (2002) (quoting Argersinger v. Hamlin, 407 U.S. 25, 37 (1972)). The Court has referred to the lack of counsel as

a "unique constitutional defect," Custis v. United States, 511 U.S. 485, 496 (1994), because the availability of counsel is often an essential prerequisite to the vindication of other rights -- rights an individual may not even be aware of in the absence of counsel. See, e.g., Powell v. Alabama, 287 U.S. 45, 68-69 (1932). Those of us who have chosen the legal profession as our own should be particularly cognizant of the role an attorney plays in safeguarding a client's liberties.

In considering issues of the sort raised by your question, a nominee to the D.C. Circuit cannot help but recall the first major litigation in the District of Columbia courts -- the treason trial of Aaron Burr's associates Bollmann and Swartwout, who had been arrested by military order and held incommunicado without access to counsel. The founding father of the D.C. courts -- William Cranch -- dissented from a decision (later overturned by the Supreme Court) to hold the pair for trial with these words:

> In times like these, when the public mind is agitated, when wars, and rumors of wars, plots, conspiracies and treasons excite alarm, it is the duty of a court to be peculiarly watchful lest the public feeling should reach the seat of justice, and thereby precedents be established which may become the ready tools of faction in times more disastrous. * * * The Constitution was made for times of commotion. * * * Dangerous precedents occur in dangerous times. It then becomes the duty of the judiciary calmly to poise the scales of justice, unmoved by the arm of power, undisturbed by the clamor of the multitude.

United States v. Bollmann and Swartwout, 1 D.C. (1 Cranch) 373 (1807).

Beyond these basic principles, however, it would not be appropriate for me to comment on the particular question of whether Mr. Padilla or Mr. Hamdi may or may not be denied access to counsel as enemy combatants, or to address whether counsel may be denied to United States citizens in hypothetical circumstances. Such issues are of course being actively litigated at present. Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003) is currently pending on

petition for rehearing en banc, and Padilla v. Rumsfeld, 243 F. Supp. 2d 42, 233 F. Supp. 2d 564 (S.D.N.Y. 2003) is currently pending on the government's petition for interlocutory appeal. Related cases are pending in the courts of the District of Columbia. See, e.g., Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), currently pending on petition for rehearing en banc. (Al Odah involves three consolidated habeas petitions filed on behalf of aliens held at Guantanamo Bay.) Such issues could well come before the court for which I have been nominated. As Justice Ruth Bader Ginsburg explained during her most recent confirmation hearing, "I must avoid giving an advisory opinion on any specific scenario, because * * * that scenario might come before me. * * * I must avoid responding to hypothetical [cases], because they may prove not to be so hypothetical." Hearings, at 390.

With respect to the defendants on death row in Illinois, it certainly raises the most serious concerns whenever an individual who has progressed that far through the criminal justice system is found to be not guilty. It is good that the determination of innocence is reached before it is too late, but given the irremediable finality of capital punishment, it is to be hoped and expected that competent counsel could secure relief for innocent clients well before reaching the death row stage. The concerns are of course not limited to Illinois; just last week the North Carolina Senate voted in favor of a moratorium on executions pending a comprehensive study of the administration of its death penalty.

I have felt that, regardless of one's views on capital punishment, affording those accused in capital cases competent counsel at the outset can avoid delays and uncertainties further down the road. I have read about the situation in Illinois, and I am also aware of other reports about the generally poor quality of representation of indigent defendants. Enough has been established to make clear that indigent defendants do not always have meaningful access to competent counsel. It seems that it would be a wise use of resources to ensure competent counsel at the outset, rather than spend years and years trying to assess and address the damage caused by inadequate counsel.

Follow-Up Questions for Jeffrey S. Sutton
From Senator Patrick Leahy

Disability Rights and Civil Rights

1. During your hearing, you brought up your involvement in Ohio Civil Rights Comm'n. v. Case W. Reserve Univ., 666 N.E.2d 1376 (Ohio 1996), several times. In that case, you were the Ohio Solicitor General, in charge of all of the State of Ohio's appeals. In that capacity, you would usually have represented a state agency like the Ohio Civil Rights Commission, would you not?

   If you did in fact choose to represent the Ohio Civil Rights Commission, please explain to me the legal and policy reasons for your decision.

   I do not understand why the Attorney General had to agree to represent the State Universities as an *amicus* party on the other side of the Civil Rights Commission. Did you have any discretion to recommend that the Attorney General only weigh in on one side or other, and, if so, what did you recommend?

In this case both the Ohio Civil Rights Commission and the state medical schools were state agencies. Therefore, both were entitled to be represented by the State in the Ohio Supreme Court. As General Montgomery has indicated in a letter to the committee, I recommended that the State Solicitor argue the Commission's position in the case, because I believed that the Commission had the better factual, legal and equitable arguments in the case.

Once I was assigned to represent the Commission, I did not have discretion to recommend to the Attorney General that she not weigh in on the state medical schools' side of the case. That would not have been appropriate given my obligation to the Commission at that point in time. Whether to represent the state universities as an *amicus* in the Ohio Supreme Court was the Attorney General's decision.

2. From my count, you have only argued two cases that could be seen to be in favor of disabled individuals: (1) Ohio Civil Rights Comm'n. v. Case W. Reserve Univ., 666 N.E.2d 1376 (Ohio 1996), discussed above, and (2) National Coalition for Students with Disabilities v. Taft, 2002 U.S. Dist. LEXIS 22376 (S.D. Ohio 2002), in which you argued that the Ohio Secretary of State violated the National Voter Registration Act in failing to designate the disability services offices at state public colleges and universities as registration sites. In terms of your actual clients, are there any other cases involving disability rights that you argued, other than those noted above, in which you were involved before you were nominated to this position in May 2001? If so, please describe each case for me.

In *Roman v. Gobbo*, a case pending in the Ohio Supreme Court, I am representing a client that is arguing that a proposed interpretation of Ohio tort law

would violate the ADA and Ohio civil rights law. The brief in that case has been forwarded to the Senate Judiciary Committee. In addition, the Equal Justice Foundation, for which I am a board member, has filed numerous cases on behalf of disabled persons in Ohio. Some examples are: suing cities in Ohio to force them to make their sidewalks accessible to persons in wheelchairs, and suing an amusement park company that prohibited people with disabilities from using their rides.

3. At your hearing, you testified that a judge should try to "see the world through other people's eyes" (Transcript at p.102). In other words, you said that as an advocate you have tried, and as a judge you would try, to imagine what it would be like to be on each side of the cases that come before you. Let me ask you for a moment to engage in this exercise. Please imagine that you are Patricia Garrett, J. Daniel Kimel, Christy Brzonkala, a Westside Mother, or any other disabled person, senior citizen, woman, low-income child, or state employee. Please describe for me what you think it would be like to be in their shoes after those court decisions, in which you participated, denied these individuals remedies for their claims. What do you think are the implications of your arguments on these, and other similarly situated, individuals' ability to receive compensation when their rights are violated?

Having represented the cause of individuals in civil rights litigation and having lost, *see, e.g., Case Western*, I can well imagine what it would be like to be in the shoes of these litigants. For Cheryl Fischer, it was a great blow to her to learn that Case Western would not allow her to be the doctor and psychiatrist she had dreamed of becoming. And it was disappointing to me as well. Any long-term implications of the arguments in the above cases, I respectfully submit, should be attributed to the clients and deciding courts, not to the lawyer who argued the case.

It bears mentioning that the cases you cite are not necessarily the final word on the respective plaintiffs' ability to recover: one case was later reversed (*Westside Mothers*); one case continues with a pending claim under section 504 of the Rehabilitation Act (*Garrett*); one case permits the Congress to respond with Spending Clause legislation, if indeed it has not already done so (*Kimel*); and the final case not only allows state tort remedies but also would allow Congress to amend the statute to include a jurisdictional element (*Morrison*).

Federalism

4. In answer to one of my questions to you about your cases involving sovereign immunity issues, you stated that you have represented both sides of the issue. (Transcript pages 95-96). Please list and describe for me cases in which you have argued against a state in a case in which the state was claiming immunity from suit under the Eleventh Amendment.

My recollection is that, during the hearing, I stated that I would be willing to represent both states and private litigants in Eleventh Amendment cases. To

my knowledge, I have not been asked to argue, and have not argued, a case against a state that was asserting immunity under the Eleventh Amendment. However, I have argued against states on a number of occasions. *See, e.g., Becker v. Montgomery*, 532 U.S. 757 (2001); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

5. At your hearing, you said that you "believe in Federalism as a principle" but that the disagreement concerns "the application of that principle in given cases." (Transcript at p.161). In your view, how should that principle be applied and what factors would guide your application?

Supreme Court precedent marks the appropriate path for applying this principle. That precedent establishes that federal legislation is given a heavy presumption of constitutionality, *United States v. Morrison*, 529 U.S. 598, 607 (2000), and that Congress is better equipped than the courts to ascertain as a matter of fact finding whether an issue deserves national or local resolution. *See City of Boerne v. Flores*, 521 U.S. 507, 517 (1997). Within that framework, the Supreme Court has held that it still retains authority under *Marbury v. Madison*, 1 Cranch 137, 176 (1803), to determine what state and national laws are constitutional. *See City of Boerne*, 521 U.S. at 535-36. I would faithfully adhere to these decisions.

6. In your remarks at a Federalist Society panel entitled "Federalism Revived? The Printz and City of Boerne Decisions," you said: "In a federalism case, 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." You further state that: "It strikes me that states and localities don't deserve any more victories at the Court if they can't develop a little more courage when it comes to litigating these structural issues. It is frustrating that, in pursuit of particular political goals, the states are not rising up together and defending their authority against encroachment by Congress."

   Do you recall making these statements about your personal views of the zero-sum game of federalism?

   Is it still your view that federalism cases are "invariably" a battle between states and the federal government? Is it your view that the states and the federal government are necessarily locked in an antagonistic battle for supremacy and that the federal government is always the usurper of state prerogatives? Do you still believe that states need to develop a "little more courage" in challenging federal power before the Supreme Court?

I do not specifically recall these remarks, which occurred during a panel discussion that I was moderating. I would say, however, that in the context of Section 5 legislation, the Supreme Court has made the same comment. According to the Court, certain statutes passed by Congress were "grounded on the expansion of Congress' powers with the corresponding diminution of state sovereignty . . . ."

***Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976). Thus, the Supreme Court itself has characterized some federalism cases—those, like *City of Boerne*, in which the federal government and the states cannot simultaneously regulate the same subject matter—as a zero-sum game because one sovereign's gain of power necessarily causes the other sovereign to lose authority in that area. But this is not invariably true in all federalism cases; it is most likely true in section 5 cases, and less so in Commerce Clause cases. In the context of regulating commerce, states and the federal government have overlapping jurisdiction, and state and federal laws may in many instances supplement rather than supplant one another. And in the context of Spending Clause legislation, the Court has said that the states consent to be regulated in return for federal funds -- which would not seem to create a zero-sum situation.**

My comment about states' "courage" to litigate structural issues was made in the context of underscoring that federalism is about the structural allocation of power, and should not be a subterfuge for reaching one favored policy result over another. In any event, as to what the states should or should not litigate, the job of a court of appeals judge would be to resolve the case based on precedent, not based on the number of states involved in the litigation.

7. You also stated in a 1997 article titled, "City of Boerne v. Flores: A Victory for Federalism," that "federalism is ultimately a neutral principle" that says nothing about what particular policies should be adopted. Discussing your role as an advocate for overturning the Religious Freedom Restoration Act, you argue that: "In seeking to invalidate the federal RFRA, we stated that if RFRA is struck down, we will propose state legislation along the same lines the day the law is struck. And that's what we did. At the end of the day, we ought to have 51 different RFRAs." ("Federalism Revived? The Printz and City of Boerne Decisions.") Are there now 51 RFRAs? How is your view of federalism a "neutral principle" when it would strip away a floor of national protections that is already in place and create a patchwork quilt of different laws that are inevitably less effective? How would 51 different Clean Air Acts or 51 different food safety acts protect the environment and the public's health and welfare? Aren't some of these issues necessarily solved on a national level? Don't you think that some of these are battles in which both the state and the federal government, along with American citizens, may win?

I do not know the number of state RFRAs that have been passed. My comment about "neutrality" had to do with the allocation of policymaking power, not with the substance of a given policy. That is to say, federalism applies as a system of checks and balances between state and federal power regardless of whether one agrees with the federal policy at issue. One inevitable consequence of that system of checks and balances is some disuniformity. However, as I said at the hearing last week, some issues are more amenable than others to national resolution. While the Supreme Court has applied a broad presumption of constitutionality to all federal laws, it has been more skeptical of national family laws than, say,

national environmental laws. Environmental issues raise externality problems that do not arise in other contexts. Thus, as your question suggests, some policy issues do demand a national solution.

8. Mr. Sutton, at your hearing, you were asked about a comment that you made in a Legal Times article in November 1998, a time when you were still State Solicitor of Ohio. (Tony Mauro, "An Unlikely High Court Specialist," Legal Times, 11/2/98 at 8.) Specifically, you were quoted in the article as saying "It doesn't get me invited to cocktail parties. But I love these issues. I believe in this federalism stuff." When I asked you about this quote at your hearing, you explained it by saying that you were on the lookout for U.S. Supreme Court cases "**after** I left the State of Ohio" and go on to discuss the cases you took on when you returned in Jones Day. (Transcript at p. 92). However, when later asked about the same quote by Senator DeWine, you stated that at the time of the article you were State Solicitor and that you were on the lookout for cases because "Betty Montgomery, the Attorney General, correctly realized . . . that just because a case comes from another State, another set of courts, and goes to the U.S. Supreme Court, it doesn't mean it's not going to affect them. . . . What the article was pointing out and what Betty Montgomery asked me to do and we did do was to look for cases principally in her area of interest. Her area of interest was, of course, criminal law." Now that you have had an opportunity to compare these two responses, would you like to revise the answer you provided to me at your hearing?

   The article also indicates that you said Betty Montgomery was "very supportive" of your efforts to participate "early, often and orally in Supreme Court cases" that did not directly involve Ohio. Was she the one driving Ohio's involvement in Supreme Court cases, as you testified at your hearing, or were you the one, as you were quoted as saying in the article? The article quotes other sources as evidence of the fact that it was your "first-out-of-the-gate aggressiveness" and "active role" which led to Ohio taking so many cases before the Supreme Court, getting other states to sign onto the briefs, and to you getting argument time. What is the truth?

I misapprehended the above question, which I thought referred to periods both during and after I was State Solicitor. That said, it is certainly true that I was on the lookout for Supreme Court cases *after* I left the State Solicitor's office when I returned to Jones Day. And it is true that during that time I was hired to represent States, to represent parties against States, and to represent parties in cases not involving States.

With respect to the article and my time as State Solicitor, my answer to Senator DeWine's question is correct. I was State Solicitor when the article was written. And the Ohio Attorney General did realize that cases going to the Supreme Court from other States affected Ohio, and, accordingly, asked me to look for Supreme Court cases involving her area interest.

Finally, my job as State Solicitor was a subordinate one. I was hired by the Ohio Attorney General to serve her interests and the interests of the many state clients that she represented. Everything that I am described as doing in the article was done to further those interests and was done only with her permission.

9. In answer to questions about many of the cases on which you worked, you stated that you were just an advocate and that a client's position cannot be ascribed to the lawyer. Therefore, I would like to put the cases that you have argued aside and focus on your published writings. You indicate in your Senate Questionnaire that you have nine published writings and have given numerous speeches. It appears that the plurality of these writings have been in Federalist Society papers, particularly those of the practice group called Federalism & Separation of Powers, of which you were an officer. In all of those articles, you argue in favor of a certain ideology, one that seeks to increase state power and decrease the power of the federal government. As noted above, you have said that it is frustrating that "states are not rising up together and defending their authority against encroachment by Congress" and have argued passionately in favor of limits on Congress' authority to act under Section 5 of the Fourteenth Amendment and the Commerce Clause. Yet, at your hearing, when I asked you whether you prefer states' rights or national standards, you said that you "have no idea." (Transcript at p.96). Any reasonable person would take your views reiterated time and time again as deeply held, yet you seemed to disavow those views at your hearing. Are you saying that you do not believe anything that you voluntarily wrote in these articles for the Federalist Society?

In commenting on some of the federalism decisions, I wrote these articles not as an academic scholar or as a judge but as a lawyer who had represented a client in these cases. In that setting, the fact that I accepted a request (I did not volunteer) to defend the Court's decisions in *City of Boerne*, *Kimel*, and *Morrison* -- all cases in which I represented a client -- should not seem surprising. I of course could not have disagreed publicly with those decisions, because doing so would have been detrimental to my clients. It also bears noting that my primary agreement with these decisions, as explained in the articles, turned on principles with which no sitting Justice has yet disagreed -- namely, that the Court has the final say over what the Constitution means in section 5 cases and that the Court has a role to play in interpreting the meaning of interstate commerce in Commerce Clause cases. I agreed with these principles then and, like the Supreme Court, I agree with them now. But these principles by no means indicate that I favor state power over federal power. And they do not indicate how I would decide future cases if confirmed as a lower court judge.

10. At your hearing, I asked you some questions about Judge Noonan's book, which discusses the concepts of sovereignty and sovereign immunity, and explores how these concepts have become the current Court's way of restricting the powers of Congress and expanding the areas in which states can escape the effective control of Congress. In conclusion, Judge Noonan writes:

> Twenty times in the constitution as amended, the states appear. Sometimes they are given powers, sometimes they are subjected to prohibitions. . . . The tenth amendment reserves powers to them as well as to the people. Nowhere in the entire document are the states identified as sovereigns.
> The claim that the sovereignty of the states is constitutional rests on an audacious addition to the eleventh amendment, a pretense that it incorporates the idea of state sovereignty. Neither the text nor the legislative history of the amendment supports this claim, nor does an appeal to the history contemporaneous with the amendment. A rhetorical advantage is gained by the current court referring to state sovereignty as "an eleventh amendment" matter. The constitutional connection is imaginary.

At your hearing, you admit that "the doctrine that the king can do no wrong is a bad doctrine." (Transcript at p. 252). In your view, not that of being an advocate for your clients, what do you think are the justifications for the expanded doctrine of sovereign immunity? What is the basis on which this rule can be defended?

In your view, where in the Constitution do you find the concept of "sovereign immunity"? Where in the Constitution does it say that citizens of a State cannot sue their own State for violations of law absent consent of the State or Congress' explicit abrogation of state immunity, a principle you seemed to agree with at your hearing? (Transcript at p.211). Doesn't the Eleventh Amendment merely impose a "textual limitation on the diversity jurisdiction of the federal courts" as Justice Stevens wrote in his dissent in Kimel v. Florida Board of Regents, 120 S.Ct. 631, 653 (2000)(*Stevens dissenting*)?

As an advocate, I have not been asked to defend *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), or the Tenth and Eleventh Amendment precedents upon which it relies. The issue was not joined in *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), or for that matter in *City of Boerne v. Flores*, 521 U.S. 507, 517 (1997). While the Constitution does not specifically refer to a sovereign immunity for States, it also does not refer to such an immunity for the National Government. It thus has fallen to the Supreme Court to determine what constitutional immunity there is, when it exists and to which sovereigns it applies.

In a series of century-old cases, the Supreme Court has held that the states enjoy sovereign immunity from lawsuits for money damages. *See Hans v. Louisiana*, 134 U.S. 1 (1890). These cases remain the law of the land, and if confirmed I would be obliged to follow them until such time as the Supreme Court chooses to overrule them.

11. In response to my question about your role in arguing for limits on Congress' power to protect civil rights, you mentioned Justice Brennan's theory, articulated in 1977 in an article called "State Constitutions and the Protection of Individual Rights," that encouraged state constitutions to protect individual rights beyond the minimum by the federal constitution, a concept you referred to as "new federalism." Recently, however, the term "new federalism" has also been used to refer to the trend of increasing the power of states by challenging the authority of Congress to enact laws that impose obligations on the states. What is your view of this version of "federalism," used to describe championing the states at the expense of the national government? Do you think that this federalism also results in increased "dis-uniformity" of the law and a new latitude for result-oriented judicial decision making?

The debates in the Supreme Court about federalism over the course of 200 years show that this is a difficult issue. Throughout, however, the Supreme Court has said that the federal government does not have unlimited power. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507, 516 (1997) (citing *M'Culloch v. Maryland*, 4 Wheat. 316, 405 (1819); *Marbury v. Madison*, 1 Cranch 137, 176 (1803)); *see also The Federalist No. 29*, at 180-81 (C. Rossiter ed. 1961) ("Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government."). The system of checks and balances underlying our system of government sometimes leads to inefficiencies at every level, whether between the federal government and the states or among the branches of the federal government itself. *See, e.g., Bowsher v. Synar*, 478 U.S. 714, 722 (1986) ("That this system of division and separation of powers produces conflicts, confusion, and discordance at times is inherent, but it was deliberately so structured to assure full, vigorous, and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power."). Federalism should not, however, lead to results-oriented judging. I would follow binding Supreme Court precedent and apply it even-handedly in every case.

12. I asked you about the Judge Noonan's interpretation of the Supreme Court's revised standard (in 1997) for reviewing Congress' authority to act under Section 5 of the Fourteenth Amendment, which requires that a court review of the legislative record to determine whether Congress identified a constitutional violation or wrong and whether there is proportionality and congruence between the injury to be remedied and the means adopted by the legislature. At your hearing, you admitted that, "It doesn't seem fair to suddenly judge these laws based on a standard that was developed after the law. I think your right to be skeptical of that." (Transcript at p. 255). Do you think it is wrong to apply the new standard to laws enacted prior to 1997, such as the ADA or the Violence Against Women Act? Please explain your position.

As I indicated at the hearing, I sympathize with legislators whose legislation is invalidated based on standards that may not have been apparent at the time the law was passed. The problem in this area is that courts generally treat an interpretation of the Constitution as indicating what the document has always meant, and courts accordingly have hesitated to apply constitutional rulings only on a prospective basis. This rule -- generally declining to announce constitutional decisions solely on a prospective basis -- has been applied in a broad set of contexts. It has not just been applied in federalism decisions but in many civil rights cases where new civil liberties were recognized long after the legislature had enacted laws in the area. As a court of appeals judge, I would follow binding Supreme Court precedent on this issue.

Sixth Circuit

13. As you know, there has been a great deal of press about bitter disputes among the judges on the closely divided Sixth Circuit. It appears that some of your articles, such as the one titled "Supreme Court Highlights" in the Federalist Paper in 1994, defend the harsh tone in Justice Scalia's opinion and discount the notion of having a more conciliatory tone. Such an approach to disagreements among colleagues on the bench would seem to be counterproductive and would only serve to divide further that already divided bench. What assurances can you give the Committee that you will not approach the process of reaching decisions in appellate cases as you have some of the scholarly topics you have written about with a harsh tone?

I believe that it is essential that judges show civility to litigants and to fellow members of the bench. Respect for one's colleagues and fellow members of the Bar requires no less. Collegiality also is essential for maintaining a well-functioning court. Nothing in my writings was intended to suggest otherwise.

Precedent

14. President Bush previously appointed a judge to the Sixth Circuit (John Rogers) who asserted that a lower court, when faced with case law it thinks a higher court would overturn were it to consider the case, should take that responsibility upon itself and go ahead and reverse the precedent of the higher court on its own. As I read it, the idea is that the Supreme Court, for instance, has rules it follows about when and whether to overturn precedent, and lower courts should follow this body of law in the same way they follow other laws of the higher court, and, therefore, a judge should reverse higher court precedent on his own when he thinks that the higher court would. Do you subscribe to this theory that lower courts should intuit when a higher court would decide to overturn its own precedent?

The Supreme Court alone enjoys the prerogative of overruling its own decisions. *Agostini v. Felton*, 521 U.S. 203 (1997). Lower courts must adhere to Supreme Court precedent until that precedent is overruled.

Cases of First Impression

15. As a federal court of appeals judge, you will be called upon to not only interpret case law as it applies to the cases before you, but also to rule on issues that are of first impression for your circuit. How do you approach cases of first impression?

I would approach cases of first impression by keeping an open mind within the bounds of existing precedent. I would review the parties' briefs thoroughly and review the cases that may shed light on the issue. In particular, I would look to the decision of other circuits that may have addressed the issue, and would examine analogous caselaw from related areas of law. I also would discuss the issues presented by the case with law clerks, discuss the case with my colleagues, and go to argument prepared both to ask questions and to listen to the answers provided.

Other

16. In response to Senator Kennedy, you said at your hearing that the cases you have worked on "have covered the spectrum of issues of really almost every social issue of the day, and I have had the opportunity to be on opposite sides of almost every one of those issues" (Transcript pp.77-78).

In what case (or cases) did you argue on behalf of state employees seeking remedies for discrimination?

In what case (or cases) did you argue in favor of or on behalf of women's rights?

In what case (or cases) did you argue in favor of or on behalf of low-income mothers or children in need of health care?

Have you argued any cases before the U.S. Supreme Court involving any of the following social issues, such as the right to privacy, reproductive rights, the constitutionality of the death penalty, immigration, or takings?

Is it more than a coincidence that many of the cases you ended up with before the Supreme Court involved the narrow issues related to sovereign immunity, Congress' authority to act under Section 5 of the Fourteenth Amendment and the Commerce Clause, and federal preemption?

In the *Case Western* case, I argued in favor of an individual who had been discriminated against, but she was not a state employee. Thus far, I have not been asked to argue a Section 5 case on behalf of the Federal Government or a private individual -- though I would certainly be willing to do so. (Of course, while working for the State of Ohio for three and a half years, that option would not have arisen.)

I have not argued a case that specifically addressed women's rights.

I have argued a case involving a law designed to benefit low-income mothers and fathers (and their children). In *Gatton v. Goff*, which I argued when I was Ohio's State Solicitor, the issue was whether an Ohio education funding program (designed for low-income families) was constitutional.

I have not argued a case in the United States Supreme Court involving any of the other issues you mention.

It frequently happens that lawyers develop a reputation for expertise in a given area -- for me, owing to my experience working for the State of Ohio, it was section 5 of the Fourteenth Amendment. As a result, many of my Supreme Court oral arguments occurred in this area, but not all of them. *General Motors v. Tracy*, 519 U.S. 278 (1997), involved a challenge to Ohio's natural gas tax under the dormant commerce clause. While *City of Boerne v. Flores*, 521 U.S. 507 (1997), was a Section 5 case, *Hohn v. United States*, 524 U.S. 236 (1998), was not. There, I was appointed *sua sponte* to argue an appealability issue arising under the Antiterrorism and Effective Death Penalty Act of 1996. *West Covina v. Perkins*, 525 U.S. 234 (1999) was a criminal due process case. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000), and *Garrett v. Alabama Bd. of Regents*, 531 U.S. 356 (2001), were Section 5 cases, but *Alexander v. Sandoval*, 532 U.S. 275 (2001) posed the statutory question whether Title VI created a private right of action to enforce disparate-impact regulations. In *Becker v. Montgomery*, 531 U.S. 1123 (2001), I represented a civil- rights claimant on a pro bono basis in a dispute over the proper filing of a notice of appeal. I again argued against states in a free-speech and preemption case in *Lorillard v. Reilly*, 531 U.S. 1068 (2001). *United States v. Craft*, 535 U.S. 274 (2002) involved a challenge to a federal tax lien. I argued in support of upholding local transportation safety laws against a federal preemption challenge in *City of Columbus v. Ours Garage and Wrecker Service*, 536 U.S. 424 (2002). Finally, *Holland v. Bellaire Corp.* (2003), turned on a statutory question involving the Coal Act.

17. Former White House Counsel C. Boyden Gray has testified before the Senate Judiciary Committee on the idea of judicial activism, stating "I suggest that history provides us with a working definition of judicial activism. Whenever the judiciary exceeds the role set forth by the Framers, it has exceeded its constitutional role and has become activist. Modern courts have far exceeded their limited role set forth by the Framers and the Constitution." Do you agree with this philosophy, why or why not? Mr. Gray also stated that numerous Supreme Court decisions within the past few decades constitute "activism. It is unconstitutional. If we truly value self-government, we must force the judiciary to return to the limited role envisioned by the Framers and set forth by the Constitution." Do you agree with this philosophical approach, why or why not?

While I am generally uncomfortable with labels like "judicial activism," I agree that the Constitution contains limits on the authority of each branch of government and promotes the principle of separation of powers. Accordingly, courts (like all branches of government) should strive to ensure that they are acting within the constitutional and statutory limits on their power.

1. I would like to ask you about the Violence Against Women Act and the backdrop to that law. You filed a brief in the Supreme Court on behalf of the State of Alabama, arguing against the constitutionality of the federal civil remedy for victims of sexual assault and violence. Among other things, your brief in the Morrison case stated that gender-based violence does not substantially affect interstate commerce.

Prior to the passage of the Violence Against Women Act, Congress held nine hearings and received testimony from over a hundred witnesses. At the end of that long and thorough exploration, Congress concluded that gender-based crimes and fear of these crimes had a substantial impact on interstate commerce.

In the Garrett case, which addressed the constitutionality of the Americans with Disabilities Act, you responded to a question from a Supreme Court justice regarding the function of Congressional findings: "they're exceedingly relevant, and they certainly sustain the ADA as a matter of Commerce Clause legislation, but just as with *Kimel* and the age laws they refer only to discrimination in general. They don't establish constitutional violations."

How do you differentiate between the Congressional findings in the Garrett case which you contend created an acceptable interstate commerce nexus and the findings generated in connection with the Violence Against Women Act? What hearings and evidence would have been sufficient to authorize the Violence Against Women Act under the Commerce Clause? What Congressional findings would have been enough?

***Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001), like *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), and *Equal Employment Opportunity Commission v. Wyoming*, 460 U.S. 226 (1983), involved a law directly regulating employment. Because the Court has indicated that the regulation of employment directly concerns an economic activity, the Court allows the national regulation of this area so long as its aggregate impact has a substantial effect on interstate commerce. *See United States v. Morrison*, 529 U.S. 598, 610 (2000); *United States v. Lopez*, 514 U.S. 549, 560 (1995). On the other hand, the civil remedy of the Violence Against Women Act (VAWA), which was at issue in *Morrison*, did not directly regulate any employment relationship. While the congressional findings in *Morrison* were relevant in determining whether this one provision of VAWA substantially affected interstate commerce, the Supreme Court ultimately concluded that this connection had not been established.**

As a general matter, Congress is the branch of the Federal Government that is best equipped to gather evidence about effects on interstate commerce and to make these kinds of findings -- which is why the Supreme Court gives Commerce Clause legislation a substantial presumption of constitutionality. *See, e.g., Lopez*, 514 U.S. at 563. It is difficult to say in the abstract what amount of evidence, what number of hearings, or what types of findings would have sufficed to sustain the provision struck by the Court in *Morrison*. As intimated by the Court, it is possible that the provision would have survived review if it had contained "a jurisdictional

element" affirmatively limiting its application to cases with an adequate interstate nexus. *See Morrison*, 529 U.S. at 612; *Lopez*, 514 U.S. at 561-62.

2. Prior to the passage of the Violence Against Women Act, 21 state task force reports scrupulously documented systemic state barriers to women when trying to bring criminal and civil cases against their assailants. What weight should Congress have given to these state reports? What weight should a court reviewing the constitutionality of the Act have given to these reports? Do you attach any significance to the fact that 41 state attorneys general (from 38 states, the District of Columbia, and two United States territories) urged Congress to enact the Violence Against Women Act?

In considering whether to enact legislation, it is appropriate for Congress to take into account all evidence reasonably available, including state reports relevant to the item under consideration. In the case of laws enacted under Section 5 of the Fourteenth Amendment, the above state reports could be relevant in determining whether the states had a history of violating the constitutional rights of their citizens. *See City of Boerne v. Flores*, 521 U.S. 507 (1997). From the perspective of a reviewing court, these kinds of reports could establish or rebut a conclusion that the states had a history of violating the constitutional rights of their citizens. According to the Supreme Court, the main difficulty in *United States v. Morrison*, 529 U.S. 598 (2000), was not whether such a history of constitutional violations existed. Rather, the issue for the Court was whether VAWA responded to the problem by regulating state action. *Id.* at 626.

As a practical matter, it is significant that a large number of state attorneys general supported the federal government in *Morrison*. In fact, this may show that the states are sensitive to the problem of violence against women. But the Court has concluded that such popular support for a law is not dispositive in determining its constitutionality. *See City of Boerne v. Flores*, 521 U.S. 507 (1997) (rejecting bipartisan Congressional efforts to protect religious liberties); *United States v. Lopez*, 514 U.S. 549 (1995) (finding unconstitutional Congressional regulation of guns in the vicinity of schools).

3. Do you still believe that the constitutional defense of VAWA and other similar statutes "would give any congressional staffer with a laptop the ultimate *Marbury* power – to have a final say over what amounts to interstate commerce and thus to what represents the limits on Congress's Commerce Clause powers?" Why?

The Supreme Court has held that, in light of its ultimate *Marbury* authority to say what the law is, the Court has a role in reviewing even the most extensive findings of fact. *See Morrison*, 529 U.S. at 614 ("'[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court'" (quoting *Lopez*, 514 U.S. at 557 n.2 (internal quotation marks omitted)) (brackets in *Morrison*)); *City of Boerne v. Flores*; 521 U.S. 507, 536 (1997) ("Congress' discretion is not unlimited, however,

and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution."). I continue to believe that this principle, as difficult as it may be to apply in some settings, is firmly established in the Supreme Court's cases -- and I would follow it as a court of appeals judge. Even the four dissenters in *Morrison*, it bears adding, embraced this principle, though not its application in that case. *See Morrison*, 529 U.S. at 628 (Souter, J., dissenting).

4. Your criticism of "unexamined deference" to Congressional findings suggests that when determining interstate commerce effects, courts must take a long, hard look at Congressional findings and evaluate them. What specific criteria should courts apply to Congressional findings? How should these criteria be applied?

While the Supreme Court has rejected wholly unexamined deference to congressional fact findings, it has emphasized the great degree of deference that courts should afford such findings as well as Congress's superior fact-finding capacity. *See, e.g.*, *City of Boerne*, 521 U.S. at 535-36. Such findings properly enable courts "to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye." *Lopez*, 514 U.S. at 563. The Court in *Morrison* merely cautioned that the strength of such findings is weakened where they employ "a method of reasoning that [the Supreme Court] ha[s] already rejected as unworkable." 529 U.S. at 614. Through it all, however, the Court has made clear that federal laws deserve a heavy presumption of constitutionality and congressional findings deserve a great deal of respect.

5. Do you believe that Congress, through its Commerce Clause powers, may criminalize the killing of endangered species, even if the animals in question never cross state lines? Why?

According to existing Supreme Court precedent, Congress may criminalize the killing of animals of an endangered species, even if the animals in question never cross State lines. To do so, Congress would only need to show that the regulated activity substantially affects interstate commerce. *See Morrison*, 529 U.S. at 610; *Lopez*, 514 U.S. at 560-61. Several appellate courts have upheld the Endangered Species Act as a valid exercise of Congress's Commerce Clause powers. *See, e.g.*, *Gibbs v. Babbitt*, 214 F.3d 483, 492 (4th Cir. 2000).

6. May Congress, through its Commerce Clause powers, criminalize wholly intrastate activity, such as drug use? Let's say that Bob grows marijuana in his backyard, somewhere in Delaware, and then walks over to the house of his neighbor Jim and sells some marijuana to him so Jim can get high while sitting around watching TV. No direct interstate commerce connection at all. Can the drug laws permissibly reach such activity?

Under Supreme Court precedent, the commerce power extends to (1) regulations of the use of the channels of interstate commerce, (2) laws protecting and regulating the instrumentalities of interstate commerce, and (3) laws regulating activities having a substantial effect upon interstate commerce. *See Lopez*, 514 U.S. at 558-59. With regard to the third category, so long as the regulated activity has a substantial effect on interstate commerce, it can be regulated even if it occurs wholly within a single State. *See id.* at 559-60; *see also Wickard v. Filburn*, 317 U.S. 111 (1942).

7. You have been quoted as saying "It doesn't get me invited to cocktail parties. But I love these issues. I believe in this federalism stuff." Did you say that? How does your statement that you "believe in this stuff" comport with your statements that you were merely acting as an advocate, you would have litigated either side of this issue, and you did not care which one you were on?

The quotation is from a *Legal Times* article written many years ago -- while I was the State Solicitor of Ohio. I assume that the quotation is accurate. I do believe in the general principle of federalism. It is one of many separation-of-powers principles that describes the allocation of power in our government. It also bears noting that "federalism" covers a variety of state issues -- not just disputes about section 5 of the Fourteenth Amendment or the Commerce Clause. For example, the Supreme Court case that prompted the *Legal Times* article was *City of West Covina v. Perkins*, a due process case involving property seizures.

While serving as State Solicitor, I only had the option of arguing on the state side of all cases involving state authority in the United States Supreme Court. After leaving that office, I did not restrict myself to arguing cases solely on behalf of states. Several of my cases in the Supreme Court over the last four years have not involved state parties or were brought against states. For example, I argued *Becker v. Montgomery* and *Lorillard v. Reilly* -- each against States -- after returning to private practice.

8. Mr. Sutton, I am a little concerned about what I have read regarding your approach to precedents from the Supreme Court. Could you tell me the approach you would take, as an appellate court judge, to Supreme Court decisions that are on point?

The first duty of a federal appellate court judge is to determine whether the decision in a particular case is governed by precedent from the United States Supreme Court or by a prior decision of the same court of appeals. As a court of appeals judge, I would identify the relevant precedents on point, determine the test established by that precedent, then apply that test to the facts of the case.

9. Some observers have criticized your approach to precedent in the Westside Mothers case. In that case, you argued to a District Court (and later an appeals court) that individuals cannot bring suit against state officials to require the provision of important Medicaid benefits guaranteed under federal Medicaid law. Your critics say you first

ignored a Supreme Court decision that was factually similar and directly in opposition to your position, and later advised the court not to be "overly concerned" with the ruling because the Supreme Court had backed away from other aspects of it in subsequent cases. Is this an accurate description of what happened in the case? How do you square your position with the binding nature of a Supreme Court precedent when reviewed by a lower court?

***Westside Mothers* dealt with competing Supreme Court authorities, not a single line of cases. On the one hand, *Maine v. Thiboutot*, 448 U.S. 1 (1980), suggested that federal statutory rights created through Spending Clause legislation could be enforced using § 1983. On the other hand, the Supreme Court held in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981), that "legislation enacted pursuant to the spending power is much in the nature of contract" and requires a clear statement of the duties Congress was imposing on the contracting states. *See also Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989). My role in the case was not to weigh the earlier *Thiboutot* decision against the subsequent holdings of *Pennhurst* and *Will*; my role -- as defined by the District Court's invitation for me to represent the interests of the Michigan Municipal League -- was to present the best argument I could in support of my client. As a result, while we argued that the more recent *Pennhurst* and *Will* authorities should control over the earlier *Thiboutot*, most of the brief analyzed a question of pure contract law previously reserved by the Supreme Court: whether third-party beneficiaries, at the time of section 1983's enactment, could maintain an action to bring a suit to enforce a beneficial interest in a contract.**

I did not appear as counsel during the appeal of the *Westside Mothers* case and I cannot speak to the arguments presented to the Court of Appeals.

10. If the Supreme Court has called into question a portion of an earlier Court decision, do you believe that lower courts should disregard – or minimize – other, unrelated portions of that earlier decision? Please describe how you would approach such a situation as a federal judge.

In *Agostini v. Felton*, 521 U.S. 203 (1997), the Supreme Court held that if its precedents have direct application in a case, yet appear to rest on reasons rejected in some other line of decisions, the lower federal court should follow the case that most directly controls. As *Agostini* makes clear, the Supreme Court alone enjoys the prerogative of overruling its own decisions.

11. In several instances in your testimony you took the position that your personal writings about cases you argued did not represent your personal views on the issue. I understand your point that it would have been inappropriate to take the position that your client's position was wrong, but, as I understand it, you were under no obligation to write under your own name and support your client's position. Silence was also an option as was writing a summary of what the Supreme Court did without expressing your personal views of the correctness of these opinions. But you endorsed

the views you advocated in briefs in your personal writings. Why should these not be treated as your personal writings? Does your position mean that, anytime you write or speak on an issue you have litigated on behalf of a client, your comments should not be considered your personal views? If not, when can your writings and remarks be taken as reflecting your own views?

I did not volunteer to write about the cases I argued. I was asked to do so; while I could have declined, it is appropriate in my view for lawyers to share ideas about the law -- including in this instance to discuss a case I argued. Not only is it within the prerogative of a lawyer to say that the Court was right in ruling for his or her client, the lawyer has no other choice in commenting on the decision. While these are my personal writings, they do not necessarily reflect the view I would take of a case or an issue as a judge. That very-different process requires studying the briefs, hearing the arguments, and weighing competing views with care and objectivity.

Senator Edward M. Kennedy's

Follow-Up Questions for Jeffrey Sutton

Westside Mothers

1. You were involved in a case called Westside Mothers in which poor children and their mothers challenged Michigan's failure to provide them adequate dental services as required under Medicaid. They were not after money damages in this case, they just wanted the State of Michigan to provide them the benefits required by federal law. They brought suit under section 1983, which the Supreme Court has held allows you to bring claims to address violations of federal statutes. You argued that they could not enforce the Medicaid Act using section 1983. Your argument would have limited the enforcement of a range of spending power statutes and, to my reading, sought to reverse more than 25 years of Supreme Court precedent. You prevailed at the district court level, but the Sixth Circuit reversed, rejecting your broad theories.

   In your testimony (TR 84), you stated that your briefs did not advocate all the positions that Judge Cleland, the district court judge, eventually adopted. Even accepting that Judge Cleland went further than your brief, you made many of the far-reaching arguments that Judge Cleland accepted. You argued, and Judge Cleland accepted: (1) that Spending Clause legislation creates merely a contract between a State and the federal government (Br. at 2, 3-5); (2) that section 1983 cannot be used to enforce the Medicaid Act, and can never be used to enforce federal mandates imposed under the Spending Clause (Br. 5-18).

   Your key arguments were not accepted by the Sixth Circuit. See, e.g., 289 F.3d 852, 858 (2002) (" Contrary to this narrow characterization, the Court in Pennhurst I makes clear that it is using the term 'contract' metaphorically, to illuminate certain aspects of the relationship formed between a state and the federal government."); see also id. at 861 (holding that there is a private right of action under section 1983).

   Your argument that federal rights created under the Spending Clause could not be enforced under § 1983, seems to be flatly inconsistent with the Supreme Court's decision in Maine v. Thiboutot, 448 U.S. 1 (1980). Thiboutot, which made clear that federal statutory rights could be enforced through section 1983 actions, involved rights established under the Social Security Act, a Spending Clause statute. You never discuss this binding Supreme Court ruling in your opening brief. (Indeed, you briefly cite only language from the dissent in that case.)

   Were you aware of the fact that Thiboutot and several of its progeny, were Spending Clause cases when you filed your initial brief in Westside Mothers?

   If so, why did you not bring this fact to the Court's attention in your opening brief?

In *Westside Mothers*, the district court was faced with a legal question that implicated two competing lines of Supreme Court precedent. One of those lines of cases included *Maine v. Thiboutot* and several other cases. Another line of cases from the

Supreme Court held that "legislation enacted pursuant to the spending power is much in the nature of contract" and requires a clear statement of any state responsibilities undertaken in return for federal funds. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981). To the extent the district court viewed the Spending Clause legislation as a contract between the Federal Government and the States, the court needed to determine whether section 1983 provided for a private right of action for third-party beneficiaries of that contract -- a question reserved by the Supreme Court in *Blessing v. Freestone*. Most of the Michigan Municipal League's brief thus was dedicated to analyzing a question of pure contract law: whether third-party beneficiaries, at the time of section 1983's enactment, could maintain an action to bring a suit to enforce a beneficial interest in a contract—an issue that was neither raised nor briefed in *Thiboutot*.

In filing the opening and reply *amicus* briefs in this case, we were aware of *Thiboutot* and other cases in which spending clause statutes had been enforced through section 1983. And in both briefs, we addressed the issue. In our opening brief, we said the following: "*Finally*, plaintiffs contend that any argument that Spending Clause legislation cannot be enforced by private litigation under section 1983 is foreclosed by Supreme Court and Sixth Circuit precedent. Neither court considered or rejected the arguments raised here, however. Accordingly, under firmly settled Supreme Court doctrine, the questions presented in this case remain unresolved." We then cited several Supreme Court decisions making this point as well as a concurrence in *Blessing v. Freestone* specifically reserving this question. In our reply brief, we then responded again to the issue by discussing *Thiboutot* extensively.

As an *amicus curiae* invited to participate by the district court, it bears adding that the Michigan Municipal League was not one of the two opposing parties in the litigation. Nonetheless, my client did discuss generally the relevance of other Supreme Court authority in the opening brief and extensively responded to the reliance on *Thiboutot* in the reply brief.

2. In your reply brief in Westside Mothers, you concede that "Thiboutot itself, as well as several of its progeny, arose in the context of Spending Clause legislation." You then argue that because the Court in Thiboutot and subsequent cases had "assumed but not squarely decided" the enforceability of Spending Clause mandates under § 1983, the question was an open one. You advised Judge Cleland that he should not "be overly concerned whether its decision can be reconciled with the facts - as opposed to the rationale - of Thiboutot and its progeny."

   A. Please explain why you thought the Court should not be overly concerned with Thiboutot or its progeny.

   B. Do you believe a lower court judge is free to ignore (or not be "overly concerned" with) a Supreme Court ruling that is factually indistinguishable from the case before the lower court even if the Supreme Court has backed away from other portions of the precedent in question?

A) *Westside Mothers* presented the district court with what it described as "complex" legal questions concerning competing lines of Supreme Court precedent and a difficult historical issue of statutory interpretation. As noted, *Thiboutot* and its progeny seemed to conflict with *Pennhurst*, *South Dakota v. Dole*, and *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989). In contrast to Thiboutot, Pennhurst concluded that "Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds." *Id.* at 24. In the face of these competing lines of decisions, the district court invited *amicus curiae* to provide additional briefing on these issues. The obligation of the court was either to reconcile the precedents or to determine which one was controlling. As an advocate for a client, it was reasonable to argue that the later *Pennhurst* line of cases was controlling.

B) In *Agostini v. Felton*, 521 U.S. 203 (1997), the Supreme Court held that when Supreme Court precedent has direct application in a case, lower federal courts should follow it. As a court of appeals judge, I would adhere to that precedent.

3. Judge Cleland raised the question of whether plaintiffs could bring suit under the Spending Clause sua sponte. Michigan did not raise the question. Judge Cleland asked the parties to brief the question, then dissatisfied with Michigan's answer, he invited your participation as amicus. Your client in the case was a group called the Michigan Municipal League.

Please answer the following questions:

A. Did you contact the judge to get involved in the case or did the judge contact you?

B. Do you know why the judge thought to contact you to brief the question? Did you know him personally?

C. In your testimony you said that a call from a judge is "not a call you choose not to return" (Tr. 83). Did you feel compelled to participate in the case? Once you decided to participate in the case, did you feel free to make any argument on behalf of your client? Who were you representing in the case? Who is the Michigan Municipal League (MML)?In your testimony you stated that the "Michigan Municipal League ultimately asked me to write the brief, so there was a client in the case" (Tr. 83). Did the MML contact you to be involved in the case, or did you contact them? Did the Michigan Municipal League determine the arguments to be made in this case, or did you? What was your client's interest in this case? In other words, why would towns and cities not want poor individuals to be covered under Medicaid when the burden of uncompensated care might fall to them?

D. Who were you representing in the case? Who is the Michigan Municipal League (MML)?

E. In your testimony, you stated that the "Michigan Municipal League ultimately asked me to write the brief, so there was a client in the case" (tr. 83). Did the MML contact you to be involved in the case, or did you contact them?

F. Did the Michigan Municipal League determine the arguments to be made in this case, or did you?

G. What was your client's interest in this case? In other words, why would towns and cities not want poor individuals to be covered under Medicaid when the burden of uncompensated care might fall to them?

A) The district court contacted me and invited my participation.

B) The district court did not explain its reasons for contacting me. I had not met Judge Cleland before his clerk contacted me, and I first met the judge at the hearing in the case.

C) I felt honored to be asked to participate in the case by the district court, a feeling I think most practicing lawyers would have in this instance. The district court asked the Michigan Municipal League to brief issues that had not been fully explored by the previous briefs, and we followed the district court's instructions in preparing our brief.

D) We represented the Michigan Municipal League and its Defense Fund. The Michigan Municipal League is the Michigan association of cities and villages. The League is a nonpartisan organization working through cooperative effort to strengthen the quality of municipal government and administration.

E) I had never done legal work for the Municipal League before, and I was put in contact with them either by the district court or the State of Michigan.

F) As with all legal work, the brief was filed on behalf of the client, not the lawyers, and the views expressed in the brief were those of the client, not the lawyers. We were providing the best reasonable arguments we could develop that advanced the League's interests and that were responsive to the district court's questions.

G) In filing these *amicus curiae* briefs in the district court, the Municipal League stressed the importance to cities and states of having Congress be explicit when it conditions the receipt of federal funds upon accepting specific obligations or waiving any immunity to suit.

4. Do you personally agree with the view taken by MML in Westside Mothers regarding (a) whether spending power statutes are just a contract and (b) whether spending power legislation is enforceable using Section 1983?

During the *Westside Mothers* case, I did not have the occasion to think about the issues as a judge would think about them—i.e., to determine which of the parties had the better legal argument. Rather, my job was to make the best arguments I could on behalf of

my client. As a court of appeals judge, I would be required to follow controlling precedent from the Supreme Court as well as precedent from the Sixth Circuit. The Sixth Circuit has decided the *Westside Mothers* case, and I would be obligated to—and would—adhere to that decision and precedent as a court of appeals judge. Having never been through the deliberative exercise of being asked to rule on the case, I do not know what I would have done if I had been asked to decide (rather than just argue) the case.

Sandoval

5. You represented the State of Alabama in Alexander v. Sandoval, 532 U.S. 275 (2001), in which the Supreme Court held 5-4 that there was no private right of action to enforce disparate impact regulations promulgated under Title VI of the Civil Rights Act of 1964. The Sandoval decision reversed an understanding of the law that had been in place for more than 27 years, and makes it nearly impossible to enforce a range of practices with an unjustified racially disparate impact. Additionally, as Title IX is modeled on Title VI, Sandoval has been interpreted to limit private enforcement of regulations promulgated under Title IX, such as regulations forbidding retaliation against those who file Title IX complaints.

   In oral argument, you lead with a more sweeping argument than whether there was an implied right of action under the Title VI regulations, you argued that there should be no implied right of action under spending power statutes. See 2001 WL 55359, *3 ("The first [argument] is that it is never appropriate for a branch of the Federal Government to imply the creation of a private right of action under the spending power."). The Supreme Court did not accept this argument.

   A. Please explain why you made this argument and why you decided to lead with this argument given that a much narrower issue was before the Court.

   B. Your argument seems to contradict the Supreme Court's decision in Cannon v. University of Chicago, 441 U.S. 677 (1979), which found that individuals have an implied private right of action to enforce Title IX, which is spending power legislation. You received the following question from a Justice of the Supreme Court: "I wanted to know how sweeping your position is, and you are saying that if Cannon had been against the University of Illinois instead of the Medical School of the University of Chicago, it would have been thrown out?" You answered yes. Please explain your position that Cannon was limited to private institutions.

   C. Please explain the textual and historical basis for your argument, and any precedent that supports your position.

A) I appeared in the *Sandoval* case as an advocate on behalf of the State of Alabama. In that role, I considered it my professional duty to present all reasonable arguments, within the bounds of precedent, that advanced Alabama's interests in the case. In advancing their client's interests, advocates frequently make a range of arguments that

vary in strength, sometimes placing the stronger arguments first, sometimes placing them later in the argument.

B) As your question suggests, *Cannon v. University of Chicago*, 441 U.S. 677 (1979), involved an implied cause of action against a private defendant. Over time, the Supreme Court, in considering potential implied causes of actions against states, has applied separate criteria and factors that were not at issue in *Cannon* and were not raised in that case. As we explained in our opening brief in *Sandoval*, *Cannon* did not apply a clear-statement rule and did not involve a disparate-impact claim brought under an administrative regulation. Cases decided after *Cannon* have stressed the importance of these and other factors in considering whether an implied cause of action exists against states. As explained in our briefs, those factors include the necessary showing for establishing a waiver of constitutional rights by the states, *see College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) ("courts indulge every reasonable presumption against waiver of fundamental constitutional rights"), and the need for a clear statement when Congress imposes an obligation on a state, *see South Dakota v. Dole*, 483 U.S. 203, 207, 210 (1987) (when Congress "desires to condition" funding on a State's consent to federal authority beyond Congress's traditional limits, "it must do so unambiguously").

The Supreme Court faced two additional issues in applying *Cannon* and other precedent in deciding *Sandoval*. First, *Cannon* involved a claim arising directly from the intentional-discrimination mandate of Title IX. *Cannon* thus was a discriminatory-intent case, while *Sandoval* was a discriminatory-impact case. Second, *Cannon* did not address when a private right of action exists under administrative regulations, as it did not enforce a regulatory right, but a statutory one. *Sandoval*, on the other hand, questioned whether Congress authorized individuals to bring private rights of action against States under disparate-impact regulations issued by a federal agency.

C) The precedents discussed in the above response are the basis for the arguments that Alabama made.

6. Do you believe that Title IX and Title VI are privately enforceable against States? Why or why not? Do you believe that this question was already decided by the Supreme Court? What do you believe is the effect of Congress' post-Cannon abrogation of State's sovereign immunity under Title IX and Title VI?

Unlike the regulations at issue in *Sandoval*, the Congress expressly created private rights of action for Titles VI and IX in the Rehabilitation Act Amendments of 1986, 42 U.S.C. § 2000d-7. *See, e.g., Franklin v. Gwinnett County Public Schs.*, 503 U.S. 60, 72 (1992). As Alabama argued in the briefing in *Sandoval*, this distinction suggests that Congress appreciates that the States are not traditional civil defendants and, before they may be sued in the Spending Clause context, the private right of action must be expressly identified.

7. By my reading, you also challenged the validity of the disparate impact regulations. In your testimony. You argued that Section 601 "does not authorize federal agencies to

create rules barring disparate effects arising from generally-applicable state programs that occur 'merely in spite of,' rather than 'because of' an individual's national origin." See 1999 U.S. Briefs 1908, *24-26 ("An effort to bar disparate effects arising from such generally-applicable regulations would not 'effectuate' the objections of Title VI, but would rewrite them."). The Supreme Court decided not to take up this argument, which would have made it impossible for even the federal government to enforce acts with unjustified racially disparate impacts. In your testimony however, you stated that "even though we could have challenged the [regulations], gone that extra step, we did not challenge them." (Tr. 404)

A. Please explain how you reconciled your arguments about an agency's power to issue disparate impact regulations under Title VI with Alexander v. Choate, 469 U.S. 287, 293-94 (1985) and Guardians Ass'n. v. Civil Serv. Comm'n of New York City, 463 U.S. 582, 584 (1983).

B. Please explain why the arguments in the brief are not a challenge to the disparate impact regulations.

A) Briefly stated, *Alexander v. Choate*, 469 U.S. 287, 293-94 (1985), and *Guardians Ass'n v. Civil Serv. Comm'n of New York City*, 463 U.S. 582, 584 (1983), supported Alabama's arguments in *Sandoval* in two different ways. First, both *Alexander* and *Guardians* rejected implied private causes of action. That result by itself bolstered, rather than weakened, Alabama's argument that no implied private cause of action existed under the regulations at issue in *Sandoval*. Second, Alabama argued that *Guardians* and *Alexander* confirm that an agency may issue disparate impact regulations whenever the authorizing statute allows it. Because "[s]even Members of the Court agree[d] that a violation of [Title VI] requires proof of discriminatory intent," *Guardians*, 463 U.S. at 608 n.1, Alabama argued that it would seem that an agency could not administratively remove a requirement that Congress wrote into the statute. And Alabama showed that *Alexander* was entirely consistent with this position. Indeed, because Congress in the Rehabilitation Act intended to reach "action that discriminated by effect as well as by design," Alabama acknowledged that it was proper for the Court to "resist[] "too facile an assimilation of Title VI law into" those other laws.

B) *Sandoval* questioned whether Congress authorized a private right of action against the State under disparate-impact regulations promulgated by federal agencies. The case did not present a challenge to the validity of the disparate-impact regulations, and the reply brief specifically said that the Court did not need to reach the issue. *See Alexander v. Sandoval*, 532 U.S. 275, 279 (2001) ("We do not inquire here whether the DOJ regulation was authorized by § 602 .... The petition for writ of certiorari raised, and we agreed to review, only the question posed in the first paragraph of this opinion: whether there is a private cause of action to enforce the regulation.").

8. In your brief, you argued that "every law has a disparate impact on someone" and that "an across-the board efforts to regulate disproportionate impacts where federal dollars appear would "be far-reaching and would raise serious questions about, and perhaps

invalidate, a whole range of tax, welfare, public service and licensing statutes. Washington v. Davis, 426 U.S. 229 (1976)." 1999 U.S. Briefs 1908, *39.

In fact, the standard is not that any disparate impact is actionable, only a discriminatory impact that is substantial and that is not justified by business or agency necessity. See, e.g., Powell v. Ridge, 189 F.3d 387, 393 (3rd Cir. 1999); New York Urban League, Inc. v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995); City of Chicago v. Lindley, 66 F.3d 819, 828-29 & n.12 (7th Cir. 1995); Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1407 (11th Cir. 1993).

A. In light of this, please explain your argument that a "disparate impact" standard under Title VI would be too far-reaching.

B. Do you believe that Congress can use its spending power to reach State practices with an unjustified disparate impact? Please explain.

C. Do you believe that under Title VII of the 1964 Civil Rights Act–as amended by the Civil Rights Act of 1991– Congress had the power to make Title VII's disparate impact applicable to States? Do you believe that this question has been decided by the Supreme Court or that it is an open question after Boerne and Garrett?

D. Do you believe that the Title VI disparate impact regulations were consistent with the agencies' power to promulgate regulations to enforce the anti-discrimination provisions of Title VI?

A) There are two possible answers to this question. One, in *Sandoval*, Alabama did not argue that "a 'disparate impact ' standard under Title VI would be too far-reaching; the state argued only that the statute and regulatory requirement were insufficient to allow a private cause of action to enforce such a standard. (*See, e.g.*, Pet. Br. 39.) Two, the state argued that a privately-enforced disparate impact standard could have unanticipated consequences -- potentially stretching state resources in defending the validity of everything from school-funding requirements to bus and subway fare increases, the relocation of business and government services relocations to student graduation requirements. (*See id.*)

B) Congress may use its spending power to attach conditions on the receipt of federal funds, and I am not aware of any constitutional reason why it could not do so with respect to disparate-impact laws. *See South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

C) The Supreme Court has addressed the application of Title VII to the States in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). I have not considered whether *Fitzpatrick* definitively settles the particular question presented here, but that is where I would begin my analysis if I were presented this same question as a judge.

