Testimony of

The Honorable Orrin Hatch

February 13, 2003

Statement of Chairman Orrin G. Hatch
Before the United States Senate Committee on the Judiciary
Executive Business Meeting
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, and
Jeffery Sutton for the U.S. Court of Appeals for the Sixth Circuit

Today we will vote on the nominations of three very accomplished individuals to serve on the U.S Court of Appeals: Deborah Cook, John Roberts and Jeffrey Sutton.

Before I discuss the reasons why each of these nominees deserves to be reported favorably to the floor, I would like to mention a few things about the process.

I think every Member of this Committee knows that I always try to be fair. And I believe that the way I have handled the consideration of these three nominees goes a long way toward demonstrating why I have earned that reputation.

The relevant history begins nearly two years ago when I noticed a hearing to consider Cook, Roberts and Sutton on May 23, 2001. When some Democrat Members of this Committee said they had not had a chance to review their backgrounds, I agreed to postpone the hearing. Soon thereafter, the Democrats gained control over the Senate and this Committee, and my previous accommodation was greeted with a refusal to consider Cook, Roberts or Sutton for the entire duration of the 107th Congress.

After the Republicans regained control due to the election, it made sense for me to re-notice a hearing for these three nominees. I figured that no one would complain that the 21 intervening months provided too little time to review their backgrounds.

Instead, I was attacked for holding what a number of Members on the other side of the aisle called an unprecedented hearing because the agenda included three Circuit Court nominees. Well, you might be interested to hear what I have subsequently found out: The January 29th hearing was the thirteenth time since President Carter's Administration that this Committee has considered more than two Circuit nominees in a single hearing. The thirteenth time! Not exactly unprecedented, I'd say.

But that's not all I learned. One of those 13 hearings, chaired by Senator Kennedy on June 25, 1979, included seven circuit judges. They were all nominated by President Carter, and all for the same circuit. Three weeks later, on July 18, 1979, Chairman Kennedy held another hearing with

four more Carter Circuit nominees. Then on September 21st of that year, he held yet another multiple-Circuit hearing that included three Circuit nominees. All three hearings occurred within a four-month period.

Now, I certainly don't mean to single out my friend, Senator Kennedy. So I'll also point out that, when Senator Biden was Chairman of this Committee, he held two hearings that included three Circuit nominees each, one on July 21, 1987, and the other on October 5, 1990. Senator Thurmond held five such hearings when he was chairman, and even Senator Eastland, back in November of 1977, held a hearing for three Circuit judges in one hearing. So much for unprecedented.

The ostensible reason for the complaint about three Circuit nominees was that Members feared they would not have time to ask sufficient questions. I went out of my way to make sure everyone had all the time they wanted, first by allowing 15-minute rounds of questions - and allowing several Members to abuse even that liberal rule - and, second, by permitting the hearing to continue well into the evening, past nine o'clock. I said I would give everyone all the time they needed, and that's exactly what I did. I would have stayed there all night to accommodate the Members of this Committee.

The next issue that came up concerned the due date for written questions, and I went out of my way to accommodate everyone on that point as well. My initial inclination was to give everyone until close of business Friday to submit their questions - which is plenty of time - but when pressed, I extended the time by four days until 5 p.m. the following Tuesday. Most of the questions arrived hours after that time, but I forwarded them anyway, without complaint. In fact, some questions arrived several days later, without any explanation or request for extension of time, and guess what I did? I forwarded those to the nominees as well. And I note that the nominees were good enough to return their answers to all questions quickly. And last but not least, I'll note that one Senator waited until yesterday afternoon to submit follow-up questions - and I accommodated once again. And I can assure you that we'll have the answers to those back in plenty of time to review them prior to floor votes on these three nominees.

One final point. I was fully prepared to vote on these three nominees one week ago today. But I did not force the issue, out of deference to the feelings of my Democratic colleagues. In fact, I didn't even try to make a point out of making someone else invoke the one-week hold. I did it myself, even though no one actually asked me to do so.

So, as much as I appreciate everyone's feelings on the fairness of this process - and I really do - I would also appreciate it if some of that interest in fairness were reciprocated towards me. There was nothing unprecedented about the hearing on Cook, Roberts and Sutton - unless you consider just how many accommodations I made in order to anticipate any possible concerns of Members. And I expect that any comments made here today accusing me of unfairness will be understood by many as a thinly veiled tactic for further obstruction.

Now to the nominees.

I have to admit that I am very impressed by Ohio Supreme Court Justice Deborah Cook, who has been nominated to the Sixth Circuit. Justice Cook began her legal career as the first woman ever hired by the oldest law firm in Akron. She soon became the first woman partner in the firm's 100-year history. After she was elected to serve on the Ninth Ohio District Court of Appeals, she decided over one thousand appeals in just four years. Of the opinions she authored, she was reversed only 6 times by the Ohio Supreme Court, and of the opinions she joined, only 8 times.

Now, some have alleged that Justice Cook dissents too often. That is an easy claim to make, on the surface. However, there is no justification for inferring from the mere fact of dissenting, that she disregards precedent or favors certain types of parties over others. There is absolutely no evidence at all that Justice Cook does anything but conscientiously abides by precedent and faithfully interprets and applies the law.

