Testimony of

The Honorable Patrick Leahy

February 13, 2003

Today we consider the nomination of Jeffrey Sutton of Ohio to the U.S. Court of Appeals for the Sixth Circuit.

The hearing held on January 29, 2003, for Mr. Sutton and two other controversial circuit court nominees was unprecedented. Never before has the Committee forced into one hearing three controversial circuit court nominations over the objections of Senators. Indeed, it is highly unusual for the Committee to hold a single hearing on even two controversial nominees. The reason is simple. Our constitutional obligation to give advice and consent on nominations for lifetime appointments to the federal judiciary is compromised if we are not given adequate time to examine nominees under oath at their hearings. Hearings are not just a formality. At times they are crucial to the role of this Committee in carrying out the Senate's constitutionally mandated responsibilities.

I would also like to note that the schedule the Chairman has set with respect to Mr. Sutton, and even more so for the other circuit court nominees, is harmfully aggressive. There is little time to thoroughly review materials when written questions must be submitted within three work days after a nearly 430-page transcript of the hearing is received. Moreover, it is unnecessary and unreasonable that the Chairman would actually list Mr. Sutton on an agenda when his answers to numerous written questions were still being received and revised. This rigid schedule literally left no time to review the extensive written responses to questions that Mr. Sutton provided. I would also note that the Committee did not even receive Mr. Sutton's responses to written questions from Senator Schumer until Tuesday evening at 5:03 p.m. during a rather busy week. In my view, such a time crunch interferes with our ability to provide adequate consent to lifetime appointments to our circuit courts.

The responsibility to advise and consent on the President's life-tenured judicial nominees is one that I take seriously and is not an occasion to rubber stamp. The nomination of Jeffrey Sutton presents a number of areas of concern to me.

The number of individual citizens who came to the hearing to oppose Mr. Sutton, along with the number of Senators who came to question Mr. Sutton, several times in some cases, is some indication of the controversial nature of this nomination. The hearing had to be move to a bigger room, a room that had been reserved in advance of the hearing, in order to accommodate the public interest in the nomination. I thanked the Chairman for acceding to my suggestion and the suggestions of others to move the hearing into the larger hearing room.

In the days preceding his hearing, the Committee received thousands of letters from individuals and organizations, both in and out of Ohio, expressing concerns about appointing Mr. Sutton to the Sixth Circuit, and those letters raise serious issues. In addition, in the last few weeks, we

have received hundreds of calls from individuals and organizations opposed to the Sutton nomination. What I heard about this nominee from Ohio and around the country was troubling.

Mr. Sutton did not clear up these concerns at his hearing. In fact, his answers to many of the Senators' concerns, along with his answers to follow-up written questions, seem to raise even more concerns about his impartiality and objectivity.

Mr. Sutton is clearly a bright, legally capable, and accomplished attorney. Yet as a lawyer, in his own personal writings, and on his own time, he has sought out opportunities to attack federal laws and programs designed to guarantee civil rights protections. Let me be clear - unlike what those on the other side of the aisle may say, I am not opposing Mr. Sutton because he happened to represent clients whose positions I disagree with. As my record shows, I have voted for nearly 100 of President Bush's judicial nominees, many of whom took positions or represented clients with which I disagreed, including President Bush's two prior nominees to the Sixth Circuit.

I have taken a careful look at Mr. Sutton's advocacy record along with his personal writings and speeches. Mr. Sutton has acted as more than just counsel - he has aggressively pursued a national role as the leading advocate of a theory of federalism that would turn back the clock on federal authority to protect the civil rights of the American people, and he has succeeded in pushing extreme positions in order to limit the ability of Congress to act to prevent discrimination and protect civil rights. Mr. Sutton himself has stated that his advocacy on behalf of "states' rights" are not just arguments he makes for his clients, but something that he believes in. In a Legal Times article, he was quoted as saying, "It doesn't get me invited to cocktail parties. But I love these issues. I believe in this federalism stuff."

Let me just note that, when asked about this comment at his hearing, Mr. Sutton provided conflicting answers. First, he told me that this comment was in response to his pursuit of Supreme Court cases after he left the State Solicitor's office and returned to private practice at Jones Day. However, when later asked about the same comment by Senator DeWine, Mr. Sutton stated that, at the time of the article, he was State Solicitor and that he was on the lookout for cases because the Ohio Attorney General asked him to look for cases that affected the State. In follow-up written questions, while Mr. Sutton admits that he was on the lookout for Supreme Court cases at Jones Day, he disavows that he was similarly on the lookout as State Solicitor. Rather, he states that he was only a "subordinate" and that "everything [he was] described as doing in the article was done to further" the interests of the Ohio Attorney General. In contrast, the Legal Times article had several other sources who corroborated that it was Mr. Sutton's own efforts and passion that led to Ohio taking so many cases before the U.S. Supreme Court to assert state sovereign immunity. For example, the Supreme Court Counsel for the National Association of Attorneys General (who applauds Sutton's work), said that Mr. Sutton was a "court-watcher" with a "first-out-of-the-gate aggressiveness" who had "taken a very active role" in taking on cases where he could minimize federal authority in enforcing civil rights.