D) As an advocate for the State of Alabama in *Sandoval*, I was professionally obligated to present all reasonable grounds why the private cause of action asserted by the

plaintiff was inconsistent with the power granted to the agency. The case did not involve the existence of disparate impact regulations under Title VI generally, and I have not had an occasion to consider the question presented here. *Fitzpatrick* and *Sandoval* are both binding precedents on the Courts of Appeal, and if I were a federal appellate judge faced with this issue I would have to decide whether one, both, or neither settled a particular case.

9. In opening your argument in Sandoval, you stated that States "are co-equal sovereigns and, as a result, the Court has not lightly inferred that Congress meant to regulate the States as States, to regulate in core areas of local sovereignty, or, as here, to expose the states to a private right of action." But in Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742, 761 (1982), the Supreme Court specifically rejects the argument that States are "co-equal sovereigns." While the Court has ruled that States have sovereign immunity, the Court has recognized that this immunity can be abrogated by the Federal Government in certain circumstances, something that could never happen if the Federal Government and the States were "co-equal sovereigns."

   Do you believe the States and the Federal Government are co-equal sovereigns? Why did you choose this phrase in your opening statement in Sandoval?

   Since the decision in *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 761 (1982), the Supreme Court has recognized States as "co-equal sovereigns" both in name, *see Tafflin v. Levitt*, 493 U.S. 455, 466 (1990), and effect, *see Printz v. United States*, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144, 178 (1992). Alabama's argument in *Sandoval* was framed within these authorities. As a federal appellate judge, I would be bound both by *Sandoval / Printz / New York* conception of dual sovereignty and any limitations imposed on that conception by *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 761 (1982).

10. Do you personally agree with the arguments you made in Sandoval including that (a) it is impermissible to imply a private right of action in spending power legislation; and (b) that there is no private right of action to enforce the disparate impact regulations of Title VI.

As a court of appeals judge, I would be required to following controlling precedent from the Supreme Court. The Supreme Court has decided *Sandoval*, and I would be obligated to—and would—adhere to that decision and precedent as a court of appeals judge.

<u>Federalism</u>

11. Do you personally agree with the argument you made in Garrett that Title I of the ADA was not properly enacted under Section 5 of the Fourteenth Amendment?

As a lawyer in *Garrett*, I did not have occasion to determine whether my client's arguments were legally correct. That was the court's function. My function was to muster the best arguments possible on behalf of my client, the State of Alabama. Thus, any

argument I have made as an advocate does not necessarily reflect my own beliefs, but rather reflects what I believe will best advance my client's cause. However, if I am confirmed to be a court of appeals judge, I will be duty-bound to abide by existing Supreme Court precedent.

JONES DAY
41 SOUTH HIGH STREET • SUITE 1900
COLUMBUS, OHIO 43215-6113
TELEPHONE: 614-469-3939 • FACSIMILE: 614-461-4198

WRITER'S DIRECT NUMBER:
(614) 469-3895
jsutton@jonesday.com

804925:dc

February 11, 2003

VIA FACSIMILE TRANSMISSION
AND OVERNIGHT MAIL

Senator Orrin G. Hatch
Committee on the Judiciary of the U.S. Senate
104 Hart Senate Office Building
Washington, DC 20510

Dear Senator Hatch:

I am forwarding with this letter my answers to the questions from Senator Schumer.

Sincerely,

Jeffrey S. Sutton

Enclosure

ALKHOBAR • BRUSSELS • CHICAGO • CLEVELAND • COLUMBUS • DALLAS • FRANKFURT • HONG KONG • HOUSTON • IRVINE • LONDON • LOS ANGELES • MADRID • MENLO PARK • MUMBAI • MUNICH • NEW DELHI • NEW YORK • PARIS • PITTSBURGH • SHANGHAI • SINGAPORE • SYDNEY • TAIPEI • TOKYO • WASHINGTON
ASSOCIATE FIRM

Questions for Jeffrey Sutton from Senator Charles E. Schumer

1. In Morrison v. United States, a 5-4 Supreme Court held that despite years worth of hearings and well-substantiated findings proving that violent crime against women costs the country between $5-$10 billion each year in health care, criminal justice, and other social costs, Congress did not adequately establish the effect of violence against women on interstate commerce to justify the use of Commerce Clause powers. The four justice minority disagreed, arguing that the Court should show deference to Congress' ample findings and uphold the Violence Against Women Act as a rational response to the national threat posed by gender-motivated violence.

At your confirmation hearing, you stated that you were insufficiently familiar with the record of Congress's VAWA findings to tell us whether you agree with the majority's conclusion that Congress' findings were insufficient and were not due deference by the Court or with the minority's conclusion that Congress' findings were sufficient and were due deference. Please review Congress' findings and tell us whether you agree with the majority's conclusion or the minority's and why.

Please do not answer merely by restating the holding of Morrison. I understand that no matter what position you state here, you will follow the law as defined by the Supreme Court. I am asking this question to better understand the legal and judicial philosophy you will bring with you to the bench if you are confirmed.

As I have written before, the Court's decision in *Morrison* appears to be a reasonable one. That view, it bears emphasizing, comes not from the perspective of a disinterested judge or lawyer or from the perspective of a dispassionate scholar but from the perspective of someone who was involved in representing a client in the case (and accordingly could not later publicly disavow his client's position). That vantage point is informed by three observations.

First, all nine members of the Court agreed that a substantial presumption of constitutionality is accorded to Commerce Clause legislation and that great respect is given to Congress's superior fact-finding capacity in this area. *See Morrison*, 529 U.S. at 607; *City of Boerne*, 521 U.S. at 535-36; *United States v. Lopez*, 514 U.S. at 563. Because Congress is the branch of the Federal Government that is best equipped to gather evidence about effects on interstate commerce and to make these kinds of findings, the Court has long shown great deference to these factual determinations.

Second, all nine members of the Court agreed that the Judicial Branch nonetheless retains the *Marbury* power to review extensive congressional findings of fact to determine whether a law affects interstate commerce; otherwise, the Court has suggested, Congress's fact-finding capacity would trump the *Marbury* power. *See Morrison*, 529 U.S. at 614 ("whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court") (quotations omitted); *id.* at 628 (Souter, J., dissenting). *See also City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) ("Congress' discretion is not unlimited, however, and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under

the Constitution.").

Third, that takes us to the most difficult part of *Morrison* -- the application of these bookend principles to VAWA. While fair-minded people can assuredly disagree about its conclusion, the Court reasonably determined that this single provision of VAWA was not constitutionally connected to interstate commerce. That is not, however, because the factual findings did not establish a but-for connection to interstate commerce. They did. It is rather because the findings were at such a level of generality that similar findings could be made about any matter of traditionally local concern. And such an analysis would effectively eliminate the Court's "independent evaluation of constitutionality under the Commerce Clause." *Lopez*, 514 U.S. at 562.

Reasonable minds, to be sure, can disagree about these matters. Indeed, I do not know whether this is the view I would have taken of the matter as a lower-court judge before the Supreme Court reached its decision in *Morrison*, and as noted I am not in a position publicly to disavow a legal argument that I previously advanced on behalf of a client. Either way, if confirmed, I would follow current and future Supreme Court precedent in this area.

2. Please describe in detail what role you played, if any, in litigating *Nevada Department of Human Resources v. Hibbs*, including any role you played in preparing briefs, preparing advocates for oral argument, or assisting in the representation of any party or amicus, or any other involvement.

I have not played a role in litigating the *Hibbs* case.

3. Thank you for discussing at your hearing cases where you are critical of the court's holding or reasoning. I appreciate as well your agreeing to discuss additional cases in writing. Please identify three Supreme Court cases that have not been reversed and which you have not previously criticized publicly where you are critical either of the Court's holding or reasoning and please discuss the reasons for your criticism.

As a court-of-appeals judge, one is required to follow Supreme Court precedent, whether one agrees with those decisions or not. And in that capacity, one is required to go through a decision-making process that I have not gone through in thinking about any prior decision of the Supreme Court or for that matter any lower-court decision. One aspect of that decision-making process is occasionally to reconcile Supreme Court precedents that may be in tension with each other. While I have not thought through this issue in the way that a court-of-appeals judge would think through it, I can think of two opinions that at first blush do not seem consistent with the reasoning of later decisions of the Supreme Court.

In *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892), the Court construed an Act of Congress that prevented "any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration, of any alien or aliens, any foreigner or foreigners, in the United States . . . under contract or agreement, . . . to perform labor or

service of any kind in the United States." *Id.* at 457 (quotations omitted). After reviewing the competing arguments of the parties, the Court concluded that the legislation did not apply to a contract between a New York City church and a rector in England. *Id.* at 458. While there may be legitimate explanations for this result, the Court's reasoning does not seem consistent with portions of other Court opinions indicating that the plain language of a statute generally will control the outcome of a statutory-interpretation case.

In *Korematsu v. United States*, 323 U.S. 214 (1944), a 6-3 majority of the Court upheld the forcible detention of a class of law-abiding American citizens based solely on their race. Fifty-nine years after that decision, it is doubtful whether anyone fairly can appraise the national-security risks that led the military to issue this decision or the historical context in which the Court addressed the constitutionality of the military order. Still, the reasoning of the majority decision does not seem consistent with two constitutional assumptions established by other decisions of the Court -- namely, that guilt cannot be determined based on race and that even the most compelling governmental interests require the use of lesser alternatives in the context of suspect racial classifications.

In commenting about these decisions, I am describing the process that a lower-court judge occasionally would need to follow in reconciling different Supreme Court precedents. I am not prejudging what I would do in these areas or in any other area.

4. Please describe in detail how you came to be involved in litigating the following cases: *Sandoval*, *Garrett*, *Kimel*, and *City of Boerne* and how you decided what arguments to advance in each of those cases. To the extent a client or supervisor instructed you to take any position, for each of these cases, please describe whether you had previously advised your client or supervisor to take that position?

In the first of these cases, *City of Boerne*, I was the State Solicitor of Ohio when the Fifth Circuit issued its ruling in that case. By that time, the Ohio state corrections department (through the corrections section of the Ohio Attorney General's office) was defending many claims filed against it by prison inmates under the Religious Freedom Restoration Act (RFRA). In light of those pending claims, the Attorney General and her clients made the decision to raise the defense that RFRA exceeded congressional power. Separately, and in view of that pending litigation, the Attorney General authorized me to file *amicus curiae* briefs on behalf of Ohio and 15 other states in the United States Supreme Court. The merits *amicus* brief was joined by both Democratic and Republican Attorneys General, and also noted that at least four other states independently had challenged the validity of RFRA. *See, e.g., Sasnett v. Sullivan*, 91 F.3d 1018 (7th Cir. 1996); *Rouser v. White*, 944 F. Supp. 1447 (E.D. Cal. 1996); *Bass v. Grottoli*, 94 Civ. 3220, 1995 U.S. Dist. LEXIS 13916 (S.D.N.Y. Sept. 22, 1995); *Van Dyke v. Washington*, 896 F. Supp. 183 (C.D. Ill. 1995).

In *Kimel*, the Florida Attorney General's office and the Alabama Attorney General's office asked me to make a proposal to represent them in three consolidated cases that had been accepted for review in the Supreme Court. I did, and was engaged by both offices to represent the state defendants in these three consolidated cases. In *Sandoval* and *Garrett*, presumably as a result of my prior work for Alabama, I was asked by the Alabama

Attorney General's office to represent the state clients in those cases.

In all four of these cases, I did not become involved in them until they reached the United States Supreme Court. As a result, the positions of my clients -- constitutional challenges in *City of Boerne*, *Kimel* and *Garrett*, and a statutory-interpretation challenge in *Sandoval* -- had already been developed, established and preserved by the time the cases reached the Supreme Court. As their lawyer in the Supreme Court, I did my best to continue to articulate and advance these legal positions on behalf of my clients. In preparing these legal arguments, I did what I generally would do in this setting -- look for and develop all reasonable arguments that would advance my client's position. My clients in these cases ultimately were responsible for taking these legal positions and for approving the contents of these briefs.

It may be worth adding that I have been asked by States whether I would be willing to represent them in other settings -- including in *Rice v. Cayetano*, 528 U.S. 495 (2000) (Fifteenth Amendment challenge to Hawaii voting-requirements law), and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) (takings challenge to environmental restrictions of state agency). I was asked to make a formal proposal to represent the State in one case and was informally asked whether I would be interested in representing the State in the other. While I conveyed my willingness to represent each State, I ultimately was not hired in either case.

JONES DAY
41 SOUTH HIGH STREET • SUITE 1900
COLUMBUS, OHIO 43215-6113
TELEPHONE: 614-469-3939 • FACSIMILE: 614-461-4198

WRITER'S DIRECT NUMBER:
(614) 469-3865
jssutton@jonesday.com

804925:dc

February 12, 2003

VIA FACSIMILE TRANSMISSION
AND OVERNIGHT MAIL

Senator Orrin G. Hatch
Committee on the Judiciary of the U.S. Senate
104 Hart Senate Office Building
Washington, DC 20510

Dear Senator Hatch:

I am forwarding with this letter my answers to the questions from Senator Richard J. Durbin.

Sincerely,

J. S. Sutton

Jeffrey S. Sutton

Enclosure

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(ASSOCIATE FIRM)

Follow-up Questions for Jeffrey Sutton
Senator Richard J. Durbin
February 12, 2003

1. You stated in your testimony that many states have waived their sovereign immunity with respect to the Americans with Disabilities Act (ADA).

(a) Which states have done so? Do you think that any of them will reconsider their decision to waive sovereign immunity in light of *Board of Trustees of University of Alabama v. Garrett* (2001)?

Both before and after working on the *Garrett* case, it was my understanding that many states had joined an *amicus* brief in *Garrett* indicating that they thought they should be subjected to money-damages suits under the ADA and that some states had chosen not to assert sovereign immunity as a defense to pending money-damages claims filed in federal court under the ADA. I do not know which states they were or which states have chosen since *Garrett* not to assert sovereign immunity as a defense. The point I was trying to make during my testimony is that nothing in Alabama's argument deprived states of choosing to subject themselves to money-damages claims under Title I of the ADA in federal court.

(b) As a normative matter, do you believe that states should waive their sovereign immunity with respect to the ADA?

The question whether to waive sovereign immunity is generally a matter that falls within the prerogative of the state or federal legislature. I have not worked as a legislator before, and as a result I have not considered this question from that perspective. My work on *Garrett* was in my capacity as a lawyer representing a client.

(c) Do you believe that state laws are adequate to protect the rights of people with disabilities against discrimination and that no federal anti-discrimination law is necessary?

In the *Garrett* briefs, Alabama specifically made the point that Congress deserves credit for passing the ADA, Br. 2-3, 10 and that it was well within Congress's power to enact "national legislation comprehensively prohibiting discrimination on the basis of disability," Reply Br. 2 (quoting U.S. Brief).

2. In responding to one of my questions at the January 29, 2003 nominations hearing, you stated that the rights of the plaintiff in the *Garrett* case were not unduly restricted because she has a pending claim under Section 504 of the Rehabilitation Act.

(a) What exactly is the status of her Section 504 claim?

In discussing *Garrett* during my hearing, I was doing so as a lawyer who argued the case for a client; I was not stating whether I agreed with the decision and more specifically

was not saying that her rights "were not unduly restricted." See ABA Model Rules of Professional Conduct, Rule 1.2(b) ("A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.").

I worked on the *Garrett* case only at the United States Supreme Court, and thus was not involved in the case when Alabama initially formulated its constitutional defense and have not been involved in the case since the Court's decision. My knowledge of Ms. Garrett's section 504 claims stems from the fact that I filed a brief on behalf of Alabama at the Supreme Court urging the Court not to review the State's section 504 defenses at that time. After the Court decided *Garrett*, it remanded the case to the lower federal courts, which is where Ms. Garrett's section 504 claims presumably is currently pending.

(b) Do you believe that states should be liable for damages under Section 504 of the Rehabilitation Act, if states do not waive their sovereign immunity with respect to that statute? If so, how do you reconcile that with your belief that states who do not waive sovereign immunity should not be liable for damages under Titles I and II of the ADA?

The briefs that I wrote in the *Garrett* case were done in my capacity as a lawyer for the state, not on my own behalf and not as a reflection of my views as a potential judge. According to decisions of the Supreme Court, waivers of immunity under the Spending Clause (like Section 504) are distinct from abrogations of immunity under Section 5 of the Fourteenth Amendment (like the ADA). Under the former, the state itself waives immunity as a condition for receiving federal funds. *See South Dakota v. Dole*, 483 U.S. 203 (1987). Under the latter, Congress abrogates that immunity for the state in order to remediate and prevent constitutional violations by the states. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

3. At your hearing I asked you to list examples of cases that you would not be willing to take, even if it meant forgoing an opportunity to argue before the Supreme Court. I did not understand your answer. Please list examples of such cases.

I would not argue a case in the Supreme Court or any court that required me to make legal arguments that were not appropriate to make under the applicable rules of legal ethics. For example, I would not advance the argument that the Court does not have authority to review the constitutionality of a state law that implicated an incorporated provision of the Bill of Rights.

4. You stated at your hearing that you became involved in the RJR tobacco case because RJR was a client of your law firm. What other tobacco companies have you represented and what was the nature and outcome of your work?

To my knowledge, I have been lead counsel in two cases on behalf of tobacco companies. One case is *Lorillard v. Reilly*, which involved a free-speech and preemption challenge to several Massachusetts advertising restrictions. I worked on the matter solely in the Supreme Court, and did so along with several other lawyers on behalf of RJR as well

challenged The Ohio State University's decision to set aside all of its painting contracts for minority-owned businesses. I do not recall whether any briefs were filed in that case, but I do recall participating in a settlement conference with the district court. The case was eventually settled, and the statute was not invalidated.

In the *Ritchey* case, I reviewed and edited drafts of the two briefs the State filed in the Ohio Supreme Court, helped prepare the attorney who argued the case for oral argument, and attended the oral argument.

(b) Was your defense of this statute voluntary or obligatory?

I rarely thought of my work for the Attorney General in this way. But the attached letter from Mr. Fred Pressley regarding my work on the *Henry Painting* and *Ritchey* cases may be responsive to your question.

(c) Do you believe in the need for federal race-conscious contracting programs?

This is eminently a matter for the legislature to decide. As a court of appeals nominee, I do not believe that it is my place to advise the legislature on policy questions. What is more, this is a matter that could come before me as a court of appeals judge, and as a result it would be inappropriate for me to give my opinion on this topic. If confirmed, I would follow Supreme Court precedent in this area.

(d) Do you believe that remedying past discrimination is the only legitimate justification for race-conscious programs?

This issue is currently before the United States Supreme Court -- as a result of a circuit split between the Fifth Circuit and the Sixth Circuit. The Court should provide an answer to this question by June of this year. If confirmed, I will follow Supreme Court precedent in this area.

(e) Do you believe that diversity can be a compelling government interest in race-conscious admissions programs in the educational context?

This issue also is currently before the Supreme Court -- as a result of a circuit split between the Fifth and Sixth Circuits. The Court should provide an answer to this question by June of this year. If confirmed, I will follow Supreme Court precedent in this area.

7. You are an officer in the Federalist Society. A number of the lawyers designated by the Federalist Society as experts on the constitutionality of abortion and *Roe v. Wade* (1973), as well as a number of its officers, are openly hostile to the *Roe* decision and to a woman's right to choose. In order to understand your judicial outlook, I would like to know your personal view of the jurisprudence that has recognized unenumerated rights.

(a) Do you believe in and support a constitutional right to privacy, and that such a right encompasses a woman's right to have an abortion?

(b) Do you believe that *Roe v. Wade* was correctly decided?

(c) What unenumerated rights do you believe the Constitution truly protects?

I am an officer in the Separation of Powers working group, and the Society (it is my understanding) does not take positions in pending cases. In the *Griswold, Roe* and *Casey* decisions, among other decisions, the Supreme Court has firmly and repeatedly recognized a right to privacy under the Fourteenth Amendment. If confirmed as a court of appeals judge, I would adhere to those decisions. I do not know what I would have done as a court of appeals judge in *Roe* and I have not thought through what specific unenumerated rights the Constitution protects -- except to say that I would follow all relevant Supreme Court precedent in this area if I were confirmed. For example, in identifying certain rights as a matter of substantive due process, the Court has recognized a right to use contraceptives as well as a right to control the upbringing of one's children, among other unenumerated rights.

SUBMISSIONS FOR THE RECORD



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THE ABILITY CENTER OF GREATER TOLEDO

5605 Monroe Street,
Sylvania, Ohio 43560

419.885.5733 (V/TTY)
419.882.4813 (Fax)
866.885.5733 (Toll-free)

Web Site:
www.abilitycenter.org

DEFIANCE OFFICE:

516 Perry Street
Defiance, Ohio 43512

419.782.5441 (V/TTY)
877.209.8336 (Toll-free)
419.782.9231 (Fax)

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Timothy Harrington
Executive Director

Whereas it is the mission of the Ability Center of Greater Toledo to assist people with disabilities to live, work and socialize in the community and

Whereas individuals with disabilities can only accomplish independence by being given every opportunity afforded to those without disabilities and

Whereas individuals with disabilities must be afforded protection from discrimination by any individual or organization with whatever means necessary to guarantee that protection, including the ability to pursue monetary damages and

Whereas Jeffrey Sutton is an outspoken states' rights, federalist advocate and

Whereas Jeffrey Sutton opposes an individual's right to pursue monetary damages in federal court in the event of discrimination by a state agency and

Whereas Jeffrey Sutton has challenged, through arguments in the U.S. Supreme Court, the constitutionality of the ADA, the legitimacy of documented discrimination based on disability by the states, and has pursued numerous cases which could reduce the impact of other federal civil rights laws and

Whereas the nomination of Jeffrey Sutton to the Sixth District Court of Appeals presents a direct threat to the civil rights of individuals with disabilities.

Be it resolved that on this date, July 9, 2001, the Ability Center of Greater Toledo, its Board, Staff and Membership strongly oppose the nomination of Jeffrey Sutton as a Judge representing the U.S. Sixth District Court of Appeals and demand an immediate withdrawal of the nomination by President George W. Bush and any support of the nomination by Ohio's U.S. Senator's, Mike DeWine and George Voinovich.

Tim Harrington
Executive Director

Dan Wilkins
Chairperson, Board of Trustees



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January 22, 2003

The Honorable Orrin G. Hatch, Chairman
Senate Judiciary Committee
Dirksen Senate Office Building
Room 224
Washington, DC 20510

Dear Chairman Hatch:

On behalf of Access to Independence of Cortland County, I write respectfully to urge you to use your conscience and good judgment not to confirm Jeffrey Sutton to the Sixth U.S. Circuit Court of Appeals. As a long-time proponent of the millions of persons with disabilities and the Americans with Disabilities Act (ADA), you must recognize that Jeffrey Sutton's activist efforts to limit Congressional authority in the area of disability rights has undermined the legislative role in making and championing the ADA and other laws removing barriers for the more than 50 million children and adults with disabilities and their families in the United States.

In University of Alabama v. Garrett, Mr. Sutton argued successfully that Congress did not have the authority under the Constitution to apply the ADA to States in employment discrimination suits for damages. In this case you filed an amicus brief supporting the constitutionality of the ADA as applied to State employers. Why, then, confirm someone to a lifetime appointment to a federal appeals court whose federalist view of the Constitution will erect new barriers for Americans with disabilities seeking to assert their rights in federal court?

He argued unsuccessfully that unnecessary institutionalization should not be a violation of the ADA in the Olmstead v. L.C. case. Mr. Sutton's positions in these and other cases represent a view of Congress's authority under the Equal Protection Clause, Spending Clause, and Commerce Clause that would dramatically restrict your ability to pass laws protecting the rights of Americans with disabilities, older workers, and others under the Constitution.

Mr. Chairman, you have been a long-time supporter of federal civil rights for Americans with disabilities. Working with Senators Dole, Kennedy, Harkin and others, you helped build the overwhelming documentation of discrimination that persuaded your colleagues to support the ADA when it was enacted in 1990.

Access to Independence joins hundreds of non-partisan national, state and local disability organizations to oppose his appointment, including many from his home State of Ohio. It is unprecedented for our community to speak out so loudly in opposition to a judicial nominee, and we do so because we are convinced that his extreme views represent a real threat to our civil rights.

Please honor your commitment to a strong ADA and refrain from confirming Mr. Sutton to a federal judgeship. Please listen to the strong protests of your constituents with disabilities and their families and colleagues and confirm candidates who understand the importance of Congress's ability to remedy this nation's abysmal history of exclusion, segregation, sterilization, institutionalization and impoverishment of its citizens with disabilities.

Mr. Sutton's defenders have argued that his positions in Garrett, Olmstead, and other cases do not necessarily reflect his views, but that as a former Solicitor for the State of Ohio he was merely robustly asserting a defense of State immunity under the 11th Amendment of the Constitution. But if Mr. Sutton's view of State immunity under the ADA is the necessary position for a State attorney general to assert, why in the Garrett case was his position on behalf of the University of Alabama opposed by a bipartisan group of 14 State attorneys general, and supported by only six in addition to Alabama? As the amicus brief on behalf of 14 states in Garrett explained in reference to the ADA, "to eradicate the effects of the extensively documented, long-term, pervasive and invidious discrimination against people with disabilities, it is critical that the States be leaders in facilitating this duly enacted Section 5 legislation."

Mr. Chairman, we need your leadership to help us stem a tide of activist court decisions that are weakening the Constitutional underpinnings of disability rights laws and threatening your ability as a United States Senator to enact legislation establishing the full range of remedies to address discrimination on the basis of disability.

As a leader in activist attacks legislative power, Jeffrey Sutton does not deserve your support.

Sincerely yours,

Mary E. Ewing, MSW

Mary E. Ewing

Executive Director

Access to Independence of Cortland County, Inc.

Access II

Independent Living Center

611 West Johnson
Gallatin, MO 64640

Phone:
660-663-2423
TDD:
660-663-2663
FAX:
660-663-2517
E-mail:
access@ccp.com
Web Page
www.ccp.com/~access

Staff:
Executive Director
Gary Maddox
Program Manager
Leslie A. Anderson
Independent Living Specialist
Judy Clark
Tammy Pence
PAS/Independent Living Specialist
Kelly Brinkley
John Loyd
Amy Mort
PAS Payroll Specialist
Staci Hamilton
Benefit Specialist
Debbie Hawman
Bookkeeper/Admin. Assistant
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01-13-2003

Dear Mr. Troy Justesen,

Access II Independent Living Center strongly opposes the confirmation of Jeffery Sutton to the 6th Circuit U. S. Court of Appeals.

Based on past history, Jeffery Sutton favors "states rights" over the civil rights of persons with a disability. This is contrary to everything the Independent Living movement, the Americans with Disability Act, the "Olmstead" decision and other important disability related legislation fought for many years to attain.

Our organization serves individuals with disabilities in an 8 county 4,400 square mile area in North Western Missouri with a population of 88,221 individuals, with approximately 5,117 citizens with disabilities.

It is our belief that this appointment would have an adverse affect on the lives of many of these individuals whom we serve.

The Presidents Committee on Employment of People with Disabilities, The National Organization on Disability Harris Poll, and numerous other national organizations have clearly documented the disparities and civil rights issues that continue to exist for individuals with disabilities despite the ADA, The Rehab Act, IDEA, the Fair Housing Act, and other significant civil rights legislation.

In addition, we urge the appointment of nominees who are supportive of disability and other civil rights.

Sincerely,

Gary E. Maddox
Executive Director

ACCESS LIVING
Center for Service, Advocacy and Social Change for People with Disabilities

January 3, 2003

The Honorable Patrick Leahy
United States Senator
433 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Leahy:

As the President and Chief Executive Officer of one of the nation's largest Centers for Independent Living for people with disabilities, I write respectfully to urge you to oppose the re-nomination of Jeffrey Sutton to the U.S. Court of Appeals for the Sixth Circuit. Mr. Sutton has, to an unusual extent, dedicated his career to curtailing the civil rights of people with disabilities and racial minorities. His well-documented record indicates that, if confirmed, Mr. Sutton would seek to eviscerate Congress' authority to protect civil rights and individual liberties, without regard to existing law or the history of discrimination against people with disabilities, racial minorities, and others.

In case after case, Mr. Sutton has advanced a radical agenda that, while couched in neutral legal terms of the federal – state relationship, in fact seeks nothing less than the dismantling of civil rights laws Congress has enacted over the past four decades that guarantee freedom and opportunity for people with disabilities and others. His agenda – and his active pursuit of it – are so far out of the mainstream of the views of the American public and established law that they render Mr. Sutton unqualified to serve as a fair and impartial arbiter of justice. Mr. Sutton's efforts to eliminate civil rights include as follows:

- **Eliminating individual enforcement of civil rights laws:** Much of Mr. Sutton's legal activism has been dedicated to removing the "teeth" of civil rights laws: individual enforcement in the courts. Mr. Sutton has repeatedly sought to deny people with disabilities, racial and religious minorities, and the elderly that most basic American right – to have their day in court and an opportunity to prove their case. Without such individual enforcement, the substantive guarantees of civil rights laws are merely promises on paper.

Mr. Sutton has argued that the Constitution forbids Congress to authorize victims of discrimination to enforce their rights against states, whether in federal or state court. For example, in *Board of Trustees v. Garrett*, Mr. Sutton successfully argued before the U.S. Supreme Court that state employees with disabilities may not sue for employment discrimination under the Americans with Disabilities Act. Placing the rights of states over those of individuals, Mr. Sutton based his position on an unprecedented rejection of Congress' power to protect civil rights as well as a cavalier disregard of the extensive history Congress documented of the discrimination people with disabilities have suffered at the hands of the states, a history that five Supreme Court justices once described as "grotesque." Mr. Sutton made similar arguments that nullified individual enforcement against states in age- and religious discrimination cases.

614 West Roosevelt Road Chicago, Illinois 60607
voice 312.253.7000 *fax* 312.253.7001 *tty* 312.253.7002
generalinfo@accessliving.org

In race discrimination cases, Mr. Sutton successfully argued for nullifying claims under the Civil Rights Act of 1964 in which a victim could show that he or she suffered discrimination but could not prove intent or motivation to discriminate. In *Alexander v. Sandoval*, Mr. Sutton argued that victims of discrimination must always prove intent to discriminate – an exacting standard requiring "smoking gun" evidence such as a blatantly discriminatory statement. Such evidence is unlikely to be uncovered in most cases. Mr. Sutton's argument had the effect of significantly undercutting enforcement of the landmark 1964 Act.

- **Defending large state institutions:** Contrary to Congress and the most current three Presidents, Mr. Sutton in *Olmstead v. L..C.* urged the Supreme Court to hold that "the Americans with Disabilities Act does not impose a 'least restrictive treatment' requirement on the States" when they administer disability services to their citizens. Mr. Sutton's view that states should be free to deprive people with disabilities of their freedom, even when contrary to the recommendation of treating professionals, was soundly rejected by six Supreme Court justices and offends the core values of the disability community. It is also contrary to the current Administration's New Freedom Initiative, which requires states to end the unnecessary confinement of people with disabilities in large, expensive state facilities.

- **Re-defining the "Supreme Law of the Land":** One of the clearest examples of Mr. Sutton's activism is his role in a recent Michigan case, *Westside Mothers v. Haveman*, in which poor infants and children with disabilities sought access to basic health care, evaluations and check-ups under Medicaid. Mr. Sutton filed a friend-of-the-court brief arguing that Medicaid, or any other law premised on Congress' Constitutional spending powers, was not the "supreme law of the land." Such laws, Mr. Sutton argued, were therefore unenforceable by individuals and did not supercede state law. Mr. Sutton's reasoning would nullify multiple laws prohibiting race, gender, and disability discrimination by entities that receive federal assistance. This proposition, which the trial court adopted, was so extreme and contrary to fundamental views of constitutional law that the state of Michigan declined to defend it on appeal. The U.S. Court of Appeals for the Sixth Circuit – the very court to which Mr. Sutton has been nominated – reversed the trial court.

Mr. Sutton's role in *Westside Mothers* is instructive not only for the radical nature of his legal arguments but also for his active, and questionable, intervention into the case. As reported by Nina Totenberg on *National Public Radio*, Mr. Sutton did not represent any parties in the case. Rather, he purported to represent an organization of municipalities, even though municipalities are not entitled to immunity under the Constitution and had no apparent interest in protecting the states' immunity. However, when the lawyer for the children and families made a routine request to confirm whether the organization's members had authorized Mr. Sutton's involvement, the trial judge denied the request and fined the children and families $6,000.

This record places Mr. Sutton far outside the realm of a lawyer who merely advances his clients' interests. Mr. Sutton has methodically sought out cases and advanced arguments

designed to reverse over four decades of civil rights legislation, enacted with overwhelming bipartisan support, that are the cornerstone of independent living for people with disabilities. This is "judicial activism" in its purest sense. While Mr. Sutton has carefully phrased his opposition to civil rights legislation in seemingly non-offensive terms such as "federalism," his eagerness to sacrifice the hard-won gains of the disability movement atop this false alter has the same effect as legalizing a sign that reads "No Disabled Allowed."

Mr. Sutton's extremist record leaves little doubt that he would not check his activism at the courthouse door. More than perhaps any other lawyer, he has acted to strip Congress of its role as a guarantor of civil rights. More significantly, he has based his advocacy on a deliberate minimization and revision of the shameful and painful history of state-sponsored discrimination against people with disabilities – the very history that compelled Congress to enact the Americans with Disabilities Act. These views are intolerable to the over forty million Americans who have disabilities. Just as our political and legal landscape no longer leaves room for debate on the morality of racial discrimination, so too should there be no room for debate on the morality of disability discrimination. Mr. Sutton is not an appropriate candidate for a lifetime position on the nation's second-highest federal court.

For these reasons, I kindly urge you to reject Mr. Sutton's nomination. Thank you for your careful consideration of these concerns.

Yours truly,

Marca Bristo
President & CEO



Advocates for Ohioans with Disabilities

June 25, 2001

The Honorable Patrick J. Leahy, Chairman
Judiciary Committee
Senate Office Building
Washington, DC 20510

Dear Senator Leahy:

The nomination of Jeffrey Sutton to the US Court of Appeals for the 6th District would not be in the best interests of people with disabilities, as he has made statements in opposition to the Americans with Disabilities Act.

Sincerely,

Alice Sporar

Alice Sporar
President
AOD

1767 Longwood • Cleveland, OH 44124 • (440) 461-7133

until it's over
AIDS ACTION

The Honorable Senator Patrick Leahy
United States Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

May 21, 2001

Senator Leahy,

On behalf of AIDS Action, the national voice on AIDS representing all Americans living with HIV/AIDS and 3,200 community-based organizations that serve them, I am writing to express our opposition to the nomination of Jeffrey Sutton to the United States Court of Appeals Sixth Circuit.

The civil rights of people with disabilities – including people with HIV/AIDS, as was evidenced in *Bragdon v. Abbott* – are contingent upon the courts' rigorous enforcement of the Americans with Disabilities Act (ADA).

In passing the ADA, Congress extensively documented instances in which States discriminated against the disabled, yet in his arguments before the United States Supreme Court in the *Garrett* case, Mr. Sutton forcefully argued that those protections against State discrimination afforded by the ADA were unconstitutional.

AIDS Action is committed to ensuring the civil rights of people with HIV/AIDS and other disabilities. The appointment of Jeffrey Sutton to the Court of Appeals would dangerously undermine the protections offered to people with disabilities under the ADA.

We would respectfully ask that you oppose the confirmation of Jeffrey Sutton.

Sincerely,

Claudia Dawn French
Executive Director

1906 Sunderland Place, NW Washington, DC 20036 202 530 8030 202 530 8031 www.aidsaction.org

The Beacon Journal
Found on Ohio.com
Akron Beacon Journal

January 6, 2003 Monday 4X EDITION

SECTION: B; Pg. 2

LENGTH: 589 words

HEADLINE: A Cook tour;
At last, Deborah Cook will get a hearing on her nomination to the federal bench. Her critics should get to know her

BODY:
Tour the Web sites of various liberal interest groups, from the National Organization for Women to the Alliance for Justice, and you will discover how easily nominees for the federal courts can be caricatured. In recent months, Justice Deborah Cook of the Ohio **Supreme Court** has been a target.

Members of the Senate Judiciary Committee considering her nomination to the 6th U.S. Circuit Court of Appeals should work their way past the political slogans. They will find a judge conservative in the traditional sense. She follows the principle of judicial restraint, ruling as the law is, not as she would like the law to be. Justice Cook has waited 18 months for a hearing on her nomination. The day appears in sight, perhaps as early as Jan. 14. Cook was among the first judicial nominees of President Bush, one of 11 who gathered at the White House on a spring day to demonstrate the new administration's drive to fill vacancies on the federal bench.

Put aside that those vacancies reflected the delaying tactics of Senate Republicans during the Clinton years. Cook and the others have encountered obstacles constructed by Democrats. The November elections altered the political landscape. Republicans run the Senate and the White House. Nominations are set to move forward.

That doesn't mean critics shouldn't howl when the president opts for a nominee with excessive baggage, say, one more comfortable in a debating society than on the federal bench. Bill Clinton took the cue, avoiding ideologues and sending many impressive nominees to Capitol Hill. President Bush should keep in mind his slight margin of victory and the narrow Republican majority in the Senate.

Cook critics point to her membership in the Federalist Society, a group of conservative lawyers and academics that includes many who advocate countering liberal activists with their own brand of activism. Critics also note the many times Cook has dissented on the Ohio **Supreme Court,** contending she is out of the mainstream.

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 problem-solvers (as ward pols) more than jurists. Cook has been accused of advocating the elimination of protections for employee whistleblowers. In truth, she objected to the majority acting as a superlegislature, practicing public policy in the form of judicial rulings.

In another instance, Cook disagreed with the majority because she rightly thought it necessary to have expert medical testimony to establish whether a cancer qualified as a disability under the law. When the majority ruled that managers and supervisors could be sued individually for acts of sexual harassment and discrimination, she noted the glaring departure from the defining federal law.

Are these "pro-business" rulings on her part? That would be the caricature. More accurately, they are precise readings of the law. Indeed, in eight years on the Ohio **Supreme Court** and four on the state appeals court, Cook has consistently produced reasoned and careful analysis.

The argument might be made that we are simply cheering for an Akron resident. We've differed with Justice Cook too many times on school funding and other matters. President Bush won the election. Republicans control the Senate. They have a wide range of candidates for the federal bench. In Deborah Cook, they have a judge most deserving of confirmation, one dedicated to judicial restraint.

LOAD-DATE: January 6, 2003



AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES

May 22, 2001

By Facsimile 202 224-9102; 202 224-9516

The Honorable Orrin G. Hatch
Chairman
United States Senate Judiciary Committee
Dirksen Senate Office Building, Room 224
Washington, DC 20510

Re: Nomination of Jeffrey Sutton for U.S. Court of Appeals for the Sixth Circuit

Dear Chairman Hatch:

On behalf of the American Association of People with Disabilities (AAPD), I write in regard to President Bush's nomination of Jeffrey Sutton for the U.S. Court of Appeals for the Sixth Circuit. I have been informed by your staff that your committee is holding a hearing to consider Mr. Sutton's nomination tomorrow morning, and I am writing to request an opportunity to testify against Mr. Sutton's nomination on behalf of AAPD and a broad coalition of disability rights supporters called ADA Watch.

AAPD is a membership organization working to promote political and economic empowerment for the more than 56 million children and adults with disabilities in the U.S. We were proud to host the Spirit of ADA Torch Relay commemorating the 10th anniversary of the Americans with Disabilities Act (ADA) last summer, and very much appreciated your personal participation in our torch event in Salt Lake City. We also are very grateful for your support for the bipartisan Congressional brief that was filed in the Garrett v. University of Alabama case before the Supreme Court this term. Needless to say, we see you as one of our strongest champions on the Hill with a long record of standing up for disability rights.

Senator Hatch, please give me or another representative from the ADA Watch coalition an opportunity to testify at tomorrow's hearing regarding Mr. Sutton's track record in the area of disability rights. The AAPD board voted Friday to oppose Mr. Sutton's nomination, an unprecedented step in the six year history of our organization. Put simply, we are concerned that Mr. Sutton would interpret the Constitution in a manner that leaves very little room for Congress to protect individuals who experience disability discrimination.

1819 H Street NW · Suite 330 · Washington, DC 20006-3603
Toll Free 800-840-8844 · VOICE/TTY 202-457-0046 · FAX 202-457-0473
WEBSITE www.aapd-dc.org

In the Garrett case, when Mr. Sutton was asked whether the University of Alabama's challenge was limited to the employment provisions of the ADA, he replied that his client was challenging the ADA "across the board." Mr. Sutton also argued in that case that the "ADA was not needed" because there was insufficient record of unconstitutional discrimination by the States on the basis of disability at the time ADA was enacted. As a Senator who helped establish the voluminous record of discrimination that was compiled in the years before ADA became law, you know how incorrect Mr. Sutton's representation to the Supreme Court was.

One could argue that Mr. Sutton has simply been a lawyer representing a client, and should not be penalized for statements that he needed to make to win a case. If Mr. Sutton had been representing the University of Alabama for years in a variety of matters, that argument would be persuasive. Unfortunately, that is not the situation. Mr. Sutton has been aggressively pursuing cases across the country that present an opportunity for him to expand the scope of the Eleventh Amendment to the Constitution and narrow the authority inherent in the Fourteenth Amendment's Equal Protection Clause.

Given his prominent role attacking the ADA in the courts, Mr. Sutton should never have been nominated by President Bush. President Bush has repeatedly assured the disability community that he is proud of his father's role in signing the ADA and that he is a strong supporter of disability rights. In fact, on February 1, he invited many disability leaders, Congressional leaders, Administration officials and reporters to the White House for an event to announce his New Freedom Initiative for people with disabilities.

On behalf of AAPD, I respectfully request the opportunity to testify tomorrow so that you and your colleagues on the committee have a complete picture of Mr. Sutton's track record in the area of disability rights. As a champion for our cause, you are uniquely well positioned to seize this oppportunity to make this important record known before Mr. Sutton's nomination is acted upon. I can be reached at 202 457-0046 if you or your staff would like to discuss this matter with me.

Thank you for your steadfast leadership in the area of disability rights.

Sincerely yours,

Andrew J. Imparato
President and CEO
American Association of People with Disabilities

cc: The Honorable Patrick J. Leahy, Ranking Member (attention Helaine Greenfeld)

AMERICAN COUNCIL OF THE BLIND
1155 15th Street, NW • Suite 1004 • Washington, DC 20005
Telephone (202) 467-5081 • Fax (202) 467-5085 • www.acb.org

Charles Crawford
Executive Director

May 22, 2001

Senator Orrin Hatch, Chairman
Senate Committee on the Judiciary
SD-224
Dirksen Senate Office Building
Washington, DC 20510-6275

Dear Senator Hatch,

I am writing this letter on behalf of the American Council of the Blind, an organization with some twenty-five thousand members nationwide, to express our opposition to the nomination of Jeffrey Sutton to the United States Court of Appeals for the 6th Circuit. We are disturbed by this nomination because of the degree of enthusiasm Mr. Sutton has demonstrated for legal arguments challenging the Constitutionality of the Americans with Disabilities Act. His arguments in cases such as Board of Trustees of the University of Alabama, v. Patricia Garrett, demonstrate a patent disregard for the civil rights of Americans with disabilities and an unwillingness to recognize the authority of Congress to enact laws that protect those rights.

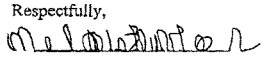
Of particular concern to us, are the following arguments successfully made by Mr. Sutton in the above-mentioned Garrett case. First, Mr. Sutton alleges in his brief for the petitioners that only a "rational basis" standard of review should be applied to instances of alleged disability discrimination perpitrated by entities of state government under the Fourteenth Amendment. This position appears to be based upon an assumption that the class Congress intended to protect when it enacted the ADA was an artificially created one, and that the evidence of discrimination which led to the enactment of this landmark civil rights act was exaggerated. We believe that both of these assumptions are inaccurate. In fact, they are contradicted by reams of evidence gathered by Congress prior to enactment of the ADA, and submitted to the courts considering the Garrett case. Further, to adopt the position taken by Mr. Sutton would place people with disabilities in a position of second-class citizenship, since the degree of scrutiny the courts give instances of discrimination against other minority groups under the Fourteenth Amendment is much more stringent. For Mr. Sutton to openly contend that people with disabilities deserve less protection under the provisions of the Fourteenth Amendment than other minority groups in this country represents a most unfortunate misinterpretation of the Constitution, which we find unacceptable for an officer of the U.S. Court of Appeals.

Mr. Sutton has criticized the ADA because it allegedly encourages individuals to litigate claims, which result in exhorbitant compensation of lawyers, while individuals with disabilities receive little or no remuneration in redress of their grievances. We question where Mr. Sutton thinks people with disabilities, many of whom are living on fixed incomes with little or no discretionary

funds, will be able to obtain legal assistance in pursuing legitimate cases of disability-based discrimination if they are unable to pay the attorneys who help them. To deny courts the option of awarding attorney fees in ADA cases will effectively shut a majority of Americans with disabilities out of the legal process at both state and federal levels. If the legal fees awarded in ADA cases are too high, that, we contend, is the fault of Mr. Sutton's profession, and not the ADA. It is the responsibility of the Bar to remedy their own conduct, and not at the expense of people with disabilities.

We believe that this nominee's insensitivity toward people with disabilities and calloused attitude toward their civil rights is inconsistent with President Bush's stated commitment to continued enforcement of the ADA. Therefore, we urge the members of the Senate Judiciary Committee to defeat the nomination of Jeffrey Sutton to the U.S. Court of Appeals.

Respectfully,



Melanie Brunson, Director of Advocacy and Governmental Affairs

CC: Senator Patrick Leahy, Gian-Carlo Peressutti, Associate Director, White House Office of Public Liaison

1/23/2003

Re: Nomination of Judge Jeffrey Sutton to the Federal Court of Appeals, Sixth Circuit.

Dear Senators Hatch and Leahy:

I am writing to strongly urge you to vote no on letting Judge Sutton's nomination out of the Judicial Committee. His confirmation would undermine the core protections and services afforded by Congress to persons with disabilities. Sutton is known for his work towards weakening the Americans with Disabilities Act and other civil rights laws in several recent Supreme Court Cases.

Sutton has argued that Congress had no power to apply the ADA to the states because, "in passing the ADA, Congress did not identify any pattern or practice of unconstitutional State action, or for that matter, even a single instance of such conduct." Despite the massive record of egregious conduct toward individuals with disabilities by states that Congress has compiled—including instances of forced sterilization of individuals with disabilities, unnecessary institutionalization, denial of education, and systemic prejudices and stereotyping perpetrated by state actors—Sutton argued that states were actually in the forefront of efforts to protect the rights of individuals with disabilities.

Sutton has also argued that Medicaid rights are unenforceable by individual recipients. Sutton's arguments can, and no doubt will, be extended to claim that rights under the Rehabilitation Act and the Individuals with Disabilities Education Act (IDEA) are unenforceable as well. Instead of Congress extending protections through federal civil rights laws, Sutton believes that states should be the "principal bulwark in protecting civil liberties" – a statement that has grave implication given the massive record of state-sanctioned discrimination against individuals with disabilities.

The Judicial Committee would not consider the confirmation of a judge who said there was no need for the Civil Rights Act of 1964, or expressed the same type of opinion towards any other class of people be it Women, African-Americans, or Latinos. Each of these classes has protections under federal law. The Americans with Disabilities Act (ADA) was drafted to give disabled citizens the same type of protections, which are badly needed.

Without my protections and rights given to me in the Americans with Disabilities Act, I would not have the job opportunity that I now have. My employer makes a reasonable accommodation due to my limited hours of work. My employer does not discriminate me because of my need for personal care attendants. I'm not able to hold down a full-time job because of the difficulty getting workers to my home early enough. Because of this my employer gives me the opportunity of putting in part-time hours to accommodate my inability to work mornings.

As a disabled person, I find the Jeffrey Sutton arguments repugnant. People with disabilities have spent years working for the laws now in place. The fight against Sutton is a Civil Rights issue, and needs to be seen as such. States have not protected our rights sufficiently which was finally recognized when Congress enacted the ADA.

Thank you for your consideration.

Sincerely,

Brian Barnard
452 Oakdale Ave
Utica, N.Y. 13502



SUSAN BARNHILL
EASY ACCESS
450 T Street
Sacramento, CA 95814
916 448-9655

May 25, 2001

By Facsimile 202 224-9102; 202 224-9516

The Honorable Orrin G. Hatch, Chairman
United States Senate Judiciary Committee
Dirksen Senate Office Building, Room 224
Washington, DC 20510

Re: Nomination of Jeffrey Sutton for U.S. Court of Appeals for the Sixth Circuit

Dear Chairman Hatch:

On behalf of all people with disabilities, I write in regard to President Bush's nomination of Jeffrey Sutton for the U.S. Court of Appeals for the Sixth Circuit. I have been informed that your committee was going to hold a hearing to consider Mr. Sutton's nomination. I am writing to let you know that I am y against Mr. Sutton's and disability rights supporters.

As a person with a disability I have been working to promote political people with disabilities in California. Many of my friends with disabilities helped get the Disabilities Act (ADA) passed in 1990. Many people are very grateful for your support for the bipartisan Congressional brief that was filed in the Garrett v. University of Alabama case before the Supreme Court this term. Needless to say, people with disabilities regard you as one of their strongest champions on the Hill with a long record of standing up for disability rights.

I understand that Mr. Sutton's track record in the area of disability rights is anti disability rights. Many are concerned that Mr. Sutton would interpret the Constitution in a manner that leaves very little room for Congress to protect individuals who experience disability discrimination.

In the Garrett case, when Mr. Sutton was asked whether the University of Alabama's challenge was limited to the employment provisions of the ADA, he replied that his client was challenging the ADA "across the board." Mr. Sutton also argued in that case that the "ADA was not needed" because there was insufficient record of unconstitutional discrimination by the States on the basis of disability at the time ADA was enacted. As a Senator who helped establish the voluminous record of discrimination that was compiled in the years before ADA became law, you know how incorrect Mr. Sutton's representation to the Supreme Court was.

One could argue that Mr. Sutton has simply been a lawyer representing a client, and should not be penalized for statements that he needed to make to win a case. If Mr. Sutton had been

representing the University of Alabama for years in a variety of matters, that argument would be persuasive. Unfortunately, that is not the situation. Mr. Sutton has been aggressively pursuing cases across the country that present an opportunity for him to expand the scope of the Eleventh Amendment to the Constitution and narrow the authority inherent in the Fourteenth Amendment's Equal Protection Clause.

Given his prominent role attacking the ADA in the courts, Mr. Sutton should never have been nominated by President Bush. President Bush has repeatedly assured the disability community that he is proud of his father's role in signing the ADA and that he is a strong supporter of disability rights. In fact, on February 1, he invited many disability leaders, Congressional leaders, Administration officials and reporters to the White House for an event to announce his New Freedom Initiative for people with disabilities.

Thank you for your steadfast leadership in the area of disability rights.

Sincerely yours,

Susan Barnhill

Susan Barnhill

THE OHIO STATE UNIVERSITY

Office of the Dean
College of Law

John Deaver Drinko Hall
55 West 12th Avenue
Columbus, OH 43210-1391
Phone 614-292-2631
FAX 614-292-1383

July 2, 2001

Senator Patrick J. Leahy
Chairman, Senate Judiciary Committee
United States Senate
433 Russell Senate Office Building
Washington, DC 20510

Dear Senator Leahy:

I am writing to you in your capacity as Chairman of the Senate Judiciary Committee with regard to your committee's consideration of President Bush's nomination of Jeffrey S. Sutton to serve on the U.S. Court of Appeals for the Sixth Circuit.

Let me first mention a few things about myself, to put my support for Mr. Sutton's confirmation by your committee and the current Senate in context.

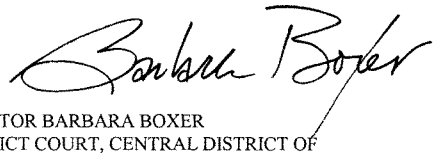
I am a lifelong Democrat, and served as the Senior Law Clerk to Chief Justice Earl Warren and as Assistant Solicitor General of the U.S. in the 1960's. In the latter capacity I argued on behalf of the United States and various government agencies in 18 cases in the U.S. Supreme Court. For the past 31 years I have been a legal educator, teaching at Notre Dame, visiting at Virginia, Michigan, and S.M.U., and serving as Dean at the University of Toledo and, from 1985 to 1993, as Dean at The Ohio State University College of Law. In that latter capacity I came to know Jeff Sutton, first as an outstanding law student, and then, with my assistance, as a law clerk for Justices Powell and Scalia on the U.S. Supreme Court. When Jeff returned to Columbus to engage in private law practice with the Jones Day law firm's office, I asked him to co-teach a U.S. Supreme Court seminar with me (something I had been doing for over 20 years), and we did so with considerable success until I retired from Ohio State in 1997 and moved to Florida. Jeff and I complemented each other in the seminar, bringing somewhat differing views to some matters but agreeing on many. I might add that, in addition to teaching Constitutional Law and related subjects for over 30 years, I served for several years as the Legal Director of the National Center for Law and the Handicapped in South Bend, Indiana, and have both expertise in and sensitivity toward those with disabilities.

I believe that Jeff Sutton would be an excellent federal appellate judge. He is a very bright, articulate and personable individual who values fairness highly. He is also a competent and experienced appellate lawyer. Indeed, Jeff's qualifications for such a position should be evident from perusal of his resume. I do not regard him as a predictable ideologue, and believe that your committee will reach the same conclusion after his hearing before you. I recommend and support his confirmation without reservation.

Thank you for your attention and consideration.

Sincerely yours,

Francis X. Beytagh
Dean Emeritus
The Ohio State University College of Law



STATEMENT OF U.S. SENATOR BARBARA BOXER
ON THE NOMINEE FOR THE U.S. DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA: S. JAMES OTERO

Mr. Chairman, Senator Leahy, and members of the Senate Committee on the Judiciary, I am pleased to offer my support for the nominee for the Central District Court of California before you today -- S. James Otero. I have no doubt you will find Judge Otero impressive and capable.

Judge Otero brings to the bench a strong legal background and an intimate familiarity with the area he has been nominated to serve. Born in Los Angeles, California, Judge Otero received his undergraduate and legal educations in California. Since passing the California state bar, he has served Californians as both an attorney and a judge.

After graduating from Stanford law school, Judge Otero became a deputy in the Los Angeles City Attorney's office, where he served for 10 years in various areas from the Liability Section to the Criminal Branch.

In 1987 and 1988, Judge Otero worked in private practice dealing with business and real estate transactions, governmental and Native American issues, and matters before the California Public Utilities Commissions.

For the last 14 years, Judge Otero has served as a judge on the Los Angeles Municipal Court and the Los Angeles Superior court. He was appointed to the Municipal Court by Governor George Deukmejian in 1988 and was elevated to the Superior Court two years later. From 1994 to 1996, he served as the Supervising Judge of the North Central District. In January 2002, he was appointed to his current position as Assistant Supervising Judge of the Civil Division.

James Otero is widely respected and is well known for his fairness and objectivity. His enthusiasm for the law extends beyond his work on the Superior Court. He is Secretary of the Latino Judges Association and a member of the Mexican Bar Association. Judge Otero has previously served as vice president of the California Judges Association and a board member of the Latino City Attorney Association.

In addition, Judge Otero sits on the boards of several non-profit community organizations, including the Salesian Boys and Girls Club and Salesian Family Youth Center, where he has volunteered since 1992.

The nominee before you today will serve with integrity and distinction in the Central District of California. I support the consensus process that brought him here, and I urge the Committee to act quicky on his confirmation.





The House of Brick

To: Senate Judiciary Committee

From: Lawrence J. Brick

Date: Sunday, January 26, 2003

Do NOT support the appointment of Jeffrey Sutton Jeffrey Sutton to the U.S. Court of Appeals for the 6th Circuit

I am deaf. My wife is deaf. And my son is deaf. I support the Americans for Disabilities Act and it needs to be strengthened.

I am fearful that as a Judge, he can dramatically restrict Congress' ability to pass laws protecting the rights of Americans with disabilities, older workers, and others under the Constitution. If he becomes a Judge, he appointment will last for a lifetime. This will erect new barriers for Americans with disabilities defending their rights in federal courts.

Lawrence J. Brick
3017 Midvale Avenue
Philadelphia, PA 19129-1027

Fax: 215-438-4229
Phone via Relay (1-800-654-5988) 215-438-2233
Call using Telecommunication Device for the Deaf (TDD) 215-438-2233



January 28, 2003

To: Senate Judiciary Committee – 202 228 0861

Re: Appointment of Jeffrey Sutton to US Court of Appeals for 6th Circuit

From: S. Bryant, Frederick, Md 21702

Comments:

I am **AGAINST** President Bush's appointment of Jeffrey Sutton to the US Court of Appeals because he is not in favor of American with Disabilities Act. Here is the Statements from one of the publications:

> Sutton argued that the protections of the Americans with Disabilities Act of 1990 (ADA) were "not needed" to remedy discrimination by states against people with disabilities. He also argued that Medicaid rights are unenforceable by individual recipients. Sutton's arguments can, and no doubt will, be extended to claim that rights under the Rehabilitation Act and the Individuals with Disabilities Education Act (IDEA) are unenforceable as well. Sutton believes that states should be the "principal bulwark in protecting civil liberties" – a statement that has grave implications given the massive record of state-sanctioned discrimination against individuals with disabilities.

This statement of his does not sound supportive of ADA and IDEA or any of the Civil rights laws. I do not support President Bush's appointment of Sutton...

Thank you

S. Bryant

LIFE
Living Independence For Everyone



Dedicated to the Independent Living Empowerment of People with Significant Disabilities

January 17, 2003

As a mother of a son with a severe disability and an active supporter of disability rights, I join thousands of people who are in opposition of the confirmation of Jeffrey Sutton to the 6th circuit US Court of Appeals. Jeffrey Sutton has actively worked to undermine the ADA on grounds of state sovereignty, to oppose Olmstead implementation and to claim that beneficiaries of Medicaid have no private right of action against states that violate the rules of the program.

I urge you to vote against Jeffrey Sutton's confirmation and request that Pres. Bush select judicial nominees who support disability and civil rights.