If you don't want to take my word for it, look to the U.S. Supreme Court. The U.S. Supreme Court reviewed three cases decided by the Ohio Supreme Court during Justice Cook's tenure, and they reversed the majority opinion in all three. And in all three cases, the U.S. Supreme Court agreed with Justice Cook's dissent. What's more, Justice Cook was 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. So anyone who attempts to equate dissenting opinions with disrespect for legal precedent is just dead wrong.

Justice Cook is an extremely qualified appellate jurist, and I believe she will continue her distinguished judicial service once confirmed to the Sixth Circuit Court of Appeals.

Our next nominee, John Roberts, easily meets or exceeds any possible definition of qualified for the job. Mr. Roberts graduated with honors from both Harvard College and Harvard law school, served as a law clerk for Second Circuit Judge Henry Friendly and for then-Justice William Rehnquist of the Supreme Court, worked as Associate Counsel to the President, and served as the Principal Deputy Solicitor General. He currently heads the appellate practice group at the prestigious D.C. law firm of Hogan and Hartson, and has argued an exceptional 39 cases before the U.S. Supreme Court. It is no wonder why the Committee received a letter supporting Mr. Roberts signed by more than 150 members of the D.C. Bar, including such well-respected attorneys as Lloyd Cutler and Boyden Gray, or why the ABA saw fit to award him the highest possible rating, unanimous well-qualified. There can be no serious doubt about whether Mr. Roberts should be confirmed; the only question is why it was not done sooner.

Our final nominee is Jeffery Sutton, who by all accounts has got to be one of the very best witnesses ever to appear before this Committee. In fact, I know from listening to recent statements made by both senators Feinstein and Schumer that Mr. Sutton left quite an impression on this Committee.

The Sutton nomination has apparently posed the following question to some Members of this Committee: Should we reject someone because we disagree with his client's legal arguments, or with the courts' decisions in the cases he has argued? For instance, some have suggested that because Mr. Sutton represented the state of Alabama in the Garret case, that somehow he must be hostile to Americans with disabilities. Well, I utterly reject this view. Even the People for the

American Way report conceded that, "No one has seriously contended that Sutton is personally biased against people with disabilities."

So what should we infer from the fact that Mr. Sutton represented some state governments in unpopular causes? Well, there's certainly no doubt in the ABA Model Rules of Professional Conduct, which states, "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." And Senator Clinton, for one, seems to agree. During a Senate floor debate on Tuesday, she said, "A long time ago I used to practice law. I represented a lot of clients of different kinds, all sorts of folks. Their views and positions were not necessarily mine. I won some and I lost some in the trial court, in the appellate court, and in the administrative hearing room, but I do not believe that any of my clients spoke for me. My advocacy on behalf of clients was not the same as my positions about the law, about constitutional issues, and about many other matters." I think that was well said.

Indeed, there are other prominent Democrats who know not to draw an unfair inference. Bonnie J. Campbell, a Clinton Judicial nominee, has written to the Committee that, "I strongly urged the Senate to reject any unfair inference that Mr. Sutton's personal views much coincide with positions he has advocated on behalf of clients." Seth P. Waxman, former Solicitor General under President Clinton and Sutton's opposing counsel in the Garrett case writes, "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."

And if that assurance were not enough, we have also heard from the nominee himself that Mr. Sutton harbors no misunderstanding about the proper judicial review of federal laws. In response to a question asked at the hearing by Senator Leahy, Mr. Sutton responded, "...there's no doubt when a Federal Statute is passed, as the U.S. Supreme Court has made clear, there's a heavy presumption of constitutionality. And there's no doubt that a Court of Appeals judge has every obligation to follow that presumption." Indeed, Mr. Sutton made it clear - over and over throughout the 12-hour hearing - that he is committed to deciding cases on the basis of relevant statutes and binding precedents and the Constitution, rather than relying on any preconceptions or policy opinions that he might hold.

But if there is anyone here who still has doubts about Mr. Sutton's ability to decide cases without regard to the positions of his former clients, I urge you to do just one thing for the sake of fairness: consider all his former clients, not just a couple of them.

One of Mr. Sutton's clients is an intelligent woman who dreams of becoming a psychiatrist, but who was denied admission to medical school because she is blind. Another client is the National Congress of American Indians. Mr. Sutton has also worked without charge for the National Coalition of Students with Disabilities, the NAACP, the Anti-Defamation League, the Japanese American Citizen League, the Center for the Prevention of Handgun Violence, and for prisoners and death row inmates asserting civil rights violations. Mr. Sutton also defended Ohio's minority set-aside statute and Ohio's ban on ethnic intimidation.

Mr. Sutton has also served on the Board of the Equal Justice Foundation, an organization that has sued three Ohio cities to force them to build "curb cuts" to make their sidewalks wheelchair accessible, sued an amusement park company that had a blanket policy banning the disabled from their rides, represented a mentally disabled woman in subsidized housing facing eviction due to her mental illness, and represented a girl with tubular sclerosis alleging that her school was not properly handling her individual education plan.

So, even though I agree with the Model Rules of Professional Conduct, and with Senator Clinton, that a lawyer should not be held responsible for the views of his clients, I think that anyone who thinks otherwise should at least be fair enough to consider all the lawyer's clients, not just a select few.

Well, I think I have made clear my unequivocal support of these three very qualified and deserving nominees. I do not want to delay the vote any further, so I will now turn to the ranking member.

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