Sincerely,
Sharon Burt
Meridian, MS

2440 North Hills St.
Suite 103C
Meridian, MS 39305
Phone (601) 485-7999
1-800-748-9398 (V/TTY)

Arent Fox
ATTORNEYS AT LAW

Arent Fox Kintner Plotkin & Kahn, PLLC
1050 Connecticut Avenue, NW
Washington, DC 20036-5339
Phone 202/857-6000
Fax 202/857-6395
www.arentfox.com

Bonnie Campbell
202/857-6041
campbell.bonnie@arentfox.com

January 7, 2003

The Honorable Patrick J. Leahy
Chairman, Senate Judiciary Committee
United States Senate
433 Russell Senate Office Building
Washington, DC 20510

The Honorable Orrin G. Hatch
Ranking Member, Senate Judiciary Committee
United States Senate
104 Hart Senate Office Building
Washington, DC 20510

Re: Nomination of Jeffrey S. Sutton to the Sixth Circuit

Dear Senator Leahy and Senator Hatch:

I am writing to urge the prompt confirmation of Jeffrey S. Sutton to the United States Court of Appeals for the Sixth Circuit. I believe that Mr. Sutton is eminently qualified and would be a great asset to the federal judiciary.

Mr. Sutton is one of the top appellate advocates in the country, having argued twelve cases in the United States Supreme Court, with a 9-2 record (and one case pending). In the 2000-2001 Term, he argued more cases than any other private attorney in the country, and won all four of them. And in *Hohn v. United States*, 524 U.S. 236 (1998), the Court *sua sponte* appointed Mr. Sutton to argue the case as a friend of the Court. When he served as the State Solicitor of Ohio, the National Association of Attorneys General presented Mr. Sutton with a Best Brief Award for practice in the United States Supreme Court an unprecedented four years in a row. And this month, the American Lawyer included Mr. Sutton in its list of the top forty-five lawyers in the country under the age of forty-five.

I understand that some legal arguments Mr. Sutton has made in the course of representing clients have aroused some controversy in connection with his nomination. Having recent experience myself with the judicial confirmation process, I strongly urge the Senate to reject any unfair inference that Mr. Sutton's personal views must coincide with positions he has advocated on behalf of clients. It is, of course, the role of the advocate to raise the strongest available arguments on behalf of a client's litigation position regardless of the lawyer's personal convictions on the proper legal, let alone policy, outcome of the case. I am confident that Mr. Sutton has the ability, temperament, and objectivity to be an excellent judge.

Sincerely,

Bonnie J. Campbell

BJC/rw

MARGARETTE BERG CASHIN
ATTORNEY AT LAW
112 ROSWELL AVENUE
STATEN ISLAND, NY 10314
TELEPHONE OR FAX: (718) 982-0423

January 14, 2003

Re: Nomination of Judge Jeffrey Sutton to the Federal Court of Appeals

Dear Senators Hatch & Leahy:

I am an attorney/advocate for the disabled & elderly. I am disabled. On behalf of myself and other disabled persons on Staten Island, New York, we ask you to vote "no" on allowing Judge Sutton's nomination out of the Judicial Committee.

President George Bush, Sr., signed into law the greatest piece of legislation in the area of civil rights for the disabled, the Americans with Disabilities Act (ADA). Judge Sutton undermines the ADA. He is openly hostile toward federal civil rights protection.

In *Board of Trustees of Alabama v. Garrett*, which successfully challenged the constitutionality of applying the ADA to states as employers; Judge Sutton argued that the protections of the ADA were not needed to remedy discrimination by states against people with disabilities. This decision prevents persons with disabilities from collecting monetary damages from state employers. As a result, fewer attorneys are willing to represent individuals in ADA cases against state employers. It chills the due process rights of the disabled.

In *Olmstead v. L.C.* Sutton filed a brief representing the State of Georgia before the Supreme Court arguing that unnecessarily keeping people with disabilities in institutions was not discrimination. The Supreme Court reversed granting the disabled the right to receive treatment in the most integrated setting.

As a disabled attorney, I know first hand how important the ADA is. I successfully argued the ADA in two state fair hearings to keep my clients in their own homes. The state Medicaid Program wanted to warehouse them in a "community of the disabled" namely, a nursing home.

It is very important that Judge Sutton's nomination not leave the Judicial Committee.

Sincerely.

Margarette Cashin

Margarette Berg Cashin, Esquire

CENTER FOR CIVIL JUSTICE

(989) 755-3120
1-800-724-7441
FAX (989) 755-3558

320 S. Washington
2nd Floor
Saginaw, MI 48607

June 5, 2001

Honorable Patrick Leahy
United States Senator
433 Russell Senate Office Building
Washington, DC 20510

Re: Opposition to the Nomination of Jeffrey S. Sutton to the Court of Appeals for the Sixth Circuit

Dear Senator Leahy:

I write on behalf of the Center for Civil Justice and its clients to express out opposition to the nomination of Jeffrey S. Sutton to sit on the Sixth Circuit Court of Appeals.

The Center for Civil Justice is a non-profit law firm serving low income clients in a 10 county region of eastern Michigan. Our clients include:

- The elderly and persons with physical or mental disabilities who rely on governmental health insurance programs like Medicaid and Medicare, as well as on cash assistance paid under the Supplemental Security Income (SSI) program and the SSI state supplement;
- Low income working families who depend on employment supports including the child day care subsidies funded by the Child Care and Development Fund (CCDF) and the Temporary Assistance to Needy Families (TANF), Food Stamps, Transitional Medicaid health insurance, and transportation assistance funded under TANF and other federal transportation programs that support state and local transportation infrastructures and systems.
- Student parents who are pursuing education as a means to advance beyond their low wage, entry level jobs and to escape poverty, and whose success depends on federal financial aid and other subsidies for adult and higher education in the states. These parents also depend on the availability of supports such as work study, TANF-funded cash assistance, CCDF- and TANF-funded child day care subsidies, Food Stamps, and low income family Medicaid health insurance for themselves and their children.
- Families, the elderly, and persons with disabilities whose ability to live in safe, suitable housing depends on the availability of subsidized rental housing or homeownership programs created by the federal government.

All of these clients depend on the so-called "safety net" of federally-created and federally-funded programs that are administered in Michigan by a variety of state agencies.

Much our legal work involves advocacy to improve state policies and practices in administering government benefit programs, and to enforce the federal laws that Congress

enacted to create and control these programs. It is in connection with the second part of our work – the enforcement of federal laws – that Mr. Sutton's nomination poses a significant danger to our clients – and indeed to all citizens who benefit from the many programs that are created and funded by the federal government but are administered in part by state agencies and officials.

While the positions that an attorney advances on behalf of a client do not always reflect the attorney's personal opinion, it is our understanding that Mr. Sutton was selected by the judge presiding in the recent Westside Mothers v Haveman case to file a brief advocating for the elimination of a citizen's right to enforce laws passed by Congress under the Spending Clause, precisely because of Mr. Sutton's personal opinions on this issue. Indeed, it is our understanding that Mr. Sutton's *amicus* brief in the Westside Mothers case expresses Mr. Sutton's personal views on these very significant issues – a view which is at odds with well-established Supreme Court precedent and which allows state agencies and officials to ignore the expressed will of Congress and violate the rights of individual citizens with impunity.

In short, Mr. Sutton is an advocate for the elimination of a citizen's right to enforce federal laws that Congress enacted for the purpose of aiding and protecting those citizens, whenever the laws to be enforced were passed pursuant to Congress's spending power. Indeed, in Mr. Sutton's view, spending clause legislation passed by Congress is not law and does not create rights that citizens should be permitted to enforce in federal court. Mr. Sutton's position is based on 19th century jurisprudence and ignores the significant body of Supreme Court case law that has developed since that time. Under Mr. Sutton's analysis, the only remedy for a state's violation of the limits set by Congress in Spending Clause legislation is the federal government's withholding of all federal funding for the program. This illusory "remedy," would, of course, be unworkable and counterproductive, as it would merely punish the citizens who Congress intended to protect and assist by creating the program in the first place.

It seems clear that if confirmed, Mr. Sutton would use his position as a Circuit Judge to advance his theories of Constitutional law, and to eliminate the rights of individuals to be protected from arbitrary and unlawful conduct by state officials and agencies. State officials who disagree with Congressional limits on the operation of federally-funded programs would have virtual *carte blanche* to simply ignore Congressional intent, with no fear of federal court enforcement.

Because low income individuals depend heavily on social welfare programs that are created and funded by Congress, Mr. Sutton poses a particular danger to our clients. To be sure, however, his views would affect middle- and upper-income citizens as well, since according to Mr. Sutton's theories, they too would no longer have a meaningful way to enforce the provisions and protections enacted by Congress if state officials were to disregard the federal legislation that governs administration of federally funded, but state-administered education, environmental, housing, transportation, and other public works programs.

Accordingly, we urge you to carefully question Mr. Sutton when he appears before the Judiciary Committee and to vote against his nomination to the Court of Appeals for the Sixth Circuit.

Please do not hesitate to contact our office should you have any questions concerning our position on this matter.

Sincerely,

CENTER FOR CIVIL JUSTICE

Jacqueline Doig
Attorney at Law

The Center for Independent Living OPTIONS

OHIO:
632 Vine Street, Suite 601
Cincinnati, Ohio 45202
513/241-2600 (VOICE)
513/241-7170 (TDD)
513/241-1707 (FAX)
cilo@winstarmail.com (E-MAIL)

KENTUCKY:
3031 Dixie Highway, Suite 103
Edgewood, Kentucky 41017
859/341-4346 (VOICE)
800/914-4647 (VOICE)
859/341-1252 (FAX)

The Center for Independent Living Options, Inc. is funded in part by:

U.S. Dept. of Housing & Urban Development

U.S. Dept. of Education
Rehabilitation Services Administration

Ohio Rehabilitation Services Commission

Kentucky Cabinet for Human Services
Department for Social Services

City of Cincinnati
Department of Neighborhood Services

and the generous donations of many

January 10, 2003

The Honorable Patrick Leahy
United States Senate
Washington, D.C. 20510

Dear Senator Leahy:

On behalf of the staff and consumers of the Center for Independent Living Options (CILO), Inc., we write respectfully to urge you not to confirm Jeffrey S. Sutton to the Court of Appeals for the Sixth Circuit, which would undermine the core protections and services afforded by Congress to persons with disabilities. Sutton has actively sought participation in numerous cases in which he has attempted to limit Congress's power to protect civil rights, including rights under the Americans with Disabilities Act (ADA), Section 504 of Rehabilitation Act, the Individuals with Disabilities Education Act (IDEA) and Medicaid. As a chief lawyer, he has engaged in a calculated effort, case after case, to take away the civil rights guaranteed to persons with disabilities and others.

In your position as member of the Senate Judiciary Committee, you have a unique opportunity to make a difference in the lives of children and adults with disabilities. Congress extending protections through federal civil rights laws will ensure that individuals with disabilities will not be segregated in institutions as professional opinion clearly states that we are better served in the community, impoverished children and adults will not be denied the basic medical care guaranteed to them under the Medicaid program, and State governments will not be free to exclude people with disabilities from their programs and services, which would include health care, education, roads and streets, public buildings, and welfare benefits, without fear of having to compensate those individuals for the discrimination they suffered.

As an advocacy organization, CILO has a strong commitment to assist people with disabilities in creating supports, so they can achieve their greatest personal potential and independence. We promote the protection and strengthening of the ADA and the IDEA, the expansion of home based services, improvement of access to health care, and increased choice and consumer control for individuals with disabilities. As CILO, Inc. serves individuals with a broad range of significant disabilities in seven counties included in the Cincinnati metropolitan area, we do not want to see those protections systematically stripped away as a result of the appointment of Jeffrey Sutton to the Sixth Circuit Court, which reviews appeals from the federal district Courts in Kentucky, Michigan, **Ohio** and Tennessee.

FROM : CENTER FOR ILO INC. PHONE NO. : 513 241 1707 Jan. 10 2003 05:15PM P5

As Jeffrey Sutton poses a grave threat to the rights of individuals with disabilities, we request that you please honor your commitment to a strong ADA and refrain from nominating Jeffrey Sutton for the federal judgeship of the 6th Circuit Court. It is vital that the rights of Americans with disabilities lead lives of dignity, productivity and self-satisfaction in their communities without the fear of it being compromised. Please feel free to contact us at (513) 241-2600, should you have any questions or we can be of any assistance.

Sincerely,

Lin Laing
Executive Director

Suzanne Hopkins
Director of Programs

FROM : CENTER FOR ILO INC. PHONE NO. : 513 241 1707 Jan. 10 2003 05:19PM P6

Central Utah Center for
Independent Living
491 North Freedom Blvd,. Provo, UT 84601 801-373-5044 Fax 801-373-5094

August 8, 2001

Senator Orrin Hatch
104 Hart Senate Office Bldg.
Washington, DC 20510

Dear Senator Hatch;

Thank you for your generic response to my letter voicing my concerns about the Jeffrey Sutton nomination to the 6th Circuit Court. I am aware of the process a nominee goes through before their name comes before the Senate. I am placing my hopes in you, that you will listen to the concerns of the disability community and fight for us to keep Mr. Sutton from being appointed.

Your letter mentioned some of Mr. Sutton's good points. I'm happy to hear he has some. However, the instances of his outspoken and antagonistic comments about the ADA and disability rights in general, are what is causing my concerns. Let me mention several:

- Sutton agreed that the protections of the ADA were "not needed" to remedy discrimination by states against people with disabilities. He also argued that Medicaid rights are unenforceable by individual recipients.
- Sutton's arguments can, and no doubt will, be extended to claim that rights under the Rehabilitation Act and the Individuals with Disabilities Education Act (IDEA) are unenforceable as well.
- Sutton has stated his belief that states should be the "principal bulwark in protecting civil liberties" - a statement that has grave implications given the massive record of state-sanctioned discrimination against individuals with disabilities.
- His direct attacks on the ADA - In Olmstead v. L.C., he represented the state of Georgia before the Supreme Court and argued that states had no duty under the ADA to serve people with disabilities in integrated settings. He argued that unnecessarily keeping people with disabilities in institutions was not a form of discrimination.

These few examples, and there are many more, indicate that Mr. Sutton represents a grave threat to the civil rights of people with disabilities. We fought hard to secure the much-needed protections afforded by the ADA, Section 504, the IDEA, and Medicaid. We do not want to see those rights systematically stripped away as a result of the appointment of Jeffery Sutton. I implore you to protect these rights for me and others like me.

Sincerely,

Eileen D. Glathar, VISTA
Advocacy, Research, & Resource Development



January 27, 2003

The Honorable Patrick Leahy
United States Senator
104 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Leahy:

As the Executive Director of The Cerebral Palsy Association of Ohio, a non-profit, statewide advocacy organization dedicated to advancing the independence of Ohioans with cerebral palsy and other severe disabilities, I write to respectfully urge you to oppose the re-nomination of Jeffrey Sutton to the U.S. Court of Appeals for the Sixth Circuit.

Mr. Sutton has, to an unusual extent, dedicated his career to curtailing the civil rights of people with disabilities and racial minorities. Mr. Sutton has, as his well-documented record illustrates, been a leader in the effort to limit congressional power to enact laws protecting civil rights and individual liberties, without regard to existing law or the history of discrimination against people with disabilities, racial minorities and others.

In case after case, Mr. Sutton has advanced a radical agenda that seeks nothing less than dismantling of civil rights laws Congress has enacted over the past four decades that guarantee freedom and opportunity for people with disabilities and others. Mr. Sutton's efforts to eliminate civil rights are as follows:

***Eliminating individual enforcement of civil rights laws:**
Much of Mr. Sutton's legal activism has been dedicated to undermining the "teeth" of civil rights laws: individual enforcement in the courts. Mr. Sutton has repeatedly sought to deny people with disabilities, racial and religious minorities, and the elderly that most basic American right- to have their day in court and opportunity to prove their case. Without such individual enforcement, the substantive guarantees of civil rights laws are merely promises on paper.

***Defending large state institutions:**
Contrary to Congress and the most current three Presidents, Mr. Sutton in Olmstead v. L.C. urged the Supreme Court to hold that "the American with Disabilities Act does not impose a 'least restrictive treatment' requirement on the

4550 Indianola Ave. ★ Columbus, OH 43214-2246 ★ Toll-Free (800) 796-8498 ★ Phone (614) 267-5071 ★ Fax (614) 267-4550

States" when they administer disability services to their citizens. Mr. Sutton's view that states should be free to deprive people with disabilities of their freedom, even when contrary to the recommendation of treating professionals, was soundly rejected by six Supreme Court justices and offends the core values of the disability community. It is contrary to the current Administration's New Freedom Initiative, which requires states to end the unnecessary confinement of people with disabilities in large, expensive state facilities.

Mr. Sutton has systematically sought out cases and developed arguments designed to reverse over four decades of civil rights legislation, enacted with overwhelming bipartisan support, that are the foundation of independent living for people with disabilities. These views are intolerable to the over forty million American who have disabilities. Mr. Sutton is not an appropriate candidate for a lifetime position on the nation's second-highest federal court.

I respectfully urge you to reject Mr. Sutton's nomination. Thank you for your careful consideration of these concerns.

Sincerely,

Beverly Johnson

Beverly Johnson
Executive Director
Cerebral Palsy Association of Ohio

CP of New Jersey
Many Faces. All Disabilities. One Agency.
354 South Broad Street, Trenton, New Jersey 08608
Voice (609) 392-4004 ◆ Fax (609) 392-3505
Toll free (888) 522-1918 ◆ TTY (609) 392-7044
www.cpofnj.org
President, Joanne M. Ventura, Esq.
CEREBRAL PALSY OF NEW JERSEY
Executive Director, Myra Ryan, M.B.A.

January 14, 2003

The Honorable George W. Bush
The White House
Washington, DC 20500

Dear President Bush,

On behalf of Cerebral Palsy of New Jersey, I am writing to urge you to oppose the renomination of Jeffrey Sutton to the Sixth U.S. Circuit Court of Appeals.

Jeffrey Sutton's record shows that he does not support the civil rights of people with disabilities or racial minorities. For example, in Garrett V. University of Alabama, Mr. Sutton argued that Congress did not have the authority under the Constitution to apply the Americans with Disabilities Act to states in employment discrimination suits for damages. In the L.C. v. Olmstead, he argued that unneccessarily keeping people with disabilities in institutions was not discrimination. Fortunately, the Supreme Court did not agree, and reversed the decision.

Sutton has also successfully argued against civil rights in the following cases: Sandoval v. Alabama (holding that there is no private right of action under Title VI of the 1964 Civil Rights Act's disparate impact regulations.) and United States v. Morrison (holding that the civil remedy provisions of the Violence Against Women Act was beyond Congress's power to enact).

In each of these cases, Mr. Sutton holds extremely negative views on civil rights both for persons with disabilities and racial minorities. People with disabilities are fully deserving of the federal civil rights protections included in Section 504 of the Rehabilitation Act, Individuals with Disabilities Education Act (IDEA), and the Americans with Disabilities Act.

For these reasons, I kindly urge you to reject Mr. Sutton's nomination. Thank you for your time and consideration.

Sincerely,

Myra Ryan
Executive Director

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The Cincinnati Enquirer

November 8, 2002 Friday Final Edition

SECTION: METRO; Pg. 6B

LENGTH: 372 words

HEADLINE: Ohio Hail, hail, the gang's all gone

BYLINE: Ray Cooklis, STAFF

BODY:
BY **Ray Cooklis**

The "Gang of Four" is no more.

With this week's Ohio Supreme Court victory by Lt. Gov. Maureen O'Connor to fill the seat of retiring Justice Andrew Douglas, the court's four-vote activist majority appears to have dissipated. Justice Douglas had teamed with Justices Alice Resnick, Francis Sweeney and Paul Pfeifer in rulings on school funding, tort reform, liability and other issues that strained the court's credibility as a dispassionate arbiter of the law, precedent and constitutional principles. Presumably, Justice-elect O'Connor will help forge a new "gang" with Chief Justice Thomas Moyer, Justice Deborah Cook (until she ascends to the U.S. 6th Circuit) and Justice Evelyn Stratton, who won re-election herself last week. Presumably, if you believe the news accounts that reported this as fact, this new majority will issue "pro-business" decisions.

That's a lot of presumption. Anyone who presumes to know how a justice will vote could be sadly mistaken (see Souter, David). This includes Gov. Bob Taft, who in a moment of irrational exuberance called Justice Stratton "the most pro-business justice." Ouch. "I strongly reject that notion," she told the Enquirer, noting she gets only a 66 percent favorable score from the Ohio Chamber of Commerce. She insists she's never advocated tort reform.

What does seem clear is that the new court will have a majority of justices who profess a belief in judicial restraint. In practice, that could disappoint insurance companies as well as trial lawyers, Republicans as well as Democrats, depending on the case. That's the way it should be.

It also seems clear that the new court's rulings will be more likely to make sense and less likely to leave legal scholars giggling in derision. For example, in a scathing opinion last year, U.S. District Judge James S. Gwin said the state court has made a "mess" of Ohio's motorist insurance law and has "destroyed the predictability needed to price and administer" auto insurance.

During the campaign, Judge Janet Burnside, Justice Stratton's opponent, criticized her for writing too many dissents. Judge Burnside may be happy to know that Justice Stratton should be writing lots of majority opinions now.

LOAD-DATE: November 15, 2002

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October 29, 2000 Sunday, FINAL / ALL
SECTION: FORUM OPINION & IDEAS; Pg. 2G

LENGTH: 726 words

HEADLINE: SUPREME;
COURT;
O'DONNELL AND COOK WOULD SHIFT A NARROW MAJORITY;
TOWARD A WELCOME RESURGENCE OF JUDICIAL RESTRAINT

BODY:
In two vitally important contests for the **Ohio Supreme Court,** we urge voters in the Nov. 7 general election to cast their ballots for Terrence O'Donnell and Deborah Cook.

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 in two high-profile cases with profound ramifications for Ohioans' pocketbooks.

Incumbent Cook was in the minority of a court that, in one case, ruled that the state had failed to meet constitutional requirements for school funding and, in the other, overturned a **tort-reform** law.

O'Donnell, 54, a Cuyahoga County appeals judge, has no record on these issues but said in an interview: "My view is that judges should practice judicial restraint and resist the temptation to not follow the law."

He has the more formidable opponent in two-term Justice Alice Robie Resnick. Resnick, 61, is favored by trial lawyers and labor unions; O'Donnell is preferred by business and insurance interests.

Despite what is alleged by a barrage of questionable advertising, clearly intended to help O'Donnell but disavowed by him, voters need not conclude that Resnick has "sold her vote" to special interests.

By the same token, we urge them to assess O'Donnell's campaign on its own merits, not by the motives and behaviors of interest groups that have waged a shrill, mega-bucks campaign against Resnick.

We have endorsed Resnick in the past. But in this race, we prefer O'Donnell. Since Resnick in many areas has performed laudably, it is fair to ask why we

believe she should not be re-elected.

Bluntly, the school-funding and **tort-reform** cases were significant factors in our tilting against her, although we emphasize that it is not so much how she voted on those issues that aroused our concern, but her subsequent statements and conduct.

Last May 23, after Resnick proposed a summit of justices, legislators and Gov. Bob Taft to work out a solution to the schools funding case, we urged her to confine herself to interpreting laws, not making them.

In our view, such a meeting would have violated the principle of separation of powers: First, a Supreme Court justice helps draft a plan for the General Assembly to vote on, then rules on its constitutionality. How could she even have conceived such a thought?

Then, in August, the court demolished a 1996 **tort-reform** law. In writing the majority opinion, Resnick scolded the legislature, adopting a tone that raised many eyebrows. We do not necessarily quibble with the argument that portions of the **tort-reform** law went too far but, as our editorial at the time suggested, it was another indication that Resnick and some of her colleagues may yearn more to write laws than to interpret them.

We don't believe O'Donnell will succumb to that temptation. Since 1995, he has built a solid record on the 8th District Ohio Court of Appeals, which meets in panels of three to assess the work of trial courts. Previously, he served on the Common Pleas bench, beginning in 1980. In those roles, he developed a reputation as a stickler for following the rules.

The time is ripe for O'Donnell to move up to the state's top court.

In the other contest, voters should see to it that first-term incumbent Deborah Cook retains her seat.

Cook, 48, is challenged by Hamilton County Municipal Judge Tim Black in a contest that is being conducted with kid gloves and in the shadows, compared with the Resnick-O'Donnell race.

Yet the stakes also are high, since it is likely that Black, 47, a self-styled progressive, would fit comfortably into the majority activist block that has emerged in crucial rulings and whose power should be checked.

Cook is refreshingly more difficult to categorize - a justice who views herself as the most independent thinker on the bench.

In professional ability, the rivals are well matched. Both are thoughtful, mature

jurists who deserve to have emerged from any pack of potential statewide candidates.

But Cook has earned the voters' confidence and deserves a second term. Along with O'Donnell, she would help keep the state's highest court on a steady course.

Page Break



COALITION FOR INDEPENDENT LIVING OPTIONS, INC.

6800 Forest Hill Boulevard
West Palm Beach, Florida 33413

Voice: (561) 966-4288
TTY: (561) 641-6538
Fax: (561) 641-6619
FL Toll-Free: 1 (800) 683-7337

January 27, 2003

To: U.S. Senate Judiciary Committee
From: Genevieve Cousminer, Esquire
Coordinator of Advocacy Services

Re: Opposition to Sutton Confirmation

The purpose of this memo is to state the Coalition for Independent Living Options, Inc.'s opposition to the appointment of Jeffrey Sutton to the 6th Circuit Court of Appeals.

The Coalition's mission is to promote independence for people with disabilities through advocacy, information and referral, peer counseling, and independent living skills training. Our consumers represent a cross-section of disability, age, race, and socio-economic status. The unifying force is the consumers' desire to live productive, independent lives in the community with self-respect and dignity.

People with disabilities have made strides in achieving civil rights through federal legislative protections in employment, housing, health, and education. Sutton's record reflects his ideology which is outside the mainstream:

- In *Garrett,* Sutton argued against the right of state employees who have been discriminated against to sue employers for damages under the ADA. (And did so by denying the existence of a massive record of state discrimination compiled by Congress including forced sterilization of people with disabilities, unnecessary institutionalization, denial of education, and more.)

- In *Olmstead v. LC,* Sutton argued that unnecessarily keeping people with disabilities in institutions was not a form of discrimination and that states had no duty under the ADA to serve individuals in integrated settings

- In *Westside Mothers*, Sutton successfully argued that Medicaid recipients cannot sue to protect their rights under the law, States have begun citing this decision to persuade courts to rule that people with disabilities have no right to enforce their rights under Medicaid, Section 504, IDEA and the Rehabilitation Act.

- In Alexander v. Sandoval, Sutton argued that individuals cannot privately enforce regulations under Title VI, a race discrimination statute. States have since used Sutton's arguments in efforts to persuade courts that people with disabilities

should not be allowed to enforce regulations under Section 504 and Title II of the ADA requiring reasonable accommodations and integration of individuals with disabilities.

- There are numerous other cases in which he argued to weaken or eliminate federal protections addressing age discrimination, violence against women, religious discrimination and more, These statutes represent years of congressional finds and bipartisan compromises to establish greater fairness in the workplace and provide effective remedies for discrimination.

Unelected Federal Court judges should not advance their own ideologies and thereby deny the vast record of discrimination compiled by Congress in enacting the ADA.

Therefore, we urge you to consider our opposition to the appointment of Jeffrey Sutton and that you not confirm his nomination to the Sixth Circuit Court of Appeals.

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August 18, 1999, Wednesday
SECTION: EDITORIAL & COMMENT , Pg. 10A

LENGTH: 717 words

HEADLINE: ROLE REVERSAL HIGH COURT AGAIN TRIES HAND AT LAWMAKING

BODY:

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, upending whatever law conflicts with the ideological bent of the majority, legal and constitutional principles be damned.

The latest victim in what has become the justices' perennial 4-3 split is the state's civil- justice-reform law, or **tort reform,** a balanced statute that limits certain damages awards by judges and juries.

Trial lawyers and the Ohio AFL-CIO in December 1997 predictably filed a constitutional challenge to the sweeping legislation. Sadly, but just as predictably, the court this week torpedoed the law, contending that it violated the Ohio Constitution's separation of powers and the ban against including more than one subject in a single bill. The court majority -- Democrats Alice Robie Resnick and Francis E. Sweeney, and Republicans Andrew Douglas and Paul E. Pfeifer -- consistently refuses to acknowledge that there can be legislated limits to plaintiffs' awards in civil cases.

In this decision, they cloak their allegiance to the plaintiffs' bar behind a fig leaf of devotion to separation of powers. In effect, the majority has declared that the General Assembly has no constitutional authority to address the legitimate public- policy question of civil damages.

Any court that renders as many decisions on the same 4-3 split as this one is not making every effort simply to interpret the law and apply the constitution. Justices should remember they are not elected to consider how they would have voted for the law had they been legislators.

The legislature can write criminal law as it sees fit, limiting or increasing to various degrees the judiciary's power to sentence and fine lawbreakers and limiting or, in some cases, eliminating parole.

The legislature has prescribed the death penalty for certain cases. No matter

how much a particular crime may incense a judge or jury, if it does not fall within those specified as punishable by the death penalty, such a sanction may not be imposed.

The legislature sets judicial pay and maximum jury compensation. When the Supreme Court wants the criminal-sentencing laws reformed, where does it turn? The legislature. The court can't change the code by fiat.

In civil law, however, the **tort-reform** statute suddenly, in the words of Justice Resnick, author of the majority opinion, "marks the first time in modern history that the General Assembly has openly challenged this court's authority to prescribe rules governing the courts of Ohio and to render definitive interpretations of the Ohio Constitution binding upon the other branches." Hyperbolic nonsense.

The **tort-reform** law, which took effect in 1997, capped most noneconomic damages at $ 500,000 and punitive damages at $ 250,000, or three times compensatory damages, whichever is greater. Punitive damages are to punish misconduct. The law did not attempt to limit economic damages.

The statute also put a 15-year limit on the filing of most lawsuits and a six-year limit for medical claims and professional-malpractice claims.

Chief Justice Thomas J. Moyer, in his dissenting opinion, correctly argued the court zealously and prematurely reviewed the law. Challenges had not yet come up through the lower courts. Moyer also said the majority "unnecessarily construed the actions and language of the General Assembly in the most negative light."

His assessment of the court's majority opinion doesn't bode well for relations with the legislature, which in coming months is set to debate a complex proposal for juvenile-justice reform. Moyer's comments imply as well that the fissure between the two factions on the court, which has him on the losing side, has widened perhaps beyond repair.

The big losers, however, are the people of Ohio and their constitutional system of state government.

The legislature not only has the right, it has a duty to act upon the great public policy questions of the day, those issues affecting the public welfare -- including the awarding of damages in civil cases.

The court majority's declaration that the legislature has no such right is an act of arrogance and an affront to the doctrine of separation of powers.

The COMMITTEE for JUSTICE

JEFFREY S. SUTTON: A LAWYER'S LAWYER

On May 9, 2001, President Bush nominated Jeffrey S. Sutton, of Columbus, Ohio, to a vacant seat on the United States Court of Appeals for the Sixth Circuit. Today, January 9, 2003—*610 days later*—he is still waiting to be confirmed. We enthusiastically add our voice to the chorus of those calling on the United States Senate expeditiously to confirm him to the chronically-understaffed Sixth Circuit bench.

For Jeff Sutton is as skilled a lawyer as one can find in the United States. Both during his tenure as a government official and in private practice, he has represented clients from all walks of life: the disabled, racial minorities, liberal interest groups such as the NAACP and the Center for the Prevention of Handgun Violence, state governments, businesses, and death-row inmates. His work on behalf of persons with disabilities in particular has been extensive. In doing so, he has done what good lawyers do, and are required by the rules of professional conduct to do: advance the arguments he believes will bring victory to his clients, not necessarily the ones that reflect his personal views, whatever they happen to be. And far more often than not, his clients have prevailed; one year saw Sutton achieve an almost unprecedented perfect four-for-four record before the United States Supreme Court. No wonder *The American Lawyer* recently named him one of the 45 best lawyers in the nation under the age of 45. In a word, Jeff Sutton is a lawyer's lawyer. And when he is confirmed, we are confident that he will become a judge's judge.

A Distinguished Legal Career

Not to put too fine a point on it, Jeff Sutton is one of best lawyers in the United States. On January 2 of this year, *The American Lawyer* named him one of its "45 under 45"—i.e., the 45 best attorneys in the country who are less than 45 years old. Though Sutton rightly is regarded as an excellent all-around lawyer, it is in the field of appellate litigation that he has made his mark. Since graduating from The Ohio State University College of Law in 1990—where he finished first in his class—Jeff Sutton has established a reputation for himself as a consummate appellate advocate. He has extensive experience before appellate courts across the country, having argued some 20 cases before the federal Courts of Appeals and state Supreme Courts.

Sutton's record of practice before the United States Supreme Court is even more impressive. As of January 6, 2003, he has argued a total of twelve cases before the High Court, winning nine of them and losing just two (one case currently is pending). During the Supreme Court's October Term 2000, Sutton argued and won four cases—the best win-loss record of any private lawyer in the country that year. In recognition of his stellar performance, a *Washington Post* columnist named Sutton "champion of the Hearsay Supreme Court Sweepstakes for the 2000-01 term," observing that Sutton's four-for-four batting average was "by far the best

record."[1] We are not aware that any Sixth Circuit judge, past or present, has ever had as much experience in front of the Supreme Court before taking the bench.

Jeff Sutton has earned such a stellar reputation among our nation's judges that they regularly recruit him to participate in proceedings before them, in cases covering the full spectrum of legal issues. In *Becker v. Montgomery*,[2] the Supreme Court appointed Sutton to represent an inmate in a prisoners-rights lawsuit against his jailors. In the course of agreeing with Sutton's position unanimously, the Court, in an opinion by Justice Ginsburg, took the unusual step of thanking him for his excellent advocacy: "His able representation . . . permit[s] us to decide this case satisfied that the relevant issues have been fully aired."[3] The High Court similarly asked for Sutton's assistance in *Hohn v. United States*,[4] a case involving a civil-procedure question. And in *Westside Mothers v. Haveman*,[5] a Medicaid case, a federal district judge invited Sutton to participate as a "friend of the court" (amicus curiae) after it found the parties' briefing "to be less than fully satisfactory."[6] Like the Supreme Court in *Becker*, the *Westside Mothers* judge went out of his way to thank Sutton for his efforts: "Particularly noteworthy for its quality and helpfulness is the *amicus* participation *at the court's request* of the League and its *pro bono* counsel, Mr. Jeffrey Sutton."[7]

The fact that Sutton has now reached the pinnacle of the legal profession should come as no surprise to those familiar with how his career as a lawyer began. Upon graduating from law school in 1990, he was offered and accepted a clerkship with the Honorable Thomas J. Meskill of the United States Court of Appeals for the Second Circuit. Even more impressively, from 1991-92 he served as a law clerk to Justice Lewis Powell (retired) and Justice Antonin Scalia on the United States Supreme Court. Sutton developed a close bond with Justice Powell, in part because he admires the Justice's moderate and pragmatic judicial philosophy. In a 1998 article for the *Columbus Dispatch* entitled "Justice Powell's Path Worth Following," Sutton praised his mentor for being a "balanced voice" who represented "the center of gravity in landmark debates over affirmative action, civil rights, school funding, abortion and federalism."[8] He concluded by emphasizing that Powell "believed in people more than ideas, in experience more than ideology and in the end, embraced a judicial pragmatism that served the country well."[9]

Public service is nothing new to Jeff Sutton. From 1995 through 1998, he served as Ohio's State Solicitor—the state's top litigator, and the equivalent of the Solicitor General of the United States. In that capacity, Sutton was responsible for representing the state of Ohio and its people in all appeals before the federal and state courts, including the United States Supreme Court. His efforts won him accolades from state-government lawyers across the country. Four

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[1] *See* James V. Grimaldi, *It's All a Matter of Perception in How to View the Microsoft Ruling*, WASH. POST, July 2, 2001, at E06.
[2] 532 U.S. 757 (2001).
[3] *Id.* at 762 n.1.
[4] 524 U.S. 236 (1998).
[5] 133 F. Supp. 2d 549 (E.D. Mich. 2001).
[6] *Id.* at 552 n.3.
[7] *Id.* (emphasis added); *see also id.* at 552 ("[T]he court invited and accepted the participation of the Michigan Municipal League ('the League') as *amicus curiae* to address the *issues raised by the court*." (emphasis added)).
[8] Jeffrey S. Sutton, *Justice Powell's Path Worth Following*, COLUMBUS DISPATCH, Oct. 24, 1998.
[9] *Id.*

years in a row the National Association of Attorneys General honored him with a Best Brief Award for his practice before the Supreme Court. Some 30 state attorneys general, representing states from across the nation and occupying all points on the political spectrum, support Sutton's nomination. Twenty-seven of them signed a single letter attesting that: "Mr. Sutton is an award-winning, highly-qualified attorney. Jeff Sutton's intelligence and qualifications are unquestioned, with a great deal of experience in commercial, constitutional and appellate litigation. . . . His career has been distinguished, and he has displayed a rare sense of principled fairness throughout it."[10]

Sutton earned the support of the attorneys general not just because of his proficiency as a litigator, but because of his willingness to subordinate his personal views, whatever they may happen to be, in service of his clients. The attorneys general know that, by making an argument on behalf of a client, a lawyer does not thereby adopt it as his own belief. Under the American Bar Association's legal-ethics rules, "[a] lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."[11] That's why the attorneys general reject the notion that a lawyer's personal views can be gleaned from the arguments he makes in court—especially in the case of public-sector lawyers, who have a special obligation to defend the laws the people put in place through their democratically elected representatives:

> This distinction, between personal policy preferences and legal advocacy, is a crucial one, and we Attorneys General have a unique perspective on the importance of that distinction. We are legal advocates, sworn to uphold the interests of our clients, and while we also serve as policy advocates for our States, we often must adopt legal positions that do not match our personal beliefs.
>
> As you know, all attorneys have an ethical duty to zealously represent their clients' interests within the bounds of the law, even where the lawyer may not personally share the client's views. This is especially true for public sector lawyers, because we are bound not only by the same ethical rules as all lawyers, but we are also bound by law to represent our legislatures, governors, and agencies. As Attorney General, each of us has worked to advocate legal positions that may not reflect our personal beliefs. Doing so may be difficult, but that is our job as lawyers and as public servants.[12]

Even when Jeff Sutton has not been employed by government, he has dedicated himself to bettering the lives of his neighbors through community service. Community service is not something that comes unnaturally to Sutton; his father ran a school for children with cerebral palsy, and his mother continues to teach middle school and high school. Indeed, Sutton and his wife are both former middle-school teachers. Between 1985 and 1987, after graduating from college and before enrolling in law school, Sutton taught geography to seventh graders and history to tenth graders; he also found time to coach the school's soccer and baseball teams. Even today, Sutton continues to teach, serving as an adjunct professor of law at his alma mater,

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[10] *See* Letter of State Attorneys General to Senators Daschle, Lott, Leahy, and Hatch, at 1 (July 31, 2001).
[11] ABA Model Rules of Professional Conduct Rule 1.2(b).
[12] Attorneys General letter, *supra* note 10, at 2.

The Ohio State University. He also is an elder, deacon, and Sunday School teacher at the Broad Street Presbyterian Church. Sutton's pastor David A. Van Dyke—who describes himself as "an independent who almost always votes for the Democrat on the ticket"—enthusiastically supports his nomination:

> As his pastor, I don't believe I'm breaching confidentiality in sharing a conversation Jeff and I had shortly after his nomination. Jeff told me that he had some major reservations regarding his nomination. He expressed concern over the brutal nomination process. He worried about the substantial pay cut he'd have to take in order to become a judge and about how that would impact his ability to pay for his children's education. But he also spoke about his commitment to the law and to being a good judge as his "calling" in life. He stressed that life was not about making money, but was about doing what one was called to do; making the most of one's unique gifts and abilities. In our conversation he used terms like "duty, "responsibility" and "honor" to describe his decision to accept this nomination. Jeff loves the law and is committed to the high calling of public service. As a pastor, it's wonderful to see conviction, especially when the motives are good and the purpose is admirable.[13]

Like Pastor Van Dyke, we look forward to the day Jeff Sutton takes his seat on the Sixth Circuit, and continues his long tradition of service to the community.

Representing a Diverse Group of Clients

Just thirteen years removed from law school, Jeff Sutton has firmly established his reputation as the consummate appellate lawyer. Sutton agrees to represent clients, not based on whether he agrees with their political, social, or economic aims, but because of his commitment to using his skills to help resolve people's legal problems. And he makes the arguments he believes will bring about a victory for his clients, not simply the ones that reflect his personal views, whatever they may be.

During his career as a lawyer for the state of Ohio, and as an attorney in private practice, Sutton has represented a diverse array of individuals and groups, occupying every conceivable point on the political spectrum. His clients include Cheryl Fischer, a blind woman who was denied admission to an Ohio medical school; the National Coalition of Students with Disabilities; the NAACP; the Anti-Defamation League; the National Congress of American Indians; the Center for the Prevention of Handgun Violence; Joe D'Ambrosio, a death-row inmate; and Richard Fox, another capital defendant.

This is not to say that, by serving as a lawyer to these groups and individuals, Sutton thereby adopts their viewpoints as his own—any more than it is true that by representing a state government, Sutton thereby endorses its policies. Again, ABA ethics rules make clear that "[a] lawyer's representation of a client, including representation by appointment, does not constitute

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[13] Letter from David A. Van Dyke to Senator Leahy, at 2 (Aug. 8, 2002).

an endorsement of the client's political, economic, social or moral views or activities."[14] The point is that Sutton does what all good lawyers do: subordinate his own interests to those of the client, and do everything possible, within the bounds of the law, to win.

On a number of occasions, Sutton has lent his considerable legal skills to individuals and organizations dedicated to improving the lives of the disabled. In *Ohio Civil Rights Commission v. Case Western Reserve University*,[15] Sutton, who then was serving as State Solicitor of Ohio, argued that Case Western's medical school violated Ohio's antidiscrimination law when it denied admission to Cheryl Fischer, who is blind, on the sole ground of her disability. Because the case pitted one Ohio agency against another, Sutton had to choose whether he would take the blind woman's side or that of the medical school. He chose the blind woman. Betty Montgomery, Ohio's attorney general, recalls that:

> As occasionally happens in government litigation, different state agencies took different stands on Ms. Fischer's case when it arrived at the Ohio Supreme Court. . . . As State Solicitor, Mr. Sutton was responsible for overseeing appellate litigation in my office. When the Fischer case arrived at the Ohio Supreme Court, he explained the views of the different state agencies on the case and the need to assign different lawyers in the office to argue these two very-different positions. He then specifically asked me if he could represent Ms. Fischer's side of the case while another lawyer in the office represented the state universities. It was clear that Jeff thought Cheryl Fischer had the better legal argument, that he believed in her position, and that he thought the State Solicitor should advocate that position before the Ohio Supreme Court.[16]

Sutton threw himself into Cheryl Fischer's case with characteristic vigor and dedication—despite the existence of an adverse precedent from the U.S. Supreme Court that cut against her claim.[17] It's not surprising, then, that Ms. Fischer is a strong backer of his nomination to the Sixth Circuit. In a letter to Ohio Senator DeWine, she writes:

> Working for the State, Jeff took my case on, firmly convinced I had been wronged. I recall with much pride just how committed Jeff was to my cause. He believed in my position. He cared and listened and wanted badly to win for me. I recall well sitting in the courtroom of the Ohio Supreme Court listening to Jeff present my case. It was then that I realized just how fortunate I was to have a lawyer of Jeff's caliber so devoted to working for me and the countless of others with both similar disabilities and dreams."[18]

Cheryl Fischer is not the only disabled student to reap the benefits of Jeff Sutton's legal acumen. In *National Coalition of Students with Disabilities v. Taft*,[19] he was recruited to serve as

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[14] ABA Model Rules of Professional Conduct Rule 1.2(b).
[15] 666 N.E.2d 1376 (Ohio 1996).
[16] Letter from Betty D. Montgomery to Senator Leahy, at 1-2 (Jan. 7, 2003).
[17] *See* Southeastern Community College v. Davis, 442 U.S. 397 (1979) (holding that a nursing school did not violate the federal Rehabilitation Act of 1973 when it decided not to admit a deaf student).
[18] Letter from Cheryl A. Fischer to Senator DeWine, at 1 (May 21, 2001).
[19] No. 2:00-CV-1300, 2002 WL 31409443 (S.D. Ohio Aug. 2, 2002).

lead counsel in a lawsuit claiming that Ohio's state-run universities were violating the federal "motor voter" law by failing to provide their disabled students with voter registration materials. Sutton both authored the brief and conducted the oral argument, and as a result of his efforts, the disabled students prevailed. Benson Wolman, former Executive Director of the ACLU in Ohio and self-described "liberal Democrat," asked Sutton to help in the *NCSD* case, and strongly supports his nomination. He writes:

> In another case, I asked him to assume the role of lead counsel on behalf of the National Coalition of Students with Disabilities (he secured a declaratory judgment and preliminary injunction that required the Ohio Secretary of State to set up voter-registration-and-assistance locations at State colleges and universities as required by federal law. . . . His commitment to individual rights, his civility as an opposing counsel, his sense of fairness, his devotion to civic responsibilities, and his keen and demonstrated intellect all reflect the best that is to be found in the legal profession.[20]

Beyond actively litigating cases on their behalf, Sutton has advanced the interests of the disabled through his service on the board of trustees of the Equal Justice Foundation, a pro bono organization that provides free legal services to the disadvantaged, including the disabled. During his tenure on the board, which dates to the year 2000, the Equal Justice Foundation has handled a number of high-profile cases designed to better the lives of disabled citizens in Ohio, including by:

- Bringing three lawsuits against Ohio cities to force them to build "curb cuts" to make their sidewalks wheelchair accessible;
- Filing suit against an amusement park company that had a blanket policy banning the disabled from using their rides;
- Representing a mentally ill woman who lived in subsidized housing when her landlord tried to evict her because of her disability; and
- Representing a girl with tubular sclerosis in a case alleging that her school was not providing her with an adequate education plan.

Sutton became involved with the Equal Justice Foundation through the efforts of its Executive Director, Kimberly M. Skaggs, who recruited him in 2000 to join the organization's board of trustees. Now as then, Ms. Skaggs remains deeply impressed by Sutton's abilities and his compassion. In a letter to Senator DeWine, she testifies that: "I admired Mr. Sutton's abilities so much that, upon joining the Equal Justice Foundation, I actively recruited him to become a member of the Equal Justice Foundation's Board of Trustees. Much to his credit, Mr. Sutton accepted and has been extremely supportive of the Foundation's work." She concludes: "I believe that Mr. Sutton possesses all the necessary qualities to be an outstanding federal judge. I have no hesitation whatsoever in supporting his nomination."[21]

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[20] Letter from Benson A. Wolman to Senators Leahy and Hatch, at 2 (Jan. 3, 2003).
[21] Letter from Kimberly M. Skaggs to Senator DeWine, at 1 (May 29, 2001).

The skill with which Sutton defended the interests of Cheryl Fischer and of the National Coalition of Students with Disabilities, and his service to the Equal Justice Foundation, help explain why so many people in the disability-rights movement back his nomination to the Sixth Circuit. For example, Professor Francis Beytagh, who served as Legal Director of the National Center for Law and the Handicapped, writes that:

> I believe that Jeff Sutton would be an excellent federal appellate judge. He is a very bright, articulate and personable individual who values fairness highly. . . . I do not regard him as a predictable ideologue, and believe that your committee will reach the same conclusion after his hearing before you. I recommend and support his confirmation without reservation.[22]

The co-director of the University of Alabama's Disability Law Institute, Professor James Leonard, agrees, certifying that "Jeffrey Sutton is well qualified to sit on the Sixth Circuit and should be confirmed." He continues:

> It's important to keep in mind that as State Solicitor of Ohio, he represented the Ohio Civil Rights Commission in its attempt to require that Case Western's Medical School admit an academically accomplished blind woman, Cheryl Fischer. Just as I would not infer an anti-disabled agenda from Mr. Sutton's participation in *Garrett*, neither would I assume from his role in the *Fischer* case that he had the opposite inclination. Rather, he seemed to be a good lawyer acting in his client's interests."[23]

Nor are these glowing reviews limited to disability-rights advocates in the legal academy. Beverly Long—who has served, among other things, as President of the World Federation of Mental Health, and a Commissioner on President Carter's Commission on Mental Health—testifies that "Mr. Sutton is a sensitive and caring person who is a knowledgeable, ethical, and competent lawyer. I believe he is the kind of attorney who would be a substantive asset to the federal judiciary."[24] And President Clinton's Solicitor General Seth Waxman, who has litigated several matters against Sutton, including a disability case, affirms that:

> I have known Mr. Sutton professionally for four years and have high regard for him. Both as Solicitor General [sic] for the State of Ohio and as a partner at Jones, Day, Mr. Sutton handled important cases in the United States Supreme Court in which I was personally involved. I consider Mr. Sutton both a gifted appellate advocate and a fine human being.[25]

Persons with disabilities may be some of the principal beneficiaries of Jeff Sutton's legal abilities, but they are not the only ones. He also has sought to protect the interests of racial minorities, both as Ohio's State Solicitor and in private practice. In two separate cases, Sutton

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[22] Letter from Francis X. Beytagh to Senator Leahy, at 2 (July 2, 2001).
[23] Letter from James Leonard to Senator Hatch, at 2 (Aug. 1, 2001) (citation omitted).
[24] Letter from Beverly B. Long to Senator Leahy, at 1 (July 6, 2001).
[25] Letter from Seth P. Waxman to Senators Leahy and Hatch, at 1 (June 18, 2001).

defended the constitutionality of Ohio's "set-asides law," which required that a certain percentage of the state's contracts be awarded to businesses owned by racial minorities.[26] He even defended The Ohio State University's policy of awarding *fully 100%* of its painting contracts to minority-owned firms. An Ohio civil-rights lawyer who worked on the set-asides cases emphasizes that "Mr. Sutton was a tenacious defender of Ohioans, regardless of their race, gender, disability, or nationality. . . . Despite the constitutional hurdles present in defending such statutes, Mr. Sutton was creative and unwavering in his defense of the statute. . . . As an African-American and Democrat, I believe that Mr. Sutton is well-qualified to sit on the Sixth Circuit and would be an unbiased jurist."[27]

In 1992, Sutton was a key member of the legal team that defended the state of Ohio's hate-crimes law against a First Amendment challenge. In *Ohio v. Wyant*,[28] he authored a pro bono amicus brief on behalf of organizations including the NAACP, Anti-Defamation League, and Columbus Urban League, arguing that Ohio's ban on "ethnic intimidation" was constitutional. (In addition to these groups, Sutton has represented the Center for the Prevention of Handgun Violence; in *Springfield Armory v. City of Columbus*,[29] he helped defend the constitutionality of a Columbus law banning the sale and possession of "assault weapons.") According to Sutton's co-counsel in the hate-crimes case, a Democratic officeholder in Ohio:

> Jeff is a fair and open-minded person who will always give advocates before the Sixth Circuit everything they could ask for: the fullest opportunity to present their case, the confidence that he will listen carefully to their arguments, the certainty that he will be prepared, the great relief that he will listen to them with every kindness and courtesy, and the satisfaction that his decision in each case will be made on the basis of the law and justice to the parties, entirely divorced from any personal sense of bias, intolerance, or prejudice—of which he has none.[30]

The National Congress of American Indians recently recruited Sutton to file an amicus brief on its behalf in the Supreme Court case *United States v. Navajo Nation*.[31] Sutton's brief argues that Congress specifically intended to create a private right of action for Native Americans to sue the federal government over mineral-rights disputes. Riyaz Kanzi, the lawyer who asked Sutton to write the brief (and who formerly served as a law clerk to Justice David Souter), recalls:

> In August, I called Mr. Sutton to see whether he would be interested in writing an amicus brief for the National Congress of American Indians . . . . In our ensuing conversations, it became apparent to me that Mr. Sutton did not simply want to work on the matter for the small amount of compensation it would bring him (he readily agreed to charge far below his usual rates for the brief), but that he instead

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[26] *See* Ritchey Produce Co. v. Ohio, 707 N.E.2d 871 (Ohio 1999); Henry Painting Co. v. Ohio State University, No. C2-94-0196 (S.D. Ohio).
[27] Letter from Fred G. Pressley, Jr. to Senators Leahy and Hatch, at 1 (Dec. 11, 2002).
[28] 624 N.E.2d 722 (Ohio 1994).
[29] 29 F.3d 250 (6th Cir. 1994).
[30] Letter from Richard A. Cordray to Senator Leahy, at 2 (Jan. 3, 2003).
[31] No. 01-1375

> had a genuine interest in understanding why Native American Tribes have fared as poorly as they have in front of the Supreme Court in recent years, and in trying to help improve that record. . . . In my experience, the principles that resonate with him most deeply, and that he has a knack of expressing so well, have to do with fairness and equity.[32]

Jeff Sutton has made a name for himself in the area of civil litigation, but he also has represented a number of criminal defendants on a *pro bono* basis—including two death-row inmates. He currently is the lawyer for capital-murder convict Joe D'Ambrosio, who was charged when, after a night of using alcohol and drugs with his friends, one of the group was found dead. Sutton got involved with the *D'Ambrosio* case through the efforts of David Van Dyke, the pastor at his church who is "very active in my opposition of the death penalty in Ohio." According to Pastor Van Dyke:

> Through my involvement in one particular case, I learned about the plight of another inmate whose court-appointed attorney had literally slept through his trial. I approached Jeff regarding that case and he eagerly accepted it, making it the second death penalty case in which Jeff is currently involved. . . . Jeff would make an excellent judge, and I write this as an independent who almost always votes for the Democrat on the ticket."[33]

In addition to the *D'Ambrosio* case, Sutton presently is representing Richard Fox, another death-row inmate who was convicted of stabbing an 18-year-old woman multiple times, strangling her, and leaving her body in a ditch.[34]

Jeff Sutton is perhaps best known for his Supreme Court advocacy on behalf of the state of Ohio. But he also has had occasion to represent Ohio's opponents before the High Court. In *Becker v. Montgomery*[35]—a lawsuit against Ohio attorney General Betty Montgomery, his former boss—he represented a prisoners-rights plaintiff who had appealed an adverse ruling by a district court, but had failed to sign his notice of appeal. Sutton convinced all nine Justices that the inmate's mistake did not require the appellate court to dismiss the lawsuit. As mentioned above, the Court went out of its way to praise Sutton's abilities: "His able representation . . . permit[s] us to decide this case satisfied that the relevant issues have been fully aired."[36] The nine Justices of the Supreme Court weren't the only ones who were impressed with Sutton's advocacy. Stewart Baker, the opposing counsel in *Becker* and General Counsel of the NSA under President Clinton, strongly backs Sutton's nomination:

> Mr. Sutton argued with great zeal and enthusiasm on Becker's behalf. By asking the Court to forgive the pro se litigant's failure to sign the notice of appeal, Mr. Sutton took a position that facilitated the Ohio inmate's ability to challenge state

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[32] Letter from Riyaz Kanji to Senators Leahy and Hatch, at 1-2 (Dec. 12, 2002).
[33] Letter from David A. Van Dyke to Senator Leahy, at 1-2 (Aug. 8, 2002).
[34] *See* Fox v. Coyle, 271 F.3d 658 (6th Cir. 2001).
[35] 532 U.S. 757 (2001).
[36] *Id.* at 762 n.1.

> prison conditions in federal court. His advocacy for Becker's access to the court never wavered.[37]

Once he takes his seat on the Sixth Circuit, we have every reason to believe that Jeff Sutton's commitment to the rule of law will be equally unwavering.

Confirm Sutton Now!

Jeffrey S. Sutton represents the very best in the legal profession. An attorney of unquestioned ability, intelligence, and experience, his ambition is to use his talents not to accumulate as much wealth as possible, but rather in service of his neighbors, his community, and his nation. He has spent the last thirteen years, since graduating from law school, doing just that. Over the course of his career, Sutton has been a lawyer to any client he could help, regardless of the popularity of their cause. That's why the editorial page of the *Cleveland Plain Dealer*, no friend to Republicans, ran an article favorably comparing Jeff Sutton to John Adams, who represented the British troops accused of committing the Boston Massacre:

> It is the duty of a lawyer to represent to the best of his ability the interest of his clients. That, the record shows, Sutton has done throughout his career. . . . [T]he fact that his advocacy has countered the goals of a powerful special interest group should not sway that consideration. A good lawyer, doing his job, will make enemies. A good judge, doing his job, will have but one abiding friend—the law he is sworn to uphold. Sutton's ability to honor that friendship should be the criterion of his consideration.[38]

Jeff Sutton has been waiting since May 9, 2001 to demonstrate his commitment to the rule of law, and it is high time for the United States Senate to confirm this superlatively qualified lawyer to the court that needs him.

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[37] Letter from Stewart A. Baker to Senator Leahy, at 2 (Sept. 22, 2001).
[38] Editorial, *A Man of the Law*, THE PLAIN DEALER (Cleveland), June 17, 2001.

Southeast Kansas Independent Living Resource Center, Inc.
S.K.I.L. Resource Center, Inc.
P.O. Box 1035 1801 Parsons Plaza Parsons, KS 67357-1035
Phone: (620) 421-5502 Fax: (620) 421-3705 TDD: (620) 421-0983 Toll Free: 1-800-688-5616

Columbus Office
125 E. Maple
Columbus, KS 66725
(620) 429-3600

Coffeyville Office
806 E. 8th
P.O. Box 497
Coffeyville, KS 67337
(620) 251-5400

Pittsburg Office
104 W 6th
Pittsburg, KS 66762
(620) 231-6780

Chanute Office
222 W Main, Suite D
Chanute, KS 66720
(620) 431-0757

Fredonia Office
305 N. 6th.
Fredonia, KS 66736
(620) 378-4881

Yates Center Office
119 W Butler
Yates Center, KS 66783
(620) 625-2818

Stop Sutton!!!

We need a real 'man' that is for 'ALL' the people!!

It would be a disgrace to the American Justice System to give this man a seat!!!

Please think of 'All' Americans not just his chosen few!!!

Sincerely,
Ronna Crosby
IL Coordinator, SKIL

Assistive Technology for Kansans
1-800-526-3648

CARL & JO CUNNINGHAM
PO BOX 1130/18825 MORGAN VALLEY ROAD
LOWER LAKE, CA 95457

Phone 707-995-9630
Fax 707-995-2740
Cell Ph: 707-350-0424
cunning@calicom.net

January 22, 2003

The Honorable Orrin G. Hatch
Chairman
Senate Judiciary Committee
Dirksen Senate Office Building, Room 224
Washington, DC 20510

Via Fax: 202-228-0861

Dear Chairman Hatch:

I am writing to you on behalf of my six year old son with Down syndrome and the many family and friends who love him. We urge you to **not** confirm Jeffrey Sutton to the Sixth U.S. Circuit Court of Appeals. As the parent of a special needs child, it isn't easy to find the time to write political leaders such as yourself, nonetheless stay involved in the political process. I do so at great sacrifice. It is disheartening, therefore, to find my hard fought efforts to advocate people with developmental disabilities be undermined by Mr. Sutton with his history of efforts to limit Congressional authority in the area of disability rights.

In University of Alabama v. Garrett, Mr. Sutton argued successfully that Congress did not have the authority under the Constitution to apply the ADA to States in employment discrimination suits for damages. He argued that unnecessary institutionalization should not be a violation of the ADA in the Olmstead v. L.C. case. Mr. Sutton's positions in these and other cases represent a view of Congress's authority under the Equal Protection Clause, Spending Clause, and Commerce Clause that would dramatically restrict your ability to pass laws protecting the rights of Americans with disabilities, older workers, and others under the Constitution.

Mr. Chairman, you have been a long-time supporter of federal civil rights for Americans with disabilities. We need your help now to keep this effort moving in the right direction. All human beings have value, Mr. Chairman, even the small, weak, and helpless; even the mentally and physically challenged; even unborn and the aged.

Respectfully,

Jo Cunningham
Parent

cc: The Honorable Patrick J. Leahy, Ranking Member
Senate Judiciary Committee Members

YOSHIKO DART
907 6TH STREET, S.W., APT. 516C
WASHINGTON, D.C. 20024
202-488-7684

"I am with you always. I love you. Lead on. Lead on."

Justin Dart, Jr.

January 27, 2003

The Hon. Orrin Hatch
Chairman
Committee on the Judiciary
104 Senate Hart Office Building
Washington, DC 20510
Fax: 202/228-0861

The Hon. Patrick Leahy
Ranking Democrat
United States Senate
433 Senate Russell Office Building
Washington, DC 20510

Dear Senators Hatch and Leahy:

Enclosed is a statement made by my late husband, Justin Dart, Jr., in regard to Jeffery Sutton in May 2001.

We know you will make your decision based on your principle.

We appreciate your great leadership in the revolution of individualized empowerment for ALL to live the Dream.

We love you!

Lead on.

Yoshiko Dart and the Family

Justice for All means Real Power for All,
Real Choices for All, Real Access to the Dream for All

JUSTIN DART, JR.
907 6TH STREET, SW, APT. 516C
WASHINGTON, DC 20024
202-488-7684

Remarks by Justin Dart, ADA Watch Press Conference, May 19, 2001, Washington, DC

I feel certain that the great majority of fifty four million Americans with disabilities, and millions more their family members, join me in urging President Bush to reconsider his nomination of Jeffrey Sutton as federal judge.

The Americans with Disabilities Act is the world's first comprehensive civil rights law for people with disabilities. Barbara Bush has described it as the finest accomplishment of her husband's administration.

Abraham Lincoln led this nation to war and died to establish the authority of our federal government to protect the rights of our citizens no matter what the state of their residence.

It is very difficult to understand how President George W. Bush could send to the Federal Court a man who challenges the "across the board" constitutionality of a great civil rights law written in the tradition of Abraham Lincoln and signed by his father, George Bush Sr.

I am deeply concerned for the future of American democracy. I am deeply concerned for the civil rights not only of Americans with disabilities, but of all Americans. I am deeply concerned not only for the principle of federal civil rights, but also for the economic prosperity of our nation. As more and more Americans triumph over death to live with disabilities, it becomes absolutely imperative that they be empowered to get off of the welfare rolls and onto the tax rolls.

At the last count more than seventy percent of employable Americans with disabilities were unemployed. Millions more were underemployed. In 1990 President Bush Sr. estimated the resulting burden to the nation to be 200 billion dollars annually, and growing.

Finally I love the American Dream. I am passionately serious about the pledge: "one nation, under God, indivisible with liberty and justice for all."

Mr. President, you have pledged to support the ADA. You have pledged to support one nation with liberty and justice for all. You must send people to the court who support those pledges.

Justice for All Means Real Power for All,
Real Choices for All, Real Access to the Dream for All

THE OHIO SUPREME COURT:
A PRIME EXAMPLE OF JUDICIAL ACTIVISM

Even Ohio newspapers concede that the Ohio Supreme Court has been a hotbed of judicial activism, disregarding the law and usurping the role of the legislature. Here are some of the criticisms by Ohio newspapers:

- The *Cleveland Plain Dealer*, endorsing Justice Cook and Terrence O'Donnell in the 2000 judicial election, said:

  > "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** . . . ." ("O'Donnell and Cook would Shift a Narrow Majority Toward a Welcome Resurgence of Judicial Restraint," *Plain Dealer*, Oct. 29, 2002)

- 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, upending whatever law conflicts with the ideological bent of the majority**, legal and constitutional principles be damned." ("Role Reversal High Court Again Tries Hand at Lawmaking," *Columbus Dispatch*, Aug. 18, 1999)

- The *Akron 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 problem-solvers (as ward pols) more than jurists**." ("A Cook Tour," *Beacon Journal*, Jan. 6, 2003)

- Referring to certain members of the Ohio Supreme Court as the "Gang of Four," Ray Cookliss of the *Cincinnati Enquirer* observed,

  > "With this week's Ohio Supreme Court victory by Lt. Gov. Maureen O'Connor to fill the seat of retiring Justice Andrew Douglas, the court's four-vote activist majority appears to have dissipated. Douglas had teamed with Justices Alice Resnick, Francis Sweeney, and Paul Pfeifer in rulings on school funding, tort reform, liability and other issues that **strained the court's credibility as a dispassionate arbiter of the law, precedent, and constitutional principles**." ("Ohio Hail, Hail, the Gang's All Gone," *Cincinnati Enquirer*, Nov. 8, 2002)

- Referring to the *DeRolph* school funding cases, the *Toledo Blade* declared,

  > "That's because the ultimate responsibility for deciding how much money the state spends on primary and secondary education, and how it is spent, lies with the General Assembly, not with **that meddlesome majority of the high court we refer to as the 'Gang of Four**.'" ("The 'Gang of 4' Flames Out," *Toledo Blade*, Dec. 15, 2002)

SENATOR BOB DOLE
901 15TH STREET, N.W.
SUITE 410
WASHINGTON, D.C. 20005

January 16, 2003

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

On May 9 of 2001, President Bush nominated to a vacancy on the U.S. Court of Appeals for the Sixth Circuit one of the most distinguished lawyers in the United States: Jeffrey S. Sutton of Columbus, Ohio. I ask that you join me in backing Jeff's nomination, which I support in part because of his demonstrated commitment to safeguarding the rights of all Americans—especially those of persons with disabilities.

As you know, some in the disability-rights community—for whom I have great respect and with whom I have had the privilege of working in the past, including during our joint efforts to pass the landmark Americans with Disabilities Act in 1990—have raised questions about Jeff's nomination. I believe that these criticisms miss the mark, and do so by a wide margin. For during his career as a lawyer, both as an Ohio government official and in private practice, Jeff Sutton has gone out of his way to defend the interests of the disabled.

In 1996, Jeff tried to convince the Ohio Supreme Court that Case Western Reserve University had unlawfully discriminated against Cheryl Fischer, who is blind, when it refused to admit her to its medical school solely on the basis of her disability. Jeff actively sought out the opportunity to represent Ms. Fischer, and he was passionately dedicated to her cause. But don't take my word for it. Here's what Ms. Fischer has to say:

> Working for the State, Jeff took my case on, firmly convinced I had been wronged. I recall with much pride just how committed Jeff was to my cause. He believed in my position. He cared and listened and wanted badly to win for me. I recall well sitting in the courtroom of the Ohio Supreme Court listening to Jeff

> present my case. It was then that I realized just how fortunate I was to have a lawyer of Jeff's caliber so devoted to working for me and the countless of others with both similar disabilities and dreams.

Jeff fell just one vote short of prevailing, but his service to Ms. Fischer leaves no doubt as to his commitment to defending the rights of the disabled.

Cheryl Fischer is not the only person with a disability to be helped by Jeff Sutton. Six years later, Jeff was the lead counsel in a case brought by the National Coalition of Students with Disabilities against the state of Ohio, his former employer. Jeff argued that Ohio universities were failing to provide voter-registration materials to their disabled students, in violation of the federal "motor voter" law. As a direct result of Jeff's efforts, the National Coalition of Students with Disabilities prevailed, and the state of Ohio was made to set up voter-assistance stations at state colleges and universities.

Beyond representing them in court, Jeff Sutton has improved the lives of the disabled through his service to a disability-rights group. Since 2000, Jeff has served on the Board of Trustees of the Equal Justice Foundation, which provides free legal services to the disadvantaged, including persons with disabilities. During his service, the Equal Justice Foundation has filed lawsuits against three Ohio cities demanding that they make their sidewalks wheelchair accessible. It has sued an amusement park that flatly prohibited the disabled from riding its rides. And it has represented a woman with a mental illness who lived in subsidized housing, when her landlord tried to evict her on the ground of her disability.

Again, those who know Jeff Sutton best speak with great eloquence about his dedication to the disabled. Kim Skaggs, the Executive Director of the Equal Justice Foundation, testifies that:

> I admired Mr. Sutton's abilities so much that, upon joining the Equal Justice Foundation, I actively recruited him to become a member of the Equal Justice Foundation's Board of Trustees. Much to his credit, Mr. Sutton accepted and has been extremely supportive of the Foundation's work. I believe that Mr. Sutton possesses all the necessary qualities to be an outstanding federal judge. I have no hesitation whatsoever in supporting his nomination.

These are not the actions of a man who is indifferent to the rights of persons with disabilities. Although he defended the state of Alabama in an Americans With Disabilities Act lawsuit, the complete picture of Jeff Sutton's career reveals a consistent concern about the special burdens that the disabled face in their everyday lives, and an equally consistent commitment to alleviating those burdens. In all candor, I believe that my friends in the disability-rights community should be actively supporting Jeff Sutton's nomination. For we are not likely to find a more sympathetic ear on the federal bench.

I do not write these words lightly. As you know, I spent many years in the United States Senate fighting for the rights of the disabled. I co-sponsored and worked hard for passage of the 1990 Americans with Disabilities Act. I have no doubt that, if he is confirmed, Jeff Sutton will

faithfully enforce that law, just as he will enforce all acts of Congress. And I have no doubt that he will scrupulously respect the rights of the disabled, just as he will respect the rights of all Americans.

Sincerely,

BOB DOLE

cc: The Honorable Patrick J. Leahy
Ranking Member



Kirsten Dunham
4489 A Laclede
St. Louis, MO 63108

January 22, 2003

The Honorable Orrin G. Hatch
Chairman
Senate Judiciary Committee
Dirksen Senate Office Building, Room 224
Washington, DC 20510

Dear Chairman Hatch:

I urge you to oppose Jeffrey Sutton's confirmation to the 6th U.S. Circuit Court of Appeals. I and other civil rights advocates are opposed to Sutton's nomination because of his actions to limit Congress' power to protect individuals' civil rights. He has argued against the Americans with Disabilities Act, saying that the law was not needed to protect the rights of people with disabilities and that Congress had no power to apply the ADA to the states. Mr. Sutton has also attacked the rights of Medicaid recipients to enforce their rights under the law. His position that Spending Clause laws are not supreme federal law is counter to over sixty-five years of Spending Clause jurisprudence.

If Jeffrey Sutton is appointed to the 6th Circuit, then the rights of people with disabilities and other civil rights will be in jeopardy. Congress had clear evidence of discrimination by states against people with disabilities. Discrimination exists today, and people with disabilities and other minorities must have access to all remedies including lawsuits to enforce their rights. Civil rights advocates have fought for decades to end segregation and discrimination, and we must not turn back the clock by appointing judges such as Mr. Sutton who want to limit the powers of Congress and weaken civil rights protections.

You have been a supporter of disability rights and the constitutionality of the ADA. The disability rights community needs your help to stem the tide of activist rulings that are undermining the principles and intention of disability rights laws. I hope that you will consider the harm that Jeffrey Sutton's positions will cause and oppose his confirmation to the 6th Circuit Court of Appeals.

Thank you.

Sincerely,

Kirsten Dunham

Kirsten Dunham



January 23, 2003

The Honorable Orrin G. Hatch
Chairman
Senate Judiciary Committee
Dirksen Senate Office Building, Room 224
Washington, DC 20510

[redacted]

Dear Chairman Hatch:

The Eastern Paralyzed Veterans Association strongly opposes the confirmation of Jeffrey Sutton to the Sixth U.S. Circuit Court of Appeals. In the past, Mr. Sutton's attempts to limit Congressional authority in the area of disability rights has directly undermined the protections given to people with disabilities through the Americans with Disabilities Act (ADA) and other disability rights laws.

In University of Alabama v. Garrett, Mr. Sutton argued that Congress did not have the authority under the Constitution to apply the ADA to States in employment discrimination suits for damages. The United States Supreme Court agreed with his argument. Additionally, in Olmstead v. L.C. he argued that unnecessary institutionalization of people with disabilities should not be a violation of the ADA, but, fortunately, the Supreme Court disagreed in that case.

Mr. Sutton's positions in these and other cases clearly represent an interpretation of the Equal Protection Clause, Spending Clause, and Commerce Clause that would dramatically restrict Congress's authority and hinder its ability to pass laws protecting the rights of Americans with disabilities, older workers, and others under the Constitution. For this reason, Eastern Paralyzed Veterans Association, and many other disability rights organizations, strongly urge you, and the Senate Judiciary Committee, not to confirm Mr. Sutton to the court.

People with disabilities have fought, with you at their side, to achieve the protections afforded by the ADA and likeminded laws. We must now continue that fight to ensure that these rights and protections, which are now in place, not be abridged by an activist court with a Congressionally limiting analysis of the law. Please oppose Jeffrey Sutton's nomination.

Sincerely,

John D. DelColle

JOHN D. DEL COLLE
Associate Executive Director
Government Relations

CC: The Honorable Patrick J. Leahy, Ranking Member
Senate Judiciary Committee Members

75-20 Astoria Boulevard
Jackson Heights, NY 11370-1177
(718) 803-3782
Fax: (718) 803-0414
www.epva.org
info@epva.org

CLEAN WATER ACTION · COMMUNITY RIGHTS COUNSEL
DEFENDERS OF WILDLIFE · EARTHJUSTICE
FRIENDS OF THE EARTH · OCEANA
PHYSICIANS FOR SOCIAL RESPONSIBILITY
SIERRA CLUB · THE WILDERNESS SOCIETY

January 28, 2003

The Honorable Orrin Hatch
Chairman, Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Member, Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

RE: Sixth Circuit Nomination of Jeffrey S. Sutton

Dear Chairman Hatch and Ranking Member Leahy:

We are writing to express our very serious concerns with the nomination of Jeffrey S. Sutton to a lifetime position on the U.S. Court of Appeals for the Sixth Circuit, which decides the fate of federal environmental and other safeguards in Kentucky, Michigan, Ohio, and Tennessee.

In his writings and speeches, Mr. Sutton has advanced a view that pits the federal government against the states, doing violence to notions of cooperative federalism that underlie most environmental, health, and safety legislation. He has characterized a string of cases challenging the federal government's authority to regulate as "invariably a battle between the states and the federal government over legislative prerogative" and a "zero-sum game—in which one, or the other law making power must fall." Mr. Sutton's views on states' rights are not even shared by the vast majority of states. For example, thirty-six states advocated in favor of the federal Violence Against Women Act in *United States v. Morrison*. Only one state, Alabama, represented by Mr. Sutton, advocated against federal authority. Likewise, nine northeastern states recently sued the Bush Administration for not aggressively enforcing the Clean Air Act. These states clearly do not share Mr. Sutton's view that federal rules "invariably" and improperly encroach on state legislative prerogatives.

Mr. Sutton's positions on federal constitutional power and citizen access to the courts are extreme and go far beyond the already disturbing 5-to-4 Rehnquist Supreme Court rulings on these topics. For example:

- Mr. Sutton argued to the U.S. Supreme Court in *Solid Waste Authority of Northern Cook County (SWANCC) v. U.S.* that the federal government did not have authority under the Constitution's Commerce Clause to prevent destruction of waters and wetlands that serve as critical habitat for migratory birds. No less an authority than Justice Oliver Wendell Holmes writing for a 7-2 majority of the Supreme Court in 1920 called the protection of migratory birds a "national interest of very nearly the first magnitude" and held that "[i]t is not sufficient to rely upon the States." By contrast, Mr. Sutton called these concerns "uniquely a matter of local oversight." The *SWANCC* Court decided the case on statutory grounds, declining to decide Mr. Sutton's constitutional argument.

- Mr. Sutton has been a leading advocate for aggressively limiting private causes of action that permit citizens to bring civil rights and environmental justice claims to the courts. In *Alexander v. Sandoval,* he convinced a deeply divided Supreme Court that regulations under Title VI of the Civil Rights Act, which form the primary source of rights to ensure environmental justice, did not permit citizens to sue the states directly. Mr. Sutton asked the *Sandoval* Court to go much further: his position would have also prevented vindication of environmental claims under § 1983 of the Civil Rights Act, a question specifically left open by the *Sandoval* Court.

- Mr. Sutton has also advocated for a dramatic narrowing of the category of federal rights that can be enforced under the Court's landmark 1908 ruling in *Ex Parte Young.* Effective, enforceable, cooperative federalism in environmental laws is dependant upon *Ex Parte Young,* which permits suits to enjoin state officials from violating federal law even where the Eleventh Amendment would bar a suit against the state seeking money damages. In *Westside Mothers v. Haveman,* Mr. Sutton took the extreme position that federal legislation passed under the Constitution's Spending Clause never creates federal mandates that can be enforced under *Ex Parte Young.*

Another disturbing aspect of the briefs Mr. Sutton filed in the cases discussed above is his tendency to cavalierly disregard precedent that is unfavorable to his position and his willingness to instruct judges to ignore such precedent in ruling in his favor. For example, in his opening brief in *Westside Mothers*, Mr. Sutton ignored a landmark Supreme Court case on point, *Maine v. Thiboutot*, and in a reply brief, admitting his error, advised the district judge not to "be overly concerned with whether its decision can be reconciled with the facts—as opposed to the rationale—of *Thiboutot* and its progeny." In that same brief, he argued that Spending Clause legislation creates a federal/state "contract" despite a 1985 Supreme Court ruling in *Bennett v. Kentucky Dep't of Education* to the contrary, which he again failed to cite. After convincing a district court

to adopt his position, the Sixth Circuit reversed, finding that "binding precedent has put the issue to rest."

In the words of Chief Judge J. Harvie Wilkinson of the Fourth Circuit Court of Appeals, we are in the midst of a "third wave of judicial activism," activism being led by judges and advocates who purport to be conservatives. Mr. Sutton's extreme views on federal authority and environmental access to courts, coupled with his apparent disdain for unfavorable precedent, give every indication that he would be a leading supporter of this new and virulent form of activism that is advancing an anti-environmental policy agenda from the federal bench. We urge you to give Mr. Sutton's nomination the closest scrutiny.

Thank you considering these important environmental concerns with Mr. Sutton's record and for taking seriously your Constitutional advise and consent responsibility.

Sincerely,

Paul Schwartz
National Campaigns Director
Clean Water Action

Doug Kendall
Executive Director
Community Rights Counsel

William Snape
Vice President and Chief Counsel
Defenders of Wildlife

Vawter Parker
Executive Director
Earthjustice

Sara Zdeb
Legislative Director
Friends of the Earth

Ted Morton
Federal Policy Director
Oceana

Robert K. Musil, PhD, MPH
CEO and Executive Director
Physicians for Social Responsibility

Pat Gallagher
Director
Sierra Club Environmental Law Program
Sierra Club

Leslie Jones
Staff Attorney
The Wilderness Society

c: Members, Senate Committee on the Judiciary

Contact: **Doug Kendall, Community Rights Counsel 202 296-6889**
Glenn Sugameli, Earthjustice 202 667-4500

Executive Summary

Sixth Circuit Nominee Jeffrey S. Sutton
A Threat to the Constitution and the Nation's Environmental Protections

Jeffrey S. Sutton, President Bush's nominee for a lifetime position on the U.S. Court of Appeals for the Sixth Circuit, is one of the country's leading advocates for an extreme and virulent form of judicial activism that would limit citizen access to justice and seriously undermine the ability of the federal government to protect the environment.

In his writings and speeches, Mr. Sutton has advanced a view that pits the federal government against the states, doing violence to notions of cooperative federalism that underlie most environmental, health, and safety legislation. He has characterized a string of cases challenging the federal government's authority to regulate as "invariably a battle between the states and the federal government over legislative prerogative" and a "zero-sum game—in which one, or the other law making power must fall." Mr. Sutton's views on states' rights are not even shared by the vast majority of states. For example, thirty-six states advocated in favor of the federal Violence Against Women Act in *United States v. Morrison*. Only one state, Alabama, represented by Mr. Sutton, advocated against federal authority. Likewise, nine northeastern states recently sued the Bush Administration for not aggressively enforcing the Clean Air Act. These states clearly do not share Mr. Sutton's view that federal rules "invariably" and improperly encroach on state legislative prerogatives.

Mr. Sutton's positions on federal constitutional power and citizen access to the courts are extreme and go far beyond the already disturbing 5-to-4 Rehnquist Supreme Court rulings on these topics. For example:

- Mr. Sutton argued to the U.S. Supreme Court in *Solid Waste Authority of Northern Cook County (SWANCC) v. U.S.* that the federal government did not have authority under the Constitution's Commerce Clause to prevent destruction of waters and wetlands that serve as critical habitat for migratory birds. No less an authority than Justice Oliver Wendell Holmes writing for a 7-2 majority of the Supreme Court in 1920 called the protection of migratory birds a "national interest of very nearly the first magnitude" and held that "[i]t is not sufficient to rely upon the States." By contrast, Mr. Sutton called these concerns "uniquely a matter of local oversight." The *SWANCC* Court decided the case on statutory grounds, declining to decide Mr. Sutton's constitutional argument.

- Mr. Sutton has been a leading advocate for aggressively limiting private causes of action that permit citizens to bring civil rights and environmental justice claims to the courts. In *Alexander v. Sandoval*, he convinced a deeply divided Supreme Court that

regulations under Title VI of the Civil Rights Act, which form the primary source of rights to ensure environmental justice, did not permit citizens to sue the states directly. Mr. Sutton asked the *Sandoval* Court to go much further: his position would have also prevented vindication of environmental claims under § 1983 of the Civil Rights Act, a question specifically left open by the *Sandoval* Court.

- Mr. Sutton has also advocated for a dramatic narrowing of the category of federal rights that can be enforced under the Court's landmark 1908 ruling in *Ex Parte Young*. Effective, enforceable, cooperative federalism in environmental laws is dependant upon *Ex Parte Young*, which permits suits to enjoin state officials from violating federal law even where the Eleventh Amendment would bar a suit against the state seeking money damages. In *Westside Mothers v. Haveman*, Mr. Sutton took the extreme position that federal legislation passed under the Constitution's Spending Clause never creates a federal mandate that can be enforced under *Ex Parte Young*.

Another disturbing aspect of the briefs Mr. Sutton filed in the cases discussed above is his tendency to cavalierly disregard precedent that is unfavorable to his position and his willingness to instruct judges to ignore such precedent in ruling in his favor. For example, in his opening brief in *Westside Mothers*, Mr. Sutton ignored a landmark Supreme Court case on point, *Maine v. Thiboutot*, and in a reply brief, admitting his error, advised the district judge not to "be overly concerned with whether its decision can be reconciled with the facts—as opposed to the rationale—of *Thiboutot* and its progeny." In that same brief, he argued that Spending Clause legislation creates a federal/state "contract" despite a 1985 Supreme Court ruling in *Bennett v. Kentucky Dep't of Education* to the contrary, which he again failed to cite. After convincing a district court to adopt his position, the Sixth Circuit reversed, finding that "binding precedent has put the issue to rest."

Mr. Sutton's extreme views on federal authority and environmental access to courts, coupled with his apparent disdain for unfavorable precedent, strongly suggest that Mr. Sutton's nomination to the Sixth Circuit poses a threat to the Constitution and enforcement of our nation's core environmental protections.

Contact: **Doug Kendall, Community Rights Counsel 202 296-6889**
Glenn Sugameli, Earthjustice 202 667-4500

Sixth Circuit Nominee Jeffrey S. Sutton
A Threat to the Constitution and Fundamental Environmental Protections

Jeffrey S. Sutton, nominated by President Bush for a lifetime position on the U.S. Court of Appeals for the Sixth Circuit, is one of the country's leading advocates for a new and virulent form of judicial activism that is advancing an anti-environmental policy agenda from the federal bench with little regard for precedent and constitutional text. In his writings and speeches, Mr. Sutton has been extraordinarily outspoken in his views on limiting federal constitutional power and citizen access to justice. Mr. Sutton's views are extreme and go far beyond the already disturbing 5-to-4 Rehnquist Supreme Court rulings on these topics. His views threaten enforcement of environmental protections across the board.

In the past decade, the Supreme Court has struck down federal legislation at a rate rivaled only by the discredited "*Lochner*-era" Court, which blocked the labor reforms of the Progressive Era and the Congressional response to the Depression in the early stages of the New Deal.[1] The Court's recent rulings, often grouped together under the inaccurate label of "federalism," have undermined important laws protecting women, senior citizens, minorities, the disabled, and the environment.

These rulings have engendered withering criticism from both sides of the political spectrum. For example, Judge John Noonan, a conservative appointed by President Reagan to the Ninth Circuit, declared in a recent book entitled *Narrowing the Nation's Power* that the Rehnquist Court has already acted "without justification of any kind" in doing "intolerable injury to the enforcement of federal standards."[2] "The present damage," Judge Noonan warns, "points to the present danger to the exercise of democratic government."[3]

A July 2001 report entitled *Hostile Environment: How Activist Federal Judges Threaten Our Air, Water, and Land,* released jointly by Natural Resources Defense Council, Community Rights Counsel, and Alliance for Justice, details how Supreme Court rulings and even more extreme rulings by lower federal courts are "threatening the very core of environmental law."[4]

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[1] *See* JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER 13 (2002) ("This state of affairs invites comparison with other moments in the history of the United States produced by positions taken by the Supreme Court – with *Dred Scott v. Sandford*, holding that Congress could not constitutionally prevent property, including slaves, from being brought into federal territory; with *Lochner v. New York*, holding that a state could not constitutionally regulate the hours of work of employees of business; and with *Carter v. Carter Coal Company*, holding that Congress could not constitutionally regulate the labor relations of a corporation whose business was coal mining. * * * Each decision is recognized today as unjustified by the Constitution.").

[2] NOONAN, *supra* note 1, at 154-55.

[3] *Id.* at 140.

[4] HOSTILE ENVIRONMENT is available on line at www.communityrights.org/combatsjudicialactivism/he/hemain.asp. The report was published by the Environmental Law Reporter as Douglas T. Kendall, Timothy J. Dowling, Sharon Buccino & Elaine Weiss,

Jeffrey Sutton advocated for many of the rulings attacked in Judge Noonan's book and some of those discussed in *Hostile Environment*,[5] but what's most troubling is that the arguments advanced by Mr. Sutton are considerably more extreme than those accepted to date by the Supreme Court.

Sutton's Legal Philosophy: Of Zero Sum Games and Neutral Principles

Repeatedly in briefs and in speeches expressing his personal views,[6] Mr. Sutton has characterized cases challenging federal constitutional authority as "invariably a battle between the states and the federal government over a legislative prerogative."[7] In his words, these cases represent a "zero-sum game—in which one, or the other law-making power must fall."[8]

But the states themselves overwhelmingly disagree with Mr. Sutton's perspective on this critical point. In *United States v. Morrison*, for example, thirty-six states advocated in favor of the federal Violence Against Women Act. Only one state, Alabama, represented by Mr. Sutton, advocated against federal authority. In the environmental arena, nine northeastern states recently sued the Bush Administration for not being aggressive enough about enforcing the provisions of the Clean Air Act. These states clearly do not share Mr. Sutton's view that an exercise of federal authority is "invariably" an encroachment into state legislative prerogative. Instead, states, by and large, recognize that a federal role is critical in combating national issues such as environmental degradation.

In urging courts to strike down federal laws, Mr. Sutton has repeatedly asserted that he is advancing a "neutral principle" that "says nothing about what particular policies should be adopted."[9] But his positions would invalidate innumerable federal minimum protections that now have the force of law in every state in the nation. Even if every state responded by passing legislation addressing the problem (an enormously unlikely proposition), the states would inevitably create a patchwork of protections that would be less effective than the existing federal programs. While states and local governments play an invaluable role in addressing

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Conservative Judicial Activism and the Environment: An Assessment of the Threat, 32 ENVT'L L. REP. 10835 (2002).

[5] Mr. Sutton argued before the Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997), *Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001), *Alexander v. Sandoval*, 532 U.S. 275 (2001), and *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000), and filed briefs in favor of the states' rights position in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), *United States v. Morrison*, 529 U.S. 598 (2000), and *Buckhannon v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598 (2001).

[6] *See, e.g.*, Federalism Revived? The Printz and City of Boerne Decisions, Oct. 17, 1997, *available at* www.fed-soc.org/Publications/practicegroupnewsletters/federalism/fd020103.htm. *See also*, Brief of Amicus Curiae the State of Alabama at *14, *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (No. 99-1178), *available at* 2000 WL 1052159 (hereinafter "SWANCC Brief").

[7] Federalism Revived? The Printz and City of Boerne Decisions, *supra* note 6.

[8] *Id.*

[9] *Id.*

problems such as environmental degradation, in the wise words of Justice Oliver Wendell Holmes from 80 years ago, "it is not sufficient to rely on the States."[10]

Undermining Commerce Clause Authority to Protect the Environment

A good example of Mr. Sutton's disturbing views on the federal power to protect the environment comes from the brief[11] that Mr. Sutton filed in the U.S. Supreme Court in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*. In *SWANCC*, he expressed the view that the Constitution's Commerce Clause does not grant the federal government authority to prevent destruction of waters and wetlands that serve as critical habitat for migratory birds.[12] Despite the paramount federal interests in protecting migratory birds, Mr. Sutton characterized these topics as "uniquely a matter of local oversight."[13]

Congress has rooted most of this nation's federal environmental protections in its authority under the Commerce Clause of the Constitution, which grants Congress the right to "regulate commerce among the several states." The reason is simple. Pollution and environmental degradation are external costs of many land uses and manufacturing processes. These external costs are frequently borne by residents outside of the state in which the pollution or degradation originates. Even wholly intrastate pollution can have significant impacts on interstate commerce, for example, where the despoliation of a lake or river reduces tourism dollars spent by out-of-state vacationers. For decades, the courts have recognized that the Commerce Clause authorizes Congress to regulate such intrastate activities that have a significant effect on interstate commerce.[14] Indeed, between 1937 and 1995, the Supreme

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[10] *Missouri v. Holland*, 252 U.S. 416, 435 (1920).

[11] *See* SWANCC Brief, 2000 WL 1052159. Reports confirm that Mr. Sutton's litigating positions parallel his personal views. *See* Tony Mauro, *The Limbo Bar*, AMERICAN LAWYER, October 2001 ("Sutton developed a specialty of arguing the states' rights side of federalism cases before the Supreme Court. He also happens to believe in that point of view . . ."); Tony Mauro, *An Unlikely High Court Specialist*, LEGAL TIMES, Nov. 2, 1998 (quoting Mr. Sutton, "I love these issues. I believe in this federalism stuff."). In most of the cases cited in this memorandum, Mr. Sutton has appeared as counsel of record for an amicus or "friend of the court," frequently the State of Alabama, a position that gives an advocate considerable flexibility in expressing his own views before the U.S. Supreme Court and lower federal courts. Finally, Mr. Sutton has been an officer of the Federalist Society's Separation of Powers and Federalism practice group and he has personally adopted many of the positions that he has taken in his briefs in articles written for Society publications and speeches delivered to the Society. In one of these speeches he actually reprimanded state and local governments for opposing his positions regarding the reach of federal authority, demanding that they "develop a little more courage when it comes to litigating these structural issues." *See, e.g.*, Federalism Revived? The Prinz and City of Boerne Decisions, *supra* note 6.

[12] 531 U.S. 159 (2001). The Court in *SWANCC* ultimately interpreted the Clean Water Act narrowly to avoid the Commerce Clause question discussed in Mr. Sutton's brief. *See SWANCC*, 531 U.S. at 173.

[13] *SWANCC* Brief, 2000 WL 1052159 at *12.

[14] *See, e.g., Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (intrastate activity "may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . . ."); *United States v. Darby*, 312 U.S. 100, 118 (1941) (rejecting a Commerce Clause challenge to the Fair Labor Standards Act because Congress's Commerce Clause power "extends to those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end . . . .").

Court did not invalidate a single federal statute as being outside the scope of the Commerce Clause.

Since 1995, the Court's 5-to-4 rulings in *United States v. Lopez*[15] and *United States v. Morrison*[16] struck down portions of two federal laws that it deemed beyond Congress's Commerce Clause authority. These are deeply divisive rulings that have been roundly criticized. They are also, however, narrow in an important manner: in both cases, the Court stressed that the regulated activity (handgun possession in *Lopez* and violence against women in *Morrison*) was not economic in nature and fell within traditional state police powers. As a result, *Lopez* and *Morrison* do not necessarily pose much of a threat to environmental safeguards, because environmental laws focus on harms resulting from commercial activity.

The "Migratory Bird Rule" in *SWANCC* is a good example. The rule protects intrastate water bodies and wetland areas that provide important habitat to migratory birds. Protecting migratory birds is quintessentially a task for the federal government. As Justice Holmes declared for the Supreme Court in 1920, the protection of migratory birds is a "national interest of very nearly the first magnitude."[17] Justice Holmes explained that the federal government must provide protection because action by the states individually would be ineffectual:

> *[Migratory birds] can be protected only by national action in concert with that of another power. The subject matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States.*[18]

The activity regulated in *SWANCC* was plainly economic in nature. The sewer authority wanted to fill more than 200 ponds and small lakes in order to build a large municipal landfill that would accept trash from a large portion of Illinois' Cook County.[19] This is typical: filling of waters and wetlands virtually always is undertaken for commercial purposes.[20] The birds themselves also generate a considerable amount of economic activity. More than 120 bird species had been seen at these ponds and lakes, and the waters served as a large breeding ground for great blue herons. The commercial value of migratory birds is manifest: each year millions of people spend more than a billion dollars in commerce on recreational pursuits

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[15] 514 U.S. 549 (1995).
[16] 529 U.S. 598 (2000).
[17] *Missouri v. Holland*, 252 U.S. 416, 435 (1920).
[18] *Id.*
[19] The Rehnquist Supreme Court has repeatedly held that trash is an object of commerce, *see, e.g., C&A Carbone, Inc. v. Town of Clarkson, New York*, 511 U.S. 383 (1994), and has repeatedly struck down local efforts to regulate the flow of trash. *Id.*
[20] *SWANCC*, 531 U.S. at 192-93 (Stevens, J., with whom Souter, Ginsburg, & Breyer, JJ., join, dissenting).

related to migratory birds.[21] These birds also protect crops and forests by feeding on insects that would otherwise damage these commercial enterprises. [22]

The Migratory Bird Rule, in other words, was plainly distinguishable from laws struck down in *Morrison* and *Lopez*. Mr. Sutton, however, could see no distinction. Mr. Sutton characterized the federal government's "interstate justifications for asserting power" as "bird watching and hunting" and dismissed these interests as "non-economic in nature."[23] Where Justice Holmes saw in 1920 a "national interest of very nearly the first magnitude," Mr. Sutton saw in 2000 an "an area that is uniquely a matter of local oversight."[24] Where Holmes saw protections of migratory birds as necessary to save "the protectors of our forests and our crops," Mr. Sutton saw a federal law designed to allow "bird watchers and hunters to pursue their hobbies."[25]

Mr. Sutton's Commerce Clause analysis in *SWANCC* mirrors the reasoning applied by District Judge Brevard Hand in his decision in *United States v. Olin Corp.*,[26] which struck down key provisions of the federal Superfund toxic-waste cleanup law. In *Olin*, Judge Hand ruled that because the site was no longer active, the cleanup of the site was essentially a local real estate matter, not "economic activity."[27] Because "the law regulating real property has been traditionally a local matter," Judge Hand declared that Congress under the Commerce Clause could not regulate such activities.[28]

Judge Hand's view was rejected by other courts[29] and was quickly reversed on appeal.[30] It indicates, however, the breadth of the threat that judicial activism poses to federal environmental safeguards and the danger presented by nominees such as Jeffrey Sutton. After all, if regulation of waste disposal operations (at issue in both *Olin* and *SWANCC*) does not fall within the scope of the Commerce Clause, then a wide array of environmental protections would also fall outside the Clause.

Eleventh Amendment and Ex Parte Young: Ensuring State Compliance with Federal Environmental Mandates

Environmental statutes are textbook examples of cooperative federalism. Almost every major environmental law authorizes state environmental agencies to implement federal environment programs in their state. For these programs to work, states must be held

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[21] *SWANCC*, 531 U.S. at 173.
[22] *Missouri v. Holland*, 252 U.S. at 431.
[23] SWANCC Brief, 2000 WL 1052159 at *4.
[24] *Id.* at *12.
[25] *Id.*
[26] 927 F. Supp. 1502 (S.D. Ala. 1996).
[27] *Id.* at 1532-1533.
[28] *Id.* at 1533.
[29] *See Nova Chemicals, Inc. v. GAF Corp.*, 945 F. Supp. 1098 (E.D. Tenn. 1996); *U.S. v. NL Indus., Inc.*, 936 F. Supp. 545 (S.D. Ill. 1996).
[30] *United States v. Olin Corp.*, 107 F.3d 1506 (11th Cir. 1997).

accountable for ensuring the minimum environmental standards mandated by federal law. To ensure this accountability, many environmental laws have citizen suit provisions that permit citizens to sue states in federal court when state agencies fail to implement federal mandates.

Activist interpretations of the Constitution's Eleventh Amendment are undermining state accountability under federal environmental laws and thus the federal/state partnerships at the center of these critical statutes. The Eleventh Amendment's plain language prevents a federal court only from hearing a suit brought against a state by a citizen of *another* state or another country.[31] The Court, however, has ruled that the amendment applies to suits brought by a state's own citizens, effectively extracting the word "another" from the amendment. In 1996, in a 5-4 ruling in *Seminole Tribe of Florida v. Florida,* the Supreme Court overruled a landmark case called *Pennsylvania v. Union Gas*,[32] and held that the Commerce Clause – the basis for most environmental legislation – could not be used to abrogate state immunity. Thus, the Court made it impossible for citizens to ensure that states are held financially responsible for their contributions to hazardous waste sites that must be cleaned up under the Superfund law.

Effective, enforceable, cooperative federalism in environmental laws remains viable after *Seminole Tribe* because of the Supreme Court's 1908 ruling in *Ex Parte Young,* which permits suits to enjoin state officials from violating federal law even where the Eleventh Amendment would bar a suit against the state seeking money damages.[33] *Ex Parte Young* thus constitutes an essential linchpin of our nation's federal environmental laws: without it, almost every environmental statute would have to be re-written, or retained in a much less effective form.

Jeffrey Sutton has been a leading advocate for expanding Eleventh Amendment immunity from suit and limiting the reach of *Ex Parte Young*. Most remarkably, in a brief that he filed in *Westside Mothers v. Haveman*,[34] Mr. Sutton took the unequivocal position that federal statutes passed under the Constitution's Spending Clause[35] "create a contract between the Federal Government, which has offered the State federal funding in exchange for compliance with certain conditions, and the State, which has agreed to these conditions by accepting the proffered funds."[36] "States" in Sutton's view, "are bound only by the

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[31] U.S. CONST. amend. XI. The Amendment states simply: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

[32] 490 U.S. 1 (1989), *overruled by Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

[33] 209 U.S. 123 (1908).

[34] 133 F. Supp. 2d 549, *rev'd* 289 F.3d 852 (2002), *cert. denied*, 123 S. Ct. 618 (2002).

[35] U.S. Const. Art. 1, § 8 (providing the power to tax and spend for the "general welfare"). In *United States v. Butler*, 297 U.S. 1 (1936), the Court rejected Madison's view and held that the "power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." *Id.* at 66.

[36] Brief of Amicus Curiae Michigan Municipal League at 2, *Westside Mothers v. Haveman*, 133 F. Supp. 2d 549 (2001) (No. 99-73442).

unambiguously expressed terms of such Spending Clause contracts."[37] Because Spending Clause legislation merely creates contracts, according to Mr. Sutton, these mandates cannot be enforced under *Ex Parte Young*.[38] The District Court adopted Mr. Sutton's novel views on both of these points.[39]

A Sixth Circuit panel that included Judge Danny Boggs, the court's most prominent conservative, unanimously and pointedly overruled the district court in *Westside Mothers*. With regard to Mr. Sutton's argument about Spending Clause legislation creating only a contract, the Circuit Court concluded that "[b]inding precedent has put the issue to rest."[40] The court also made short shrift of Mr. Sutton's views on *Ex Parte Young*, declaring: "Medicaid is not merely a contract, but a federal statute. This suit seeks only to compel state officials to follow federal law,"[41] and thus may be enforced under *Ex Parte Young*.

While the views Mr. Sutton expressed in *Westside Mothers* about the Spending Clause and *Ex Parte Young* have now been thoroughly rejected by the Sixth Circuit, similar views on *Ex Parte Young* suits have recently been adopted by courts in two critical environmental cases. In the past 18-months, the Third and Fourth Circuits have ruled that citizens could not enjoin Pennsylvania[42] or West Virginia[43] under *Ex Parte Young* for non-compliance with the essential mandates of the federal Surface Mining Control and Reclamation Act (SMCRA). In *Bragg v. West Virginia Coal Association*, for example, the Fourth Circuit reversed a district court ruling which held that state officials had violated SMCRA by permitting one of the most environmentally-destructive practices imaginable: mountaintop removal coal mining that buries and destroys valleys, rivers, and streams. The Fourth Circuit bypassed *Ex Parte Young* by declaring that in states that have an approved program to administer SMCRA, the federal minimum standards "drop out" and a claimant's only cause of action is under state law, which cannot be enforced under *Ex Parte Young*.[44]

The argument made by Mr. Sutton in *Westside Mothers* directly parallels the argument adopted by the courts in *Bragg* and *Hess*: both arguments limit the category of federal rights that can be enforced under *Ex Parte Young*. If anything, Mr. Sutton's argument in *Westside*

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[37] *Id.*

[38] *See* Reply Brief of Amicus Curiae Michigan Municipal League at 7, *Westside Mothers v. Haveman*, 133 F. Supp. 2d 549 (2001) ("*Ex Parte Young* explicitly approved the holding and rationale of *In re Ayers*, 123 U.S. 443 (1887), distinguishing that case as involving 'an attempt to make the state itself, through its officers, perform its alleged contract, by directing those officers to do acts which constituted such performance' and recognizing that it properly denied relief because '[t]he State alone had any interest in question, and a decree in favor of plaintiff would affect the treasury of the state'"). In other words, Mr. Sutton argued that because Spending Clause legislation created a federal/state contract, such legislation could not be enforced under *Ex Parte Young*. The District Court adopted Mr. Sutton's argument on this point. *See Westside Mothers v. Haveman*, 133 F. Supp. 2d at 562.

[39] *See* 133 F. Supp. at 561-62, 574-575.

[40] 289 F.3d at 858.

[41] *Id.* at 861.

[42] *Pennsylvania Fed'n of Sportsmen's Clubs, Inc. v. Hess*, 297 F.3d 310 (3d Cir. 2002).

[43] *Bragg v. West Virginia Coal Ass'n*, 248 F.3d 275 (4th Cir. 2001), *cert. denied*, 122 S. Ct. 920 (2002).

[44] *See Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981).

Mothers is more extreme than the one accepted in *Bragg* and *Hess,* because, as the Sixth Circuit explained, Mr. Sutton's argument in *Westside Mothers* was ruled out by binding Supreme Court precedent. There is every reason to believe that, if confirmed, Mr. Sutton would interpret *Ex Parte Young* in a way that undermines enforcement of a host of federal environmental statutes.[45]

Eviscerating Private Actions for Environmental Injustice

Mr. Sutton has been a leading advocate for aggressively limiting private causes of action against states, including the private cause of action that permits vindication of claims of environmental injustice.

Mr. Sutton served as counsel of record for the state of Alabama in *Alexander v. Sandoval*[46] and successfully convinced the Supreme Court to find that there is no private cause of action to enforce disparate impact regulations promulgated under Title VI of the Civil Rights Act–regulations that form the primary source of rights to ensure environmental justice.[47] By a 5-to-4 vote, the Court, through Justice Scalia, ruled that the well-established private cause of action to enforce § 601 of the Civil Rights Act[48] did not extend to disparate impact regulations promulgated under § 602 of Title VI.[49]

The *Sandoval* decision by itself is enormously controversial.[50] But our concern is not primarily that Mr. Sutton advocated for this result. Our most significant concern is that the

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[45] As explained above, Mr. Sutton believes that cases challenging federal constitutional authority are "invariably a battle between the states and the federal government over legislative prerogative." *See supra* text accompanying note 7.

[46] 532 U.S. 275 (2001).

[47] See discussion of the *South Camden* case below.

[48] This cause of action under Title VI was originally implied by the Court but has subsequently been recognized and expanded by Congress.

[49] § 602 authorizes federal agencies "to effectuate the provisions of [§ 601] * * * by issuing rules, regulations, or orders of general applicability" (42 U.S.C. 2000d-1). DOJ promulgated a regulation forbidding funding recipients to "utilize criteria or methods of administration which have the effect of subjecting individual to discrimination because of their race, color or national origin..." (28 C.F.R. § 42.104(b)(2) (1999). *See Buckhannon*, 532 U.S. at 278.

[50] The *Sandoval* decision effectively overruled a line of earlier Supreme Court rulings that had, at the very least, presumed that § 602 regulations could be privately enforced. Interpreting these Supreme Court rulings, ten federal circuit courts had addressed the question of whether there was a private cause of action to enforce regulations validly promulgated under Title VI and every one of these courts had concluded that such a right existed. As Justice Stevens notes in dissent: "This Court has already considered the question presented today and concluded that a private right of action exists." 532 U.S. at 295 (Stevens, J., dissenting). Stare decisis alone demanded that the *Sandoval* plaintiffs prevail. Justice Stevens ends his *Sandoval* dissent with a stinging critique of the majority's activism in denying the *Sandoval* class a day in court:

> The question the Court answers today was only an open question in the most technical sense. Given the prevailing consensus in the Courts of Appeals, the Court should have declined to take this case. Having granted certiorari, the Court should have answered the question differently by simply according respect to our prior decisions. But most importantly, even if it were to ignore

position Mr. Sutton staked out in his briefs on behalf of Alabama is considerably more extreme than the position ultimately adopted by the Supreme Court.

The *Sandoval* decision left open the question of whether victims of disparate impact discrimination could enforce § 602 regulations under 28 U.S.C. § 1983.[51] In dissent, Justice Stevens thus raised the question of whether *Sandoval* was simply "something of a sport" and suggested that "litigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference § 1983 to obtain this relief."[52] The *Sandoval* majority never responded to this assertion by the dissent.

Mr. Sutton's position would have eliminated this alternative avenue for seeking relief and left victims of environmental injustice and other forms of disparate impact discrimination without any means of obtaining redress. Indeed, Mr. Sutton argued that where the federal government acts within its Spending Clause authority, a state must "express[] unequivocally that it waives its immunity," in order to be subject to suit in federal court.[53] This waiver by the states must be "altogether voluntary" and cannot be assumed even if Congress expresses "unequivocally its intention that if the state takes certain action it shall be deemed to have waived that immunity."[54] In his brief in the *Westside Mothers* case, Mr. Sutton was even more sweeping, asserting that states can never be sued under § 1983 for federal mandates imposed in legislation passed under the Spending Clause.[55] This is an extremely broad position that would have required the Supreme Court to overrule a host of well-established precedent.

The implications of Mr. Sutton's views on claims for environmental injustice are illustrated by the split decision of the Third Circuit in *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*[56] holding that § 602 regulations could not be enforced under 28 U.S.C. § 1983. The *South Camden* case wiped off the books a significant environmental justice victory achieved by activists in New Jersey and leaves victims of environmental injustice in the Third Circuit without a reliable avenue for asserting these claims in court.

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all of our post-1964 writing, the Court should have answered the question differently on the merits.

532 U.S. at 317 (Stevens, J., dissenting).

[51] Section 1983 provides a cause of action against "every person who, under color of any statute * * * causes * * * the deprivation of any rights, privileges or immunities secured by the Constitution and laws." 42 U.S. § 1983. As the D.C. Circuit has explained, Section 1983 "allows private parties to enforce federal laws against a special class of defendants – state and municipal actors – in much the same way that implied rights of action permit private enforcement of federal statutory obligations against any party, public or private." *Samuels v. District of Columbia*, 770 F.2d 184, 194 (D.C. Cir. 1985).

[52] *Sandoval*, 532 U.S. at 300 (Stevens, J., dissenting).

[53] Petitioners' Reply Brief at *6, *Alexander v. Sandoval*, 532 U.S. 275 (2001), *available at* 2000 WL 1911423.

[54] *Id.*

[55] Reply Brief of Amicus Curiae Michigan Municipal League at 1, *Westside Mothers v. Haveman*, 133 F. Supp. 2d 549 (2001) (No. 99-73442) ("42 U.S.C. § 1983 should not be interpreted to support private actions to enforce Spending Clause legislation.").

[56] 274 F.3d 771 (3d Cir. 2001).

Eliminating Attorneys' Fees for Prevailing Plaintiffs

A powerful innovation of modern environmental law is the authority Congress granted to citizens to ensure that these laws are carried out by regulatory agencies and obeyed by polluters. Concerned that agencies would be "captured" by regulated industries, Congress authorized suits against the government to force compliance with congressional mandates. Anticipating that enforcement budgets could be slashed, Congress enacted citizen-suit provisions deputizing citizens to act as "private attorneys general" to force polluters to comply with federal mandates. To ensure that these private attorneys general have the resources necessary to prosecute polluters, Congress ensured that "prevailing" environmental plaintiffs would be able to obtain reasonable attorneys fees from their adversaries.

Mr. Sutton has also taken the position that plaintiffs should not be allowed attorneys' fees under laws authorizing such fees for "prevailing parties" when, in response to a lawsuit, a polluting company does precisely what a plaintiff is requesting in the lawsuit.[57] Sadly, this position was adopted by the Supreme Court with regard to an important statute in a 5-4 ruling in *Buckhannon v. West Virginia Department of Health and Human Resources* that undermines Congress's intent "to place private actions, * * * securely within the federal law enforcement arsenal."[58]

Buckhannon involved what is known as the "catalyst" rule, under which an environmental claimant is deemed to have "prevailed" within the meaning of fee shifting provisions when a defendant responded to the filing of a lawsuit by voluntarily changing its conduct. Under the catalyst rule "aggrieved individuals were not left to worry, and wrongdoers were not led to believe, that strategic maneuvers by defendants might succeed in averting a fee award."[59] While never endorsed specifically by the Supreme Court, the catalyst rule was deeply ingrained in the fabric of our nation's environmental and civil rights laws. Prior to 1994, every single court of appeals (with the exception of the Federal Circuit, which never had the opportunity to address the issue) had unanimously endorsed the catalyst rule.[60] So had Congress; both the Senate and House Reports for the 1976 Civil Rights Attorney's Fees Awards Act unambiguously endorse fee awards even where no formal relief is obtained.[61]

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[57] Brief of Amici Curiae Los Angeles County and California State Association of Counties, *Buckhannon v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598 (2001), *available at* 2000 WL 1873811 (hereinafter "*Buckhannon* Brief").

[58] *Buckhannon v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 634 (2001) (Ginsburg, J., dissenting).

[59] *Id.* at 636 n.10 (Ginsburg, J., dissenting).

[60] *See id.* at 602 n.3 (cases cited by the majority); *S-1 & S-2 v. State Bd. of Ed. of North Carolina*, 21 F.3d 49 (4th Cir. 1994) (en banc).

[61] *Buckhannon*, 532 U.S. at 637 (Ginsburg, J., dissenting) (citing S. REP. No. 94-1011 at 5 (1976) ("For purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief."); H.R. REP. No. 94-1558 at 7 (1976) ("A court should still award fees, even though it might conclude...no formal relief...is needed.")).

The first challenge to the rule came in 1994, when the Fourth Circuit – the most conservative court in the country – voted 6-to-5 along purely ideological lines to jettison the catalyst rule.[62] The Fourth Circuit's ruling caused other circuits to look again at the catalyst rule. Nine courts of appeals revisited the issue and each one rejected the Fourth Circuit's ruling and reaffirmed the catalyst rule.[63]

In the face of this precedent, Mr. Sutton's brief was mostly devoted to policy. He argued that fee-shifting is a bad idea because it reverses the "historic presumption against shifting responsibility for attorney fees,"[64] but this was precisely Congress's intent in enacting fee shifting provisions. He argued that the catalyst rule forces "lower courts into utterly speculative debates over why parties voluntarily dismiss cases or voluntarily change their conduct after cases are filed"[65] but ignores that lower courts had been applying the catalyst rule for more than a decade with few recorded problems. Finally, Mr. Sutton argued that the plain meaning of the term "prevailing" precluded recovery when a claimant merely caused a change in behavior,[66] but he failed entirely to explain why appellate judges overwhelmingly concluded that the term "prevailing" was at least ambiguous in this regard.

Justice Ginsburg's stinging dissent to Chief Justice Rehnquist's majority opinion is equally forceful in response to Mr. Sutton's brief:

> The Court states that the term "prevailing party" in fee-shifting statutes has an "accepted meaning." If that is so, the "accepted meaning" is not the one the Court today announces.
>
> * * *
>
> When this Court rejects the considered judgment prevailing in the Circuits, respect for our colleagues demands a cogent explanation. Today's decision does not provide one. The Court's narrow construction of the words "prevailing party" is unsupported by precedent and unaided by history or logic. Congress prescribed fee-shifting provisions * * * to encourage private enforcement of laws designed to advance civil rights. Fidelity to that purpose calls for court-awarded fees when a private party's lawsuit, whether or not its settlement is registered in court, vindicates rights Congress sought to secure.[67]

Comments on Judicial Temperament

A disturbing aspect of the briefs discussed in this memorandum is Mr. Sutton's tendency to cavalierly disregard precedent that is unfavorable to his position and his willingness to instruct judges to ignore precedent in order to rule in his favor. One example is Mr. Sutton's brief in *Buckhannon*, where he blithely asserted that "precedent confirms" his

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[62] *S-1 & S-2 v. State Bd. of Ed. of North Carolina*, 21 F.3d 49 (4th Cir. 1994) (en banc).
[63] *Buckhannon*, 532 U.S. at 627 (Ginsburg, J., dissenting).
[64] *Buckhannon* Brief, *supra* note 57, at *3.
[65] *Id.* at *6.
[66] *Id.* at *5-6.
[67] 532 U.S. at 643-44 (Ginsburg J., dissenting) (citations omitted).

interpretation of attorneys fees statutes, even though at least nine courts of appeals cases, not cited by Mr. Sutton, had rejected his reading.

Even more telling are the district court briefs Mr. Sutton filed in *Westside Mothers*. In Mr. Sutton's opening brief, he confidently and unequivocally stated that federal rights created under the Spending Clause differ from federal rights created under other Constitutional grants of authority and that only the latter category of rights can be enforced through § 1983. But *Maine v. Thiboutot,* the landmark ruling that established that federal statutory rights could be enforced through § 1983 actions, involved rights established under the Social Security Act, a Spending Clause statute.[68] Mr. Sutton's failed entirely to mention this major problem with his theory in his opening brief and had to admit, rather sheepishly, in his reply brief that he was "aware that *Thiboutot* itself, as well as several of its progeny, arose in the context of Spending Clause legislation."[69]

Mr. Sutton's then argued that because the Court in *Thiboutot* and subsequent cases had "assumed but not squarely decided" the enforceability of Spending Clause mandates under § 1983, the question was an open one. He advised the district court not to "be overly concerned whether its decision can be reconciled with the facts – as opposed to the rationale – of *Thiboutot* and its progeny."[70]

Similarly, Sutton argued unequivocally in *Westside Mothers* that Spending Clause legislation creates a federal/state contract despite a 1985 Supreme Court ruling in *Bennett v. Kentucky Department of Education* that declared that Spending Clause legislation was "[u]nlike normal contractual undertakings" because they "originate in and remain governed by statutory provisions expressing the judgment of Congress concerning desirable public policy."[71] Mr. Sutton never cited *Bennett* in his brief and, perhaps as a result, the district court adopted his position. The Sixth Circuit, reversed, finding that "binding precedent has put the issue to rest."[72] The Supreme Court denied review in *Westside Mothers* and, in June 2002, Justice Scalia reaffirmed *Bennett,* stating "we have been careful not to imply that all contract-law rules apply to spending clause legislation, *see, e.g., Bennett v. Kentucky Dep't of Ed.* 470 U.S. 656, 669 (1985)").[73]

Even as a matter of advocacy, Mr. Sutton's *Westside Mothers* briefs push the envelope: ethical rules obligate lawyers to inform a court of binding precedent that contradicts their positions.

More important for present purposes, Mr. Sutton's *Westside Mothers* briefs provide a disturbing window into his views on the authority of a lower court judge regarding Supreme Court precedent. Mr. Sutton first ignored *Maine v. Thiboutot,* a Supreme Court decision that

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[68] 448 U.S. 1 (1980).
[69] Reply brief at 2, *Westside Mothers, supra* note 55.
[70] Reply brief at 5, *Westside Mothers, supra* note 55.
[71] *Bennett v. Kentucky Dep't of Ed.*, 470 U.S. 656, 669 (1985).
[72] *Westside Mothers,* 289 F.3d at 858.
[73] *Barnes v. Gorman,* 122 S. Ct. 2097, 2101 (2002).

was factually indistinguishable and directly in opposition to his position, and then instructed the district court not to be "overly concerned" with the ruling because the Supreme Court had backed away from other aspects of *Thiboutot* in subsequent cases. But backing away from binding Supreme Court precedent is the job of the Supreme Court, not a district judge. Mr. Sutton's *Westside Mothers* briefs call into serious question his willingness to follow precedent and his understanding of the role and power of lower court judges in our federal judicial system.

Conclusion

Jeffrey Sutton is one of the nation's leading and most extreme proponents of a judicial activism that is advancing an anti-environmental policy agenda from the federal bench. His aggrandized view of the authority of lower court judges indicates that he would feel little compulsion to follow precedent that runs contrary to his personal ideology. Mr. Sutton's nomination to the Sixth Circuit Court of Appeals thus poses a significant threat to the enforcement of our nation's core environmental protections.

EVERYBODY COUNTS CENTER FOR INDEPENDENT LIVING
ECCIL "Equals" Systemic Change and Personal Empowerment for People with Disabilities
9111 Broadway • Suite A • Broadfield Center • Merrillville, IN 46410
VOICE 219/769-5055 TTY 219/756-3323 (D-E-A-F) FAX 219/769-5325 TOLL FREE 888/769-3636

January 22, 2003

The Honorable Orrin G. Hatch, Chairman
Senate Judiciary Committee
Dirksen Senate Office Building, Room 224
Washington, DC 20510

Dear Chairman Hatch:

This letter is written on behalf of the board, staff and constituency of Everybody Counts, a Center for Independent Living serving the Northwest region of the state of Indiana.

We write to urge you not to confirm Jeffrey Sutton to the Sixth U.S. Circuit Court of Appeals.

Mr. Sutton's efforts to limit Congressional authority in the area of disability rights has undermined your role in championing the Americans with Disabilities Act (ADA) and other laws expanding opportunities for the more than 50 million children and adults with disabilities and their families in the United States.

He successfully argued in the case of the University of Alabama v. Garrett that Congress did not have the authority under the Constitution to apply the ADA to States in employment discrimination suits for damages. In the case of Olmstead v. L.C. he argued that unnecessary institutionalization should not be considered a violation of the ADA. Although the Supreme Court declined to follow his lead in that case, it is clear that Mr. Sutton's positions in these and other cases represent a view of Congress's authority under the Equal Protection Clause, Spending Clause, and Commerce Clause that would dramatically restrict your ability to pass laws protecting the rights of Americans with disabilities, older workers, and others under the Constitution.

Mr. Chairman, you have been a long-time supporter of federal civil rights for Americans with disabilities. Working with Senators Dole, Kennedy, Harkin and others, you helped build the voluminous record of egregious discrimination that persuaded your colleagues to overwhelmingly support the ADA when it was enacted in 1990. In defense of that record, you filed an amicus brief in the Garrett case supporting the constitutionality of the ADA as applied to State employers.

Why, then, confirm someone to a lifetime appointment to a federal appeals court whose view of the Constitution will erect new barriers for Americans with disabilities seeking to assert their rights in federal court?

Since President Bush nominated Jeffrey Sutton in the last Congress, AAPD has joined literally hundreds of non-partisan national, state and local disability organizations to oppose his appointment, including many from his home

State of Ohio. It is unprecedented for our community to speak out so loudly in opposition to a judicial nominee, and we do so because we are convinced that his extreme views represent a real threat to our civil rights.

Please honor your commitment to a strong ADA and refrain from confirming Mr. Sutton to a federal judgeship. Please listen to the strong protests of your constituents with disabilities and confirm candidates who understand the importance of Congress's ability to remedy this nation's abysmal history of exclusion, segregation, sterilization, institutionalization and impoverishment of its citizens with disabilities.

Mr. Sutton's defenders have argued that his positions in Garrett, Olmstead, and other cases do not necessarily reflect his views, but that as a former Solicitor for the State of Ohio he was merely robustly asserting a defense of State immunity under the 11th Amendment of the Constitution. But if Mr. Sutton's view of State immunity under the ADA is the necessary position for a State attorney general to assert, why in the Garrett case was his position on behalf of the University of Alabama opposed by a bipartisan group of 14 State attorneys general, and supported by only six in addition to Alabama? As the amicus brief on behalf of 14 states in Garrett explained in reference to the ADA, "to eradicate the effects of the extensively documented, long-term, pervasive and invidious discrimination against people with disabilities, it is critical that the States be leaders in facilitating this duly enacted Section 5 legislation."

Mr. Chairman, we need your leadership to help us stem a tide of activist court decisions that are weakening the Constitutional underpinnings of disability rights laws and threatening your ability as a United States Senator to enact legislation establishing the full range of remedies to address discrimination on the basis of disability. Having ridden that tide to national prominence, Jeffrey Sutton does not deserve your support.

Sincerely yours,

Teresa L. Torres

Teresa L. Torres, Executive Director
Everybody Counts Center for Independent Living

cc: The Honorable Patrick J. Leahy, Ranking Member
Senate Judiciary Committee Members

11501 Mayfield Road Apt. 902
Cleveland, OH 44106

May 21, 2001

The Honorable Senator Mike DeWine
Member of the Senate Judiciary Committee
140 Russell Senate Building
Washington, DC 20510

Dear Senator DeWine

A few weeks ago my sister called to tell me that President Bush nominated Jeff Sutton to serve on the Sixth Circuit Court of Appeals. I was thrilled to hear the news.

While working as Solicitor General for the State of Ohio, Jeff represented me in a lawsuit the Ohio Civil Rights Commission brought against Case Western Reserve University on my behalf. I sought but was denied admission to the Case Western medical school. I alleged then, as I continue to believe now, that the school denied my application for one impermissible reason: I'm blind. The Ohio Civil Rights Commission agreed with me. After a thorough investigation, the Commission determined that I was otherwise qualified for admission and that the school could make reasonable accommodations to enable me to pursue training to become a psychiatrist.

The case worked its way through the Ohio courts and ultimately landed in the Ohio Supreme Court. It was at this point that I first met Jeff Sutton. Working for the State, Jeff took my case on, firmly convinced I had been wronged. I recall with much pride just how committed Jeff was to my cause. He believed in my position. He cared and listened and wanted badly to win for me. I recall well sitting in the courtroom of the Ohio Supreme Court listening to Jeff present my case. It was then that I realized just how fortunate I was to have a lawyer of Jeff's caliber so devoted to working for me and the countless of others with both similar disabilities and dreams.

Although I ultimately fell short in the courts, Jeff Sutton stood firm by my side. My experience confirmed what President Bush understands: Our nation would be greatly served with Jeff Sutton on the federal bench.

Sincerely yours,

Cheryl A. Fischer

From: Ann Ford <annford@incil.org>
Date: 7/12/01 5:12:30 PM
To: senator_leahy@leahy.senate.gov, tom_daschle@daschle.senate.gov, dick@durbin.senate.gov, peter_fitzgerald@fitzgerald.senate.gov
Subject: nomination of Jeffrey Sutton

I would like to express my extreme opposition to the Nomination of Jeffrey Sutton to the 6th Circuit Court of Appeals. While Mr. Sutton might have some qualifications for this position, his very biased position on the Americans with Disabilities Act and people with disabilities would clearly prevent him from giving fair consideration to cases brought before him related to the ADA. Mr. Sutton's comments to the Supreme Court that "disability discrimination, in a constitutional sense, is really difficult to show" and "There are legitimate reasons for treating the competent differently from the incompetent" are frightening and insulting.

I have been disabled since I had polio at age 5. I have faced real discrimination for the past 50 years, from being told I would not be considered for employment because of my disability (in pre-ADA days) to not being able to use the buildings and public services my tax dollars help support. Since 1962 I have been a taxpayer and a voter. I would be willing to match my competence against any of my non-disabled peers. I have, by the way, never been denied the right to pay taxes because of my disability.

Mr. Sutton brings a prejudice that has perpetuated the barriers to full inclusion of people with disabilities throughout our history. He should not sit in a position where he can destroy the lives of people with disabilities with decisions based on that prejudice.

Please use your influence to see to it that people are appointed to appeals court positions whose personal prejudices will not guide their decisions.

Thank you for your consideration.

Ann Ford
Springfield, Illinois

Vicki Forman
4528 Daleridge Road
La Canada, CA 91011
Tel: (818) 952-4061
Fax: (818) 952-4091
Cell: (818) 414-0457
vickikamida@earthlink.net

January 27, 2003
The Honorable Orrin G. Hatch
Chairman
Senate Judiciary Committee
Dirksen Senate Office Building, Room 224
Washington, D.C. 20510

Dear Chairman Hatch:

I'm writing in support of Andrew J. Imparato, President and CEO American Association of People with Disabilities, and his position against the nomination of Jeffrey Sutton to the Sixth U.S. Circuit Court of Appeals.

Joseph Shapiro's book, "No Pity," makes clear your key involvement in and support of the Americans with Disabilities Act. From what I understand, Jeffrey Sutton has worked hard to limit Congressional authority that is so key to the ongoing success of the ADA.

As the mother of a young child with multiple disabilities, I find myself working hard every day to find equality and inclusion for my child. It's my hope that my son Evan will grow up into a world where neither the color of his skin nor the limitations in his abilities control his chance to be a successful member of society. But we need to protect federal civil rights to allow Evan's life—and the lives of all children and adults with disabilities—to be all that it should be.

Please vote against Jeffrey Sutton's nomination.

Sincerely yours,

Vicki Forman

The Freedom Center

THE FREEDOM CENTER, INC

Rose Hill Plaza, Unit A-20
1560 Opossumtown Pike
Frederick, MD 21702

301-846-7811
301-846-9070 (fax)
TTY: 711

"Empowering people with disabilities to lead self-directed, independent, and productive lives in a barrier-free community"

Jamey E. George,
Executive Director

Board of Directors:

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Treasurer

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Secretary

Cari Watrous

Gloria Clinton

Marty Qually

Don Miller

Patrick McMurtray

January 10, 2003

Dear Senator Leahy and Senator Hatch:

I am an Executive Director for The Freedom Center, a Center for Independent Living in Frederick, MD. We serve people with disabilities of all ages and disabilities in the Frederick and Carroll County region. Our mission is to empower people with disabilities to lead self-directed, independent, and productive lives in a barrier-free community. Our services and supports include systems and individual advocacy, information and referral, peer counseling, and independent living skills training. We promote the removal of physical and attitudinal barriers to enhance the quality of life for individuals with disabilities and to ensure fully integrated communities in which people with disabilities are able to have the same opportunities to live the American Dream in their own homes just like everyone else.

I find it disappointing to hear of President Bush's decision to nominate Jeffrey Sutton to the Court of Appeals for the Sixth Circuit Court. If he is confirmed, he will become a Federal Judge with a lifetime appointment with one step away from being appointed to the Supreme Court Justice. It is so wrong to appoint an individual who is biased against civil rights. He has in many occasions demonstrated his lack of understanding and care for individuals with disabilities. To name a couple, he has stated that the Americans with Disabilities Act is unconstitutional. He testified in opposition to Patricia Garrett's right to work without being discriminated against. He testified in opposition to L.C. and E.W. in the Olmstead case. He basically testified against their right to live in the most integrated setting of their choosing as it states in the ADA. Mr. Sutton is known for purposely looking for ADA cases so he can testify against it. He has struck against Medicaid, IDEA, Section 504, etc. People with Disabilities are people, too, and have the right to be treated as human beings. It is their right to be included in the mainstream of the American Society. It is my opinion, and I represent many who feel the same, that it is morally wrong to appoint Jeffrey Sutton to the status of Federal Judge when he harbors many biases against people with disabilities. It is my opinion that he will never be capable of making a judicial decision that serves Justice for All. Our constitution was written to give us freedom and with him as a Judge, all freedoms will be lost. We oppose the nomination of Jeffrey Sutton. It is our hope that President Bush will rescind his nomination. If it is not rescinded, it is my hope that people with disabilities are not stripped of their civil rights with the confirmation of Jeffrey Sutton's nomination. Thank you for your time and consideration in this urgent matter.

Sincerely,

Jamey George
Executive Director

PUBLIC INTEREST LAW
CENTER OF PHILADELPHIA

125 South Ninth Street • Suite 700 • Philadelphia, PA 19107 • Phone: 215-627-7100 • Fax: 215-627-3183

Michael Churchill
Chief Counsel

Jerome Balter
Thomas K. Gilhool
Judith A. Gran
Barbara E. Ransom
Attorneys

Margaret C. Colon
Development Coordinator

David Smith
Chairman of the Board

Edwin D. Wolf
Executive Director 1974-1976

May 17, 2002

VIA REGULAR MAIL AND FAX 202-224-9516
Bruce Cohen
Senator Judiciary Committee
224 Dirkson Senate Office Building
Washington, D.C. 20510

Dear Bruce:

I 'm Ron's lawyer whom you tried mighty to help overrule Sandoval —something we must return to when we can.

If, as is said at the telephone task force meetings of the Civil Rights Leadership Conference, your committee is planning hearings on Anti-Federalism, may I encourage you to bring Akil Amar, Yale Law School, and Carlos Vazquez, Georgetown Law Center, and Pamela Karlos, Stanford to testify and San Beer if he's able —his 1993 To Make a Nation: the Rediscovery of American Federalism remains the very best statement of who won the original time around (not the Anti-Federalists, of whom the misnamed Federalist Society is the current imitators), why they won, and what it means. If Beer is not available you may wish to consider Steve Elkin, U. of Md. Center on Democracy, editor of the journal "Political Economy for the Good Society.

But I write today for a different reason, in re Jeffrey Sutton. I argued Westside Mothers against him in the district court in Michigan. He took a bye in the Sixth Circuit —the attached Nina Totenberg report (no element of which has been denied as far as I know by Jeffrey, the Governor or district court Judge Cleland) may have been a reason—but Jennifer Clarke and I did argue there along with the U.S,, on our side (and amici from Drew Days, the Catholic Hospital Association and virtually all national non-profit health care associations). We won Wednesday, unanimously, Judge Merritt, Judge Boggs, Judge Moore each a widely respected adherent a differing shade of current judicial opinion. (Cf. today's Wall Street Journal " Sixth Circuitry" editorial; also I attach todays PH. Legal Intelligencer front page.) The unanimous Court reversed on all counts the positions that Jeffrey Sutton led district Judge Cleland to take. I enclose the Opinion; and the Opinion late last week of the Fourth Circuit —by Judge Neimeyer, like Judge Boggs a very bright, very conservative judge. I enclosed a piece of the S.G.'s brief in Gonzaz, in which he does a devastating job on the Sutton-Cleland position. I

Affiliated with the Lawyers Committee for Civil Rights Under Law

hope these may be useful to you in subjecting Sutton's nomination to appropriate scrutiny and defeat. If you would like to read the transcripts of argument. I would be glad to put them together.

Do read Ron's deposition in Sanchez. It is one of the best I've ever witnessed.

Best Wishes.

Very truly yours,

Tom

Thomas K. Gilhool

TKG/ldb

cc: Ron Cohen, Esquire

P.S. The South Camden people whom I understand were the hit of the press conference last week on the anniversary of certain judicial nominees are clients of ours. Yes, we do have the best clients going. My partner, Jerry Balter, who at the request of one of your colleagues arranged for them to be there but in the end couldn't go himself would otherwise have stopped in to say hello to you.

C:\OFFICE\WORK\Tom\brucecohenletter051702.wpd



GENDER JUSTICE
ACTION GROUP
At the Unitarian Universalist
Community Church
70 Sycamore Drive
Park Forest, IL 60466
708/748-5339
fax: 708/481-1716
Email: uuccpfil@aol.com

WOMEN'S COORDINATOR
Pam Godbout
708/481-9019
abercat@earthlink.net

MEN'S COORDINATOR
Dave Matteson
708/672-0807
d-matteson@govst.edu

GLBT COORDINATOR
Heather Godbout
708/757-3954
teachped5@aol.com

August 8, 2001

Senator Patrick Leahy, Chair
Senate Judiciary Committee
433 Russell Senate Office Building
Washington, DC 20510

Dear Senator Leahy:

We are writing to you to urge you to vigorously oppose the nomination of judges to the federal courts of appeal who would work to weaken or even eliminate basic rights of women, African Americans and homosexuals.

Fully half of the 18 nominees Governor Bush has announced have records that clearly indicate their disdain for women's right and for civil rights. We urge you to fight for the principles and values we share as progressives. Please help defeat the nominations of the judges listed below (attached is a brief record of each nominee):

- Terrence Boyle
- Patricia Cook
- Carolyn B. Kuhl
- Michael W. McConnell
- Pricilla Owen
- John G. Roberts
- Lavenski R. Smith
- Jeffrey S. Sutton
- Timothy M. Tymkovich

Thank you for your tireless efforts to oppose the radically conservative Bush agenda. Please help keep the courts a place where the wealthy and privileged can be held accountable for their exploitations. Defeat these nominees!

Thank you,

Pam Godbout
Women's Coordinator
and members of the
Gender Justice Action Group

Heath M. Godbout
Patricia C. Segner
Rosalie R. Cramer
Valerie Dirk
Beverly A. Feldt

Terrence Boyle, 4th Judicial District (North Carolina)

- Ruled against African American and for whites in 2 voting rights cases. Both cases were reversed on appeal
- Ruled against women in a Title VII sex discrimination case. This case was also reversed on appeal

Patricia Cook, 6th Judicial District (Ohio)

- Was endorsed by the Ohio Right to Life organization in her last election
- Voted against equalizing funding for Ohio public schools

Carolyn B. Kuhl, 9th Judicial District (California)

- Signed on to a brief urging the overrule of *Roe v. Wade*
- Argued in favor of a domestic gag rule
- Supported tax exempt status for Bob Jones University

Michael W. McConnell, 10th Judicial District (Utah)

- Signed statement called for overrule of *Roe v. Wade*
- Represented the Boy Scouts in their effort to remove a gay scout master

Pricilla Owen, 5th Judicial District (Texas)

- Voted to narrow and eliminate buffer zones around a group of Texas abortion clinics
- Has consistently voted against minors trying to use the judicial bypass provision of Texas' parental notification requirement

John G. Roberts, DC Judicial District (Washington, DC)

- Signed a brief urging that *Roe v. Wade* be overturned
- Argued against affirmative action for federal contractors
- Argued that abortion providers were not protected by civil rights law

Lavenski R. Smith, 8th Judicial District (Arkansas)

- Argued against Arkansas public hospitals providing abortions
- Accepted money from anti-abortion PAC

Jeffrey S. Sutton, 6th Judicial District (Ohio)

- Argued against the Americans with Disabilities Act applying to states
- Argued against the ADEA applying to states
- Argued against provision of the Violence Against Women Act that allowed women to sue their attackers in federal court
- Argued against private right of action for civil rights laws

Timothy M. Tymkovich, 10th Judicial District (Colorado)

- If favor of Amendment 2 to the Colorado Constitution which would ban local laws prohibiting discrimination against homosexuals

Mr. Michael Godino
1064 Alhambra Road
Baldwin, NY 11510
Phone: 516-623-7427
E-mail: mikeg125@wroldnet.att.net

January 20, 2003

United States Senate
Committee on the Judiciary
224 Dirksen Senate Building
Washington, DC 20510

Honorable Senators:

When the ADA was signed in 1990 the nation's leaders pledged to level the playing field for people with disabilities. To confirm Jeffery Sutton into the 6th Circuit Court would be setting the United States back thirteen years for people with disabilities. Thus, I write to you in opposition of the Jeffery Sutton nomination to the Sixth Circuit Court.

Mr. Sutton has provided adequate justification for me to infer his position apposing the ADA in his quest to abolish all Civil Rights for people of this great nation. Mr. Sutton assisted the Supreme Court in reaching their decision to refuse to acknowledge the ADA in the Alabama vs. Garrett case. Additionally, Mr. Sutton worked to have two peoples right to live freely denied in what has come to be known as the Olmsted decision. Fortunately, the decision came out on the side opposite of Sutton; however, in the Sansaval vs. Arkansas, Ms. Sansaval was not so lucky. Sutton fought against and convinced the Supreme Court that the language a person speaks has no grounds in an English only state. By convincing the Supreme Court via the argument that the state has upheld their own constitution and the US Supreme Court has no relevance in changing their law.

This country was founded on the values of all the people not only some of the people. The ADA came to be as people with disabilities fought for its passage during 1990. Mr. Sutton has taken it upon himself to oppose the ADA and all other Civil Rights that were hard fought by our nation's greatest heroes, such as Rosa Parks, Martin Luther King Jr., Justin Dart and others. We the people do **NOT** want Jeffery Sutton to have the platform to reverse the decisions put forth as a matter of law by the people.

Through the statements made herein and your staff investigation, I believe you will find sufficient evidence to conclude that Jeffery Sutton should not be confirmed as a sixth Circuit Court justice.

Thank you in advance for your attention in this matter

Sincerely,

Michael Godino

123 Nelson Ave. North
Piscataway, NJ 08854
Tel: 732-463-9058
Jan. 27, 2003

Senator Patrick Leahy
433 Russel Senate Office Building
Washington, DC 20510

Dear Senator Leahy:

I am passionately concerned with maintaining the civil rights of those who are disabled, elderly, of different races and of women, to name but a few.

I have a pressing matter to bring before you concerning the recent nomination of Mr. Jeffrey Sutton to serve on the U.S. Court of Appeals for the Sixth Circuit. President Bush nominated him, despite the fact that he has declared that, "Everyday our nation was segregated was a day that America was unfaithful to our founding ideals . . . " Nonetheless, President Bush still nominated Jeffrey Sutton, who is adamantly opposed to the civil rights of Americans with disabilities. Mr. Sutton has been a leader in the effort to limit Congressional Power to enact laws protecting civil rights of all those in need of them. Sutton has prevailed in a series of 5—4 cases before the Supreme Court, all of which have resulted in negative outcomes for people with disabilities. Furthermore, Sutton believes that the protection of the Americans with Disabilities Act (ADA) is "not needed" to remedy discrimination by states against people with disabilities.

A further assault on those least able to help themselves occurred, when Sutton filed a brief before the Supreme Court in Olmstead vs LC arguing that unnecessarily keeping people with disabilities in institutions against their will was not discrimination. Those of us in the community of disabled, elderly, women and people of color, to name just a few, are outraged by beliefs such as these. Jeffrey Sutton has admitted that he is often "on the lookout" for cases where he can litigate for any group that supports his hostility toward Federal Civil Rights Protections. Worse yet, he has strongly advocated going far beyond the Court's 5—4 majority to further restrict Congress's Power to protect civil rights.

Many people have fought and died for their civil rights. Revisiting the Civil War and the ongoing fight for civil rights throughout our history are sharp reminders of the terrible cost of gaining and maintaining civil rights. This emphasis on every person's right to participate fully in our society is what makes our nation unique, and in so doing makes our nation the greatest in the world.

Thus, I strongly urge you and any like-minded Senators to vote against the confirmation of Jeffrey Sutton to the Sixth Circuit Court of Appeals.

Sincerely,

Dr. Patricia Grant

NANCY GRIM
Attorney at Law
237 East Main Street
Kent, Ohio 44240-2526

330-678-6595
Fax 330-678-6517
ngrim@mindspring.com

January 23, 2003

Senator Patrick Leahy
Fax 202-224-3479

Re: Nominees for Sixth Circuit Court of Appeals

Dear Senator Leahy:

As a citizen of Ohio and an attorney who practices in the state and federal courts, primarily in employment law, I urge you to oppose the confirmation of Deborah Cook and Jeffrey S. Sutton for the Sixth Circuit Court of Appeals.

I have had particularly close opportunities to observe Deborah Cook, who hails from Akron, and served on the local court of appeals before she was elected to the Ohio Supreme Court.

Although **Justice Deborah Cook** couches her decisions in the form of judicious rationality, she has shown a consistent determination to mold the law to serve corporate interests at the expense of ordinary people.

Justice Cook's record shows that she is insensitive to bigotry. Cook insisted that even overt racist, sexist and ageist statements are irrelevant in a discrimination case simply because the target of discrimination was not personally named. *Byrnes v. LCI Communications Holdings Co.* (1996). She has *never* voted to unconditionally affirm a plaintiff's civil rights verdict. Even where evidence of discrimination is abundant, Cook consistently votes against plaintiffs' civil rights verdicts. For example, *Gliner v. Saint Gobain Norton Industrial Ceramics Corp.* (2000). In an astounding decision, Justice Cook ruled that medical schools could refuse to admit blind applicants, ignoring testimony from a successful blind physician about readily available accommodations. *Ohio Civil Rights Comm'n v. Case Western Reserve University* (1996).

Justice Cook has refused to protect the safety of workers, and has sought to minimize protection for whistleblowers. She has denied remedies to workers who suffered catastrophic injuries, and voted (in dissent) to uphold legislation which permitted employers to put their employees in situations where it is substantially certain that employees would suffer serious injuries or death. *Johnson v. BP Chemicals* (1999). Justice Cook has consistently written opinions which would limit remedies for employees who try to prevent dangerous or illegal practices by employers. *Kulch v. Structural Fibers, Inc.* (1997). She has condoned employer deceit. Unlike her six fellow justices, Cook voted to dismiss an action filed against an employer for concealing and destroying evidence and giving untruthful testimony. *Davis v. Wal-Mart Stores, Inc.* (2001). (Notably, 6th Circuit nominee Jeffrey Sutton represented the employer in this case.) Cook wanted to dismiss the case of an employee with a fatal lung disease caused by beryllium, based on late filing, even though the delay in filing was caused by the employer's lying about the presence of beryllium in the workplace. *Norgard v. Brush Wellman, Inc.* (2002). (Sutton represented this employer as well.)

Jeffrey S. Sutton has consistently advocated to limit the protections for working people. As noted above, he urged the Ohio Supreme Court to reward employers who deceive workers about dangerous chemicals. *Davis v. Wal-Mart Stores, Inc.* (2001); *Norgard v. Brush Wellman, Inc.* (2002). He has attacked the Americans

with Disabilities Act, arguing that its protections are not needed to remedy discrimination by states against people with disabilities. *Board of Trustees of the University of Alabama v. Garrett* (2001).

Sutton has fought to limit protections against discrimination. Sutton successfully argued that disparate impact regulations promulgated under Title VI of the Civil Rights Act of 1964 did not contain a private right of action for victims of race discrimination. *Alexander v. Sandoval* (2001). He has argued that states should not be covered by the ADEA. *Kimel v. Florida Board of Regents* (2000).

Sutton argued to ignore precedent in order to restrict the rights of Medicaid recipients. Sutton argued that Congress cannot authorize individuals to sue states to enforce their rights, even in connection with federal funding of state programs. According to Sutton, the Medicaid law and other Spending Clause laws, such as the Rehabilitation Act and the Individuals with Disabilities Education Act, are not supreme federal law. This argument runs counter to over sixty-five years of Spending Clause jurisprudence. *Westside Mothers v. Haveman* (2001).

He argued to allow states to institutionalize people with disabilities. Sutton unsuccessfully argued that states have no duty under the ADA to provide services for people with disabilities in integrated settings, and claimed that keeping people with disabilities in institutions was not a form of discrimination. *Olmstead v. L.C.* (1999).

Nor are these simply the arguments of a skilled advocate. Jeffrey Sutton is an active member of the conservative Federalist Society. His writings indicate that his positions as an attorney in court correspond to his personal beliefs.

Judges should be fair, impartial and sensitive and enforce the letter and spirit of our laws. These two nominees lack these qualities. I urge you to oppose these nominations, to ensure that fair judges are appointed to the federal bench!

Very truly,

Nancy Grim

NANCY GRIM

CARYN GROEDEL & ASSOCIATES LPA CO.

3681 Green Road
Suite 410
Cleveland, OH 44122

Phone: (216) 831-7077
Fax: (216) 831-2135
email: cgroedel@aol.com

The Honorable Patrick Leahy
United States Senate
Fax: 202-224-3479

I am an employment attorney who strongly opposes the nomination of Ohio Supreme Court Justice Deborah Cook and Jeffrey Sutton to the Sixth Circuit Court of Appeals.

Justice Cook's record on the Ohio Bench illustrates a hostile attitude towards workers and civil rights litigants. She mostly sides with corporate interests and is an opponent of employees' rights.

Mr. Sutton is also hostile towards employee rights, which was evidenced by his successfully arguing a case in which the U.S. Supreme Court ruled 5-4 that employees of state governments cannot sue for discrimination under the Americans with Disabilities Act.

The Sixth Circuit is currently filled with, for the most part, well balanced judges. The nominations of Cook and/or Sutton would severely disturb the current makeup of the court. Justice Cook and Mr. Sutton are not simply right leaning judges—they are conservative zealots whose personal beliefs would overshadow their obligation to fairly administer justice.

I strongly urge the Senate Judiciary Committee to deny the nominations of Mr. Sutton and Ms. Cook.

Very truly yours,

Caryn M. Groedel

Caryn M. Groedel, Attorney at Law
3681 Green Road,
Cleveland, Ohio 44122
Cgroedel@aol.com

Joseph L. Guagliano
20 Timberline Trail
Pawling, New York 12564
845-855-3321

The Honorable President George W. Bush
The White House
1600 Pennsylvania Avenue NW
Washington, D.C. 20500
To Fax # 202-456-2461

January 13, 2002

Dear President Bush,

I am a disability rights advocate from White Plains, New York. I also suffer from a disability. I know first hand how much of a struggle it is for myself and for consumers who come to my center seeking assistance. The Americans with Disabilities Act (ADA) is a special law because it protects the rights of the disabled. The ADA attempts to level the playing field for people with disabilities so that they can fully participate in the mainstream of American life.

I am writing to express my opposition to the nomination of Jeffrey Sutton to the US Circuit Court of Appeals for the 6th Circuit. Jeffrey Sutton has actively worked to undermine the ADA on the grounds of state sovereignty, he opposes Olmstead implementation and Jeffrey Sutton claims that Medicaid beneficiaries have no private right of action against states to enforce their rights under Medicaid. Jeffrey Sutton's opposition to the ADA and his opposition to disability rights and civil rights is troubling to me and I respectfully suggest that your administration could choose a candidate to fill the vacancy in the 6th Circuit Court of Appeals.

CC: Troy Justesen
ADA Watch

Joseph L. Guagliano

News Release
JUDICIARY COMMITTEE
United States Senate • Senator Orrin Hatch, Chairman

January 29, 2003 Contact: Margarita Tapia, 202/224-5225

Statement of Senator Orrin G. Hatch, Chairman
Before the United States Senate Committee on the Judiciary
on the Nominations of

Deborah Cook for the U.S. Court of Appeals for the Sixth Circuit
John Roberts for the U.S. Court of Appeals for the D.C. Circuit
Jeffrey Sutton for the U.S. Court of Appeals for the Sixth Circuit
John Adams for the District Court for the Northern District of Ohio
Robert Junell for the District Court for the Western District of Texas
S. James Otero for the District Court of the Central District of California

I am pleased to welcome you all to the Committee's first judicial confirmation hearing of the 108th Congress. I first would like to acknowledge and thank Sen. Leahy for his service as Chairman of the Committee over the past 16 months. I also would like to extend a particular welcome to Senator Bob Dole, our former Majority Leader, and to Commissioner Russell Redenbaugh, the three-term U.S. Civil Rights Commissioner who also happens to be the first disabled American to serve on that Commission. It means a great deal to me that they are both here today to support Mr. Jeff Sutton's nomination. And of course, I would also like to express my deep appreciation for the Members we have here who have taken time to come and present their views on the qualifications of our witnesses today.

Our first panel features three outstanding circuit nominees who were nominated on May 9, 2001, whose hearing was originally noticed for May 23, 2001. I agreed to postpone that hearing for one week at the request of some of my Democratic colleagues who claimed to need the additional week to assess the nominees' qualifications. As we all know, control of the Senate and the Committee shifted to the Democrats shortly thereafter, on June 5, 2001, and these nominees have been languishing in Committee without a hearing ever since. So I am particularly pleased to pick up where we left off in May 2001 by holding our first confirmation hearing for the same three nominees we noticed back then, Justice Deborah Cook, Jeffery Sutton, and John Roberts. It is with great pleasure that I welcome these distinguished guests before the Committee this morning. We also have three very impressive district court nominees with us today: John Adams for the Northern District of Ohio, Robert Junell for the Western District of Texas and S. James Otero for the Central District of California. I will reserve my remarks about these district court nominees until I call their panel forward.

Our first nominee is Ohio Supreme Court Justice Deborah Cook, who has established a distinguished record as both a litigator and a jurist. Justice Cook began her legal career in 1976 as a law clerk for the firm now known as Roderick Linton, which is Akron's oldest law firm. Upon her graduation from the University of Akron School of Law in 1978, Justice Cook became the first woman hired by the firm. In 1983, she became the first female partner in the firm's century of existence. I am proud to have her before us as a nominee who knows first hand the difficulties and challenges that professional women face in breaking the glass ceiling.

During her approximately fifteen years in the private sector, Justice Cook had a large and diverse civil litigation practice. She represented both plaintiffs and defendants at trial and on appeal in cases involving, for example, labor law, insurance claims, commercial litigation, torts, and ERISA claims.

In 1991, Justice Cook left the private sector after winning election to serve as a judge on the Ninth Ohio District Court of Appeals. During her four years on the Ninth District bench, she participated in deciding over one thousand appeals. The Ohio Supreme Court reversed only six of the opinions that she authored, and eight of the opinions in which she joined. In 1994, Justice Cook was elected to serve as a justice on the Ohio Supreme Court. She therefore brings to the federal bench more than ten years of appellate judicial experience, which was built on a foundation of fifteen years of solid and diverse litigation experience. There can be little doubt that she is eminently qualified to be a Sixth Circuit jurist, and I commend President Bush on his selection of her for this post.

Our next nominee is Jeff Sutton, one of the most respected appellate advocates in the country today. He has argued over 45 appeals for a diversity of clients in federal and state courts across the country, including a remarkable number, 12 to be exact, before the U.S. Supreme Court. His remarkable skill and pleasant demeanor have won him not only a lot of decisions, but also a wide variety of prominent supporters, including Seth Waxman, President Clinton's Solicitor General; Benson Wolman, the former head of the Ohio ACLU; Bonnie Campbell, a Clinton nominee to the Eighth Circuit Court of Appeals; Civil Rights Commissioner Redenbaugh, the first disabled American to serve on the U.S. Civil Rights Commission, and former Senate Majority Leader Bob Dole, who is among the country's most powerful advocates on behalf of disabled Americans.

I feel it necessary for me to comment briefly on some of the recent criticisms we have heard. Of course, to no one familiar with the nominations process' surprise, our usual gang of fringe Washington leftist lobbyists are opposing Republican nominees. Well, their opposition of Jeff Sutton is for all the wrong reasons. But, as people who know me well will attest, I have always been willing to acknowledge a fair point made by the opposition. So in keeping with that principle, I want everyone to know that I found something commendable in the so-called report published by one of these groups about Jeff Sutton. That report conceded that, "No one has seriously contended that Sutton is personally biased against people with disabilities." That is a very important point – and should be obvious since Jeff Sutton has a well-known record of fighting for the legal rights of disabled people. And he was raised in an environment of concern

for the disabled; his father ran a school for people affected by cerebral palsy.

Since the opposition to Jeff Sutton is not personal, then what is it? It seems to come down to a public policy disagreement about some Supreme Court decisions relating to the limits to federal power when Congress seeks to regulate state governments. Those cases include *City of Boerne*, *Kimel*, and *Garrett*, among others. But in those cases, it was Jeff's job, as the chief appellate lawyer for the State of Ohio, and as a lawyer, to defend his clients' legal interests. As the American Bar Association ethics rules make clear, "[a] lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."

Now I don't think anyone on this Committee would actually consider voting against a nominee out of dislike for the nominee's clients. We had an important discussion about clients in connection with the confirmation of Marsha Berzon, now a judge on the Ninth Circuit – who was born in Ohio, by the way – and this Committee ultimately decided not to hold her responsible for her clients' views. Judge Berzon had been a long-time member of the ACLU, serving on the board of directors and as the vice president of the Northern California branch. She testified that:

> "[I]f I am confirmed as a judge, not only will the ACLU's positions be irrelevant but the positions of my former clients and, indeed, my own positions on any policy matters will be quite irrelevant and I will be required to and I commit to look at the statute, the constitutional provisions, and the precedents only in deciding the case." [July 30, 1998]

I want to remind my colleagues that that answer sufficed for Judge Berzon, and she was approved by this Committee with my support and confirmed by the Senate. I think we all agree that anybody involved in a legal dispute has a right to hire a good lawyer – even if that person is guilty of murder. And Jeff's clients are not murderers; they are state governments, defending their legal rights. So let's not beat up on Mr. Sutton just because he worked for the State of Ohio.

Of course, I am not suggesting that Committee Members must praise the effects of the Supreme Court's rulings in *City of Boerne*, *Kimel* and *Garrett*. Those decisions affected real people and undid some hard work on the part of Congress. I should know – I did a lot of that work. I put a great deal of time and energy into drafting and passing the Religious Freedom Restoration Act, the Americans with Disabilities Act, and other laws that have been declared beyond federal power, including the Violence Against Women Act. I thought those laws would be good for the country, and they still are. It was not easy to see them limited or struck down. Of course, I understand the powerful constitutional principles underpinning the Supreme Court's decisions, but I can sympathize with those who see things differently. I have no sympathy, however, for the notion that those Supreme Court decisions and the positions of the states who were Mr. Sutton's clients are somehow a legitimate reason to oppose Jeff Sutton's nomination.

So – since even the People for the American Way concedes that Jeff Sutton harbors no

personal bias, and since Mr. Sutton cannot be held responsible for the Supreme Court's decisions, and since we all agree that Ohio and Alabama and Florida have the right to representation in court, then I do not see any real reason to oppose this highly skilled and highly qualified lawyer. I do look forward to his testimony and would only urge my colleagues and observers to keep an open mind. From the record I have observed so far, I am convinced that Jeff Sutton will be a great judge, and one who understands the proper role of a judge.

Our final circuit nominee today is Mr. John Roberts, who has been nominated for a seat on the D.C. Circuit Court of Appeals. He is widely considered to be one of the premiere appellate litigators of his generation. Most lawyers are held in high esteem if they have had the privilege of arguing *one* case before the U.S. Supreme Court. Mr. Roberts has argued an astounding *39* cases before the Supreme Court. It is truly an honor to have such an accomplished litigator before this Committee.

The high esteem in which Mr. Roberts is held is reflected in a letter the Committee recently received urging his confirmation. This letter, which I will submit for the record, was signed by more than 150 members of the D.C. Bar, including such well-respected attorneys as Lloyd Cutler, who was White House Counsel to both Presidents Carter and Clinton; Boyden Gray, who was White House Counsel to the first President Bush; and Seth Waxman, who was President Clinton's Solicitor General. The letter states, "Although, as individuals, we reflect a wide spectrum of political party affiliation and ideology, we are united in our belief that John Roberts will be an outstanding federal court of appeals judge and should be confirmed by the United States Senate. He is one of the very best and most highly respected appellate lawyers in the nation, with a deserved reputation as a brilliant writer and oral advocate. He is also a wonderful professional colleague both because of his enormous skills and because of his unquestioned integrity and fair-mindedness." This is high praise from a group of lawyers who themselves have excelled in their profession, who are not easily impressed, and who would not recklessly put their reputations on the line by issuing such a sterling endorsement if they were not 100% convinced that John Roberts will be a fair judge who will follow the law regardless of his personal beliefs.

Let me say a brief word about Mr. Roberts's background. He graduated from Harvard College, *summa cum laude*, in 1976, and received his law degree, *magna cum laude*, in 1979 from the Harvard Law School, where he was managing editor of the Harvard Law Review. Following graduation he served as a law clerk for Second Circuit Judge Henry J. Friendly, and for then-Justice William Rehnquist of the Supreme Court. From 1982 to 1986, Roberts served as Associate Counsel to the President in the White House Counsel's Office. From 1989 to 1993, he served as the Principal Deputy Solicitor General at the U.S. Department of Justice. He now heads the appellate practice group at the prestigious D.C. law firm Hogan & Hartson. And he has received the ABA's highest rating of unanimously Well Qualified.

I must say that this panel represents the best of the best, and I commend President Bush for seeking out such nominees of the highest caliber.

# # #

hip hip hip hip hip hip hip

January 27, 2003

Fax To: 202- 224- 9102
Pages: 4

For:
Senator Orrin Hatch, Chairperson, Judiciary Committee
and all members of the Judiciary Committee:
Senator Grassley, Senator Specter, Senator Kyl, Senator DeWine, Senator Sessions, Senator Graham, Senator Craig, Senator Chambliss, Senator Cornyn, Senator Leahy, Senator Kennedy, Senator Biden, Senator Kohl, Senator Feinstein, Senator Feingold, Senator Schumer, Senator Durbin, and Senator Edwards.

Our agency Heightened Independence and Progress (***hip***), an agency that provides information and services for people with disabilities, is extremely concerned about the renomination of Jeffrey Sutton for a lifetime seat on the 6th Circuit Court of Appeals.

Jeffrey Sutton has clearly taken positions against providing effective remedies under federal law for disadvantaged persons in our society. He has stated that he does not feel that keeping people with disabilities unnecessarily in institutions is a form of discrimination and that states have no duty under the ADA to serve individuals in integrated settings. He has taken the position that people with disabilities should not be allowed to enforce regulations under Section 504 and Title II of the ADA requiring reasonable accommodations and integration of individuals with disabilities. Sutton's arguments in advancing the Federalist agenda have been used by others in many cases that threaten the years of effort by Congress, previous presidents, people with and without disabilities to ensure that we wipe out society-wide discrimination against people with disabilities in such vital areas as employment, housing, transportation and public accommodations.

Appeals of cases that relate to these issues will be brought to the 9th Circuit Court of Appeals and it seems clear to us that Jeffrey Sutton has clearly established an unacceptable and biased position relating to these issues. I am enclosing 3 pages of a petition signed by 35 registered voters that **OPPOSE** the nomination of Jeffrey Sutton to a seat on the 9th Circuit Court of Appeals. **We urge you to do all you can to *prevent his nomination* and, if he is nominated, to *vote NO to his appointment*.**

Sincerely,

Nancy Hodgins
Community Advocate
Fax: 201-996-9422

heightened independence & progress
A Center for Independent Living for People with Disabilities
WEBSITE: www.hipcil.org
131 MAIN ST., SUITE 120, HACKENSACK, NJ 07601 201-996-9100 FAX 201-996-9422 TDD 201-996-9424 E-MAIL: ber@hipcil.org
HUDSON BRANCH - 2815 KENNEDY BLVD., SUITE 2G, JERSEY CITY, NJ 07306 201- 413-1200 FAX 201- 413-0520 TDD 201-413-0521 E-MAIL: hud@hipcil.org
Heightened Independence and Progress, Inc. is not in any way affiliated with the Visiting Nurse Association Plan of Greater New York, nor of New Jersey, nor its merit offices.

From: Sue Hetrick <shetrick@abilitycenter.org>

Date: 7/2/01 11:24:14 AM

To: webpage@feingold.senate.gov, senator@kennedy.senate.gov, senator_leahy@leahy.senate.gov

Subject: Sutton Nomination/6th District Court

Senators,
As an Ohioan, as a parent of a child with disabilities and
as a professional advocate for people with disabilities I am actively
opposing the nomination of Jeffrey Sutton as 6th District Court Judge. Ijoin many state and national organizations in doing so. Our opposition iscentered around Mr. Sutton's Federalist, State's Rights stance. We believethat his position threatens the civil rights of individuals with disabilities. While he appears to be a superior attorney, his commentsduring and following the Garrett case were disturbing.
I am interested in your perspective on Mr.Sutton's nomination and how hisposition might affect people with disabilities in federal court. I lookforward to your reply either via phone at 419-885-5733, via fax at
419-882-4813 or email shetrick@abilitycenter.org.

Sincerely,
Susan Hetrick
Advocacy Director
The Ability Center of Greater Toledo

North Country
Independent Living

2231 Catlin Ave.
PO Box 1245
Superior, WI 54880-5137
(715) 392-9118 Voice/TTY
1-800-924-1220 Voice/TTY
(715) 392-4636 FAX

422 West 3rd Street
Suite 114
Ashland, WI 54806
(715) 682-5676 Voice/TTY
1-800-499-5676 Voice/TTY
(715) 682-3144 FAX

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January 24, 2003

Senate Judiciary Committee

Dear members of the Senate Judiciary Committee:

Please oppose the appointment of Solicitor Jeffrey Sutton to the 6th Circuit Court of Appeals. Judge Sutton has a long record of opposing disability rights for people with disabilities. We are especially concerned about future decisions by Judge Sutton if he is confirmed. The Americans With Disabilities Act (ADA) is one of the most important civil rights laws for people with disabilities. We are concerned that if Judge Sutton is confirmed, ADA could be further narrowed and this important civil rights legislation weakened.

We need the ADA and the recent Olmstead decisions to remain intact. Not so that we can be given things we don't deserve, but so that we can have equal opportunity to live as independently as our abilities allow.

As a professional and an individual with a life-long disability, I urge each of you to vote against the confirmation of Judge Sutton to the 6th Circuit Court of Appeals.

Sincerely,

Stewart Holman
Independent Living Specialist
Home Address:
420 East Third Street, #121
Washburn, WI 54891
Cc: Senator Feingold, Senator Kohl

SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

THE WASHINGTON HARBOUR
3000 K STREET, NW, SUITE 300
WASHINGTON, DC 20007-5116
TELEPHONE (202)424-7500
FACSIMILE (202) 424-7643
WWW.SWIDLAW.COM

LESTER S. HYMAN
SENIOR OF COUNSEL
DIRECT DIAL (202) 424-7509
LSHYMAN@SWIDLAW.COM

NEW YORK OFFICE
THE CHRYSLER BUILDING
405 LEXINGTON AVENUE
NEW YORK, NY 10174
(212) 973-0111 FAX (212) 891-9598

6 June 2001

Dear Pat –

Just a brief note to tell you that court nominee John Roberts is an old friend of mine and one of the finest lawyers in this country. His legal background and experience are impeccable.

Although John and I share differing political views on some subjects I can assure you that, as a judge, he will always respect the law and act in a responsible and measured way — never as a knee-jerk ideologue. I hope you'll find it possible to support John Roberts' nomination. Many thanks –

Les

Independence Now, Inc.
6811 Kenilworth Avenue / Suite 504 / Riverdale, MD 20737
Voice: 301-277-2839 / FAX: 301-277-4587
TDD for Disabled: Maryland Relay Service 711

The Honorable Orrin Hatch
United States Senator
104 Hart Senate Office Building
Washington, D.C. 20510

January 10, 2003

Dear Senator Hatch:

As the director of the center for independent living that serves people with disabilities in the Maryland suburban counties of Washington, DC, I am writing respectfully to urge you to oppose the re-nomination of Jeffrey Sutton to the U.S. Court of Appeals for the Sixth Circuit. Mr. Sutton unfortunately has chosen a path of judicial activism that demonstrates his complete disregard for and invalidates the civil rights of people with disabilities and racial minorities.

Mr. Sutton's arguments in the Board of Trustees v. Garrett case, Olmstead v. L..C. case and Westside Mothers v. Haveman are examples of his lack of regard for the civil rights of people with disabilities. Fortunately, his point of view did not prevail in all of these cases.

His record demonstrates that Mr. Sutton is not merely advancing his clients' interests. He apparently has sought out cases and created arguments designed to reverse over four decades of civil rights legislation, enacted with overwhelming bipartisan support. You and other members of Congress understood the impact that our country's long history of discrimination and segregation of people with disabilities has had in curtailing their achievement and preventing their full participation as citizens of our great nation. Congress enacted the Americans with Disabilities Act in an effort to correct the problems of isolation, lack of access to opportunities and high unemployment experienced by people with disabilities.

If Mr. Sutton's nomination is confirmed, it is highly probable that he will reverse many of the gains that people with disabilities have made since the enactment of the ADA. Mr. Sutton is not an appropriate candidate for a lifetime position on our nation's

second-highest federal court. I urge you to reject Mr. Sutton's nomination. Thank you for your careful consideration of these concerns.

Sincerely,

Catherine A. Raggio
Executive Director

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL
750 FIRST STREET NE SUITE 1100
WASHINGTON, DC 20002
(202) 326-6054
(202) 408-6999
http://www.naag.org

LYNNE M. ROSS
Executive Director

PRESIDENT
CARLA J. STOVALL
Attorney General of Kansas

PRESIDENT-ELECT
W.A. DREW EDMONDSON
Attorney General of Oklahoma

VICE PRESIDENT
BILL LOCKYER
Attorney General of California

IMMEDIATE PAST
PRESIDENT'S DESIGNEE
MIKE FISHER
Attorney General of Pennsylvania

July 31, 2001

The Honorable Thomas Daschle
Majority Leader
United States Senate
The Capitol, S-230
Washington, D.C. 20510

The Honorable Trent Lott
Senate Minority Leader
United States Senate
The Capitol, S-221
Washington, D.C. 20510

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Orrin Hatch
Ranking Member
Committee on the Judiciary
United States Senate
104 Hart Senate Office Building
Washington, D.C. 20510

Re Nomination of Jeffrey Sutton to the
United States Court of Appeals for the Sixth Circuit

Dear Senators

We, the undersigned individual state Attorneys General, are writing to urge your prompt and affirmative vote on confirmation of the nomination of Jeffrey Sutton to the United States Court of Appeals for the Sixth Circuit.

Mr. Sutton is an award-winning, highly-qualified attorney. Jeff Sutton's intelligence and qualifications are unquestioned, with a great deal of experience in commercial, constitutional and appellate litigation. He has argued nine cases in the United States Supreme Court, including *Hohn v. United States,* in which the Court invited Mr. Sutton's participation, and *Becker v. Montgomery,* in which he represented a prisoner's interests *pro bono*. He has argued twelve cases in the Ohio Supreme Court and seven cases in the federal courts of appeal. And, as the former Ohio State Solicitor, he has also handled countless cases in the state and federal courts. His career has been distinguished, and he has displayed a rare sense of principled fairness throughout it.

Jeff Sutton graduated first in his law school class, and clerked for two United States Supreme Court justices. It deserves note that Mr. Sutton has represented a wide range of clients. For example, he represented Cheryl Fischer, a blind woman, who claimed that Case Western University Medical School discriminated against her on basis of disability in denying her admission to medical school. He also is a board member of the Equal Justice Foundation, which provides legal representation to the indigent and has filed several class actions on behalf of the disabled. Beyond this, he has filed pro bono amicus briefs on behalf of the NAACP, the Anti-Defamation League and the Center for the Prevention of Handgun Violence.

Unfortunately, Mr. Sutton's exemplary record is being distorted by some critics, and as state Attorneys General, we are particularly concerned when we see a lawyer being attacked not for positions he advocated as a private individual, but for positions he argued as a legal advocate for State government. For example, some critics have claimed that Mr. Sutton is against the Americans with Disabilities Act because he argued that one provisions of the law overstepped States' rights (in the case of *Univ. of Alabama v. Garrett*). We do not wish here to debate the merits of that position; although we note that the Supreme Court agreed with that position. The important point here at issue is that Mr. Sutton argued that case as *a lawyer representing his client*. He was not advocating his personal views; rather, he was working to represent a public-sector client.

This distinction, between personal policy preferences and legal advocacy, is a crucial one, and we Attorneys General have a unique perspective on the importance of that distinction. We are legal advocates, sworn to uphold the interests of our clients, and while we also serve as policy advocates for our States, we often must adopt legal positions that do not match our personal beliefs.

As you know, all attorneys have an ethical duty to zealously represent their clients' interests within the bounds of the law, even where the lawyer may not personally share the client's views. This is especially true for public sector lawyers, because we are bound not only by the same ethical rules as all lawyers, but we are also bound by law to represent our legislatures, governors, and agencies. As Attorney General, each of us has worked to advocate legal positions that may not reflect our personal beliefs. Doing so may be difficult, but that is our job and our duty as lawyers and as public servants.

Just as we do this, so do the attorneys who work for us. They have often been faced with the challenge of espousing a position which might not match their own personal beliefs. While their abilities in representing their clients will surely be evaluated by the Senate whenever those government lawyers are nominated for federal judgeships, we urge you not to unnecessarily mistake their advocacy for personal belief. We all believe that everyone in America deserves legal representation no matter how unpopular his or her cause may seem. Lawyers will not be willing to take on such causes if they fear that their advocacy may later be used against them. The potential chilling effect could be enormous.

Indeed, as legislators, you have a great interest in seeing that government lawyers advocate the government's position and not their own. When Congress passes legislation, you have the right to expect that the United States Solicitor General and the entire Department of Justice will defend Congress's work. Individual federal lawyers cannot pick and choose whether to represent only the federal acts that they like. We expect the same of lawyers for the States.

We respectfully suggest that Mr. Sutton should not be criticized because he has been a vigorous and effective advocate. That has been his duty, and it is to his credit that he has discharged that duty well.

When you review Mr. Sutton s nomination, please look at his qualifications and his ability to understand and apply the law. Please do not assume that his past legal positions reflect his personal views. No lawyer would wish to be personally held to every position which, as an advocate, he or she was required to advance.

Sincerely,

Betty D. Montgomery
Ohio Attorney General

Attorney General Bill Pryor
Attorney General of Alabama

Attorney General M. Jane Brady
Attorney General of Delaware

Attorney General Robert A. Butterworth
Attorney General of Florida

Attorney General Earl Anzai
Attorney General of Hawaii

Attorney General Alan Lance
Attorney General of Idaho

Attorney General Steve Carter
Attorney General Indiana

Attorney General Carla J. Stovall
Attorney General of Kansas

Attorney General Richard P. Ieyoub
Attorney General of Louisiana

Attorney General J. Joseph Curran Jr.
Attorney General of Maryland

Attorney General Mike Moore
Attorney General of Mississippi

Attorney General Don Stenberg
Attorney General of Nebraska

Attorney General Frankie Sue Del Papa
Attorney General of Nevada

Attorney General Philip T. McLaughlin
Attorney General of New Hampshire

Attorney General Wayne Stenehjem
Attorney General of North Dakota

Attorney General Herbert Soll
Attorney General of the N. Mariana Islands

Attorney General W.A. Drew Edmondson
Attorney General of Oklahoma

Attorney General Hardy Myers
Attorney General of Oregon

Attorney General Mike Fisher
Attorney General of Pennsylvania

Attorney General Sheldon Whitehouse
Attorney General of Rhode Island

Attorney General Charlie Condon
Attorney General of South Carolina

Attorney General Mark Barnett
Attorney General of South Dakota

Attorney General Paul Summers
Attorney General of Tennessee

Attorney General John Cornyn
Attorney General of Texas

Attorney General Mark Shurtleff
Attorney General of Utah

Attorney General Randolph A. Beales
Attorney General of Virginia

Attorney General Iver A. Stridiron
Attorney General of the Virgin Islands

BDM/jkc

No Recipient, Fwd: ACTION ALERT!! Sutton Hearing Scheduled for January 29

To:
From: Michele James <mjames@pirs.org>
Subject: Fwd: ACTION ALERT!! Sutton Hearing Scheduled for January 29
Cc:
Bcc:
Attached:

January 22, 2003

The Honorable Orrin G. Hatch
Chairman
Senate Judiciary Committee
Dirksen Senate Office Building, Room 224
Washington, DC 20510

Dear Chairman Hatch:

I write respectfully to urge you not to confirm Jeffrey Sutton to the Sixth U.S. Circuit Court of Appeals. Jeffrey Sutton's activist efforts to limit Congressional authority in the area of disability rights has undermined your role in championing the Americans with Disabilities Act (ADA) and other laws expanding opportunities for the more than 50 million children and adults with disabilities and their families in the United States.

In University of Alabama v. Garrett, Mr. Sutton argued successfully that Congress did not have the authority under the Constitution to apply the ADA to States in employment discrimination suits for damages. He argued that unnecessary institutionalization should not be a violation of the ADA in the Olmstead v. L.C. case, but thankfully the Supreme Court declined to follow his lead in that case. Mr. Sutton's positions in these and other cases represent a view of Congress's authority under the Equal Protection Clause, Spending Clause, and Commerce Clause that would dramatically restrict your ability to pass laws protecting the rights of Americans with disabilities, older workers, and others under the Constitution.

Mr. Chairman, you have been a long-time supporter of federal civil rights for Americans with disabilities.

Jan 22 03 12:10p Placer Indep.Rsc.Svcs Inc 530-885-3032 p.2

No Recipient, Fwd: ACTION ALERT!! Sutton Hearing Scheduled for January 29

Working with Senators Dole, Kennedy, Harkin and others, you helped build the voluminous record of egregious discrimination that persuaded your colleagues to overwhelmingly support the ADA when it was enacted in 1990. In defense of that record, you filed an amicus brief in the Garrett case supporting the constitutionality of the ADA as applied to State employers. Why, then, confirm someone to a lifetime appointment to a federal appeals court whose view of the Constitution will erect new barriers for Americans with disabilities seeking to assert their rights in federal court?

Please honor your commitment to a strong ADA and refrain from confirming Mr. Sutton to a federal judgeship. Please listen to the strong protests of your constituents with disabilities and confirm candidates who understand the importance of Congress's ability to remedy this nation's abysmal history of exclusion, segregation, sterilization, institutionalization and impoverishment of its citizens with disabilities.

Mr. Sutton's defenders have argued that his positions in Garrett, Olmstead, and other cases do not necessarily reflect his views, but that as a former Solicitor for the State of Ohio he was merely robustly asserting a defense of State immunity under the 11th Amendment of the Constitution. But if Mr. Sutton's view of State immunity under the ADA is the necessary position for a State attorney general to assert, why in the Garrett case was his position on behalf of the University of Alabama opposed by a bipartisan group of 14 State attorneys general, and supported by only six in addition to Alabama? As the amicus brief on behalf of 14 states in Garrett explained in reference to the ADA, "to eradicate the effects of the extensively documented, long-term, pervasive and invidious discrimination against people with disabilities, it is critical that the States be leaders in facilitating this duly enacted Section 5 legislation."

Mr. Chairman, we need your leadership to help us stem a tide of activist court decisions that are weakening the Constitutional underpinnings of disability rights laws and threatening your ability as a United States Senator to enact legislation establishing the full range of remedies to address discrimination on the basis of disability. Having ridden that tide to national prominence, Jeffrey Sutton does not deserve your support.

Sincerely yours,

Michele James

Jan 22 03 12:10p Placer Indep.Rso.Svcs Inc 530-885-3032 p.3

Michele James
Independent Living Specialist
Placer Independent Resource Services
11768 Atwood Road Suite 29
Auburn, CA 95603
530-885-6100x15
mjames@pirs.org

Jan 22 03 12:11p Placer Indep.Rsc.Svcs Inc 530-885-3032 p.4



MRS.LORIE A JIRSCHELE
518 COUNTRY DRIVE
PIERRE SD 57501

FAX TRANSMITTAL SHEET

DATE: January 27, 2003 TIME: 4:10 p.m.

TO: Senate Judiciary Committee
FAX #: (202) 228-0861

FROM: Lorie Jirschele

PHONE: (605) 945-0307
E-MAIL: loriejir@msn.com

Dear Senators,

Please do whatever you can to STOP the confirmation of Jeffrey Sutton to the 6th Circuit Court of Appeals. His effort to weaken Federal protection of persons with disabilities, minorities, seniors, women victims of violence, Medicaid recipients and others is deplorable! Over 400 nonpartisan disability and civil rights organizations, as well as individuals across the country have united in opposition to Sutton's appointment.

Thank you for all you do for our nation.

Sincerely,

Lorie A Jirschele

NUMBER OF PAGES INCLUDING COVER SHEET: 1

HARRIET MCBRYDE JOHNSON
ATTORNEY AT LAW
FRANKE BUILDING
171 CHURCH STREET, SUITE 160
CHARLESTON, SOUTH CAROLINA 29401

(843) 722-0178 (VOICE) • (843) 722-8250 (TDD) • FAX (843) 577-0460

January 14, 2003

BY FAX - 202/228-0861
The Hon Orren Hatch
US SENATE
Judiciary Committee
Washington DC

RE: SUTTON NOMINATION

Dear Senator Hatch:

I would like to express my **opposition** to the nomination of Jeffrey Sutton to the U.S. Court of Appeals for the Sixth Circuit. Of particular concern is Mr Sutton's view of authority to legislate under the enabling clause of the 14th amendment.

The amendment itself plainly vests in Congress the responsibility for implementing the equal protection and due process clauses as applied to the states. The flexible legislative process is uniquely able to gather facts, weigh interests, and shape solutions that are practical and fair. The two great examples of the exercise of this responsibility are the 1964 Civil Rights Act and the 1990 Americans with Disabilities Act. In both, Congress identified the problem of discrimination, outlawed specific practices, and set up remedies that reflected reasonable compromises among the affected interests.

In the case of the ADA, Mr Sutton would toss this careful legislative decision-making out the window. He would give the judiciary sole responsibility for deciding when state-sponsored discrimination should be illegal. A forum designed to resolve narrow controversies between specific parties would be required to determine broad social policy. The branch of government designed to apply the law would be asked to create it - or at least given a plenary veto power.

Please reject this nomination and send a message to President Bush that nominees should respect the basic balance of power embodied in the 14th amendment.

Sincerely,

Harriet McBryde Johnson

TOTAL P.01

Name: Jonas
Company:
Voice Number:
Fax Number: (201) 634 0628

Fax

Date: Friday, January 24, 2003
Total Pages: 1
Subject: Appointment of Jeffrey Sutton

Name: Senate Judiciary Committee
Company:
Voice Number:
Fax Number: (202) 228-0861

Note: Dear Committee Members,

I deeply oppose the appointment of Jeffrey Sutton to the court. He would set back the rights of people with disabilities, the elderly and those unable to defend themselves.

Don't you have family members who are aging or who have disabilities? It could be you or I tomorrow. Appoint Jeffrey Sutton and any of us could go back to the days of discrimination, lack of services and no protection of our rights.

Judy Jonas
Paramus, NJ

January 21, 2003

Senator Thad Cochran
Washington, D.C.

Dear Senator Cochran;

As a disabled person for more than 46 years, I would like to express my avid opposition to the nomination of Jeffrey Sutton for the judgeship to the 6th Circuit US Court of Appeals.

Mr. Sutton has worked to undermine the ADA on Grounds of State Sovereignty, he opposes Olmstead implementation and claims that beneficiaries of Medicaid have no private right of action against states that violate the rules of the program.

On my behalf and all the handicapped communities of America, I respectfully ask you to oppose this nomination.

Respectfully Submitted,

Eddie Jones

EDDIE JONES
L.I.F.E. OF SOUTH MS
710 KATIE AVENUE
HATTIESBURG, MS 39401

FAXED

JUDICIAL SELECTION MONITORING PROJECT

A project of the Free Congress Foundation's Center for Legal Policy

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PROJECT SUPPORTERS:
(Partial Listing)

60 Plus Association
Alabama Family Alliance
American Assoc. of Christian Schools
American Center for Law and Justice
American Conservative Union
American Constitutional Law Foundation
American Family Association
Americans for Tax Reform
Arizona Family Research Institute
Arkansas Family Council
Assoc. of Christian Schools Int'l.
Catholic Alliance
Center for Individual Rights
Center for New Black Leadership
Christian Action Network
Christian Coalition
Citizens Against Violent Crime
Citizens for Law and Order
Citizens United
Coalitions for America
Concerned Citizens of Florida
Concerned Women for America
Coral Ridge Ministries
Defenders of Property Rights
Delaware Family Foundation
Eagle Forum
The Family Foundation (VA)
Family Research Council
Family Taxpayer's Network (IL)
Focus on the Family
Freedom Alliance
Gun Owners of America
Home School Legal Defense Assoc.
Independent Women's Forum
Individual Rights Foundation
Judicial Watch
Kansas Conservative Union
Landmark Legal Foundation
Law Enforcement Alliance of America
Lincoln Legal Foundation
Memory of Victims Everywhere
Michigan Family Forum
Minnesota Family Council
National Association of Evangelicals
National Coalition for Restoration of the Black Family
National Family Legal Foundation
National Law Center for Children and Families
National Legal Foundation
National Legal and Policy Center
National Parents' Commission
National Rifle Association/ILA
National Tax Limitation Committee
New Yorkers for Constitutional Freedoms
Oklahoma Family Policy Council
Organized Victims of Violent Crime
Pennsylvania Landowners Association
Pro-Life Action League
Southeastern Legal Foundation
Students for America
Texas Public Policy Foundation
Traditional Values Coalition
United Seniors Association
U.S. Business and Industrial Council
Utah Coalition of Taxpayers

May 8, 2002

The Honorable Patrick J. Leahy, Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
United States Senate
Washington, D.C. 20510

Dear Senator Leahy:

We represent more than a million Americans deeply concerned about the vacancy crisis in the federal judiciary. As the first anniversary of President Bush's initial nominations to the federal judiciary approaches, we urge you to end the delays and allow a hearing and a vote for the eight nominees who have been waiting nearly a year for you to act.

Miguel Estrada, John Roberts, Terry Boyle, Priscilla Owen, Jeffrey Sutton, Deborah Cook, Michael McConnell, and Dennis Shedd were each nominated on May 9, 2001. Your months of delay since then have been disappointing given your public commitment to treat judicial nominees fairly.

On the day President Bush announced their nominations, you praised his choices saying: "Had I not been encouraged, I would not have been here today. I will continue to work with the President." Yet now, one year later, you have allowed the Senate to act on only three from that original group, leaving these eight men and women waiting. We urge you to work with the President as you said you would and allow these nominees a hearing and a vote.

Several times during 2000, you supported then-Gov. Bush's call for the Senate to act quickly on nominations. In October, you said: "I have said on the floor, although we are different parties, I have agreed with Gov. George Bush, who has said that in the Senate a nominee ought to get a vote, up or down, within 60 days." These eight long-standing nominees have been waiting 364 days for you to give them a hearing and an up or down vote.

When there were 50 vacancies on the federal bench, you spoke of "a judicial vacancy crisis" that was "plaguing so many federal courts." There are nearly 90 empty judgeships today, and while the vacancy rate has remained at 100 or higher during seven of your 11 months in charge of the Judiciary Committee, you have not acted to fill these eight vacancies, half of which have been designated judicial emergencies.

In a letter to President Bush on March 16 of last year, you and Senator Charles Schumer referred to the American Bar Association's evaluation of nominees as "the gold standard by which judicial candidates are judged." Under that standard, all of these nominees have been deemed either qualified or well-qualified for judgeships on the U.S. Court of Appeals, yet your committee has not held a single hearing to review their qualifications, temperament, commitment to upholding the law.

In fact, these are well-respected attorneys and sitting judges with stellar credentials who will make excellent additions to the federal judiciary. They deserve a hearing before your committee, and they deserve an up or down vote before the Senate.

Senator Leahy, you have spoken of a need to end the vacancy crisis. You have said that nominees should receive a vote within 60 days. You have recognized the ABA rating as "the gold standard." Any you announced that you were "encouraged" by these nominations while committing yourself to work with the President.

In all these things, Senator, you have set forth a standard for fairness – but after nearly a year of delays, it is not fair to keep these eight nominees waiting any longer. We therefore urge you to apply your own fairness standard to the May 9 nominees, lift the blockade, and allow these men and women the opportunity to be confirmed.

Sincerely,

Adirondack Solidarity Alliance
Alabama Policy Institute
American Association of Christian Schools
American Center for Law & Justice
American Conservative Union
American Council on Economic Security
American Council for Immigration Reform
American Decency Association
American Family Association of Arkansas
American Family Association of New York
American Family Defense Coalition

American Freedom Crusade
American Policy Center
American Pro-Constitutional Association
American Renewal
American Reformation Project
American Values
Association of New Jersey Rifle and Pistol Clubs
California Public Policy Foundation
Campaign for Working Families
Capitol Hill Prayer Alert
Catholic Citizens of Illinois
CatholicVote.org
Center for Reclaiming America
Christian Coalition of America
Christian Coalition of California
Christian Coalition of Georgia
Christian Coalition of Maine
Citizens for Excellence in Education
Coalitions for America
Coalition on Urban Renewal & Education
Concerned Women for America
Concerned Women for America of Virginia
Connecticut Association of Christian Schools
Conservative Victory Committee
Coral Ridge Ministries
Council for America
Eagle Forum
Eagle Forum of Alabama
Eagle Forum of Arkansas
Eagle Forum of Indiana
Eagle Forum of Massachusetts
Eagle Forum of Rhode Island
Evergreen Freedom Foundation
Family Policy Network
Family Research Council
Florida Eagle Forum
Free Congress Foundation
Freedom Alliance
Frontiers of Freedom
Georgia Sport Shooting Association
Government is Not God – PAC
Gun Owners' Action League
Gun Owners of America
Human Life Alliance
Illinois Citizens for Life
Illinois Right to Life Committee
Iowa Right to Life
Independent Women's Forum

Judicial Watch
Kansas Taxpayers Network
Life Issues Institute
Ludwig von Mises Institute
Maine Right to Life Committee
Maryland Taxpayers Association
Massachusetts Family Institute
Mississippi Policy Institute
National Abstinence Clearinghouse
National Federation of American Hungarians
National Legal Foundation
National Taxpayers Limitation Committee
New Jersey Christian Coalition
New Jersey Policy Council
New Yorkers for Constitutional Freedoms
New York Eagle Forum
Oklahomans for Children and Families
Oklahoma Family Policy Council
Ohio Conservative Alliance
Old Dominion Association of Christian Schools
Organized Victims of Violent Crime
Parents for Control
People Advancing Christian Education
Project 21
Republicans United for Tax Relief
Republican Women of Whatcom County
Restore America
60 Plus Association
Smith Center – California State University
Teen-Aid
Tennessee Christian Coalition
Tennessee Eagle Forum
Texas Justice Foundation
The Center for Arizona Policy
The Christian Alert Network
The Family Foundation of Kentucky
The National Center for Home Education
The National Center for Public Policy Research
The Southeastern Legal Foundation
Tradition, Family, Property
Traditional Values Coalition
United Seniors Association
U.S. Business and Industry Council
Utah Eagle Forum
Watchdogs Against Government Abuse



Yale Law School

NEAL KUMAR KATYAL
Visiting Professor of Law

February 22, 2002

Senator Patrick Leahy
Chairman, Senate Judiciary Committee
United States Senate
Washington, DC

Dear Senator Leahy:

I am writing to urge the confirmation of John G. Roberts as a Judge on the United States Court of Appeals for the District of Columbia. I have had the privilege of having some firsthand experience with Mr. Roberts that may shed light on his nomination. I believe him to be the very finest advocate I have ever seen before the Court, and a man of the highest integrity.

I know Mr. Roberts quite well because I worked with him for three months on a daily basis after I graduated from law school. Before accepting employment with his law firm, Hogan & Hartson, I asked Mr. Roberts whether he would be comfortable taking me–a Democratic young lawyer–under his wing. His response: "Not only would I be comfortable with it, I want you here because I want to learn what others who may at times see the world differently than I think." Over the years, I have often come back in my mind to Mr. Roberts' response, as an aspiration for me to strive towards and as an example for my students. It was evident to me when he said it, and clear in the subsequent months, that his statement was sincerely heartfelt. Over those months, I was treated with respect and care as we worked through several extraordinarily complicated legal issues together. Mr. Roberts has always sought out different points of view, and has avoided the trap that most of us at one time or another fall into, of just talking to those with whom we feel most comfortable. These skills, among others, make him, quite simply, the most talented lawyer with whom I have ever worked. He is careful and honest, a beautiful writer and a kind manager to boot.

In the 100 or so Supreme Court arguments I have seen, John has been the best advocate I have ever come across. The reason why is simple: he is remarkably honest with the Court. He does not try to hide the caselaw on the other side of his position, rather, he confronts it directly and with skill. I believe very strongly that he would act no differently as a lower court judge, and that he would approach judicial precedent with the honesty and the care with which it is due. For the above reasons, I would have no hesitation whatsoever in recommending any student of mine – liberal or conservative – to clerk for him. He would quite simply be one of the top handful of judges in the country, not simply in terms of sheer intelligence, but also in terms of disposition.

P.O. BOX 208215, NEW HAVEN, CONNECTICUT 06520-8215 · TELEPHONE 203 432-4825 · FACSIMILE 203 432-1040
COURIER ADDRESS 127 WALL STREET, NEW HAVEN, CONNECTICUT 06511 · EMAIL NEAL.KATYAL@YALE.EDU

In short, I believe that John Roberts has the integrity, temperament, and brilliance to be one of the finest judges to have ever served on the United States Court of Appeals for the District of Columbia. I urge you to begin the process of confirming him.

Sincerely,



Neal Katyal

January 28, 2003

The Honorable Orrin G. Hatch
Chairman
State Judiciary Committee
Dirksen Senate Office Building, Room 224
Washington, DC 20510

Dear Chairman Hatch:

This letter is written concerning the nomination of Jeffrey Sutton for the Sixth U.S. Circuit Court of Appeals. I strongly urge you to not confirm this appointment.

As a person with a disability, I am very concerned about Mr. Sutton's history opposing the basic civil, human rights of people with disabilities. His views that the ADA does not apply in discrimination in employment or unnecessary institutionalization are clear signals that he sees people with disabilities as second-class citizens not deserving of their constitutional rights.

As a longtime supporter of people with disabilities, I find it hard to believe that you would support this lifetime appointment to someone whose record indicates direct contradiction to your views.

We need your continued support and leadership to assure that American citizens are not denied their basic constitutional rights simply on the basis of a disability. Thank you for your support — Jeffrey Sutton does not deserve your support.

Sincerely,
Roger Knoblauch
Roger Knoblauch
504 W. Washington, #106
Bloomington, IL 61701

3811 Griffin Road
Clinton, NY 13323
January 21, 2003

Senator Orrin Hatch
Chair
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building

Dear Senator Hatch:

I strongly urge you to vote no on letting Judge Sutton's nomination out of the Judicial Committee. His confirmation would undermine the core protections and services afforded by Congress to persons with disabilities. Sutton is known for his work weakening the Americans with Disabilities Act and other civil rights laws in several recent Supreme Court Cases.

Sutton has argued that Congress had no power to apply the ADA to the states because, "in passing the ADA, Congress did not identify any pattern or practice of unconstitutional State action, or for that matter, even a single instance of such conduct." Despite the massive record of egregious conduct toward individuals with disabilities by states that Congress has compiled—including forced sterilization of individuals with disabilities, unnecessary institutionalization, denial of education, and systemic prejudices and stereotyping perpetrated by state actors—Sutton argued that states were actually in the forefront of efforts to protect the rights of individuals with disabilities.

Sutton has also argued that Medicaid rights are unenforceable by individual recipients. Sutton's arguments can, and no doubt will, be extended to claim that rights under the Rehabilitation Act and the Individuals with Disabilities Education Act (IDEA) are unenforceable as well. Instead of Congress extending protections through federal civil rights laws, Sutton believes that states should be the "principal bulwark in protecting civil liberties" – a statement that has grave implications given the massive record of state-sanctioned discrimination against individuals with disabilities.

As an American, I find Jeffrey Sutton's arguments repugnant. People with disabilities have spent years working for the laws now in place. The fight against Sutton is a Civil Rights issue, and needs to be seen as such. States have not protected our rights sufficiently, which was finally recognized when Congress enacted the ADA.

Thank you for your consideration.

Sincerely,

Shirley Knop

ROBBINS, RUSSELL, ENGLERT, ORSECK & UNTEREINER LLP
1801 K STREET, N.W., SUITE 411
WASHINGTON, D.C. 20006
PHONE (202) 775-4500
FAX (202) 775-4510

June 25, 2001

The Honorable Patrick Leahy
United States Senator
Senate Judiciary Committee
433 Russell Senate Office Building
United States Senate
Washington, D.C. 20510

Re: Nomination of John G. Roberts, Jr.

Dear Senator Leahy:

We write to support the nomination of John Roberts to the United States Court of Appeals for the District of Columbia Circuit. Each of us served with Mr. Roberts in the Office of the Solicitor General during the time that he was Deputy Solicitor General. Although we are of diverse political parties and persuasions, each of us is firmly convinced that Mr. Roberts would be a truly superb addition to the federal court of appeals.

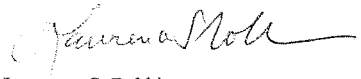
As the Committee will doubtless hear from many quarters, John is an incomparable appellate lawyer. Indeed, it is fair to say that he is one of the foremost appellate lawyers in the country. But we know him best in his capacity as Deputy Solicitor General – and in that capacity, he served his country and the Office of the Solicitor General with great distinction. The Office then, as now, comprised lawyers of every political affiliation – Democrats, Republicans, and Independents. Mr. Roberts was attentive to and respectful of all views, and he represented the United States zealously but fairly. He had the deepest respect for legal principles and legal precedent – instincts that will serve him well as a court of appeals judge.

In recent days, the suggestion has surfaced in press accounts that Mr. Roberts may be expected to vote in particular cases along the lines intimated in briefs he filed while in the Office of the Solicitor General. As lawyers who served in that Office, we emphatically dispute that assumption. Perhaps uniquely in our society, lawyers are called upon to advance legal arguments

for clients with whom they may, in their private capacities, disagree. It is not unusual for an individual lawyer to disagree with a client, while at the same time fulfilling the ethical duty to provide zealous representation within the bounds of law. And government lawyers, including those who serve in the Solicitor General's Office, are no different. They too have clients – federal agencies and officers, with a broad and diverse array of policies and interests. Moreover, the Solicitor General, unlike a private lawyer, does not have the option of declining a representation and telling a federal agency to find another lawyer.

We hope the foregoing is of assistance to the Committee in its consideration of Mr. Roberts's nomination. He is a superbly qualified nominee.

Very truly yours,



Lawrence S. Robbins
Robbins, Russell, Englert, Orseck
& Untereiner LLP*
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006

Michael Lazerwitz
Cleary, Gottlieb, Steen & Hamilton
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Christopher Wright
Harris, Wiltshire & Grannis
1200 18th Street, N.W.
Washington, D.C. 20036

Alan Horowitz
Miller & Chevalier
655 15th Street, N.W.
Suite 900
Washington, D.C. 20005-5701

* All references to institutions are for identification purposes only.

Maureen Mahoney
Latham & Watkins
555 Eleventh Street, N.W.
Suite 1000
Washington, D.C. 20004-1304

Stephen Marzen
Shearman & Sterling
801 Pennsylvania Avenue, N.W.
Ninth Floor
Washington, D.C. 20004-2604

Stephen Nightingale
Counsel
ING North America Insurance Corporation
151 Farmington Avenue, TS31
Hartford, CT 06156-8975

William Kelley
Notre Dame Law School
Notre Dame, IN 46556

Richard Seamon
University of South Carolina
School of Law
Main & Greene Streets – Room 301
Columbia, SC 29208

Thomas Hungar
Gibson, Dunn & Crutcher
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306

David Shapiro
Harvard University Law School
Cambridge, MA 02138

Thomas W. Merrill
John Paul Stevens Professor of Law
Northwestern University Law School
357 East Chicago Avenue
Chicago, IL 60611

John F. Manning
Columbia University School of Law
435 W. 116th Street
New York, NY 10027

SCHOOL OF LAW
THE UNIVERSITY OF TEXAS AT AUSTIN

727 East Dean Keeton Street • Austin, Texas 78705-3299 • (512) 232-1341
FAX (512) 471-6988 • E-mail dlaycock@mail.law.utexas.edu

Douglas Laycock
Alice McKean Young Regents Chair in Law

July 3, 2001

Senator Patrick Leahy, Chair
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Leahy:

I write to oppose the President's nomination of Jeffrey Sutton to the United States Court of Appeals for the Sixth Circuit. As always, I write in my personal capacity; The University of Texas takes no position on this or any other nomination.

I do not know Sutton well. He has been a personable and friendly fellow in my few encounters with him, and he may well be a personable witness at his confirmation hearing.

But everything I know about him suggests that he holds truly extreme views on questions of federalism. His intellectual project is to systematically dismantle the powers of Congress, and especially to dismantle federal power to protect human liberty in the states. He is unconstrained by Supreme Court precedent. He has suggested that the Civil War was an event of no significance to the protection of liberty or the enforcement of constitutional rights.

It is the duty of a federal judge to enforce the constitutional limits on the federal government -- and on state and local governments as well. It is not appropriate for a federal judge to be bent on disabling the federal government. It is not appropriate for a federal judge to be so radically hostile to federal power or so resistant to Supreme Court precedent. It is especially inappropriate for a federal judge to be so hostile to federal protections for human liberty.

Sutton has been at the forefront of the recent dismantling of federal power to protect individual rights. He argued *Alexander v. Sandoval*, eliminating the private right of action to enforce disparate impact regulations under Title VI, *Board of Trustees v. Garrett*, eliminating back pay liability for states that violate the Americans with Disabilities Act, and *Kimel v. Florida Board of Regents*, eliminating back pay liability for states that violate the Age Discrimination in Employment Act. He was an active amicus, seeking out oral argument time, in *City of Boerne v. Flores*, invalidating the Religious Freedom Restoration Act as applied to the states.

Garrett, *Kimel*, and *Boerne* are the centerpiece of a narrow Supreme Court's majority's dismantling of Congressional power to enforce the Fourteenth Amendment. It was at the oral argument in *Boerne* that Sutton urged the Court "to restore the Jeffersonian vision of the states

as the primary guardians when it comes to our liberties." This is good rhetoric, but in context it was absurd history and absurd constitutional law. The case was about interpretation of the Fourteenth Amendment -- the Amendment that made the federal government responsible for protecting liberty in the states, in the wake of a great Civil War provoked by the grossest abuse of human liberty in the states.

Perhaps Sutton's most radical position to date is his brief in *Westside Mothers v. Haveman*, 133 F. Supp. 2d 549 (E.D. Mich. 2001). He appeared as amicus, urging a position that Michigan had been unwilling to argue even when the judge raised the possibility. He cannot say he owed it to his client to argue this position; he had no client.

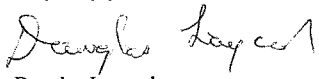
The argument is long and complex, but the practical consequences are clear: *Westside* holds, at Sutton's urging, that the conditions accepted by states when they accept federal funds are not enforceable by a private right of action, and that Congress cannot make them enforceable. States are free to take the money and violate the conditions, until or unless the United States can devote federal resources to enforcing the conditions. The intended beneficiaries of the conditions are remediless. If this decision stands, Congressional power to attach effective conditions to grants of federal funds will be gutted. That is precisely Sutton's goal.

The *Westside* holding is in defiance of long-standing law. The trial judge conceded that "suits have been brought repeatedly over at least the past thirty years against state officers for alleged non-compliance with federal-state programs enacted pursuant to the Spending Power." 133 F. Supp. 2d at 563. He cited four Supreme Court cases that "involve the use of § 1983 by private parties to enforce federal legislation enacted pursuant to the Spending Power." *Id.* at 582. But Sutton persuaded him that none of those cases were binding because they had not really focused on the issue. The truth is that the power to enforce federal law by suits against state officers was settled and fundamental, and the cited opinions went on to the issues that were fairly arguable.

The opinion relies heavily on nineteenth century cases that long pre-date *Ex parte Young*, the decision that settled the availability of officer suits to enforce federal law, and on the recent propensity of the Supreme Court majority to re-open settled questions. But that is a power of the Supreme Court, not of district courts.

What *Westside* shows is Sutton aggressively creating new doctrine to restrict or overturn settled law, leading the way at the frontier of the campaign to roll back federal power and leave citizens without effective protection for their federal rights. I do not know if the President supports his nominee's radical views. But I believe the Senate is entitled and obligated to consider them, and to decide that these views should not receive additional representation on the federal courts.

Very truly yours,



Douglas Laycock

U.S. SENATOR PATRICK LEAHY

CONTACT: David Carle, 202-224-3693 VERMONT

Statement Of Senator Patrick Leahy,
Ranking Member, Senate Judiciary Committee
Judicial Nominations Hearing
January 29, 2003

Today the Judiciary Committee meets in an extraordinary session to consider six important nominees for lifetime appointments to the federal bench. During the last four years of the Clinton Administration, this Committee refused to hold hearings and Committee votes on qualified nominees to the D.C. Circuit and the Sixth Circuit. Today, in sharp contrast, this Committee is being required to proceed on three controversial nominations to those circuit courts -- simultaneously. This can only be seen as part of a concerted and partisan effort to pack the courts and tilt them sharply out of balance.

In contrast to the President's circuit court nominees, the district court nominees to vacancies in California, Texas and Ohio seem to be more moderate and bipartisan. Today we will hear from Judge Otero, nominated to the U.S. District Court for the Central District of California, who was unanimously approved by California's bipartisan Judicial Advisory Committee, established through an agreement Senator Feinstein and Senator Boxer reached with the White House. We urge the White House to proceed without further delay to nominate another qualified, consensus nominee, like Judge Otero, for the remaining vacancy in California as recommended by that bipartisan panel. Too often in the last two years we have seen the recommendations of such bipartisan panels rejected or stalled at the White House. I note that Judge Otero has contributed to the community, working on a *pro bono* project for the Mexican Legal Defense and Education Fund and serving as a member of the Mexican Bar Association, the Stanford Chicano Alumni Association, and the California Latino Judges Association, among others.

We will also hear from Robert Junell, nominated to the U.S. District Court for the Western District of Texas. He is another consensus nominee who has had a varied career as a litigator and a member of the Texas House of Representatives, and who has worked to help numerous disadvantaged individuals. A life member of the NAACP, Mr. Junell is also a former member of the board of directors of the La Esperanza clinic. I spoke earlier this week to Representative Charlie Stenholm who is a strong supporter of Mr. Junell's, and I look forward to hearing from him.

Finally, Judge Adams, nominated to the U.S. District Court for the Northern District of Ohio, is a lifelong member of the NAACP and has served as a member of a number of civic organizations, such as the Summit County Mental Health Association.

I am very disappointed that the Chairman has unilaterally chosen to pack so many circuit court nominees onto the docket of a single hearing. This is unprecedented in his tenure and simply no

way to consider the controversial and division nominations he has selected for a single hearing. This is no way for us to discharge our constitutional duty to advise and consent to the President's nominees.

While I was Chairman over 17 months we reformed the process of judicial nominations hearings. We made tangible progress in repairing the damage done to the process in the previous six years. We showed how nominations of a Republican president could be considered twice as quickly as Republicans had considered President Clinton's nominees. We added new accountability by making the positions of home-state Senators public for the first time and we did away with the previous Republican practice of anonymous holds on nominations.

We made significant progress in helping to fill judgeships in the last Congress. The number of vacancies on the courts was slashed from 110 to 59, despite an additional 50 new vacancies that arose during our watch. Chairman Hatch wrote in September 1997 that 103 vacancies (during the Clinton Administration) did not constitute a "vacancy crisis." He also stated his position on numerous occasions that 67 vacancies meant "full employment" on the federal courts. Even with the two additional vacancies that have arisen since the beginning of this year, there are now 61 vacancies on the district and circuit courts. This is well below the level that Chairman Hatch used to consider acceptable and the federal courts have more judges than when Chairman Hatch proclaimed them in "full employment."

We made the extraordinary progress we did by holding hearings on consensus nominees with widespread support and moving them quickly, but by also recognizing that this President's more divisive judicial nominations would take time. We urged the White House to consult in a bipartisan way and to keep the courts out of politics and partisan ideology. We urged the President to be a uniter, not a divider, when it came to our federal courts. All Americans need to he able to have confidence in the courts and judges need to maintain the independence necessary to rule fairly on the laws and the rights of the American people to be free from discrimination and to have our environmental and consumer protection laws upheld.

Under Democratic leadership the Senate confirmed 100 of President Bush's nominees within 17 months. Two were rejected by majority votes of the Judiciary Committee. Several others were controversial but confirmed despite negative votes. Given all of the competing responsibilities of the Committee and the Senate in these times of great challenges to our Nation -- especially the attacks of September 11 and later also the anthrax attacks directed at Senator Daschle and at me that killed several people and disrupted the operations of the Senate itself -- hearings for 103 judicial nominees, voting on 102, and favorably reporting 100 is a record of which the Judiciary Committee and the Senate can be proud. During the 107th Congress, the Committee voted on 102 of the 103 judicial nominees eligible for votes - 99 percent. Of those voted upon, 98 percent were been reported favorably to the Senate. Of those 100 reported favorably to the Senate, 100, all of them, were confirmed.

It is true that we could not hold hearings on every nominee, including the scores of controversial nominees selected by this White House, during those 17 months. We did proceed on 94 percent of those whose files were completed. We did proceed on a record 103 in 17 months — in contrast to the less than 40 a year our Republican predecessors averaged. Indeed, Republicans

failed to proceed on 79 of President Clinton's judicial nominees in the two-year Congress in which they were nominated and delayed several three years and four years and more. More than 50 of those nominees were never accorded Committee consideration.

We transcended the relative inaction of the prior six and one-half years of Republican control by moving forward on judicial nominees twice as quickly as our predecessors did. Indeed, the Senate confirmed more judicial nominees in 17 months than the Republican-controlled Senate did during its last 30 months. More achieved, and in half the time, but achieved responsibly.

We showed how steady progress could be made without sacrificing fairness and thoroughness. In contrast, this hearing portends real dangers to the process and to the results — all to the detriment of our courts and to the protections they are intended to afford to the American people. The Senate in this instance, and the Congress in many others, is supposed to act as a check on the Executive and add balance to the process. Proceeding as the majority has unilaterally chosen to today is unprecedented and wrong. It undercuts the ability of the Committee and the Senate to provide that balance.

Today, the Chairman has scheduled these three controversial circuit nominations of a Republican president for a single hearing -- something he never did for the moderate and relatively noncontroversial nominees of a Democratic President just a few years ago. It seems part of a headlong effort to pack the courts. Despite all of the efforts of the Democratic leadership not to repeat the Republican obstructionism and to proceed fairly on President Bush's judicial nominees, the White House and Republicans have continued to play partisan politics on these matters.

I cannot recall a time when three such controversial circuit nominees were listed simultaneously. Jeffrey Sutton's nomination has generated significant controversy and opposition. I have questions about his efforts to challenge and weaken, among other laws, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Violence Against Women Act, and his perceived general antipathy to federal protection for State workers. I am concerned that more than 500 disability rights groups, civil rights groups, and women's groups are opposed to his confirmation because they feel he will act against there interests and not protect their rights. I am concerned about a reputation among observers of the legal community that he is a "leading advocate for the states' rights' revival." This is a nomination that deserves serious scrutiny, and which ought to be considered, as has been the practice in the past decades, as the only circuit court nomination in a hearing. The process imposed by the majority is cheating the American people of the scrutiny these nominees should be accorded.

Unfortunately, we are also being asked to simultaneously consider the nomination of Deborah Cook. Justice Cook, one of the most active dissenters on the Ohio Supreme Court, comes to the Committee with a judicial record deserving of some scrutiny. I intend to ask her about some of her opinions and legal analysis in hopes of gaining a better understanding of her judicial philosophy and abilities. This nomination has generated a good deal of controversy and opposition as well, both inside and outside of Ohio and the Sixth Circuit.

I note that these two difficult nominations are both to judgeships on the Sixth Circuit Court of Appeals, a court to which President Clinton had a much harder time getting his nominees considered. Republicans fail to acknowledge that most of the vacancies that have plagued the Sixth Circuit arose during the Clinton Administration. During that time Republicans closed the gates and refused to consider any of the three highly qualified and moderate nominees President Clinton sent to the Senate for those vacancies. Not one of the Clinton nominees to those current vacancies on the Sixth Circuit received a hearing by the Judiciary Committee under Republican leadership from 1997 through June 2001. In spite of that recent history, Democrats proceeded to hold hearings, give Committee consideration and confirm two of President Bush's conservative nominees to that court last year. With the confirmations of Judge Julia Smith Gibbons of Tennessee and Professor John Marshall Rogers of Kentucky, Democrats confirmed the only two new judges to the Sixth Circuit in the past five years. Regrettably, despite my best efforts, the White House rejected all suggestions to address the legitimate concerns of Senators in that circuit that qualified, moderate nominees were blocked by Republicans during the previous administration.

The Sixth Circuit vacancies are a prime and unfortunate legacy of the past partisan obstructionist practices under Republican leadership. Vacancies on the Sixth Circuit were perpetuated during the last several years of the Clinton Administration when the Republican majority refused to hold hearings on the nominations of Judge Helene White, Kathleen McCree Lewis and Professor Kent Markus to vacancies in the Sixth Circuit from Michigan and Ohio.

One of those seats has been vacant since 1995, the first term of President Clinton. Judge Helene White of the Michigan Court of Appeals was nominated in January 1997 and did not receive a hearing on her nomination during the more than 1,500 days before her nomination was withdrawn by President Bush in March 2001. Judge White's nomination may have set an unfortunate but unforgettable record. Her nomination was pending without a hearing for more than four years – 51 months, in fact. She was first nominated in January 1997 and was one of the 79 Clinton judicial nominees who did not get a hearing during the Congress in which she was first nominated. Unfortunately, she was also denied a hearing after being renominated a number of times including in January 2001.

Under Republican control, the Committee averaged hearings on only about eight Courts of Appeals nominees a year and, in 2000, held only five hearings on Courts of Appeals nominees all year. Today, by contrast, the Committee is seeking to hold hearings on three Courts or Appeals nominees in one sitting.

Likewise, Kathleen McCree Lewis, a distinguished African American lawyer from a prestigious Michigan law firm was also never accorded a hearing on her 1999 nomination to the Sixth Circuit. That nomination was withdrawn by President Bush in March 2001 without ever having been considered by this Committee.

Professor Kent Markus, another outstanding nominee to a vacancy on the Sixth Circuit that arose in 1999, never received a hearing on his nomination before his nomination was returned to President Clinton without action in December 2000. While Professor Markus' nomination was pending, his confirmation was supported by individuals of every political stripe, including 14

past presidents of the Ohio State Bar Association and more than 80 Ohio law school deans and professors.

Others who supported Professor Markus include prominent Ohio Republicans, including Ohio Supreme Court Chief Justice Thomas Moyer, Ohio Supreme Court Justice Evelyn Stratton, Congresswoman Deborah Pryce, and Congressman David Hobson, the National District Attorneys Association, and virtually every major newspaper in the State.

In testimony at a hearing in May 2001, Professor Markus summarized his experience as a federal judicial nominee, demonstrating how the "history regarding the current vacancy backlog is being obscured by some." Here are some of the things he said:

> "On February 9, 2000, I was the President's first judicial nominee in that calendar year. And then the waiting began. . . .
>
> At the time my nomination was pending, despite lower vacancy rates than the 6th Circuit, in calendar year 2000, the Senate confirmed circuit nominees to the 3rd, 9th and Federal Circuits. . . . No 6th circuit nominee had been afforded a hearing in the prior two years. Of the nominees awaiting a Judiciary Committee hearing, there was no circuit with more nominees than the 6th Circuit.
>
> With high vacancies already impacting the 6th Circuit's performance, and more vacancies on the way, why, then, did my nomination expire without even a hearing? To their credit, Senator DeWine and his staff and Senator Hatch's staff and others close to him were straight with me.
>
> Over and over again they told me two things: 1) There will be no more confirmations to the 6th Circuit during the Clinton Administration[.] 2) This has nothing to do with you; don't take it personally – it doesn't matter who the nominee is, what credentials they may have or what support they may have – see item number 1. . . .
>
> The fact was, a decision had been made to hold the vacancies and see who won the presidential election. With a Bush win, all those seats could go to Bush rather than Clinton nominees."

As Professor Markus identified, some on the other side of the aisle held these seats open for years for a Republican President to fill instead of proceeding fairly on the consensus nominees pending before the Senate. They were unwilling to move forward, knowing that retirements and attrition would create four additional seats that would arise naturally for the next President. That is why there are now so many vacancies on the Sixth Circuit.

Had Republicans not blocked President Clinton's nominees to the Sixth Circuit, if the three Democratic nominees had been confirmed and President Bush appointed the judges to the other vacancies on the Sixth Circuit, that court would be almost evenly balanced between judges appointed by Republican and Democratic Presidents. That is what Republican obstruction was designed to prevent -- balance. The same is true of a number of other circuits, with Republicans benefiting from their obstructionist practices of the preceding six and a half years. This,

combined with President Bush's refusal to consult with Democratic Senators about these matters, is particularly troubling.

Long before some of the recent voices of concern were raised about the vacancies on that court, Democratic Senators in 1997, 1998, 1999, and 2000 implored the Republican majority to give President Clinton's distinguished and moderate Sixth Circuit nominees hearings. Those requests, made not just for the sake of the nominees but for the sake of the public's business before the court, were ignored. Numerous articles and editorials urged the Republican leadership to act on those nominations.

The former Chief Judge of the Sixth Circuit, Judge Gilbert Merritt, wrote to the Judiciary Committee Chairman years ago to ask that the nominees get hearings and that the vacancies be filled. The Chief Judge noted that, with four vacancies - the four vacancies that arose in the Clinton Administration - the Sixth Circuit "is hurting badly and will not be able to keep up with its work load due to the fact that the Senate Judiciary Committee has acted on none of the nominations to our Court." He predicted: "By the time the next President in inaugurated, there will be six vacancies on the Court of Appeals. Almost half of the Court will be vacant and will remain so for most of 2001 due to the exigencies of the nomination process. Although the President has nominated candidates, the Senate has refused to take a vote on any of them."

However, no Sixth Circuit hearings were held in the last three full years of the Clinton Administration (almost his entire second presidential term), despite these pleas. Not one. The situation was exacerbated further as two additional vacancies arose.

When I scheduled the April 2001 hearing on the nomination of Judge Gibbons to the Sixth Circuit, it was the first hearing on a Sixth Circuit nomination in almost five years, even though three outstanding, fair-minded individuals were nominated to the Sixth Circuit by President Clinton and pending before the Committee for anywhere from one year to over four years. Judge Gibbons was confirmed by the Senate on July 29, 2002, by a vote of 95 to 0. We did not stop there, but proceeded to hold a hearing on a second Sixth Circuit nominee, Professor Rogers, just a few short months later in June. He, too, was confirmed last year.

Another important court to which President Clinton was denied confirmations for his nominees for years is the District of Columbia Circuit, the court to which another of today's nominees, John Roberts, is nominated. This appellate court is also known as the Nation's circuit court because it plays a uniquely significant role evaluating certain decisions of federal agencies, such as the Environmental Protection Agency (EPA) that protects our environment, the Occupational Safety and Health Administration (OSHA), and the National Labor Relations Board (NLRB), among others.

Last year I kept my commitment to hold a hearing on Miguel Estrada, another controversial nominee to a vacancy on the D.C. Circuit. I had hoped that the White House would see fit to work with us to ensure balance on that important court rather than insist on its initial court-packing scheme. Again, in the last four years of the Clinton Administration, Republicans obstructed Senate action on any of the highly-qualified nominees to vacancies on that court in order to preserve them for a Republican President.

Allen Snyder was a law partner of Mr. Roberts and a former clerk to Chief Justice Rehnquist. While he was allowed a hearing in May 2000, any hopes he might have had for Committee consideration or a Senate vote were obstructed and he was never accorded a Committee vote. Republicans refused to give Professor Elena Kagan, another D.C. Circuit nominee, a hearing during the 18 months her nomination was pending. Republicans refused to consider any and all nominees to the D.C. Circuit since 1997.

Today's nominee to the D.C. Circuit, John Roberts, worked in the Reagan Justice Department and in the Reagan White House and was an associate of former Solicitor General Kenneth Starr. It is apparent that Republicans feel some confidence that he will help accomplish their court-packing scheme to control the D.C. Circuit.

When the results of rushing can be the rolling back of hard-won rights of workers, women, consumers and minorities, and when the positions being filled are for a lifetime and cannot be undone at the polls, the American people expect us to act carefully, and better to err on the side of caution than to give the public's interest short shrift.

To proceed as they have chosen, Republicans are rewriting the rules or simply breaking them. This is the first judicial nominations hearing I have ever seen where the Committee has not even taken the step of formally consulting home-state Senators. As far as we have been informed, no "blue slips" have been received on these particular nominations. Indeed, we understand that they have not even been sent out by the Committee. Today's majority, when they were yesterday's majority, respected objections from Republican Senators to President Clinton's judicial nominees within their States, within their circuits and sometimes clear across the country. Their ability to pivot on a dime on these matters is breathtaking and unfortunate.

Treating the vetting of appointments to some of the highest courts in the land with little more attention and scrutiny than we would pay to appointees for a temporary federal commission on this or that is a disservice to the citizens of these circuits and to all Americans.

The American people can be excused for sensing that there's the smell of an inkpad in the air, and that the rubber stamp is already out of the drawer.

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United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

January 28, 2003

Dear Chairman Hatch:

We write to protest your intention to convene a Judiciary Committee hearing tomorrow to consider, among others, three controversial nominees to United States Courts of Appeal. The official notice of the agenda for tomorrow's hearing, not delivered until this afternoon at 4:45 p.m., indicates that the nominees will be Jeffrey Sutton and Deborah Cook for the Sixth Circuit, and John Roberts for the D.C. Circuit. As you know, each of these is considered a controversial nomination, and we believe each of these nominees ought to be considered separately.

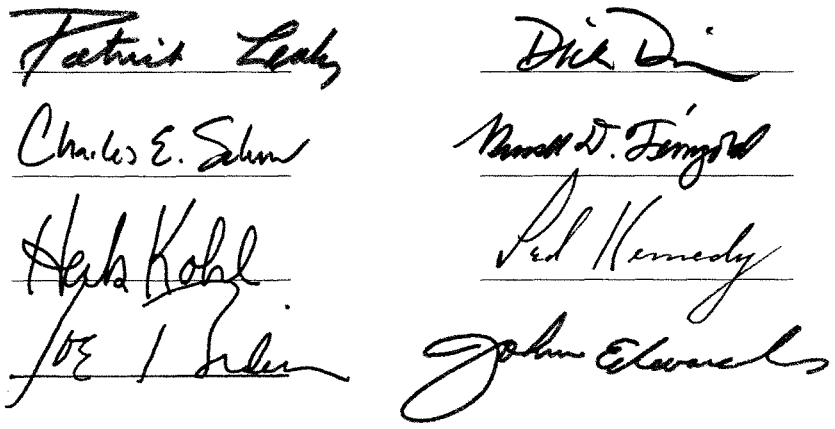
Since 1985, when Chairman Thurmond and Ranking Member Biden signed an agreement about the pace of hearings and the number of controversial nominees per hearing (which we have attached), there has been a consensus on the Committee that the Members ought to be given ample time to question the nominees before them, and that particularly controversial nominations deserve more time. As far as we know, the Committee has held a hearing for three circuit court nominees only once. That instance was under Senator Biden's chairmanship when non-controversial nominees of a Republican President were being considered.

Your rush to consider these three nominees at once is especially surprising, considering the pace at which you scheduled President Clinton's nominees for hearings. When you were chairman then, you never held a hearing to consider more than two circuit court nominees at once. In fact, while there were several times during your previous chairmanship you did schedule two circuit court nominees at one hearing, it was roughly equal to the number of times you scheduled a judicial nominations hearing which did not include any circuit court nominees at all. And, of course, more than 50 of President Clinton's nominees never received hearings at all.

During the 107th Congress, the Democratic-led Judiciary Committee went at a steady pace, considering one circuit court nominee at a time, and giving ample process to controversial nominees instead of putting off their hearings indefinitely. We were able to schedule a record number of hearings to consider a record number of nominees and still give the Senators on the Committee the time they needed to properly exercise their Constitutional duty to give their advice and consent to the President's lifetime appointments to the federal bench.

We hope you will reconsider your plans for tomorrow's hearing and will schedule only one controversial nominee per hearing, as has been the practice for so many years.

Sincerely,



Bounds Law Library

THE UNIVERSITY OF
ALABAMA
SCHOOL OF LAW

August 1, 2001

Senator Orrin Hatch
104 Hart Senate Office Building
Washington DC 20510

Dear Senator Hatch:

I am writing in support of Jeffrey Sutton's nomination to the Sixth Circuit Court of Appeals.

Let me first identify myself and state my interest in this nomination. I am Professor of Law and Library Director at The University of Alabama School of Law. I am also the Co-Director of the school's Disability Law Institute. My academic interests and scholarship focus on the interaction between disability law and our system of federalism. I attended oral argument last October in the *Garrett* case where I saw Mr. Sutton and two other capable attorneys (Michael Gottesman and Seth Waxman) represent their clients in a complicated case that tested the limits of Congress's power under the Americans with Disabilities Act to regulate state entities through the imposition of damages awards. I also heard Mr. Sutton give a presentation several years ago when I was on the law faculty at Ohio Northern University in Ada, Ohio, and he was the State Solicitor of Ohio. I have spoken with Mr. Sutton on limited occasions, but can't say that I know him personally. For what it's worth, I'm also a Democrat, a member of the ACLU, a member of the Sixth Circuit Bar, and support the policy objectives of federal disability laws such as the ADA. I also want to make clear that I am speaking for myself and not on behalf of my employer, The University of Alabama.

In my opinion, Jeffrey Sutton is well qualified to sit on the Sixth Circuit and should be confirmed. The primary qualification for a court of appeals judge is intellectual capacity, adequate legal experience and the ability to apply the precedents established by the Supreme Court faithfully and intelligently. There is little question that he meets these standards. He graduated first in his law class from Ohio State, then clerked for Judge Meskill on the Second Circuit, then for Justices Powell and Scalia. He has served as Ohio's State Solicitor. He has become a partner in the prestigious Jones Day law firm. He has argued nine cases before the Supreme Court. He teaches a course in Supreme Court Litigation at the College of Law at Ohio State. By any objective measure, Mr. Sutton has demonstrated the depth and quality of experience that are necessary for a Court of Appeals judge. My limited interactions with him also give me the sense that he is a kind and decent man.

There have been several well publicized objections to Mr. Sutton's nomination by disability rights advocacy groups. I'm sure that you are aware of them, so I won't repeat them here in detail. I am frankly concerned by the prospect that nominees for federal judgeships may be penalized for doing what good lawyers are supposed to do: representing their clients zealously. Similarly, I am also alarmed by criticisms that Mr. Sutton's participation in the *Garrett* case has single handedly dismantled federal protections for

Box 870383
Tuscaloosa, Alabama 35487-0383
(205) 348-5925
FAX (205) 348-1112

disabled citizens. I consider that assertion to be flawed, most obviously because courts and not lawyers decide cases. The problem with the criticism, however, goes deeper and reflects a misunderstanding of the role of the courts in deciding constitutional issues. The matter of Congressional power to regulate the states, whether under section 5 of the Fourteenth Amendment, the Commerce Clause or the Spending Clause is a constitutional issue of the greatest significance. There is a division of opinion on these important points of law, supported by respectable arguments made in good faith by each side. To treat Jeffrey Sutton's participation, as an attorney, in the resolution of these issues has the unfortunate effect of reducing the process of judicial review to one of issue advocacy stripped of the structural constitutional questions.

I also see no "agenda" on Mr. Sutton's part to target disabled citizens. The objections to his nomination seem to focus on the result in *Garrett*. That decision, however, turned on the issue of the remedy for an alleged violation of the ADA by a state entity, not on the substantive obligation not to discriminate. I read or heard nothing in the briefs or oral arguments to indicate that Mr. Sutton was pursuing an agenda wider than the issues on which the Court had granted certiorari, or doing anything other than representing his client's interests. It's important to keep in mind that as State Solicitor of Ohio in *Ohio Civil Rights Commission v. Case Western Reserve University*, 76 Ohio St. 3d 168 (1996), he represented the Ohio Civil Rights Commission in its attempt to require that Case Western's Medical School admit an academically accomplished blind woman, Cheryl Fischer. Just as I would not infer an anti-disabled agenda from Mr. Sutton's participation in *Garrett*, neither would I assume from his role in the Fischer case that he had the opposite inclination. Rather, he seemed to be a good lawyer acting in his client's interests.

In sum, I encourage you to view Jeffrey Sutton's nomination to the Sixth Circuit favorably and expeditiously. Thank you for your consideration.

Sincerely,

James Leonard
Professor of Law
Co-Director, Disability Law Institute
Director, Bounds Law Library

cc: Senator Leahy
Senator DeWine



Advocating and Promoting Independent Living for Persons with Disabilities

Via Facsimile (202) 228-1229 First-Class Mail

Senator Arlen Specter
United States Senate
711 Hart Senate Office Building
Washington, D.C. 20510-3803

Re: Opposition of Jeffrey Sutton to 6th Circuit Court of Appeals

Dear Senator Specter:

As you are aware, Liberty Resources, Inc. (the Center for Independent Living for Philadelphia County) has long enjoyed your unwavering support of the rights of people with disabilities in Pennsylvania and in particular your sponsorship of MICASSA which we all hope will become law in 2003.

However, today I am writing you to seek your important opposition to President Bush's appointment of Jeffrey Sutton to the Sixth Circuit Court of Appeals. Mr. Sutton's demonstrated record of deliberate, repeated and adverse litigation against the continued implementation of the community integration mandates of Title II of the Americans with Disabilities Act ("ADA") make him an unqualified candidate for a prestigious Court of Appeals Judicial appointment. Specifically, his direct involvement against the Supreme Court's Olmstead decision will never be forgotten among people with disabilities throughout the United States.

Please oppose his judicial appointment and please encourage all of your Senate colleagues to do the same.

Respectfully,

Thomas H. Earle

Thomas H. Earle, Esquire
Executive Director, Liberty Resources

1341 N. Delaware Ave., Suite 105 - Philadelphia, PA 19125-4314
215-634-2000(voice) 215-634-6628 (fax) 215-634-6630 (TDD)
www.libertyresources.org

LEAP

Empowering individuals with disabilities in making significant life choices and changes to enhance their employment and independent living opportunities

Linking Employment, Abilities & Potential • 1468 West 25th Street • Cleveland, OH 44113 • (216) 696-2716 • FAX (216) 696-3317

8-27-01

The Honorable Orrin Hatch
104 Hart Senate Office Building
Washington, DC 20510

Dear Senator Hatch:

Linking Employment, Abilities and Potential (LEAP), in Cleveland, works with people with disabilities in making significant life choices and changes to enhance their independent living and employment opportunities. LEAP is a program of Lutheran Metropolitan Ministry.

Because of LEAP's mission and the broader social justice mission of LMM, and after extensive study and deliberation, LEAP's Board resolves unanimously to oppose President Bush's nomination of Jeffrey Sutton to the Sixth Circuit Court of Appeals and to communicate that opposition to our elected officials and elsewhere.

LEAP's decision was not taken abruptly since we are mindful that single issue, special interest opposition to Federal judicial nominees is viewed by many responsible members of both the Republican and Democratic parties as inappropriate. Our opposition to Mr. Sutton's nomination is driven primarily by what we view as his legal insensitivity to the barriers faced by the American community of people with disabilities in reaching the highest level of independence and employment. This insensitivity is best reflected by Mr. Sutton's legal advocacy in his successful Supreme Court arguments in the case of University of Alabama Board of Trustees v. Garrett. Mr. Sutton's position on the Americans with Disabilities Act, however, is not the sole basis for our opposition. We direct your attention to the comprehensive analysis of Mr. Sutton's legal philosophy by the Bazelon Center on Mental Health Law which at great length examines his career of opposition to fundamental civil rights embodied in the U.S. legislation, including the ADA and Medicaid laws. For detail of the Bazelon Center study, see www.ncil.org/sutton.htm (scroll through the list of opposing organizations for the report).

As a member of the Senate Judiciary Committee, and more importantly, as a public official long viewed as fair minded in your deliberation of critical issues, we urge you to keep an open mind during the Judiciary Committee hearing (as yet unscheduled we understand).

Representatives from LEAP would be happy to speak with you personally or with your staff, to elaborate further on our concerns. We may be reached at 216-696-2716.

Thank you for your consideration.

Very truly yours,

Melanie Hogan
Interim Director, LEAP

CCIT

LEAP is a 501(c) (3) Tax-Exempt, Non-Profit Corporation.

Beverly Benson Long
1036 Somerset Drive, N.W.
Atlanta, Georgia 30327

July 6, 2001

Senator Patrick J. Leahy
Senate Judiciary Committee
24 Dirksen Building
Washington, DC 20510

Dear Senator Leahy:

This is to support the nomination of Jeffrey S. Sutton to the Sixth Circuit Court of Appeals.

Since 1964, I have been involved in a wide range of associations and federations dedicated to improving the lives of persons with mental illnesses and disabilities. I am the Immediate Past President of the World Federation for Mental Health and have been the president of the the Mental Health Associations of Atlanta, The State of Georgia, and the National Mental Health Association (NMHA). I was a Commissioner on The President's Comission on Mental Health (President Carter), and a member of the Institute of Medicine (IOM) Committee on ""Prevention of Mental Disorders" that in 1994 published "Reducing Risks for Mental Disorders: Frontiers for Preventive Intervention Research". Currently and since 1997, I have been a member of the Board of Neuroscience and Behavioral Health of the Institute of Medicine.

I met Mr. Sutton when he consulted for several months in a case with my daughter who is an attorney. My impression is that Mr. Sutton is a sensitive and caring person who is a knowledgeable, ethical; and competant lawyer. I believe he is the kind of attorney who would be a substantive asset to the federal judiciary.

I have followed news reports of the intense lobbying against Mr. Sutton by various persons who advocate on behalf of the disabled. This effort is unfortunate and, I am convinced, misguided. 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.

Thank you for considering my endorsement of Mr. Sutton for the Sixth Circuit Court of Appeals.

Very truly yours,

Beverly Long

Beverly B. Long, M.S., M.P.H.

cc Senator Mike DeWine
cc Senator Orrin Hatch

January 17, 2003

THE HONORABLE SENATOR PATRICK LEAHY
FAX: (202) 224-3479

Dear Senator Leahy:

As an attorney who practices before the Federal Courts. I am writing to you to express my opposition to the nomination of Ohio Supreme Court Justice Deborah Cook and attorney Jeffrey S. Sutton for the U.S. Court of Appeals for the 6th Circuit. This court is currently one of the few balanced Courts of Appeals. I believe that it is critical for Judges to be fair, impartial and sensitive and to enforce the letter and spirit of our laws. From what I know about these two nominees they appear to lack these qualities.

Justice Cook's record shows that she is insensitive to bigotry. Justice Cook insisted that even overt racist, sexist and ageist statements are irrelevant in a discrimination case simply because the target of discrimination was not personally named. *Byrnes v. LCI Communications Holdings Co.* (1996). Justice Justice Cook has to my knowledge never voted to unconditionally affirm a plaintiff's civil rights verdict. Even where evidence of discrimination is abundant, Justice Cook consistently votes against plaintiffs' civil rights verdicts. E.g., *Gliner v. Saint Gobain Norton Industrial Ceramics Corp.* (2000).

Justice Cook creates barriers for people with disabilities. Justice Cook ruled that medical schools could refuse to admit blind applicants, ignoring testimony from a successful blind physician about readily available accommodations. *Ohio Civil Rights Comm'n v. Case Western Reserve University* (1996).

Justice Cook has sought to minimize protection for whistleblowers. She has consistently written opinions which would limit remedies for employees who try to prevent dangerous or illegal practices by employers. *Kulch v. Structural Fibers, Inc.* (1997).

Justice Cook has refused to protect the safety of workers. Justice Cook has denied remedies to workers who suffered catastrophic injuries, and voted (in dissent) to uphold legislation which permitted employers to put their employees in situations where it is substantially certain that employees would suffer serious injuries or death. *Johnson v. BP Chemicals* (1999).

Justice Cook incredibly has even condoned employer deceit. Unlike her six fellow justices, Justice Cook voted to dismiss an action filed against an employer for concealing and destroying evidence and giving untruthful testimony. (Notably, Jeffrey Sutton represented the employer in this case). *Davis v. Wal-Mart Stores, Inc.* (2001).

Justice Cook wanted to dismiss the case of an employee with a fatal lung disease caused by beryllium, based on late filing, even though the delay in filing was caused by the employer lying about the presence of beryllium in the workplace (Sutton represented this employer as well). *Norgard v. Brush Wellman, Inc.* (2002).

While I believe there are many other examples suffice it to say that the above ought to be sufficient to disqualify her for a life time appointment to the 6th Circuit.

While I am less familiar with Sutton I am aware that he has attacked the ADA, arguing that its protections are not needed to remedy discrimination by states against people with disabilities. Sutton argued before the U.S. Supreme Court that the 11 th Amendment should restrict the rights of employees with disabilities to sue state government employers who discriminated. Sutton urged the Court to disregard evidence of discriminatory conduct by states against people with disabilities, which was compiled by Congress. *Board of Trustees of the University of Alabama v. Garrett* (2001). Sutton has also argued that states should not be covered by the ADEA. *Kimel v. Florida Board of Regents* (2000).

Sutton has fought to limit protections against discrimination. Sutton successfully argued that disparate impact regulations promulgated under Title VI of the Civil Rights Act of 1964 did not contain a private right of action for victims of race discrimination. *Alexander v. Sandoval* (2001).

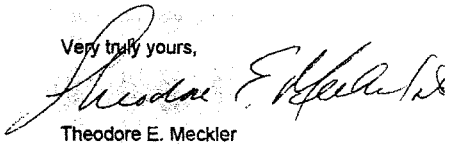
Sutton argued to ignore precedent in order to restrict the rights of Medicaid recipients. Sutton argued that Congress cannot authorize individuals to sue states to enforce their rights, even in connection with federal funding of state programs. According to Sutton, the Medicaid law and other Spending Clause laws, such as the Rehabilitation Act and the Individuals with Disabilities Education Act, are not supreme federal law. This argument runs counter to over sixty-five years of Spending Clause jurisprudence. *Westside Mothers v. Haveman* (2001).

Sutton argued to allow states to institutionalize people with disabilities. Sutton unsuccessfully argued that states have no duty under the ADA to provide services for people with disabilities in integrated settings, and claimed that keeping people with disabilities in institutions was not a form of discrimination. *Olmstead v. L.C.* (1999).

Sutton is active in the Federalist Society and is an adamant advocate for state's rights and limited federal authority. Sutton worked as a law clerk for Justice Scalia. His writings indicate that his positions as an attorney in court correspond to his personal beliefs.

Neither of these nominees would make an appropriate Court of Appeals Judge. As you know these appointments are for life. I urge you to oppose these two (2) nominations.

Very truly yours,



Theodore E. Meckler

TEM/dp

Judges011503/misc/tedwnwd

December 18, 2002

The Honorable Tom Daschle
The Honorable Orrin Hatch
The Honorable Patrick Leahy
The Honorable Trent Lott
United States Senate
Washington, D.C. 20510

Re: Judicial Nomination of John G. Roberts, Jr. to the United States Court of Appeals for the District of Columbia Circuit

Dear Senators Daschle, Hatch, Leahy, and Lott:

The undersigned are all members of the Bar of the District of Columbia and are writing in support of the nomination of John G. Roberts, Jr., to serve as a federal court of appeals judge on the United States Court of Appeals for the District of Columbia Circuit. Although, as individuals, we reflect a wide spectrum of political party affiliation and ideology, we are united in our belief that John Roberts will be an outstanding federal court of appeals judge and should be confirmed by the United States Senate. He is one of the very best and most highly respected appellate lawyers in the nation, with a deserved reputation as a brilliant writer and oral advocate. He is also a wonderful professional colleague both because of his enormous skills and because of his unquestioned integrity and fair-mindedness. In short, John Roberts represents the best of the bar and, we have no doubt, would be a superb federal court of appeals judge.

Thank you.

Sincerely,

Donald B. Ayer, Jones, Day, Reavis & Pogue
Louis R. Cohen, Wilmer, Cutler & Pickering
Lloyd N. Cutler, Wilmer, Cutler & Pickering
C. Boyden Gray, Wilmer, Cutler & Pickering
Maureen Mahoney, Latham & Watkins
Carter Phillips, Sidley, Austin, Brown & Wood
E. Barrett Prettyman, Jr., Hogan & Hartson
George J. Terwilliger III, White and Case
E. Edward Bruce, Covington & Burling
William Coleman, O'Melveny & Myers
Kenneth Geller, Mayer, Brown, Rowe & Maw
Mark Levy, Howrey, Simon, Arnold & White
John E. Nolan, Steptoe & Johnson
John H. Pickering, Wilmer, Cutler & Pickering
Allen R.Snyder, Hogan & Hartson
Seth Waxman, Wilmer, Cutler & Pickering

(Signatures continued next page)

Jeanne S. Archibald, Hogan & Hartson
Jeannette L. Austin. Mayer, Brown Rowe & Mawt
James C. Bailey, Steptoe & Johnson
Stewart Baker, Steptoe & Johnson
James T. Banks, Hogan & Hartson
Amy Coney Barrett, Notre Dame Law School
Michael J. Barta, Baker, Botts
Kenneth C. Bass, III, Sterne, Kessler, Goldstein & Fox
Richard K. A. Becker, Hogan & Hartson
Joseph C. Bell, Hogan & Hartson
Brigida Benitez, Wilmer, Cutler & Pickering
Douglas L. Beresford, Hogan & Hartson
Edward Berlin. Swidler, Berlin, Shereff, Friedman
Elizabeth Beske (Member, Bar of the State of California)
Patricia A. Brannan, Hogan & Hartson
Don O. Burley, Finnegan, Henderson, Farabow, Garrett & Dunner
Raymond S. Calamaro, Hogan & Hartson
George U. Carneal, Hogan & Hartson
Michael Carvin, Jones, Day, Reavis & Pogue
Richard W. Cass, Wilmer, Cutler & Pickering
Gregory A. Castanias, Jones, Day, Reavis & Pogue
Ty Cobb, Hogan & Hartson
Charles G. Cole, Steptoe & Johnson
Robert Corn-Revere, Hogan & Hartson
Charles Davidow, Wilmer, Cutler & Pickering
Grant Dixon, Kirkland & Ellis
Edward C. DuMont, Wilmer, Cutler & Pickering
Donald R. Dunner, Finnegan Henderson Farabow Garrett & Dunner
Thomas J. Eastment, Baker Botts
Claude S. Eley, Hogan & Hartson
E. Tazewell Ellett, Hogan & Hartson
Roy T. Englert, Jr., Robbins, Russell, Englert, Orseck & Untereiner
Mark L. Evans, Kellogg, Huber, Hansen, Todd & Evans
Frank Fahrenkopf, Hogan & Hartson
Michele C. Farquhar, Hogan & Hartson
H. Bartow Farr, Farr & Taranto
Jonathan J. Frankel, Wilmer, Cutler & Pickering
Jonathan S. Franklin, Hogan & Hartson
David Frederick, Kellogg, Huber, Hansen, Todd & Evans
Richard W. Garnett, Notre Dame Law School

(Signatures continued next page)

H.P. Goldfield, Vice Chairman, Stonebridge International
Tom Goldstein, Goldstein & Howe
Griffith L. Green, Sidley, Austin, Brown & Wood
Jonathan Hacker, O'Melveny & Myers
Martin J. Hahn, Hogan & Hartson
Joseph M. Hassett, Hogan & Hartson
Kenneth J. Hautman, Hogan & Hartson
David J. Hensler, Hogan & Hartson
Patrick F. Hofer, Hogan & Hartson
William Michael House, Hogan and Hartson
Janet Holt, Hogan & Hartson
Robert Hoyt, Wilmer, Cutler & Pickering
A. Stephen Hut, Jr., Wilmer, Cutler & Pickering
Lester S. Hyman, Swidler & Berlin
Sten A. Jensen, Hogan & Hartson
Erika Z. Jones, Mayer, Brown, Rowe & Maw
Jay T. Jorgensen, Sidley Austin Brown & Wood
John C. Keeney, Jr., Hogan & Hartson
Michael K. Kellogg, Kellogg, Huber, Hansen, Todd & Evans
Nevin J. Kelly, Hogan & Hartson
J. Hovey Kemp, Hogan & Hartson
David A. Kikel., Hogan & Hartson
R. Scott Kilgore, Wilmer, Cutler & Pickering
Michael L. Kidney, Hogan & Hartson
Duncan S. Klinedinst, Hogan & Hartson
Robert Klonoff, Jones, Day Reavis & Pogue
Jody Manier Kris, Wilmer, Cutler & Pickering
Chris Landau, Kirkland & Ellis
Philip C. Larson, Hogan & Hartson
Richard J. Lazarus, Georgetown University Law Center
Thomas B. Leary, Commissioner, Federal Trade Commission
Darryl S. Lew, White & Case
Lewis E. Leibowitz, Hogan & Hartson
Kevin J. Lipson, Hogan & Hartson
Robert A. Long, Covington & Burling
C. Kevin Marshall, Sidley Austin Brown & Wood
Stephanie A. Martz, Mayer, Brown, Rowe & Maw
Warren Maruyama, Hogan & Hartson
George W. Mayo, Jr., Hogan & Hartson
Mark E. Maze, Hogan & Hartson
Mark S. McConnell, Hogan & Hartson
Janet L. McDavid, Hogan & Hartson

(Signatures continued next page)

Thomas L. McGovern III, Hogan & Hartson
A. Douglas Melamed, Wilmer, Cutler & Pickering
Martin Michaelson, Hogan & Hartson
Evan Miller, Hogan & Hartson
George W. Miller, Hogan & Hartson
William L. Monts III, Hogan & Hartson
Stanley J. Brown, Hogan & Hartson
Jeff Munk, Hogan & Hartson
Glen D. Nager, Jones Day Reavis & Pogue
William L. Neff, Hogan & Hartson
J. Patrick Nevins, Hogan & Hartson
David Newmann, Hogan & Hartson
Karol Lyn Newman, Hogan & Hartson
Keith A. Noreika, Covington & Burling
William D. Nussbaum, Hogan & Hartson
Bob Glen Odle, Hogan & Hartson
Jeffrey Pariser, Hogan & Hartson
Bruce Parmly, Hogan & Hartson
George T. Patton, Jr., Bose, McKinney & Evans
Robert B. Pender, Hogan & Hartson
John Edward Porter, Hogan and Hartson (former Member of Congress)
Philip D. Porter, Hogan & Hartson
Patrick M. Raher, Hogan & Hartson
Laurence Robbins, Robbins, Russell, Englert, Orseck & Untereiner
Peter A. Rohrbach, Hogan & Hartson
James J. Rosenhauer, Hogan & Hartson
Richard T. Rossier, McLeod, Watkinson & Miller
Charles Rothfeld, Mayer, Brown, Rowe & Maw
David J. Saylor, Hogan & Hartson
Patrick J. Schiltz, Associate Dean and St. Thomas More Chair in Law
University of St. Thomas School of Law
Jay Alan Sekulow, Chief Counsel, American Center for Law & Justice
Kannon K. Shanmugam, Kirkland & Ellis
Jeffrey K. Shapiro, Hogan & Hartson
Richard S. Silverman, Hogan & Hartson
Samuel M. Sipe, Jr., Steptoe & Johnson
Luke Sobota, Wilmer, Cutler & Pickering
Peter Spivak, Hogan & Hartson
Jolanta Sterbenz, Hogan & Hartson
Kara F. Stoll, Finnegan, Henderson, Farabow, Garrett & Dunner
Silvija A. Strikis, Kellogg, Huber, Hansen, Todd & Evans
Clifford D. Stromberg, Hogan & Hartson

(Signatures continued next page)

Mary Anne Sullivan, Hogan & Hartson
Richard G. Taranto, Farr & Taranto
John Thorne, Deputy General Counsel, Verizon Communications Inc.
& Lecturer, Columbia Law School
Helen Trilling, Hogan & Hartson
Rebecca K. Troth, Washington College of Law, American University
Eric Von Salzen, Hogan & Hartson
Christine Varney, Hogan & Hartson
Ann Morgan Vickery, Hogan & Hartson
Donald B. Verrilli, Jr., Jenner & Block,
J. Warren Gorrell, Jr., Chairman, Hogan & Hartson
John B. Watkins, Wilmer, Cutler & Pickering
Robert N. Weiner, Arnold & Porter
Robert A. Welp, Hogan & Hartson
Douglas P. Wheeler, Duke University School of Law
Christopher J. Wright, Harris, Wiltshire & Grannis
Clayton Yeutter, Hogan & Hartson (former Secretary of Agriculture)
Paul J. Zidlicky, Sidley Austin Brown & Wood

cc: The Honorable Alberto Gonzales
Counsel to the President

MESSING, RUDAVSKY & WELIKY, P.C.

DAHLIA C. RUDAVSKY
ELLEN J. MESSING
JAMES S. WELIKY
JEREMY P. CATTANI

44 SCHOOL STREET
BOSTON, MASSACHUSETTS 02108
TELEPHONE: (617) 742-0004
FACSIMILE: (617) 742-1887
messngrdvsky@mela.org

January 14, 2003

VIA FACSIMILE ONLY

Senator Patrick Leahy
433 Russell Senate Office Building
United States Senate
Washington, DC 20510

Re: Nominations of Deborah Cook and Jeffrey Sutton to Sixth Circuit

Dear Senator Leahy:

We are writing as civil rights attorneys who represent workers in labor and employment disputes. We understand that the Judiciary Committee will presently be considering the nominations of Justice Deborah Cook and attorney Jeffrey S. Sutton to the Sixth Circuit Court of Appeals. We are writing to urge you to oppose these nominations, and to vote against their confirmation.

As you well know, these judicial nominations are lifetime appointments. Justice Cook is far to the right of her colleagues on the Ohio Supreme Court, which counts five Republicans among its seven members. We understand that she commonly dissents from their majority opinions (writing at least 313 dissents, frequently as a lone dissenter) in pursuit of a very narrow right-wing agenda, and that her judicial activism and willingness to ignore precedent have earned her the dubious description of "conservative combatant" from a major Ohio newspaper. We understand that her decisions have heavily favored corporations, to the detriment of citizens' civil rights. For example, one of her decisions advocated the elimination of protections for employee whistleblowers, while another argued against holding supervisors and managers individually liable for their acts of sexual harassment and workplace discrimination.

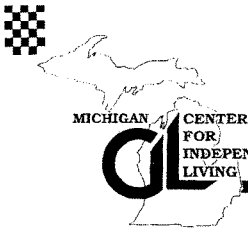
Attorney Sutton's record reflects a similar, longstanding opposition to civil rights. We understand that he has argued in favor of states' rights at the expense of limiting federal authority in various contexts; against a private right of action for victims of race discrimination, pursuant to disparate impact regulations promulgated under Title VI of the Civil Rights Act of 1964; and against the rights of people with disabilities to sue state government employers and to compel states to provide services for people with disabilities in integrated settings.

We hope that you will oppose these nominations, as well as any other nominees whose histories raise serious questions about their fitness and commitment to civil rights.

Sincerely,

Dahlia C. Rudavsky Ellen J. Messing

James S. Weliky Jeremy P. Cattani



1476 Haslett Road
Haslett, Michigan 48840
Voice/TTY (517) 333-4253 • FAX (517) 333-4244

January 14, 2003

The Honorable Patrick Leahy
United States Senator
433 Russell Senate Office Building
Washington DC 20510

Dear Senator Leahy:

I write on behalf of the Michigan Association of Centers for Independent Living (MACIL), a statewide network of local community-based organizations of people with disabilities to remove barriers to our participation in the economic and social life of our communities.

MACIL is opposed to the confirmation of Jeffrey S. Sutton to the Court of Appeals for the Sixth Circuit. His record is a pattern of efforts to override the intent of Congress and to undermine the spirit and purpose of the American with Disabilities Act of 1990 (ADA) and other civil rights laws. In spite of the extensive historical record of state-sanctioned discrimination against individuals with disabilities, Sutton has argued that the protections of the ADA were "not needed" and believes that states should be the "principal bulwark in protecting civil liberties".

In his aggressive espousal of the cause of federalism and in the guise of promoting a theory of limited government, Sutton has attempted in the federal courts to dismantle one by one the core protections for people with disabilities enacted by Congress. MACIL urges you to oppose his appointment and instead keep faith with the declaration of President George W. Bush when he launched his New Freedom initiative:

> "I am committed to tearing down the remaining barriers to equality that face Americans with disabilities today. My New Freedom Initiative will help Americans with disabilities by increasing access to assistive technologies, expanding educational opportunities, increasing the ability of Americans with disabilities to integrate into the workforce, and promoting increased access into daily community life."

Thank you,

Liz O'Hara
Executive Director

State of Michigan

Michigan Developmental Disabilities Council

Karla L. Kirkland
Chairperson

Duncan Wyeth
Vice Chairperson

Kathern E. Bacon

Roger M. Bailey

Robert D. Cecil

Felecia Jordan Da-Silva

Vera Graham

Virginia R. Harmon

Todd Koopmans

Barbara LeRoy

Margaret Nielsen

John S. Palmer, Jr.

Linda Potter

Jaye N. Shamsiddeen

Jonelle Stec

Jacquelyn J. Thompson

Daniel R. Vivian

Richard S. Webster

Sarah Avery Wojtowicz

Karen Yanny

Vendella M. Collins
Executive Director

June 1, 2001

Lewis Cass Building
Lansing, MI 48913

(517) 334-6123 Voice
(517) 334-7354 TDD
(517) 334-7353 FAX

Senator Patrick Leahy, Ranking Member
United States Senate
Committee on the Judiciary
224 Dirksen Building
Washington, DC 20510-6275

Dear Senator Leahy:

On behalf of the 177,000 Michigan residents with developmental disabilities, the Michigan Developmental Disabilities Council strongly urges you not to forward the nomination of Jeffrey Sutton for the U.S. 6th Circuit Court of Appeals.

While an accomplished attorney, Mr. Sutton has shown during his career he has little regard for citizens with disabilities in this country. In fact, he has a record of reducing the effectiveness of civil rights guarantees. Not the least of which was his recent work on the Alabama v. Garrett case before the U.S. Supreme Court.

The Council supports and encourages people with developmental disabilities to take control of their lives through community-wide, results-oriented action. We believe Mr. Sutton is not a suitable candidate for the judgeship of such an important bench. We are concerned that Mr. Sutton will interpret the Constitution in a manner that leaves very little room for Congress to protect individuals who experience disability discrimination.

Please, in the interests of not only those with disabilities in this country but for all Americans who cherish their civil rights, vote "no" on Mr. Sutton's confirmation.

Thank you, in advance, for your kind consideration.

Sincerely,

Duncan Wyeth
Chair, Public Policy Committee

Michigan Department of Community Health, designated state agency under the [illegible]
James K. Haveman, Jr., Director • [illegible]

DCH-359 (3/98)

Attorney General
Betty D. Montgomery

January 7, 2003

U.S. Senator Patrick J. Leahy
Chairman, Senate Judiciary Committee
United States Senate
433 Russell Senate Office Building
Washington, D.C. 20510
Tel: (202) 224-4242

Dear Chairman Leahy:

Almost two years ago, numerous Democratic and Republican Attorneys General and I wrote a letter in support of Jeffrey Sutton's confirmation to the United States Sixth Circuit Court of Appeals. I continue to believe that Mr. Sutton would make an excellent addition to the Sixth Circuit, and hope that you will speedily confirm his nomination.

One issue that has come up during the consideration of his nomination is his work as an advocate in the area of disability-rights litigation. At the Attorney General for the State of Ohio over the last eight years, I have a first-hand perspective on this issue. When Mr. Sutton was serving as my State Solicitor from 1995 to 1998, a case came through my office involving a blind woman named Cheryl Fischer who had been denied admission to the Case Western University Medical School on account of her disability. As occasionally happens in government litigation, different state agencies took different stands on Ms. Fischer's case when it arrived at the Ohio Supreme Court. On the one hand, the Ohio Civil Rights Commission determined that the admissions decision of Case Western had violated Ms. Fischer's rights under Ohio's civil rights statutes. It therefore was my office's responsibility to defend that decision before our State's highest court. On the other hand, the state universities (and their medical schools) took the position that Case Western had not discriminated against Ms. Fischer on account of her disability. They therefore wanted my office to file a brief on their behalf in the Ohio Supreme Court.

As State Solicitor, Mr. Sutton was responsible for overseeing appellate litigation in my office. When the Fischer case arrived at the Ohio Supreme Court, he explained the views of the different state agencies on the case and the need to assign different lawyers in the office to argue these two very-different positions. He then specifically asked me if he could represent Ms. Fischer's side of the case while another lawyer in

the office represented the state universities. It was clear that Jeff thought Cheryl Fischer had the better legal argument, that he believed in her position, and that he thought the State Solicitor should advocate that position before the Ohio Supreme Court. After I approved this recommendation, his advocacy in the case left no doubt in my mind to his commitment to her cause and to the findings of the Ohio Civil Rights Commission.

I trust the above information will help put Jeff Sutton's real views in the area of disability-rights litigation in the proper perspective.

As Ohio's Attorney General for the past eight years, I have had many opportunities to hire, evaluate and compare extremely capable attorneys. Jeff Sutton is easily in the top 1% of all such individuals. I strongly support his candidacy for a position on the United States Sixth Circuit Court of Appeals.

Thank you, in advance, for your consideration in this matter.

Sincerely,

Betty D. Montgomery
Attorney General of the State of Ohio

BDM:jmf

cc: The Honorable Senator Mike DeWine
The Honorable Senator George V. Voinovich

Stop Sutton!

To President George W. Bush, Senator Orrin Hatch, Senator Patrick Leahy, and members of the U.S. Senate:

WHEREAS
President George W. Bush has declared that: "Every day our nation was segregated was a day that America was unfaithful to our founding ideals. And the founding ideals of our nation and, in fact, the founding ideals of the political party I represent was, and remains today, the equal dignity and equal rights of every American";

WHEREAS
Numerous editorials have called for a reassessment of President Bush's judicial nominees, including the New York Times editorial of December 22, 2002 which stated: "It seems clearer than ever that the White House and the Senate should conduct a more rigorous review of current and future judicial nominees' records"..."and disqualify any whose commitment to equal rights is at all in doubt;"

WHEREAS
People with disabilities are fully deserving of the federal civil rights protections included in Section 504 of the Rehabilitation Act, Individuals with Disabilities Education Act (IDEA), and the Americans with Disabilities Act (ADA);

WHEREAS
Jeffrey Sutton, nominated last year to the U.S. Court of Appeals for the Sixth Circuit, has been a leader in the effort to limit congressional power to enact laws protecting civil rights. Sutton has prevailed in a series of 5-4 cases before the Supreme Court that have curtailed civil rights, including the *Board of Trustees of Alabama v. Garrett*, which successfully challenged the constitutionality of applying the Americans with Disabilities Act of 1990 to states as employers. (Sutton argued that the protections of the ADA were "not needed" to remedy discrimination by states against people with disabilities. This decision prevents persons with disabilities from collecting monetary damages from state employers. Most significantly, it has resulted in fewer attorneys being willing to represent individuals in ADA cases against state employers.);

WHEREAS
Sutton filed a brief representing the state of Georgia before the Supreme Court in *Olmstead v. L.C.* arguing that unnecessarily keeping people with disabilities in institutions was not discrimination. (Ruling against the segregation and unnecessary institutionalization of people with disabilities, the Supreme Court reversed in a groundbreaking decision supporting desegregation.)

WHEREAS
Sutton has successfully argued against civil rights in *Sandoval v. Alexander* (holding that there is no private right of action under Title VI of the 1964 Civil Rights Act's disparate impact regulations); and *United States v. Morrison* (holding that the civil remedy provisions of the Violence Against Women Act was beyond Congress's power to enact).

AND WHEREAS
Sutton has not just acted as an advocate for his clients, but has admitted that he is often "on the lookout" for cases that support his hostility towards Federal civil rights protections and has strongly advocated going far beyond the Court's 5-4 majority in restricting Congress's power to protect civil rights;

THEREFORE, BE IT KNOWN
The undersigned joins hundreds of disability and civil rights organizations in opposing the confirmation of Jeffrey Sutton to the Sixth Circuit Court of Appeals and respectfully requests that the U.S. Senate vote against his confirmation. The undersigned further requests that President Bush select judicial nominees supportive of disability and civil rights.

Sincerely,

Name: **Email:**

Address: **Date:**

Telephone:

Please Distribute and Fax Completed Petitions (without cover) to: 202-318-4040

Contact adawatch@aol.com for an electronic version of this petition or go to www.adawatch.org

ADA WATCH *A Campaign to Protect the Civil Rights of People with Disabilities.**

900 Second Street, Suite 211
Washington, D.C. 20002

Jim Ward
202-408-9514

May 14, 2001

The Honorable Senator Patrick Leahy
United States Senate
Washington, D.C.

Dear Senator Leahy:

President Bush's nomination of Jeffrey Sutton for federal judgeship is of great concern to members of the disability community and it is our hope that you will be willing to meet with representatives of the ADA WATCH to discuss our opposition.

The ADA WATCH is a campaign to protect the civil rights of people with disabilities. This includes an informational network designed to alert and activate the grassroots to respond to threats to the ADA from Congress, the Administration, and the courts. Our 100+ member organizations include: ADAPT, National Council on Independent Living, American Association of People with Disabilities, Consortium for Citizens with Disabilities, Paralyzed Veterans of America, and the National Association of Protection and Advocacy Systems. While the ADA Watch does not speak for any of these individual organizations, we are currently making the judicial nomination of Jeffrey Sutton a top priority and a great majority of our partners are united in opposing this nomination in light of Mr. Sutton's outspoken disregard for the civil rights of people with disabilities. The nomination of a lawyer who has enthusiastically argued against the constitutionality of the ADA is hardly consistent with the Bush Administration's stated support of the ADA and the legacy of the man who signed the ADA into law, President George H. Bush.

Mr. Sutton has made it clear that he is not supportive of the rights granted to people with disabilities by Congress through the passage of the ADA. Despite extensive documentation of state government discrimination against people with disabilities, Mr. Sutton enthusiastically supported the position that Congress did not have the authority to create the important civil rights protections afforded by the ADA. Mr. Sutton told the Supreme Court last fall when he argued the *Garrett* case for Alabama that the ADA "exaggerated discrimination problems by states." He told the court that the ADA was "not needed" and used similar arguments to weaken civil rights laws in the *Kimel* and *Sandoval* cases. His belief that laws of the various states provide adequate protections ignores the hundreds of pages of testimony before Congress that detailed the discrimination faced by people with disabilities across the country at the hands of state government agencies.

Please understand the ADA Watch's respectful opposition to this nomination and our concern that the nomination of Mr. Sutton represents a serious threat to the civil rights of people with disabilities.

Sincerely,

Jim Ward
ADA WATCH

** ADA Watch campaign partners include: Paralyzed Veterans of America, National Council for Independent Living (NCIL), ADAPT, Bazelon Center for Mental Health Law, National Association for Protection and Advocacy Systems (NAPAS), Disability Rights Center, TASH, American Association for People with Disabilities (AAPD), National Council on Disability, National Organization on Disability, Consortium for Citizens with Disabilities.*

ADA WATCH

A Campaign to Protect the Civil Rights of People with Disabilities.

900 Second Street, NE, Suite 211
Washington, D.C. 20002

Jim Ward
202-408-9514
202-329-5877 (cell)

May 20,2001

News Release

People with Disabilities March to the White House and Launch National Campaign to Defeat President Bush's Judicial Nominee Jeffrey Sutton

* Downloadable photographs of these events can be found at www.nwcil.org

(Washington, D.C.) - Leaders of numerous national disability rights, consumer, and service organizations launched a national campaign to defeat Jeffrey Sutton, President Bush's nominee for the 6th U.S. Circuit Court of Appeals. The ADA Watch, a public awareness and advocacy initiative to protect the Americans with Disabilities Act (ADA), was introduced to the more than 500 participants of the annual meeting of the National Council on Independent Living (NCIL). Deeply concerned with Sutton's belief that there is no demonstrated record of discrimination towards people with disabilities, panelists vowed to use all the resources of their nationwide grassroots network to block this nomination. Activists decided to march directly to the White House where they gathered to implore Bush to withdraw the Sutton nomination.

Sutton, who represented the University of Alabama in the *University of Alabama v. Garrett* case before the U.S. Supreme Court, has stated that the "ADA was not needed," and has been central in many attempts to weaken or eliminate civil rights protections. When asked by a Supreme Court Justice if the *Garrett* case just applied to employment aspects of the ADA, Sutton replied, "Well, Your Honor, it's a challenge to the ADA across the board."

Sutton's record against federal civil rights protections has galvanized the disability community and ADA WATCH campaign coordinator, **Jim Ward** urged action in the form of "letters, phone calls, and email to the White House and to Senate Judiciary Committee members; letters to the editor and op-ed columns; marches in the streets – every effort possible to let America know that Jeffrey Sutton represents a very real threat to the civil rights of Americans. Call on President Bush to honor the legacy of his father, who signed the ADA into law, and withdraw the nomination."

"The American Association of People with Disabilities (AAPD) strongly disagrees with the states' rights ideology that Jeffrey Sutton has made his career promoting, most recently in the *Garrett* and *Sandoval* cases before the U. S. Supreme Court," noted **Andrew J. Imparato**, President and CEO of AAPD. Five justices on the Supreme Court have been steadily chipping away at civil rights protections for people with disabilities in recent years. Jeffrey Sutton is the most prominent lawyer who has been providing the chisel that activist federal judges have been using to disenfranchise and disempower millions of Americans with disabilities."

Justin Dart, widely respected as the "father" of the ADA, reminded the audience that "the Americans with Disabilities Act is the world's first comprehensive civil rights law for people with disabilities. Barbara Bush has described it as the finest accomplishment of her husband's administration. Abraham Lincoln led this nation to war and died to establish the authority of our federal government to protect the rights of our citizens no matter what their state of residence. It is very difficult to understand how President George W. Bush could send to the Federal Court a man who challenges the "across the board" constitutionality of a great civil rights law written in the tradition of Abraham Lincoln and signed by his father, George Bush, Sr."

Representing the National Disabled Student Union (NDSU), a vital participant on today's panel was **Sabrina Marie Wilson** (alumna), VP of DC Center for Independent Living and AAPD Paul Hearne Award winner. NDSU is a cross-disability, student organization with representation at over 89 schools nationwide (colleges and universities, high schools, and elementary schools) and was founded in response to the US Supreme Court *Garrett* decision which weakened enforcement of Title I of the ADA. In a letter to President Bush, NDSU stated that "Sutton is vocally opposed to the Americans with Disabilities Act. His victory in *Garrett* severely weakened the ADA by undermining the anti-discrimination protections for persons with disabilities working for state employers despite the long history of state discrimination against people with disabilities and the fact that states like Alabama have disability rights laws that have been found by courts to lack any enforcement provisions. To be consistent with your father's distinguished legacy for widening the circle of inclusion and your honorable commitments to the disabled community, we respectfully urge you to make the right decision and withdraw the Sutton nomination."

United with hundreds of members of the Independent Living movement from around the nation, **Courtland Townes, III**, Chair of the NCIL Civil Rights Committee stated that "We are in opposition to Sutton because he seems to be in direct contradiction with the philosophy of Independent Living. The ADA has been a successful tool. It has provided concrete and real change. We stand against this nominee who has stated that the ADA, the landmark piece of legislation, our civil rights law, is unnecessary. "

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NCIL

National Council on Independent Living
1916 Wilson Blvd., Suite 209
Arlington, VA 22201
Voice (703) 525-3406
TTY (703) 525-4153
FAX (703) 525-3409
E-Mail ncil@ncil.org

Executive Director
Anne-Marie Hughey

Officers
President
Paul W. Spooner
Framingham, Massachusetts

Vice President
Micheal Oxford
Topeka, Kansas

Secretary
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Region VIII
Patricia Lockwood
Billings, Montana

Region IX
Dwight Bateman
Modesto, California

Region X
Kelly Buckland
Boise, Idaho

FACT SHEET ON THE OPPOSITION OF THE DISABILITY COMMUNITY TO THE NOMINATION OF JEFFREY SUTTON FOR A FEDERAL JUDGESHIP

Mr. Sutton has made it clear that he is not supportive of the rights granted to people with disabilities by Congress through the passage of the Americans with Disabilities Act (ADA). Despite extensive documentation of state government discrimination against people with disabilities, Mr. Sutton enthusiastically supported the position that Congress did not have the authority to create the important civil rights protections afforded by the ADA. Mr. Sutton told the Supreme Court last fall when he argued the *Garrett* case for Alabama that the ADA "exaggerated discrimination problems by states." He told the court that the ADA was "not needed" and used similar arguments to weaken civil rights laws in the *Kimel* and *Sandoval* cases. His belief that laws of the various states provides adequate protections ignores the hundreds of pages of testimony before Congress that detailed the discrimination faced by people with disabilities across the country at the hands of state government agencies.

During an interview on National Public Radio, Mr. Sutton, in noting that the Supreme Court has only required rational basis review for discrimination against people with disabilities, stated "there are legitimate reasons for treating the competent differently than the incompetent".

Also during the Garrett hearing, Mr. Sutton stated, "The text of the ADA, to begin with, makes no mention of any pattern of State violations of the equal protection rights of the disabled. Not one instance of such conduct is identified, whether in the findings and purpose section of the law or in any other Title of the Act. The legislative record is no different. Far from reflecting State insensitivity to the equal-protection rights of their
citizens, the legislative record of the ADA 'acknowledg[es] that States are willing and able to respect [the employment and public access] rights' of the disabled." (Citing
Florida Prepaid).

Mr. Sutton's statements clearly indicate that he did not believe that Congress had the authority to pass the ADA, and his actions further show that he will work to undermine the intent of Congress in protecting the civil rights of all Americans.

We call on the Senate to deny confirmation of Jeffrey Sutton.



NATIONAL DISABLED STUDENTS UNION

The National Disabled Students Union is a nationwide, cross-disability, student organization concerned with civil rights. We work to ensure that all disabled students have the opportunities they need to learn, the opportunities they need to live and work, and the opportunities they need to be full participants in their communities and full members of American society.

Senators Orrin Hatch and Patrick Leahy,
Chairman and Ranking Member, Judiciary Committee
1/23/03

Dear Senators Hatch and Leahy:

The National Disabled Students Union – a cross-disability organization representing disabled students at all levels of education across the United States – urges you to reject the Bush Administration's nomination of Jeffrey Sutton, Esq. to the 6th U.S. Circuit Court of Appeals, since it would be inconsistent with the legacy of George H.W. Bush and extremely injurious to rights of over 54 million Americans with disabilities protected by the Americans with Disabilities Act.

According to *CNN* reporter Kelli Arena, President Bush recently stated in the wake of divisive remarks by Trent Lott that the, "... Republican Party cares deeply about each individual... and I will continue to promote policies that enable the American individual to achieve his or her dreams." The nomination of states' rights legal activist Jeffrey Sutton, who admitted in a 1998 *Legal Times* interview with Tony Mauro that he was on the "lookout" for and actively sought out cases to advance the states' rights agenda at the expense of the rights of discriminated-against individuals is clearly inconsistent with that commitment, since Sutton's legal victories have already severely eroded the rights of 54 million persons with disabilities as well as many other individuals to obtain redress for legitimate grievances they have against discriminatory state entities.

The following are a list of our primary objections to Sutton. For additional details about our grievances, please refer the longer version of this letter, attached below, which contains more detailed supporting evidence.

1) **Sutton is an opponent of the ADA, who characterized Alabama's case in *University of Alabama v. Garrett* as a "challenge to the ADA across the board."**
2) **Sutton's attacks on the ADA jeopardize the civil rights of ordinary people such as Patricia Garrett and have inspired increasingly aggressive assaults on the constitutionality of the federal laws protecting persons with disabilities' right to a level playing field in education and employment.**
3) **In *University of Alabama v. Garrett*, Sutton falsely argued that states had been benevolent to persons with disabilities, that there was no record of state discrimination against the disabled and that there was no need for a national Americans with Disabilities Act.**
4) **Sutton is on the record in a 1998 interview with Tony Mauro of the *Legal Times* as stating that he takes on states rights cases challenging federal civil rights laws because he believes in states' rights.**

430 North East 16th Avenue, Portland, OR 97343
803-524-6029
http://www.disabledstudents.org

5) **In cases such as *Westside Mothers v. Haveman*, Sutton has sought to negate individuals' rights to hold states accountable for not providing services they are obligated to under federal law, such as Medicaid.**
6) **Sutton's expansion of states' rights at the expense of civil rights is based on a misguided 1890 decision in *Hans v. Louisiana* by most of the same justices that later decided that segregation was constitutionally permissible despite the 14th Amendment in the *Plessy v. Ferguson* case.**
7) **Since Sutton and Rehnquist's states rights jurisprudence relies on precedents from the court that endorsed segregation and encroaches so much on the civil rights of individuals from so many groups, it is inconsistent with the commitment to civil rights for all that the Republican Party has reaffirmed in the wake of the Trent Lott episode.**
8) **Sutton's view of states' rights is so extreme that Bush's own capstone, the Leave No Child Behind Act, the Help America Vote Act, as well as major components of the New Freedom Initiative would be ruled unconstitutional if his view of state-federal relations prevailed.**

Therefore, the appointment of Jeffrey Sutton would constitute a severe blow to the individual rights of persons with disabilities and other discriminated against groups, and would send a message to the disability rights community and the National Disabled Students' Union that would adversely impact the Bush Administration and its allies' future relationship with these groups. To be consistent with George H. W. Bush's distinguished legacy for widening the circle of inclusion and your honorable commitments to the disabled community, we respectfully urge you to make the right decision and firmly reject the Sutton nomination. Thank you for your consideration.

Sincerely,

Sarah Triano
Grassroots Organizing (Outside Action) Committee Chair, NDSU

Daniel Davis
Government Affairs (Inside Action) Committee Chair, NDSU

Joseph Hall
Isaac Huff
Co Chairs (Responsibility Coordinators), NDSU

Cc: Troy Justesen, Katy Hayes, ADA Watch

Longer Version with Explanations and Documentation:
Dear Senators Hatch and Leahy:

The National Disabled Students Union – a cross-disability organization representing disabled students at all levels of education across the United States – urges you to reject the Bush Administration's nomination of Jeffrey Sutton, Esq. to the 6th U.S. Circuit Court of Appeals, since it would be inconsistent with the legacy of George H.W. Bush and extremely injurious to rights of over 54 million Americans with disabilities protected by the Americans with Disabilities Act.

According to CNN reporter Kelli Arena, President Bush recently stated in the wake of divisive remarks by Trent Lott that the, "... Republican Party cares deeply about each individual... and I will continue to promote policies that enable the American individual to achieve his or her dreams." The nomination of states' rights legal activist Jeffrey Sutton, who admitted in a 1998 *Legal Times* interview with Tony Mauro that he was on the "lookout" for and actively sought out cases to advance the states' rights agenda at the expense of the rights of discriminated-against individuals is clearly inconsistent with that commitment, since Sutton's legal victories have already severely eroded the rights of 54 million persons with disabilities as well as many other individuals to obtain redress for legitimate grievances they have against discriminatory state entities.

Jeffrey Sutton is vocally opposed to the Americans with Disabilities Act. He represented the University of Alabama in *University of Alabama v. Garrett*. His victory in this case severely weakened the Americans with Disabilities Act, by undermining the anti-discrimination protections of persons with disabilities working for state employers. Despite the long history of state discrimination against people with disabilities, including involuntary sterilization and institutionalization and denial of basic voting and civil rights and despite the fact that states like Alabama have disability rights laws that have been found by courts to lack any enforcement provisions, Sutton claimed that the ADA is altogether unnecessary. According to Page 11 of the *Garrett* oral argument transcript, from October of 2000, when a Supreme Court Justice asked Mr. Sutton if the *Garrett* case just applied to employment aspects of the ADA, Sutton replied, "Well, Your Honor, it's a challenge to the ADA across the board." Sutton is out to destroy a piece of legislation that George H.W. Bush cites as one of his proudest accomplishments. This is judicial activism, not judicial restraint.

Persons with disabilities have suffered grievously as a result of Sutton's triumph. People like Patricia Garrett, a nurse who admirably persevered despite having breast cancer and continued to excel in her job performance, but was nevertheless forced out of her job by a boss who did not like having "sick people" around, cannot receive damages even though she suffered a serious loss of income due to the supervisor's irrational bias. Without the prospect of damages, fewer lawyers will represent persons with disabilities who are discriminated against in the work place. And many states have become emboldened to challenge the constitutionality of Title II of the ADA, which fundamentally guarantees our right to access state programs, government, courts and universities, on the same basis that Sutton invoked. Our rights are hanging in the balance, as the US Supreme Court will hear a state challenge of Title II of the ADA, *Medical Board of California vs Hason*, in late March.

If this record of hostility to individuals' rights is not bad enough, Sutton has sought to negate individuals' rights to hold states accountable for not providing services they are obligated to under federal law, such as Medicaid. His arguments in *Westside Mothers v. Haveman* that Medicaid was a contract between the state and the federal governments were so radical that both the 6th Circuit he'd be sitting on and even the conservative Rehnquist Supreme Court emphatically rejected it. In fact, Sutton's view of states' rights is so extreme that your critical legislative accomplishments such as the Leave No Child Behind Act, the Help America Vote Act, as well as major components of the New Freedom Initiative would likely be ruled unconstitutional if his view of state-federal relations prevailed.

Sutton's campaign to expand states' rights at the expense of civil rights is based on a misguided 1890 decision in *Hans v. Louisiana* by most of the same justices that later decided that segregation was constitutionally permissible – despite the 14th Amendment – in the *Plessy v. Ferguson* case. The 11th Amendment had been designed to protect states from lawsuits by non-citizens of the state and foreign countries, in response to *Chisholm v. GA* a case in which an individual from another state sued the state of Georgia. The *Hans* court presumed to divine an original intent that the framers meant for no individual to sue their own state, when nothing could be further from the truth. That this court found segregation consistent with a post 14th Amendment constitution shows how wrongheaded they were and why their precedents should not be relied upon.

Since Sutton's states' rights jurisprudence relies on precedents from the court that endorsed segregation and encroaches so much on the civil rights of individuals from so many groups, it is inconsistent with the commitment to civil rights, impartial administration of justice and equal protection for all that the Republican Party has reaffirmed in the wake of the Trent Lott episode. To truly disassociate the GOP from opponents of civil rights requires not nominating those whose jurisprudence is inspired by opponents of civil rights. Sutton is foremost on this list of judges whose nomination should accordingly be rejected.

Therefore, the appointment of Jeffrey Sutton would constitute a severe blow to the individual rights of persons with disabilities and other discriminated against groups, and would send a message to the disability rights community and the National Disabled Students' Union that would adversely impact the Bush Administration and its allies' future relationship with these groups. To be consistent with George H. W. Bush's distinguished legacy for widening the circle of inclusion and your honorable commitments to the disabled community, we respectfully urge you to make the right decision and firmly reject the Sutton nomination. Thank you for your consideration.

Sincerely,

Sarah Triano
Grassroots Organizing (Outside Action) Committee Chair, NDSU
Daniel Davis
Government Affairs (Inside Action) Committee Chair, NDSU

Joseph Hall
Isaac Huff
Co Chairs (Responsibility Coordinators), NDSU

NELA
Advocates for Employee Rights
National Employment Lawyers Association

Founder
Paul M. Tobias
President
Frederick M. Gittes
Executive Director
Terisa E. Chaw

January 27, 2003

The Honorable Orrin Hatch
Chairman, Senate Judiciary Committee
104 Hart Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy
Senate Judiciary Committee
433 Russell Senate Office Building
United States Senate
Washington, D.C. 20510

re: Jeffrey Sutton

Dear Senators Hatch and Leahy:

I am writing as President of the National Employment Lawyers Association to urge the Senate Judiciary Committee to reject Jeffrey Sutton's nomination for appointment to the Sixth Circuit Court of Appeals. NELA is the country's only professional organization that is exclusively comprised of lawyers who represent individual employees in cases involving employment discrimination and other employment-related matters. NELA and its 67 state and local affiliates have more than 3000 members.

Mr. Sutton has spent much of his career as an attorney trying to use the courts to reconfigure our system of government. He has dedicated himself to pursuing cases that provide an opportunity to convince federal judges to immunize states from suits by private individuals alleging discrimination and other reprehensible conduct by state officials. Mr. Sutton has played a significant role in persuading a narrow, conservative majority on the Supreme Court to strike down congressional enactments aimed at misconduct by state officials based on a relatively new and vague constitutional standard.

As the members of the Senate Judiciary Committee are aware, in recent cases argued by Mr. Sutton, the same five conservatives on the Supreme Court applied this new standard to severely restrict the ability of private individuals to enforce their rights under the Age Discrimination in Employment Act of 1967 ("ADEA") and under the Americans With Disabilities Act ("ADA") against State governments. *Board of Trustees v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000). In *Kimel*, a 5-4 decision, the Court held that, "in the ADEA, Congress did not validly abrogate the states' sovereign immunity to suits by private individuals." 528 U.S. at 91. In *Garrett*, another 5-4 decision, the Court held that applicants for employment, employees and ex-employees cannot bring suit to recover money damages for state violations of their rights under Title I of the ADA. *Garrett*, 531 at 360. The majority opinion in that case held that, even though Congress clearly intended the ADA to cover state employees, it had not gathered sufficient evidence of disability discrimination against state employees in judicial-like findings. *Id.* at 370-72.

These decisions have had a devastating impact on the ability of state employees, including employees of state universities and colleges, to prevent disability and age

Executive Board

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discrimination and to obtain meaningful relief for such discrimination. State governments, by and large, have not amended their statutes to fill the gap caused by these decisions.

Mr. Sutton advocates for judicial activism - - only from a point of view that has been associated with some of the most reactionary and virulent political movements in our Nation's history. Indeed, limiting the power of the federal government to protect citizens from abusive or discriminatory state and local officials (and provide meaningful remedies) has been a rallying cry of such movements as The Dixiecrat Party and other political groups dedicated to preserving and protecting segregation.

As has been exemplified by decades of litigation under the Reconstruction Era Civil Rights Acts and Title VII, state citizens often need protection from dangerous or discriminatory actions by their state officials, and, for many reasons, state remedies may be unavailable or impractical.

Mr. Sutton's notion of states' rights is extreme. For example, he convinced the district court in *Westside Mothers v. Haveman*, 133 F. Supp. 2d 549 (E.D. Mich. 2001) that spending-power programs such as Medicaid were not the supreme law of the land and that a state government cannot be sued, even for injunctive relief, based on its failure to comply with federal statutory and regulatory requirements. The case involved federal requirements for medical care for needy children. Fortunately, the Sixth Circuit rejected the incredible proposition asserted by Sutton that state governments could both accept federal money and snub federal statutory requirements all in the name of states' rights. *Westside Mothers v. Haveman*, 289 F.3d 852 (6th Cir. 2002). He even argued unsuccessfully in *Olmstead v. L.C.*, 527 U.S. 581 (1999), that states have no duty under the ADA to provide services for people with disabilities in integrated settings and that keeping people with disabilities in institutions was not a form of discrimination.

At least one historian has pointed out that views of state rights like that espoused by Mr. Sutton reflect the federal state relationship under the Articles of Confederation. As we all know, government under the Articles failed and led to the adoption of the Constitution with its provisions for a stronger Congress and President in our system of federalism.

Of course, we recognize that lawyers have a duty to represent their clients zealously. We do not criticize a nominee merely because he or she has taken a position in litigation that benefits the institutions being represented. However, it is clear that Mr. Sutton has a strong personal commitment to enhancing state government immunity regardless of the consequences on individuals who may be subjected to discriminatory or dangerous conduct which violates federal law. Mr. Sutton's role in these cases went beyond that of a lawyer merely arguing for a client.

For example, as state solicitor, Mr. Sutton actively interjected Ohio in a Texas case to advance his views of states' rights and he presented part of the oral argument in *City of Boerne v. Flores*, 521 U.S. 507 (1997). *See City of Boerne v. Flores*, 519 U.S. 1088 (1997). Mr. Sutton clearly saw that decision has having ramifications far beyond the zoning dispute and the statute at issue in that case. In "*City of Bourne v. Flores*: A Victory for Federalism," an article published in the newsletter of the Federalist Society's Federalism & Separation of Powers Practice Group, he described that decision as "strik[ing] a welcome blow for States' rights" and as a "federalism decision[] with muscle." *See* Federalist Society Web site, http://www.fed-soc.org/Publications/practicegroupnewsletters/federalism/fd010304.htm.

He also defended that decision against the charge of judicial activism and suggested that individual rights would benefit from strengthening state immunity from citizen suits under federal law because it would encourage state litigation to the same purpose. This view has been disproven by events following the recent decisions discussed above and praised by Mr.

Sutton. States have not rushed forward after these decisions to strengthen the statutory protections afforded to their employees and citizens. More important, it is naive to believe that state officials will jump to pass laws dismantling their protection from civil liability simply because the Supreme Court has granted them further protection by applying strained principles of constitutional construction which limit the authority of Congress.

As Congress well knows, the core conceit of states' rights advocates is to trust the states. Sutton has persistently cited state laws purporting to provide private individuals meaningful enforcement alternatives to federal law. In fact, what states have on paper rarely provides a meaningful alternative, and Sutton has not urged the Court to consider seriously the viability of those state laws he cites, relying instead on their mere existence. In contrast, Congress knew from hearings that the states too often act like the proverbial fox assigned to guard duty at the hen house. His insistence on deference to the states and reluctance to demand that the states provide a meaningful alternative remedy reveals the depth of his commitment to states' rights and the superficiality of his concern for those victimized by discrimination and other misconduct by state officials.

Mr. Sutton has made it clear in interviews that his legal advocacy is personal, not just professional. As he told the *Legal Times*, he and his staff are always on the lookout for cases coming before the Court that raise issues of federalism. He added, "But I love these issues. I believe in this federalism stuff."

NELA strongly opposes Mr. Sutton's nomination. His words and actions demonstrate that he is a zealous advocate for states' rights and preclude his judging cases with an open mind. Essentially, his philosophical commitment has crossed the line from adherence to a particular viewpoint or set of values and become a defining characteristic of his mission as a lawyer. In both reality and perception, the nation would be better served were he to continue on that mission in the capacity of a lawyer and not as a decisionmaker on the bench.

The Sixth Circuit Court of Appeals does not need crusaders for state rights. It needs judges who can fairly balance the interests of individuals with those of government and business under the Constitution.

Very truly yours,

Frederick Gittes President,
National Employment Lawyers Association

May 23, 2001

The Honorable Patrick J. Leahy
United States Senate
433 Russell Senate Office Building
Washington, DC 20510

·NSBA·

Excellence and Equity in Public Education through School Board Leadership

Dear Senator Leahy:

We write to support the nomination of John G. Roberts, Jr. for the D.C. Circuit Court of Appeals.

The National School Boards Association is the nationwide organization representing public school governance. NSBA's mission is to foster excellence and equity in public elementary and secondary education through leadership. Founded in 1940, NSBA is a not-for-profit federation of associations of school boards across the United States and its territories. NSBA represents the nation's 95,000 school board members that govern 14,980 local school districts serving the nation's more than 47 million public school students.

It is clear from his professional record that John Roberts is a highly intelligent and motivated attorney. Mr. Roberts has distinguished himself as an outstanding legal scholar from the start of his career. He was managing editor of the law review at Harvard Law School and served as a Supreme Court clerk for Justice Rehnquist. He continues to excel in private practice and is a distinguished member of the Supreme Court Bar.

What may not be as clear from the written record is his character. Mr. Roberts is a dedicated public servant. He has represented a number of public bodies himself, and further, regularly provides assistance to many other attorneys who also represent public entities. Mr. Roberts is among those attorneys who are always willing to contribute their time and professional expertise. He has often given his time to provide training, counsel, and advice to others. He has participated on programs within the National School Boards Association and the Counsel of School Attorneys as a speaker and author.

In addition, he has been willing to assist school attorneys as they have prepared to present arguments in the United States Supreme Court. His willingness to spend extended time assisting others comes from his dedication to improving the practice of law. He is not outcome oriented in his approach to legal issues. Instead, he seeks accuracy and fairness in his work. He is always willing to take the time to do things right; and he is willing to support others who exhibit similar values. Above all, he personifies the qualities of an outstanding jurist with his even-temper and respectful demeanor.

National School Boards Association
680 Duke Street ▪ Alexandria, Virginia 22314-3493 ▪ (703) 838-NSBA ▪ FAX (703) 683-7590

Socrates wrote that a judge should have four characteristics – "to hear courteously, to answer wisely, to consider soberly, and to decide impartially". We are confident that Mr. Roberts possesses all of these attributes.

Sincerely,

Anne L. Bryant
Executive Director

Julie Underwood
General Counsel/Associate
Executive Director



111 Washington Avenue, Suite 101,
Albany, NY 12210
(518) 427-1060 Voice & TDD, (518) 427-1139 Fax
1(888) 469-7452 Toll Free (NYS Only)
www.nysilc.org or nysilc@nysilc.org

January 14, 2003

United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senators Hatch and Leahy:

On behalf of the New York State Independent Living Council (NYSILC), I am writing to strongly **OPPOSE** the nomination/confirmation of Jeffery Sutton to the Federal Court.

Mr. Sutton has been a chief proponent of 11th Amendment states rights that come at the direct sacrifice of 14th Amendment civil rights. As an American with a disability, I resent the reversal of my civil rights for the benefit of a privileged few. I truly question the confirmation of an individual who has directed such a premeditated pursuit of gutting the comprehensive civil rights that made our country unique.

This is not a new debate. The roots go back to the founding of our country. Over 600,000 Americans then died in a Civil War to secure a strong national government that would protect the equality of ALL citizens. Once the 14th Amendment was added in 1868, it took yet another century before our country put what was established in law into practice. People with disabilities fared even worse as a protected class. Far-reaching civil rights were not provided until 1990 with the passage of the Americans with Disabilities Act (ADA). Mr. Sutton has worked very hard to deny us of our rights. Even more ironic, President George W. Bush is nominating a man to the Court who has decimated a law that was a hallmark of his father's Presidency.

What impact has Mr. Sutton's actions had on real people? Since a person can no longer sue in Federal Court for damages, it is getting very hard to find legal representation in such cases. The vast majority of Americans do not have the cash to put a retainer down for a lawyer. Most people secured representation on a contingency basis. In addition, a national government that does not take an active role protecting the equality of its citizens will allow states to influence its "remedies." These are the same remedies that Mr. Sutton feels is more appropriate. Given the opportunity, states will deny, discriminate, and retaliate against anyone who dares to challenge them.

Here's an example of how Mr. Sutton's legacy has created dysfunction and a lack of accountability at the state level. A woman with a disability from Long Island waited years for affordable and accessible housing. She ended up winning a lottery and being the alternate for a newly constructed housing unit. She was offered the

unit when the original person declined. Unfortunately, the upstairs part of the dwelling wasn't accessible because the builder and all other parties involved refused to construct readily accessible housing as mandated by Federal law. The housing agency then made a rash judgment of what they would give her as a final offer for her reasonable accommodation. The woman argued that she needed an accessible unit. Instead of meeting her needs, the agency sold the dwelling to another person without a disability.

Feeling slighted, the woman started to investigate the situation on her own. All the parties involved had no policy of how to accommodate people with disabilities during a lottery process, nor a policy on enforcing the applicable Federal law. The law requires that at least 5% of their total units be fully accessible to people with physical disabilities and 2% accessible to people with sensory impairments. All the parties involved do not and can't even begin to verify how many of their units do meet such requirements, let alone a registry of how many people with disabilities occupy them. They are in violation of Federal law.

The woman has made several attempts to find legal representation. Despite periodic interest, she still does not have a lawyer to this day. She looked to HUD for guidance. Regional HUD staff has given her conflicting interpretations causing her to contact the national HUD headquarters for assistance. HUD has yet to resolve this matter.

She contacted the state agency involved and was promised a meeting and a physical inspection to verify compliance. Going against their original promise, they changed the context of the meeting from a physical inspection and wanted her to meet with the housing agency's attorneys. She told them that she wouldn't meet with their attorneys until she could obtain her own representation. They have since tried to dismiss their obligations to her because they said she declined their meeting even though she has a letter from the agency saying they were sorry for the misunderstanding and were willing to reschedule.

The woman then filed a complaint with the state's human rights office. After looking into the matter with the housing agency, the human rights office gave her a copy of the housing agencies response, prepared by their lawyers, which questioned her claim as a person with a disability! The human rights office wanted the woman to go through a rigorous process to document that she, in fact, had a disability. She immediately postponed the complaint out of fear of retaliation. So much for the State's impartiality!

As a result, Mr. Sutton's efforts have led to limited access to Federal Court, minimized access to legal representation, compromised bureaucratic remedies, unchecked state violation of Federal law, fear, and retaliation. As an American, he is certainly entitled to his opinion, but he should never be allowed to serve on the bench of a Federal Court.

Respectfully,



Brad Williams
Executive Director

cc: Senator Charles Schumer
Senator Hillary Clinton

The New York Times

EDITORIALS/LETTERS SATURDAY, OCTOBER 14, 2000

Civil Rights Versus States' Rights

The heated debate in the Supreme Court on the scope of federal authority over the states reached a pivotal moment this week. The justices heard arguments in an Alabama case that bears not only on the civil rights of disabled Americans but, more broadly, on Congress's power to enforce constitutional guarantees of equal protection.

At issue is whether Congress acted constitutionally when it made states liable for damages for violating the Americans With Disabilities Act. The act, intended to remedy and prevent discrimination against the disabled, was approved overwhelmingly by Congress and signed into law by President Bush.

A narrow but determined conservative court majority has been chipping away at federal power. These same justices will now have to decide whether they are prepared to undercut Congress's authority to protect the rights of vulnerable minorities. Recent court decisions have already expanded the immunity of states from the reach of federal law, narrowing Congress's ability to legislate national remedies to national problems, including civil rights. Last term the court struck down portions of one law barring age discrimination in employment and another allowing rape victims to sue their attackers.

But these decisions ought not to determine the outcome on the disabilities act. As is often the case, the key vote will be cast by Justice Sandra Day O'Connor. She has been part of the states' rights majority, but her opinion last year in the age discrimination case made a point of not ruling out "powerful remedies" by Congress in other cases. Much depends on her being convinced that the disabilities law represents a "congruent and proportional" response to the long and well-documented history of pervasive and unconstitutional discrimination against disabled people committed by the states — the standard she set out in that decision. Her questioning during the argument took note of Congressional findings that states were major perpetrators of bias against the disabled. That was an encouraging sign.

Justice O'Connor and her colleagues need to think about the harm they would bring to the disabled by holding states immune from liability under the act, and the more serious damage they would inflict on the nation's constitutional framework.



Northern Regional
Center for Independent Living

165 Mechanic Street
Watertown, New York 13601
315-785-8703 (V) • 315-785-8704 (TTY) • 315-785-8612 (Fax)

7594 State Street
Lowville, New York 13367
315-376-8696 (V/TTY) • 315-376-3404 (Fax)

January 13, 2003

Senator Hillary Rodham-Clinton
464 Russell Office Building
United States Senate
Washington, DC 20510

Dear Senator Rodham-Clinton:

Please be advised that this organization strongly opposes the nomination of Jeffrey Sutton to the United States Court of Appeals. It is our understanding that the Court of Appeals becomes the final authority for all but a few cases that are reviewed by the U.S. Supreme Court. Their power, therefore, is formidable. Mr. Sutton is described as a pro-states' rights judicial activist and has in fact argued against the Americans with Disabilities Act. Given Mr. Suttons statements in *University of Alabama v. Garrett* his nomination is a threat to the Americans with Disabilities Act and therefore to this country's civil rights heritage. (According to page 11 of the Garrett oral argument transcripts, Mr. Sutton characterized his position as a "challenge to the ADA across the board".)

We urge you also to oppose this nomination to the U.S. Court of Appeals. Thank you for your time and consideration.

Yours for a barrier free society,

Aileen Martin

Aileen Martin
Executive Director

Ocean State Center for Independent Living
1944 Warwick Ave., Warwick, RI 02889
(401)738-1013 voice (401)738-1015 tty
(401)738-1083 fax www.oscil.org
e-mail - oscil@rida.net

facsimile transmittal

Date: 1-28-03 Number of pages including cover sheet:
To: Senate Judiciary Fax #: 202-228-0861
From: Ocean State ILC Fax #:
Re: Oppose Sutton

The Ocean State Center for Independent Living strongly OPPOSES the appointment of Jeffrey Sutton to the Court of Appeals - 6th circuit -

Susan Eleoff

CONFIDENTIAL

NOTE: This transmission may contain confidential information. Should you receive this information in error, please call (401) 738-1013 as soon as possible. Thank you.

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OF DEFIANCE
PEOPLE WITH DISABILITIES MAKING INDEPENDENT LIVING A REALITY
516 Perry Street, Defiance, Ohio 43512 • 419.782.5441 (V/TTY) • 877.209.8336 (Toll-free) • 419.782.9231 (Fax)

May 7, 2002

The Honorable President George W. Bush
The White House
Washington, D.C.

Dear Mr. President:

We are writing to express out deep concern with and opposition to the nomination of Jeffrey Sutton to the U.S. Court of Appeals for the Sixth Circuit. Along with many other organizations from around the country, we are extremely troubled about his outspoken disregard for and opposition to congressional protection of the rights of people with disabilities through the Americans with Disabilities Act. This nomination has been extremely troubling and divisive here in Ohio and elsewhere.

A number of Ohio disability organizations have previously signed a petition in opposition of Mr. Sutton. These groups include:

Ability Center of Defiance
Access Center for Independent Living
AXIS Center for Public Awareness of People with Disabilities
Center for Independent Living Options, Inc.
Irene M. Ward & Associates
Lorain County Coalition of Citizens with Disabilities, Inc.
Ohio Chapter of WAPD
Ohio Coalition for the Education of Children with Disabilities
Ohio Statewide Independent Living Council
People First of Ohio
Resource Linkage Association
The Ability Center of Greater Toledo
The Disability Coalition Movement of Cleveland
The Independent Living Center Of North Central Ohio, Inc.
The Ohio Women with Disabilities Network

We urge you to keep your pledge to unite Americans, not divide them, by withdrawing this nomination and seeking more moderate nominees for this and other important judicial positions.

Sincerely,

The Independent Living Center of N.C.O., Inc.
Jonnie Fisher, Director
1 Marion Ave Suite 115C
Mansfield, Ohio

Kristina Noe, Executive Director
Ability Center of Defiance
516 Perry Street
Defiance, Ohio

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Ray Jones, Chairman
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CC: Senator Patrick Leahy

Options for INDEPENDENCE INC.
Making a way for all.

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SENECA FALLS OFFICE:
55 FALL ST., SENECA FALLS, NY 13148
315-568-2724 VOICE AND TTY • FAX 315-568-1844

WEB PAGE: WWW.OPTIONSFORINDEPENDENCE.ORG
E-MAIL: OPFORIND@AOL.COM

January 7, 2003

Senator James Leahy
224 Dirksen Senate Office Building
Washington, DC 20510-6275

Good morning,

We are writing with regards to President George W. Bush's nomination of Jeffrey Sutton to the Sixth Circuit Court. Options for Independence is an Independent Living Center which works with people who have disabilities in Central New York. We serve as advocates to help individuals with disabilities remain independent in their community. We also work in the community to break barriers – often citing the Americans with Disabilities Act.

We oppose the nomination of Mr. Sutton because of his stand and disregard for the ADA and the rights of individuals with disabilities afforded to them by disability laws. Mr. Sutton has not only made statements against the ADA but has also worked against its full implementation. We contend that should Mr. Sutton be approved, the civil rights of individuals with disabilities will be in jeopardy.

It is important to reference two Supreme Court Cases that Mr. Sutton was directly involved with. Mr. Sutton represented both the University of Alabama and the State of Georgia in two well known disability cases. The University of Alabama vs. Garrett was a case where Patricia Garrett, who was a state employee, sued her employer under the ADA for damages. Mr. Sutton argued that Congress had no power to allow state employees to sue their employers for damages under Title I of the ADA. The Court ruled in favor of Mr. Sutton's defense in a 5 to 4 decision.

In Olmstead vs. L.C., Mr. Sutton argued that states had no duty under the ADA to serve individuals with disabilities in integrated settings. The Olmstead case was brought by two women living in a state run institution who wanted to be able to move back into their community. He contended that it was too costly to do this. Furthermore, he argued in this case that keeping individuals in an institution was not a form of discrimination. Luckily in this case the women won. Justice Ruth Bader Ginsburg in the Court's decision cited that unjustified institutionalization is discrimination and violates the ADA.

As an agency that works to educate individuals with disabilities about their rights, we urge you to vote against the nomination of Jeffrey Sutton to the Sixth Circuit Court. Should Mr. Sutton be confirmed the path to enforcing the rights for all people will be jeopardized where our civil rights are concerned.

Warmest regards,

Judy Wright
Statewide Systems Advocate

State Rehabilitation Council

Office of Vocational Rehabilitation Services
500 Summer Street NE, E87
Salem OR 97301-1120

Voice: (503) 945-6256
TTY: (503) 945-5894
Toll Free: (877) 277-0513
FAX: (503) 947-5025

January 28, 2003

To Whom It May Concern:

The Oregon State Rehabilitation Council wishes to express our deep concern regarding the possible confirmation of Jeffrey Sutton to the 6th Circuit Court of Appeals.

The Oregon State Rehabilitation Council, as well as many other advocacy groups, is concerned because of Mr. Sutton's record on disability rights such as enforcement of the ADA.

The disability community believes it is crucial to leave the ADA intact and that nothing should be done to weaken the law that allows the playing field to be equal for persons with disabilities.

Respectfully,

Tim E. Holmes
SRC Chair

INDEPENDENT LIVING CENTER
OF THE HUDSON VALLEY

☐ Troy Atrium, Broadway and Fourth, Troy, NY 12180
Voice/TTY (518) 274-0701 TTY # (518) 274-0216
FAX (518) 274-7944
☐ Fairview Plaza, 160 Fairview Avenue, Hudson, NY 12534
Voice/TTY (518) 828-4886 FAX # (518) 828-2592
TTY (518) 828-6993 (evening messages only)

January 24, 2003

The Honorable Orrin G. Hatch
Chairman: Senate Judiciary Committee
Dirksen Senate Office Building, Room 224
Washington, DC 20510

Honorable Chairman Hatch:

As an American citizen, a person with a disability and the State-wide Systems Advocate for the Independent Living Center of the Hudson Valley Inc. (ILCHV), I write respectfully to urge you not to confirm Jeffrey Sutton to the Sixth U.S. Circuit Court of Appeals. Jeffrey Sutton's activist efforts to limit Congressional authority in the area of disability rights has undermined your role in championing the Americans with Disabilities Act (ADA) and other laws expanding opportunities for the more than 50 million children and adults with disabilities and their families in the United States.

As a minority with a disability, I resent the reversal of my civil rights for the benefit of a privileged few. I truly question the confirmation of an individual who has directed such a premeditated pursuit of gutting the comprehensive civil rights that made our country unique. People with disabilities fared even worse as a protected class. Far-reaching civil rights were not provided until 1990 with the passage of the Americans with Disabilities Act (ADA). Mr. Sutton has worked very hard to deny us of our rights. Even more ironic, President George W. Bush is nominating a man to the Court who has decimated a law that was a hallmark of his father's Presidency.

In, University of Alabama v. Garrett, Mr. Sutton argued successfully that Congress did not have the authority under the Constitution to apply the ADA to States in employment discrimination suits for damages. He argued that unnecessary institutionalization should not be a violation of the ADA in the Olmstead v. L.C. case, but thankfully the Supreme Court declined to follow his lead in that case. Mr. Sutton's positions in these and other cases represent a view of Congress's authority that would dramatically restrict Congress's ability to pass laws protecting the rights of Americans with disabilities.

> "It's important that we show the African-American community and other minorities that we are an inclusive, tolerant and diverse party," said Senator Olympia J. Snowe, Republican of Maine. "We have to show not just in words but in actions that we mean what we say on that subject. Now the question is, how do we best go about it?"

Judicial nominations were a principal item in a letter sent to President Bush in December by the Leadership Conference. The letter stated:



"We are very concerned that many individuals who you have nominated to serve on the federal bench have records of deep hostility to core civil rights principles and to Congress's historic role in protecting the civil rights of all Americans".

Here is an example of how Mr. Sutton's legacy has created dysfunction and a lack of accountability at the state level. A woman with a disability from Long Island waited years for affordable and accessible housing. She ended up winning a lottery and being the alternate for a newly constructed housing unit. She was offered the unit when the original person declined. Unfortunately, the upstairs part of the dwelling wasn't accessible because the builder and all other parties involved refused to construct readily accessible housing as mandated by Federal law. The housing agency then made a rash judgment of what they would give her as a final offer for her reasonable accommodation. The woman argued that she needed an accessible unit. Instead of meeting her needs, the agency sold the dwelling to another person without a disability.

In case after case, Mr. Sutton has advanced a radical agenda that, while couched in neutral legal terms of the federal - state relationship, in fact seeks nothing less than the dismantling of civil rights laws Congress has enacted over the past four decades that guarantee freedom and opportunity for people with disabilities. As a result, Mr. Sutton's efforts have led to limited access to Federal Court, minimized access to legal representation, compromised bureaucratic remedies, coupled with unchecked state violation of Federal law, fear, and retaliation. As an American, he is certainly entitled to his opinion, but he should never be allowed to serve on the bench of a Federal Court.

Mr. Chairman, you have been a long-time supporter of federal civil rights for Americans with disabilities. Working with Senators Dole, Kennedy, Harkin and others, you helped build the voluminous record of egregious discrimination that persuaded your colleagues to overwhelmingly support the ADA when it was enacted in 1990. In defense of that record, you filed an amicus brief in the Garrett case supporting the constitutionality of the ADA as applied to State employers. Why, then, confirm someone to a lifetime appointment to a federal appeals court whose view of the Constitution will erect new barriers for Americans with disabilities seeking to assert their rights in federal court?

Once again, I implore you in the strongest possible manner - on behalf of the Independent Living Center of the Hudson Valley, and millions of Americans with disabilities - not to confirm Jeffrey Sutton to the Sixth U.S. Circuit Court of Appeals.

Respectfully,

Clifton Perez, M.S.W.
Systems Advocate

PORTER WRIGHT MORRIS & ARTHUR LLP
Attorneys & Counselors at Law

Fred G. Pressley, Jr.
614-227-2233
fpressley@porterwright.com

41 South High Street
Columbus, Ohio 43215-6194

Facsimile: 614-227-2100
Toll Free: 800-533-2794

December 11, 2002

The Honorable Patrick J. Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Orrin G. Hatch
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510

Re: Jeffrey Sutton

Dear Chairman Leahy and Senator Hatch:

I am writing to you to support Jeffrey Sutton's nomination for the position of United States Circuit Judge for the Sixth Circuit. I have had the distinct pleasure of working with Mr. Sutton when he was the Solicitor General for the State of Ohio. As Solicitor General, Mr. Sutton was a tenacious defender of Ohioans, regardless of their race, gender, disability, or nationality.

Specifically, I worked with Mr. Sutton as Special Counsel to the Ohio Attorney General to defend the constitutionality of Ohio's Minority Set-Aside statute. Despite the constitutional hurdles present in defending such statutes, Mr. Sutton was creative and unwavering in his defense of the statute. At no time did Mr. Sutton deviate from his duties as Solicitor General.

As an African-American and Democrat, I believe that Mr. Sutton is well-qualified to sit on the Sixth Circuit and would be an unbiased jurist. Accordingly, Mr. Sutton should receive your committee's approval.

Thank you for your attention and consideration.

Very truly yours,

Fred G. Pressley, Jr.

PROGRESS CENTER
for Independent Living

January 14, 2003

Senator Orrin Hatch
104 Hart
Senate Office Building
Washington, DC 20510

Dear Senators Hatch and Leahy;

We at Progress Center for Independent Living are extremely concerned about the permanent appointment of Jeffrey Sutton to the Sixth Court of Appeals. He has proven over and over that his decisions support neither equal nor civil rights and, in fact, support segregation in the United States. We have come too far and fought too hard to let ideals contrary to our founding ideals creep into the judiciary system under the cover of such a respected and powerful position.

We wholeheartedly request that Jeffrey Sutton not receive confirmation—not receive the vote of confidence that says his values are compatible with those of our nation.

Sincerely,

Diane Coleman

Diane Coleman, JD
Executive Director

7521 MADISON STREET • FOREST PARK, IL 60130 • (708) 209-1500 • TTY (708) 209-1826 • FAX (708) 209-1735

JAN 24 2003 13:12 FR ATTORNEY GENERAL EXEC334 242 4891 TO 81202228169B P.02/02

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

BILL PRYOR
ATTORNEY GENERAL

ALABAMA STATE HOUSE
11 SOUTH UNION STREET
MONTGOMERY, AL 36130
(334) 242-7300
WWW.AGO.STATE.AL.US

January 23, 2003

Chairman Orrin G. Hatch
United States Senate
Committee on the Judiciary
224 Dirksen Building
Washington, D.C. 20510

Dear Chairman Hatch:

I am writing to correct the record concerning Jeffrey Sutton, a nominee to the Court of Appeals for the Sixth Circuit.

I understand that it has been reported that Mr. Sutton aggressively pursued the opportunity to work on *Garrett v. Alabama*, a case in which the State of Alabama defended itself against a lawsuit brought under the Americans with Disabilities Act.

I am the person who hired Mr. Sutton to represent Alabama before the Supreme Court of the United States, and I did so solely on the basis that I hold his legal abilities in the highest esteem. Mr. Sutton never solicited this representation. I sought his representation for the State of Alabama.

I hope this clears up any confusion on this matter.

Sincerely,

Bill Pryor
Attorney General

BP:smm

UNITED STATES
COMMISSION ON
CIVIL RIGHTS

624 Ninth Street, N.W.
Washington, D.C. 20425

January 28, 2003

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C.

Re: Nomination of Jeff Sutton

Dear Senator Hatch:

As a three-term member of the United States Civil Rights Commission and the Commission's first and only representative of disabled Americans, I am writing to express my strong support for the nomination of Jeff Sutton to serve on the United States Court of Appeals for the Sixth Circuit.

I am familiar with Mr. Sutton's accomplishments and many of the landmark cases he has argued in the highest courts. I agree with some outcomes, I disagree with others, but it is clear to me that those of us who are disabled in America, and those of us who seek to protect equal opportunity and equal access for all Americans, will be well served by having in the federal judiciary someone who is so intellectually active on the issues that concern disabled Americans. I am also impressed by Jeff Sutton's personal background, which shows heartfelt sympathy for ordinary people and the disabled in particular.

The interests of the disabled are not easily pursued by partisan tactics and loud noise. The issues are complex. We are not benefited by the mere continuation of past policies or the fighting of old battles. I am well satisfied that Jeff Sutton will make a fine judge, and that he will bring to the job of judge the fine mind he has applied as an advocate, and the compassionate heart that is so evident.

Sincerely,

Russell G. Redenbaugh,
Commissioner

RAMP
CENTER FOR INDEPENDENT LIVING

REGIONAL ACCESS & MOBILIZATION PROJECT, INC.
202 Market Street, Rockford, IL 61107-3954
(815) 968-7467 Voice (815) 968-2401 TTY (815) 968-7612 Fax
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Promoting an accessible society that allows and expects full participation by people with disabilities

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January 14, 2003

Senator Patrick J. Leahy
U.S. Congress
Washington, DC

Dear Senator Leahy:

RAMP is a non-residential Center for Independent Living whose mission is to promote an accessible society that allows and expects full participation by persons with disabilities. One of our services is to advocate for the rights of people with disabilities.

As an organization and the thousands of people with disabilities we represent we want you to know that we **STRONGLY OPPOSE the re-appointment of Jeffery Sutton** to the Federal Court System.

Marco Bristo of Access Living in Chicago said it best "Mr. Sutton has dedicated his career to curtailing the civil rights of people with disabilities and racial minorities. His well-documented record indicates that, if confirmed, Mr. Sutton would seek to eviscerate Congress' authority to protect civil rights and individual liberties, without regard to existing law or the history of discrimination against people with disabilities, racial minorities, and others."

Please do not appoint Mr. Sutton!

Doing what's right isn't always easy, but it's always right.

Sincerely,

Peter Schultz
Education & Advocacy Coordinator

NATIONAL ORGANIZATION ON
DISABILITY
www.nod.org

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Hon. Major R. Owens, NY
Hon. Henry Waxman, CA

January 17, 2003

President George W. Bush
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear Mr. President:

I write in support of your nomination of Jeffrey S. Sutton to the Sixth Circuit Court of Appeals. After an informative personal interview with Mr. Sutton, and having reviewed extensive materials both in support of and opposing his nomination, I commend you for selecting an impressive member of the legal profession. I believe Mr. Sutton will be an excellent judge who will decide wisely and fairly the cases brought before him, including those involving people with disabilities.

Having joined you on the platform two years ago when you announced the New Freedom Initiative, I know of your strong belief in the Americans with Disabilities Act and your commitment to achieving its goal of full and equal participation of people with disabilities. As I am sure you are well aware, some in the disability community have opposed Mr. Sutton's nomination, and I wanted to personally consider it as I believe you would not have made this nomination if you did not trust him to support our rights.

Many disability advocates were troubled by what they perceived as Mr. Sutton's opposition to the ADA, especially in *Garrett v. The University of Alabama*. I therefore discussed with him at length his views on the ADA and disability rights in general. I am convinced that while we in the disability community have disagreed with his positions in some cases, Mr. Sutton believes in the Americans with Disabilities Act and its goals that we hold so dear. There are many other cases in which he sided fully with our community, including supporting Cheryl Fischer's attempt to attend Case Western Reserve Medical School, and enforcing the responsibility of Ohio state universities to provide voter registration materials to students with disabilities. Mr. Sutton states that he has welcomed the opportunity to take on disability cases and to represent clients with disabilities.

Mr. Sutton told me that he would be pleased if the ADA were strengthened in ways that would remove ambiguities and that would clarify the law as it increasingly becomes part of the civil rights fabric of our nation. He pledged that he would strive to be of service to people with disabilities in his future work as a judge.

I consider Mr. Sutton a fair, honest, and honorable person. He states that he supports disability rights, and I believe him. I expect America and people with disabilities will be well served by Mr. Sutton's appointment as a judge for the Sixth Circuit.

Sincerely yours,

Alan A. Reich
President

To: Members of Senate Judiciary Committee
FAX: 202 228 0861

I'm a registered, Republican voter with disabilities and do not support the appointment of Jeffrey Sutton to the U.S. Court of Appeals for the 6th Circuit.

It is incredibly stupid and dangerous of our current president to go against what his father, the past president, had done by signing the Americans with Disabilities Act.

Thank you and yours,

Ira Rothenberg
5039 Strohm Ave.
N. Hollywood, CA, 91601-4152
TTY/FAX 818 761 8512
email: bifrost@gtcinternet.com

The RUBEN CENTER for Independent Living
4522 Indianapolis Boulevard, Suite 3 -East Chicago, IN 46312
(PLEASE DIRECT MAIL TO: P. O. Box 14261, Merrillville, IN 46411)
Voice **219/397-6494** TTY Taken at **219/756-3323**

January 22, 2003

The Honorable Orrin G. Hatch, Chairman
Senate Judiciary Committee
Dirksen Senate Office Building, Room 224
Washington, DC 20510

Dear Chairman Hatch:

On behalf of the board, staff and constituency of the Ruben Center, I write respectfully to urge you not to confirm Jeffrey Sutton to the Sixth U.S. Circuit Court of Appeals. We believe that his activist efforts to limit Congressional authority in the area of disability rights has undermined your role in championing the Americans with Disabilities Act (ADA) and other laws expanding opportunities for the more than 50 million children and adults with disabilities and their families in the United States.

Mr. Sutton successfully argued in the case of the University of Alabama v. Garrett, that Congress did not have the authority under the Constitution to apply the ADA to States in employment discrimination suits for damages. In the case of Olmstead v. L.C., he argued that unnecessary institutionalization should not be considered a violation of the ADA. Thankfully, the Supreme Court declined to follow his lead in that case, but it is clear that Mr. Sutton's positions in these and other cases represent a view of Congress's authority under the Equal Protection Clause, Spending Clause, and Commerce Clause that would dramatically restrict your ability to pass laws protecting the rights of Americans with disabilities, older workers, and others under the Constitution.

Mr. Chairman, you have been a long-time supporter of federal civil rights for Americans with disabilities. Working with Senators Dole, Kennedy, Harkin and others, you helped build the voluminous record of egregious discrimination that persuaded your colleagues to overwhelmingly support the ADA when it was enacted in 1990. In defense of that record, you filed an amicus brief in the Garrett case supporting the constitutionality of the ADA as applied to State employers.

Why, then, confirm someone to a lifetime appointment to a federal appeals court whose view of the Constitution will erect new barriers for Americans with disabilities seeking to assert their rights in federal court?

Since President Bush nominated Jeffrey Sutton in the last Congress, AAPD has joined literally hundreds of non-partisan national, state and local disability organizations to oppose his appointment, including many from his home State of Ohio. It is unprecedented for our community to speak out so loudly in opposition to a judicial nominee, and we do so because we are convinced that his extreme views represent a real threat to our civil rights.

Please honor your commitment to a strong ADA and refrain from confirming Mr. Sutton to a federal judgeship. Please listen to the strong protests of your constituents with disabilities and confirm candidates who understand the importance of Congress's ability to remedy this nation's abysmal history of exclusion, segregation, sterilization, institutionalization and impoverishment of its citizens with disabilities.

Mr. Sutton's defenders have argued that his positions in Garrett, Olmstead, and other cases do not necessarily reflect his views, but that as a former Solicitor for the State of Ohio he was merely robustly asserting a defense of State immunity under the 11th Amendment of the Constitution. But if Mr. Sutton's view of State immunity under the ADA is the necessary position for a State attorney general to assert, why in the Garrett case was his position on behalf of the University of Alabama opposed by a bipartisan group of 14 State attorneys general, and supported by only six in addition to Alabama? As the amicus brief on behalf of 14 states in Garrett explained in reference to the ADA, "to eradicate the effects of the extensively documented, long-term, pervasive and invidious discrimination against people with disabilities, it is critical that the States be leaders in facilitating this duly enacted Section 5 legislation."

Mr. Chairman, we need your leadership to help us stem a tide of activist court decisions that are weakening the Constitutional underpinnings of disability rights laws and threatening your ability as a United States Senator to enact legislation establishing the full range of remedies to address discrimination on the basis of disability. Having ridden that tide to national prominence, Jeffrey Sutton does not deserve your support.

Sincerely yours,

Emas Bennett
Executive Director

Ruben Center for Independent Living

cc: The Honorable Patrick J. Leahy, Ranking Member
Senate Judiciary Committee Members

FAX

January 24, 2003

Hon. Orrin Hatch, Chair,
Senate Judiciary Committee

From: Robert G. Sanderson, Ed.D.
5268 S. 2000 W., Roy, Utah
E-mail: Marybobjoe@aol.com

Dear Senator Hatch:

I strongly oppose the nomination of Jeffrey Sutton to the U.S. Court of Appeals for the 6th Circuit for the following reasons:

1. He is blatantly biased against disabled and handicapped people, evidenced by his efforts to undermine existing laws, such as the Rehabilitation Act, and Americans With Disabilities.

2. A judge above all should and must be impartial and apply the laws of the country, not try to make them!

Believe it, that guy would be bad for the country!



73 6th Street
Hicksville, N. Y. 11801
January 23,
2003

The Honorable Orrin G. Hatch, Chair
Senate Judiciary Committee

Dear Senator Hatch:

I am aware that the American Association of Persons with Disabilities, the American Council of the Blind, and other organizations and individuals are asking you and your committee not to confirm the nomination of Jeffrey Sutton to the 6th Circuit Court of Appeals. His record, as demonstrated dramatically in the Garrett and the Olmstead cases before the Supreme Court demonstrate that he will work to restrict the ability of Congress to legislate with respect to the civil rights of persons with disabilities and other minority groups.

We need the strength and consideration you showed, Senator Hatch, in working for the passage of the Americans with Disabilities Act. I earnestly hope, therefore, that you will stand behind that commitment and work with the Judiciary Committee to refuse, on the basis of his record, to confirm Mr. Sutton to the Federal court system.

Sincerely,

Paul Sauerland

Jan 23 03 12:03p P Sauerland 15168355757 p.1

Sutton Quotes on Federalism

Sutton Is Not Just An Advocate But A Believer Who Has Embarked On a Crusade To Make the States Untouchable

- It doesn't get me invited to cocktail parties… But **I love these issues. I believe in this federalism stuff.**[1]

- 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 these federal laws? The argument, however, rests on a false premise. **In a federalism case, 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.**[2]

- In controversies over the constitutional lines of authority between one politically-accountable branch and another, the Court customarily engages in zero-sum decision making. One side's loss invariably becomes the other's gain.[3]

- **The public needs to understand that federalism is ultimately a neutral principle. Federalism merely determines the allocation of power; it says nothing about what particular policies should be adopted by those who have power.** Too often, however, states and localities sacrifice federalist principles in order to obtain near-term politically-favored results. The public debate occurs not on the grounds of structural guarantees of the Constitution, but on the grounds of the substantive legislation at issue – are you a supporter of religious liberties or are you not a supporter of religious liberties?[4]

- I think it's a positive attribute of this system of divided government that when 51 different sovereigns, 51 different legislatures tackle a different social problem, they all arrive at different approaches, and **the ultimate idea and really the transcendent purpose of federalism is to have them compete for the best solution.**[5]

- In discussing *Morrison*: "Unexamined deference to the VAWA fact 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.**[6]

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[1] Tony Mauro, An Unlikely High Court Specialist, Legal Times, Nov. 2, 1998 at 8.
[2] Jeffrey S. Sutton, Federalism Revived? The Printz and City of Boerne Decisions at http://www.federalistsociety.org/Publications/practicegroupnewsletters/federalism/fd020103.htm (last visited January 13, 2003).
[3] Jeffrey S. Sutton, Federalism 2000: A Review of the Supreme Court's Federalism Decisions, Review of Federalism and Separation of Powers Law Newsletter (Fall 2000) at 2.
[4] Sutton, supra, Federalism Revived? The Printz and City of Boerne Decisions.
[5] Jonathon Ringel, High Court Invalidates Portions of Disabilities Act, The Recorder, Feb. 22, 2001, at 3.
[6] Sutton, supra, Federalism 2000: A Review of the Supreme Court's Federalism Decisions (Fall 2000) at 2.

- If federalism is going to continue to be relevant, and there is going to continue to be a movement in the direction of delegating more authority to the states, a lot of that is going to have to come from Congress. Even though many of our congressional leaders started out as State Attorneys General, as state legislators, or as state governors, many of them seem to forget the state role in our system. **I would hate to think that the way federalism works in this country is that good government leaders are trained at the state level, only to then to move Washington in order to exercise as much power as is possible.**[7]

- The doctrine of a limited federal government was designed to enhance individual liberty, not to give state judges something to do when they go to work in the morning.[8]

- [W]e did not adopt the doctrine of enumerated powers as a favor to the States; it was a favor to ourselves.[9]

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[7] Sutton, supra, Federalism Revived? The Printz and City of Boerne Decisions.
[8] Sutton, supra, Federalism 2000: A Review of the Supreme Court's Federalism Decisions (Fall 2000) at 2.
[9] Id. at 12.

Sutton Quotes On *Stare Decisis*

- No doubt **there is a legitimate tension on when *stare decisis* should, and should not, govern a dispute**. On the one hand, adherence to precedent is an ostensible conservative notion, one consistent with protecting reliance interests in particular and furthering judicial restrain in general. But, on the other hand, **it can't be that all liberal victories become insulated by *stare decisis* while all conservative ones remain open to question. Nor can it be that bright-line decisions, which engender substantial reliance, and misty balancing tests, which engender virtually none, deserve the same level of reliance protection**. Until now, however, few strides have been made in reconciling these tensions: Some precedents simply make the Court's blood boil, others do not.[10]

- Which takes me back to Justice Thomas's concurrence in *Holder v. Hall*. His opinion goes a long way to **developing a conservative legal theory for doing an unconservative thing – overruling precedent**.[11]

---

[10] Jeffrey S. Sutton, Supreme Court Highlights, The Federalist Paper (November 1994) at 21.
[11] Id.



June 4, 2001

SCHOOL OF LAW

The Honorable Patrick Leahy
433 Russell Senate Office Building
United States Senate
Washington, D.C. 20510

Re: Nominations of **John G. Roberts** and **Miguel A. Estrada**

Dear Senator Leahy:

I support the nominations of John Roberts and Miguel Estrada to the United States Court of Appeals for the District of Columbia Circuit. I am a lifelong Democrat and have liberal views on most issues. Nonetheless, from working with these gentlemen in the Department of Justice, I am convinced that they would be superb and objective federal judges.

From 1990-1996, I was an Assistant to Solicitors General Kenneth Starr, Drew Days, and (briefly) Acting Solicitor General Walter Dellinger. As a result, I worked in the Solicitor General's Office during most of Messrs. Roberts' and Estrada's tenure there. Indeed, I worked directly under John Roberts on many cases in the office, and I came to know Mr. Estrada well, too. I believe that I am in an excellent position to assess their talents and temperament.

I am sure that you will get plenty of evidence of these men's legal talent, and so I will focus on their temperament. I do so, by the way, as someone who strongly supports women's constitutional right to choose to have an abortion; favors stringent separation of church and state; and recognizes the existence of, and need for, abundant federal power to enforce civil rights. Mr. Roberts and Mr. Estrada will judge each case on its merits. They will approach each case without preconceptions. They will respect the doctrine of stare decisis. They will appreciate the need for the law to be interpreted and applied with compassion and an understanding of the U.S. Constitution as a living document. They will strive with their fellow judges to maintain the integrity of the federal bench. In a word, they will be impeccably judicious.

If I sat down with these men in a room, I suspect that we could find many *political* issues about which they and I disagreed. Still, I will consider it a disgrace if these nominees fail to be confirmed.

Thank you for considering my views.

Sincerely,

Richard H. Seamon, Assistant Professor of Law

Equal Justice Foundation

Protecting the rights of Ohio's disadvantaged citizens

iberly M. Skaggs, Esq.
utive Director

y M. Smith, Esq.
ial Litigation Counsel

i A. Bell, Esq.
or Attorney

36 W. Gay St. • Suite 300
Columbus, Ohio 43215
t 614.221.9800
800.898.0545
f 614.221.9810

May 29, 2001

VIA FACSIMILE AND U.S. MAIL
Honorable Mike DeWine
United States Senate
140 Russell Senate Bldg.
Washington, DC 20510

Re: Jeffrey S. Sutton

Dear Senator DeWine:

I am writing to express my support of President Bush's nomination of Jeffrey S. Sutton to the United States Court of Appeals for the Sixth Circuit. I have had the pleasure of ...wing Mr. Sutton for several years and I, like many others, have the utmost regard for his ...ellect and talent. What may be somewhat different about my support for Mr. Sutton is the fact that I do not share the "conservative" views for which Mr. Sutton is known. In fact, my views may be the polar opposite.

I serve as Executive Director of the Equal Justice Foundation, a non-profit, legal services provider that specializes in class-action, impact litigation for the benefit of disadvantaged individuals and groups. Prior to this position, I served as law clerk to two federal judges. In those capacities, I became quite familiar with Mr. Sutton's work. I admired Mr. Sutton's abilities so much that, upon joining the Equal Justice Foundation, I actively recruited him to become a member of the Equal Justice Foundation's Board of Trustees. Much to his credit, Mr. Sutton accepted and has been extremely supportive of the Foundation's work.

In sum, I believe that Mr. Sutton possesses all the necessary qualities to be an outstanding federal judge. I have no hesitation whatsoever in supporting his nomination. Please do not hesitate to contact me if I can provide further information.

Sincerely,

Kimberly M. Skaggs

Kimberly M. Skaggs

12000 Chase Crossing Circle #403
Rockville, MD 20852

The Honorable Barbara Mikulski
309 Hart Senate Office Building
Washington, DC 20510

Dear Senator Mikulski:

I am very concerned about the nomination of Jeffrey Sutton to the U.S. 6th Circuit Court of Appeals. I am aware that you are likely to be voting on this nomination soon, and urge you to vote against his nomination. Much of the national commentary regarding his nomination to the federal bench has focused on Mr. Sutton's impressive educational credentials, but has failed to address the substance of Sutton's views.

Mr. Sutton has a troublesome track record as a champion for reinvigorated states' rights jurisprudence. His arguments in the *Garrett* case about the Americans with Disabilities Act [ADA] as well as more recent public statements are clear: Mr. Sutton strongly believes parts of the ADA to be unconstitutional. Therefore, promoting him to the Circuit Court of Appeals could impede Congress's ability to protect our civil rights.

The Americans with Disabilities Act is the world's first comprehensive civil rights law for people with disabilities. Barbara Bush, mother of our current President, has described it as the finest accomplishment of her husband's administration. Personally, I find it very hard to understand how President George W. Bush could send to the Federal Court a man who challenges "across the board" the constitutionality of a great civil rights law signed by his father, George Bush, Sr.

For the sake of the ADA and our civil rights more broadly, I urge you to vote against Jeffrey Sutton when considering his nomination to the United States 6th Circuit Court of Appeals.

Sincerely,

Andrew R. Sommers
Agency for Healthcare Research and Policy [DHHS]
Rockville, Maryland

cc: Senator Patrick Leahy (D), Chairman, Ranking Member, Judiciary Committee
Senator Orrin Hatch (R), Ranking Member, Judiciary Committee

Southern Maryland Council of the Blind
26314 Forest Hall Drive
Mechanicsville, MD 20659
(301) 884-4078
rkerr@starpower.net

January 23, 2003

United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Opposition to Jeffrey Sutton nomination

Dear Senator:

We are writing you at this time, in regard to the nomination of Jeffrey Sutton to the Court of Appeals for the 6th Circuit. Specifically, we would ask that you join us in opposing Mr. Sutton's appointment.

We at the Southern Maryland Council of the Blind believe that Mr. Sutton does not consider the Americans with Disabilities Act as being necessary to protect the rights of disabled people. For this reason, we believe him to be ill suited for appointment to the U.S. Court of Appeals.

Given recent revelations concerning the actions of Trent Lott, it seems more than appropriate that members of the Judiciary Committee closely scrutinize the records of all judicial nominees in respect to civil rights. After a careful review of the facts, we believe that you will reach a determination similar to ours.

Very truly yours,

Robert A. Kerr
President, SMCB

RAK:lmk

M : LUNDEBERG SEAMANSHIP LIBRARY FAX NO. : 301-994-9539 Jan. 23 2003 09:15AM P1

The Honorable Patrick Leahy
United States Senate
Fax: 202-224-3479

I am an employment attorney who strongly opposes the nomination of Ohio Supreme Court Justice Deborah Cook and Jeffrey Sutton to the Sixth Circuit Court of Appeals.

Justice Cook's record on the Ohio Bench illustrates a hostile attitude towards workers and civil rights litigants. She mostly sides with corporate interests and is an opponent of employees' rights.

Mr. Sutton is also hostile towards employee rights, which was evidenced by his successfully arguing a case in which the U.S. Supreme Court ruled 5-4 that employees of state governments cannot sue for discrimination under the Americans with Disabilities Act.

The Sixth Circuit is currently filled with, for the most part, well balanced judges. The nominations of Cook and/or Sutton would severely disturb the current makeup of the court. Justice Cook and Mr. Sutton are not simply right leaning judges—they are conservative zealots whose personal beliefs would overshadow their obligation to fairly administer justice.

I strongly urge the Senate Judiciary Committee to deny the nominations of Mr. Sutton and Ms. Cook.

Very truly yours,

David J. Steiner

David J. Steiner, Esq.
3681 Green Road.
Cleveland, Ohio 44132
dsteiner77@yahoo.com



To: Senate Judiciary Committee

From: Julie Sullivan, parent and concerned citizen for those with disabilities.

PLEASE DO NOT confirm Jeffery Sutton for his appointmen
PLEASE protect my child and other's rights who have disabilities.

Sincerely,
Julie Sullivan
2465 Bybee Chapel Road
Rock Island, TN 38581

New York Society for the Deaf

(212) 777-3809 (tty/voice)
(212) 777-2804 (fax)

TANYA TOWERS COMMUNITY RESIDENCE
620 East 13th Street
New York, NY 10009

www.nysd.org
nydeaf@aol.com

Pearl I. Johnson
Executive Director

Joe Desmond
Director, TTCR

January 28, 2003

Dear Senators:

This letter is being faxed today in regards to President Bush's nomination of Mr. Jeffrey Sutton for the 6th Circuit Court of Appeals. Our office, Tanya Towers Treatment Apartments, a part of New York Society for the Deaf, an organization servicing Deaf and Deaf-Blind consumers around the New York City metropolitan area are very concerned on the impact that Mr. Sutton could have on our non-profit agency.

As shown in previous cases argued by Mr. Sutton, he has sided with numerous employers, agencies, and various other people who practice actions that violates the American with Disabilities Act of 1990 (ADA). Because our agency services Deaf and Deaf-Blind consumers, we are concerned that his opposition to the ADA would prevent the Deaf and Deaf-Blind consumers from receiving the services that they need and deserve.

Interpreting services, equal access, and discrimination protection are just three of the many rights that Deaf and Deaf-Blind consumers finally could utilize when the ADA was enacted. If the ADA is not enforced, which will surely happen if Mr. Sutton has his way, then many services and opportunities would be taken away from the qualified, intelligent and hard working people who happen to be Deaf and Deaf-Blind.

Please support the ADA and the Deaf and Deaf-Blind community by not voting on the appointment of Mr. Sutton to the 6th Circuit Court of Appeals. We, as your constituents need our Senators to stand up for what we need, and we want our Senators to do the right thing.

Thank you for letting us voice our opinion, and if you have any questions or concerns about this issue, please do not hesitate to contact us.

CHARLOTTE LEWIS, PROGRAM SUPERVISOR II

CYNTHIA A VELAZQUEZ

Christine S. Kim, case manager

Samuel Caprabello

Mark Marcellino

Toledo Blade
Article published December 15, 2002

The 'Gang of 4' flames out

It's somehow appropriate that the Ohio Supreme Court has failed to resolve this state's long-standing school-funding controversy. As we have said from the start, the court should never have taken the *DeRolph* case to begin with.

That's because the ultimate responsibility for deciding how much money the state spends on primary and secondary education, and how it is spent, lies with the General Assembly, not with that meddlesome majority of the high court we refer to as the "Gang of Four."

Ohio's educational establishment, including the voracious teachers' unions, has an insatiable thirst for taxpayer dollars, something no court could ever quench.

DeRolph IV, the court's latest attempt since 1997 at solving the school-funding question, doesn't change that basic reality. Furthermore, it provides the plaintiffs in the case, the Coalition for Equity and Adequacy of School Funding, with little or nothing in the way of legal issues for continued appeals.

The newly constituted court that will ascend to the bench in January is not going to force the legislature to raise taxes for schools. The Nov. 5 election, in which voters replaced retiring Gang of 4 ringleader Andy Douglas with Maureen O'Connor, settled that.

Justice Paul Pfeifer, writing for the majority in this week's decision, declared that a "systematic overhaul" of school funding by the legislature is what is needed, "not further nibbling around the edges."

But, as Gov. Bob Taft points out, the state has boosted school operating funds by 81 percent in the past decade, and has appropriated $1.9 billion for building construction and repair in just the past 21/2 years. Those are enormous sums of money and can hardly be termed "nibbling."

All told, the *DeRolph* case has been a long, wasteful, and shameful example of a court usurping the legislative authority of the General Assembly. Twice before, the court ruled the state's school-funding formula unconstitutional. The third time up, the court reversed itself, saying the school formula might be constitutional if the state put more money into it.

So the state put more money into it. But we're no closer to closure than we were after the *DeRolph* suit was first filed in Perry County 11 years ago.

The latest majority opinion may carry Paul Pfeifer's name, but Andy Douglas'

political fingerprints are all over it. Typical of the Toledo justice's penchant for having it both ways, Justice Douglas basically agreed with Chief Justice Tom Moyer, one of the three justices in the minority, who said more money was the answer. But, without four votes for that view, Justice Douglas cast his vote with the Gang of 4 regulars.

If he wanted the school funding issue resolved before he leaves office, he had the opportunity to make it happen, and he muffed it again.

Despite the confusion, Governor Taft may well be correct in his appraisal that *DeRolph* has now run its course. Ohioans elected Ms. O'Connor and re-elected Justice Evelyn Stratton in November because they are weary of this roller coaster ride.

Now the legislature must begin to restore some sanity to school funding, remembering that no amount of money will solve many of the fundamental problems that plague our educational system. Lack of parental involvement is a prime example. Like school funding, there are some problems that can never be solved by the courts.

Once again, the Gang of Four and their meddler-in-chief, Andy Douglas, have done Ohio no favors.

Richard B. Treanor, Esq.
ATTORNEY
613 4TH PLACE, S.W.
WASHINGTON, D.C. 20024

(202) 554-3467
FAX (202) 863-4188

Hon. Orrin G. Hatch
United States Senate
Washington, DC

May 23, 2001

Dear Senator Hatch,

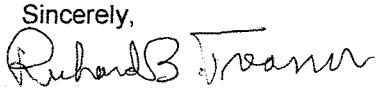
I'm writing this to request that Jeffrey Sutton not be approved as Judge of the Sixth Circuit Court of Appeals. Mr. Sutton in my opinion is an affront to the 54 million disabled people in this country of which I am one. As an attorney, I do not object to the fact that attorney Sutton argued on behalf of the University of Alabama in Garrett v. University of Alabama that part of ADA is unconstitutional. Every litigant is entitled to legal representation. I do, however, object to his background and credentials as an extremist conservative Republican, inimicable to civil rights in general and civil rights for disabled people in particular. From his testimony and background it is obvious that Mr. Sutton is a neo-Scalia philosopher.

I would like also to applaud the decision of Senator Jeffords of Vermont to bolt from the Republican party. As a native of Massachusetts, I and other New Englanders believe that the extremist Republican conservative wing has gone too far in trampling on civil rights, especially for disabled people. Prayer in the Justice Department is simply inappropriate. Fundraisers in the Vice President's mansion. How inappropriate! How hypocritical! The recent trend to exalting states rights and state sovereignty takes us back to before the civil war and no doubt if continued will result in the weakening and balkanization of the United States. We are not fifty separate "sovereign" countries, but ideally, one united nation.

I congratulate Senator Jeffords for his courageous decision which I hope will result in returning the federal judicial system to some kind of sanity which will restore civil rights, especially for disabled people, and hopefully restrain the extremist conservative judiciary foisted on the Americana people. In the meantime, keep the

nomination of Mr. Sutton for federal judge on permanent hold. Thank you for considering my comments.

Sincerely,



Richard B. Treanor

cc. Marcie Roth, NCIL

Broad Street Presbyterian Church
760 East Broad Street • Columbus, Ohio 43205 • (614) 221-6552 • FAX (614) 221-5722 • www.bspc.org

August 8, 2002

Pastor
David A. Van Dyke

Associate Pastors
Ann R. Palmerton
Judith M. Hoffhine

Parish Associate
Deborah A. Lewicki

Director of Music
Joel A. Mathias

Organist
James D. Hildrath

Christian Education
Barbara J. Blanke

Youth Ministries
Ladd J. Sonnenberg

Business Administrator
David E. Stamm

Financial Assistant
Aaron M. Laury

Secretary
Michele A. Daley

Project Coordinator
Sara E. Mosholder

COMPASS Program
Margaret A. Watson

Food Pantry
Elizabeth R. Stevens

Infant & Toddler Center
Valerie L. Lonsinger

Bldg. & Grounds Supervisor
Maxwell Lawson

Senator Patrick Leahy
Chairman, Senate Judiciary Committee
United States Senate
433 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Leahy:

I am writing to you about the nomination of Jeffery Sutton to the Sixth Circuit Court of Appeals. I am disappointed that politics is preventing him from receiving a hearing and from the Senate acting on his nomination. But I also write out of my concern over the personal attacks that Mr. Sutton's nomination have brought upon him.

I am currently Jeff's minister and know him very well. He is also my neighbor. The Presbyterian church I pastor, and of which the Suttons are active members, is a large, downtown, socially active congregation, solidly in the liberal wing of the Presbyterian Church (U.S.A.). Mr. Sutton is a member of a church, for example, that advocates for the full inclusion of gay and lesbian Christians into the life of the church. He is a member of a congregation that actively opposes the death penalty and is known in Columbus for its work against injustice. And he is a member of a congregation that reaches out to its inner city neighbors through its food pantry that distributes three tons of food each week; that operates one of only a handful of daycare centers in the city accepting Title XX payments; that employs a full time social worker to assist those coming to the church needing aid; and that tutors and mentors approximately 150 school children throughout the year.

On a personal note as a pastor, I have become very active in my opposition of the death penalty in Ohio. Through my involvement in one particular case, I learned about the plight of another inmate whose court-appointed attorney had literally slept through his trial. I approached Jeff regarding that case and he eagerly accepted it, making it the second death penalty case in which Jeff is currently involved. As a person of deep faith and strong moral character, Jeff Sutton shares my opposition to the death penalty.

I know you have political reasons for opposing Jeff Sutton's confirmation, but as his pastor and friend, I want you to know, from someone who knows him well, that he is not the evil, heartless, insensitive individual he has been made out to be

by those who oppose him. Neither is he the ultra-conservative some have characterized him or even as some might assume him to be.

As his pastor, I don't believe I'm breaching confidentiality in sharing a conversation Jeff and I had shortly after his nomination. Jeff told me that he had some major reservations regarding his nomination. He expressed concern over the brutal nomination process. He worried about the substantial pay cut he'd have to take in order to become a judge and about how that would impact his ability to pay for his children's education. But he also spoke about his commitment to the law and to being a good judge as his "calling" in life. He stressed that life was not about making money, but was about doing what one was called to do; making the most of one's unique gifts and abilities. In our conversation he used terms like "duty, "responsibility" and "honor" to describe his decision to accept this nomination. Jeff loves the law and is committed to the high calling of public service. As a pastor, it's wonderful to see conviction, especially when the motives are good and the purpose is admirable.

Jeff Sutton is a very thoughtful and capable attorney and a very bright and gifted legal scholar. He is also a wonderful father and a good husband. He loves his country, his family and his church. Jeff would make an excellent judge, and I write this as an independent who almost always votes for the Democrat on the ticket.

Senator Leahy, thank you for taking the time to read this letter and for all you do for our country. If the Judiciary Committee would grant Jeff Sutton a hearing, you could hear directly from him and not just his detractors. Granting him a hearing would also clear up the cloud of suspicion currently hanging over the judicial process and sending the message to those of us outside the "Beltway" that playing politics and paying back your opponents is more important than getting something accomplished. One other thing for you to consider. If you do grant Jeff Sutton a hearing, you might be pleasantly surprised at the person you meet.

Sincerely yours,

David A. Van Dyke
Pastor

Warner

STATEMENT TO THE JUDICIARY COMMITTEE ON THE NOMINATION OF JOHN ROBERTS TO SERVE AS A JUDGE FOR THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT
JANUARY 29, 2003

Chairman Hatch, Senator Leahy, and my other distinguished colleagues on the Senate's Judiciary Committee, I am pleased to be here today to introduce Mr. John Roberts, an imminently qualified nominee for a federal judgeship. I commend the President for this outstanding nomination.

While Mr. Roberts now lives in Maryland, he is a former resident of the Commonwealth of Virginia and a member of Hogan & Hartson, a firm that I had the pleasure of being affiliated with some years ago.

Joining Mr. Roberts today are many members of his family: his wife Jane, his children Josephine and ~~John~~, his parents, and his sisters.

Mr. Roberts has been nominated for a judgeship on the United States Court of Appeals for the District of Columbia Circuit. This is a court that I am most familiar with.

Following my graduation from the University of Virginia Law School in 1953, I was privileged to serve as a law clerk to Judge E. Barrett Prettyman, on the United States Court of Appeals for the D.C. Circuit. Judge Prettyman later became Chief Judge of this important court.

As a result of the profound respect so many people, including myself, had for Judge Prettyman, I had the honor several years ago of sponsoring, and with the help of others, passing legislation to name the federal courthouse in DC after Judge Prettyman.

Now, almost 48 years after having served as a law clerk for Judge Prettyman on this federal appeals court, I am pleased to be here today to support the nomination of John Roberts to the same court on which Judge Prettyman once served.

John Roberts has had a distinguished legal career. And, in my view, his record indicates that he will serve as an excellent jurist.

Mr. Roberts' resume is an impressive one. He graduated from Harvard College, Summa Cum Laude, in 1976. Three years later, he graduated from Harvard Law School, Magna Cum Laude, where he served as managing editor of the Harvard Law Review.

He has served as a law clerk to Judge Friendly on the United States Court of Appeals for the Second Circuit and worked as a law clerk to the current chief justice of the Supreme Court of the United States - Judge Rehnquist.

Mr. Roberts has also practiced law for over twenty years in the public and private sectors. He has served as Associate Counsel to President Reagan, worked as the Principal Deputy Solicitor General of the United States, and worked as a civil litigator at Hogan & Hartson, where he currently serves as head of the firm's Appellate Practice Group.

Mr. Roberts has presented oral argument before the U.S. Supreme Court in 39 cases covering an expansive list of legal issues.

Without a doubt, Mr. Roberts' legal credentials make him well qualified for the position to which he has been nominated. I am thankful for his willingness to resume his public service, and I am confident that he would serve as an excellent jurist.

I urge my colleagues on the Committee to support his nomination.

January 10, 2003

Ms. Patricia Watson
101 Setzer Drive
Barboursville, WV 25504-1123
(304) 736-6151

Senator Orrin Hatch
Fax # 202-228-0861

Dear Senator Hatch:

It is safe to say that the disability communities voice is not being heard. Even though the republicans have taken control of Congress, I would hope that the voices of the people should all be heard.

It is my opinion that there would be a great mistake if ADA and Olmstead opponent, Jeffrey Sutton, were to have the judicial nomination to the US Sixth Circuit Court of Appeals.

The disability community has fought hard for the passage of the ADA and individuals' rights to enforce Medicaid benefits. It is a well known fact that Mr. Sutton opposes the Olmstead decision. Since federal judges are appointed for a lifetime and federal judges who might hold the same attitudes as Mr. Sutton are appointed, the disability community could lose the long uphill battle that we have fought for.

I am asking you to contact the people who can stop the weakening of the ADA and adhere to the decision to give every member of society an equal hand up to equality.

Sincerely,

Patricia Watson

Patricia Watson

3417 ORDWAY STREET, N.W.
WASHINGTON, D.C. 20016

June 18, 2001

The Honorable Patrick J. Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Orrin G. Hatch
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510

re: Jeffrey Sutton

Dear Chairman Leahy and Senator Hatch:

I understand that Jeffrey Sutton is under consideration as a nominee for the position of United States Circuit Judge for the Sixth Circuit. I have known Mr. Sutton professionally for four years and have high regard for him. Both as Solicitor General for the State of Ohio and as a partner at Jones, Day, Mr. Sutton handled important cases in the United States Supreme Court in which I was personally involved. I consider Mr. Sutton both a gifted appellate advocate and a fine human being.

I know that some have questioned whether the position Mr. Sutton advocated last Term in the Garrett case reflected antipathy on his part toward the Americans with Disabilities Act. I argued that case against Mr. Sutton, and I discerned no such personal antipathy. Mr. Sutton vigorously advanced the constitutional position of his client in the case, the State of Alabama; doing so was entirely consistent with the finest traditions of the adversary system.

Thank you for considering these views.

Yours sincerely,

Seth P. Waxman

JAN.28.2003 6:02PM N.E. PA C.I.L. NO.898 P.2/2

NE PA CIL

Forging Pathways to Independence

Northeast Pennsylvania Center for Independent Living
Lower Level – IBEW Building
431 Wyoming Avenue • Scranton, PA 18503-1228

Executive Director
Daniel P. Loftus, MSW, MS

January 28, 2003

Senator Arlen Specter
711 Hart Office Building
Washington, D.C. 20510-3802

Dear Senator Specter:

As a person with a disability, and an advocate, I am urging you to reject Jeffrey Sutton's nomination to the 6th Circuit Court of Appeals.

He has consistently undermined the Americans with Disabilities Act (ADA) and other civil rights legislation. In Olmstead v. L.C., he argued before the Supreme Court that states had no duty to serve people with disabilities in integrated settings under the ADA. In the Garrett case, he argued that state employees with disabilities can not sue their employers for damages under Title I of the ADA. These represent only two instances of his blatant disregard of the intent and the spirit of the law.

Senator, you are a sponsor of MiCASSA, and understand these issues. We can not afford to lose the rights for which we have fought so hard to establish.

I strongly urge you to vote against Jeffrey Sutton's nomination.

Sincerely,

Keith Williams

Keith Williams
Statewide Action Team Community Organizer

Voice/TTY (570) 344-7211 • PA Only (800) 344-7211 • FAX (570) 344-7218 • E-Mail nepacil@epix.net
Interpreter Referral Program (570) 344-7288 • TTY (570) 344-7298 • FAX (570) 344-7256 • E-Mail irpnecil@epix.net

WOLMAN, GENSHAFT & GELLMAN
ATTORNEYS AND COUNSELORS AT LAW

SUSAN B. GELLMAN
NELSON E GENSHAFT
PENSON A. WOLMAN
JAMIN S. GENSHAFT

341 SOUTH THIRD STREET, SUITE 301
COLUMBUS, OHIO 43215-5463
TELEPHONE (614) 280-1000
FACSIMILE (614) 280-9000
E-MAIL wgg@wggiaw.com

January 3, 2003

The Honorable Patrick J. Leahy
Committee on the Judiciary
United States Senate
224 Dirksen Office Building
Washington, D.C. 20510

The Honorable Orrin G. Hatch
Committee on the Judiciary
United States Senate
104 Hart Office Building
Washington, D.C. 20510

Re: Nomination of Jeffrey S. Sutton to the Sixth Circuit

Dear Senators Leahy and Hatch:

I write in support of confirmation of Jeffrey Sutton – perhaps from a different perspective than many of his supporters. My background is that of a liberal Democrat, former Executive Director of the American Civil Liberties Union of Ohio for seventeen years, then a member of the National Board of the ACLU, and currently a member of its National Advisory Council. I also clerked for a federal judge. As a partner in a four-lawyer firm, I engage in constitutional and civil rights litigation and have argued at all levels of the federal courts.

I have known Mr. Sutton for nearly eight years. He and I have litigated opposite each other twice, and we have co-counseled two cases. I am particularly concerned that some of my friends in the disability rights community have sought to brand him as hostile to their plight, for I know his devotion to civil rights and liberties for all people. While I do not regard him as a liberal and expect to take issue with some of his decisions if he is confirmed, I believe him to be a moderate conservative in the style and manner of the late Justice Lewis Powell for whom he clerked.

Two cases in which we were on opposing sides arose while he was State Solicitor. The first involved a constitutional challenge to the Ohio drunk driving law (the State prevailed). The second case was a constitutional challenge to a legislative act that attempted to preclude a state-court judge from drawing a pension after he retired and was then re-elected (my client, the judge prevailed). In both cases Jeff's work reflected his brilliance and creativity as a lawyer, and his relationship with opposing counsel was dignified and respectful.

The cases that we have co-counseled were after his service as State Solicitor. In an ACLU case he volunteered as a cooperating attorney in a First Amendment challenge of the conviction of an individual who was jailed for a thought crime (that case is still in progress). In another case, I asked him to assume the role of lead counsel on behalf of the National Coalition of Students with Disabilities (he secured a declaratory judgment and preliminary injunction that required the Ohio Secretary of State to set up voter-registration-and-assistance locations at State colleges and universities as required by federal law).

Jeff's commitment to individual rights is not born of the nomination and confirmation process. Long before he was nominated by President Bush – indeed well before Bush was elected – I prompted him to serve as a fellow member of the Board of the Equal Justice Foundation, an Ohio-based nonprofit organization dedicated to class-action economic and civil rights litigation on behalf of the poor. And, while he was State Solicitor – also well before the election of Bush – he represented a blind woman seeking to gain admission to a medical school.

Jeff is an open-minded person, void of the rigidity that too often characterizes those who call themselves conservative. His commitment to individual rights, his civility as an opposing counsel, his sense of fairness, his devotion to civic responsibilities, and his keen and demonstrated intellect all reflect the best that is to be found in the legal profession.

Without qualification or reservation, I urge his speedy confirmation as a Judge of the United States Court of Appeals for the Sixth Circuit.

Sincerely,

Benson A. Wolman

cc: The Honorable Mike DeWine
The Honorable George Voinovich

The Honorable
Senator Patrick Leahy:

You have supported the Americans with Disabilities Act (ADA) in the past. Please continue your support by opposing the nomination of Jeffrey Sutton to the 6th Circuit Court of Appeals. He is on record as having called the ADA "unnecessary" and that it "exaggerated discrimination problems by states." He successfully argued Garrett, which is one of a few cases which really begins to say that we who are disabled have civil rights as long as we don't expect to have any of the 50 states recognize these civil rights. This legalizes our inequality under the law. This is un-American and it is not unlike the Jim Crow laws in the old South. In fact, it may lead to these laws being reinstated with persons of disability being the new scapegoats. Please do not give this man more power to destroy our rights to life, liberty or possession of property by his creating what he would call "due process of law." Also, I would like to remind you of the fact that former President George Bush lost the election to former President Clinton because, among other things, of the Disability Vote. I vote.

Vonne Worth
Former owner, Different Times, a disability rights newspaper
vnworth@speakeasy.org
3420 15th Ave. W., #4
Seattle WA 98119
(206) 216-0035

THE UNIVERSITY OF TOLEDO
College of Law

Mail Stop #507
Toledo, Ohio 43606-3390
419.530.2882 Phone
www.utlaw.edu

January 28, 2003

The Honorable Orrin G. Hatch
Chairman, Senate Judiciary Committee
Dirksen Senate Office Building
Room 224
Washington, DC 20510

Dear Senator Hatch,

I am writing to urge you to vote against Jeffrey Sutton, who has been nominated for a position on the Sixth Circuit Courts of Appeals. Sutton already has played an important role in changing our laws. He has devoted much of his legal career to reducing the power of Congress to protect our civil rights against infringement by the states, and to preventing individual victims of discrimination from using the federal courts to vindicate their rights. Sutton has played an active role in recent Supreme Court opinions restricting the rights of women, the disabled, the elderly, the poor, and ethnic minorities, and in reducing the effectiveness of federal laws in general.

Mr. Sutton is more than a successful lawyer advocating for his clients. An ardent supporter of states' rights who is more "pro state" than most states, Sutton sees the relationship between the federal government and the states as a battle, a "zero sum game" in which only one side can win. Sutton's "zero sum" theory contrasts sharply with a cooperative vision of federalism - in which states and the federal government work together to protect our rights - that is held by many state officials.

Moreover, rather than simply represent the interests of his clients, Sutton has sought out cases in which to make arguments in favor of states rights that are far more extreme than those accepted by the Supreme Court. For example, Sutton has argued that Congress cannot use its power to enforce the Fourteenth Amendment's guarantee of equality to protect anyone who does not belong to a racial minority. Sutton also has argued that federal statutes and regulations based on Congress' spending power, including a vast range of federal laws from unemployment compensation to the Clean Air Act, are merely a contract and do not have the force of federal law.

If Sutton had his way, Congress would be virtually powerless to prevent states from denying us our civil rights and civil liberties. Sutton is not worried about obliterating this federal protection, because he thinks that states alone will play an adequate role in protecting our rights. Unfortunately, one need only look to the sad history of state mandated segregation in many of our southern states to question Sutton's

assumption. For almost 150 years, protecting our civil rights has been one of the most important roles of the federal government.

It is particularly ironic that Sutton comes from Ohio, the home state of one of the most important advocates for federal protection of civil rights in our history, John Bingham, the author of Section 1 of the Fourteenth Amendment. Bingham envisioned the federal government as the protector of the fundamental rights of its citizens, and his vision is embodied in the Fourteenth Amendment. Jeff Sutton has devoted his legal career to obstructing Congress' attempts to realize Bingham's vision.

Sutton's vision of federalism goes well beyond disabling federal protection of civil rights. If he could, Sutton would insulate states from suit for violating virtually any federal law, from Medicaid regulations and environmental statutes to regulations governing the safety of federal highways. Sutton's vision would undermine both the supremacy of federal law and the bedrock legal principle, enunciated by the Supreme Court 200 years ago, that "for every right there is a remedy." A person with such anachronistic and dangerous views of our system of government does not belong on the federal bench. Please vote against his nomination.

Sincerely yours,

Rebecca E. Zietlow

Rebecca Zietlow
Professor of Law
(419) 530-2872
rzietlo@utnet.utoledo.edu

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