Based on Mr. Sutton's passionate advocacy and personal efforts to challenge and weaken federal laws and individual rights, and his extreme activism against federal protection for state workers, a large number of disability rights groups, civil rights groups, and women's rights groups are opposed to his confirmation. It is unprecedented for the disability community to speak out so

loudly in opposition to a judicial nominee. Overall, his nomination to the Sixth Circuit is opposed by hundreds of national, state and local disability groups, and thousands of individuals.

Mr. Sutton Has Advocated for States' Rights Over Civil Rights and Has Sought to Limit Individuals' Ability to Be Compensated When Their Rights are Violated

Mr. Sutton's record reveals a strong desire to limit Congress' power to pass civil rights laws and to limit the ability of individuals to seek redress for existing civil rights violations. In the last six years, as both a State Solicitor and in private practice, Mr. Sutton has been the leading advocate urging the Supreme Court to develop a new jurisprudence that uses states' rights as grounds to limit the reach of federal laws on behalf of the disabled, the aged, women, and environmental protection. He has argued major cases on civil rights, religion, health care, and education, and, in all of these cases, his arcane constitutional theory of the Eleventh Amendment - not based on text, legislative history, or decades of precedent - has undermined the rights of millions of people.

He has argued, among other things, that Congress exceeded its authority in passing the Religious Freedom Restoration Act (enacted in 1993 with broad bipartisan support under the leadership of Senator Kennedy and Senator Hatch), and parts of the Americans with Disabilities Act of 1990 (a bipartisan bill championed by former Senator Bob Dole and Senator Harkin), the Age Discrimination in Employment Act, and the Violence Against Women Act of 1994 (a bipartisan act cosponsored by Senator Hatch and Senator Biden).

In addition to weakening Congress' ability to protect the rights of individuals, Mr. Sutton has sought to limit the ability of individuals to seek redress in federal court for civil rights violations. For example, he has argued to limit the remedies available to victims of sexual abuse and to limit the ability of Medicaid recipients to enforce their rights under the law. In essence, he has argued for the Supreme Court to repudiate more than 25 years of legal precedents that permitted individuals to sue states to prevent violations of federal civil rights regulations.

One of Mr. Sutton's most recent and significant cases in which he attempted to erode legal rights passed by Congress was Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001), a case in which he argued that Congress exceeded its authority in enacting certain provisions of the Americans with Disabilities Act. In this case, in which a nursing director was demoted after undergoing treatment for breast cancer, Mr. Sutton argued against the ability of state employees to sue under Title I of the ADA for money damages if their employer discriminated against them. Mr. Sutton argued that alleged discrimination against individuals with disabilities should only receive "rational basis" review and that Congress unconstitutionally elevated the standard for disability discrimination in the ADA, an argument that would severely limit Congress' authority to protect individual rights. Moreover, he argued that Congress had not identified a pattern of abuse, despite extensive hearings and findings of discriminatory actions by states, including unnecessary institutionalization and denials of education. During oral argument, Mr. Sutton even said that the ADA was not needed and that the case was a "challenge to the ADA across the board."

Mr. Sutton was questioned heavily about his involvement in the Garrett case both at his hearing and in follow-up written questions, but his answers were incomplete and deeply disturbing. Most of his answers flatly contradicted statements that he made in either his legal briefs or articles, or

danced around the important substantive issues raised. Moreover, he consistently tried to redirect any questions about his involvement in Garrett to be a discussion about the only case prior to his nomination in which he represented a disabled individual. He is a skilled oral advocate and his skills were on display at his hearing. That is not the question. The question before us is whether he should be confirmed to be a circuit judge, not whether we would like him to argue an appellate case.

At his hearing, Mr. Sutton brought up his involvement in Ohio Civil Rights Comm'n v. Case W. Reserve University, 666 N.E. 2d 1376 (Ohio 1996), a case involving a blind student denied admission to medical school, several times as an example of the idea that he is sympathetic to persons with disabilities. While no one that I know of has alleged that Mr. Sutton has any personal antipathy to people with disabilities, it troubles me that he has used his representation in this case as a response to questions I and other Senators asked about his involvement in the Garrett case. He testified that he was involved in the Garrett case because he was eager to develop a Supreme Court practice, without examining the issue of whether his representation would help or hurt people, or was legally right or wrong.

However, the situation in the Case Western case was different. In that case, Mr. Sutton was the Ohio Solicitor General in charge of all of the State of Ohio's appeals and, in such a capacity, he would normally have represented a state agency, like the Ohio Civil Rights Commission. Mr. Sutton's statements regarding how he came to take this case are widely divergent and irreconcilable: In his Senate Questionnaire, he states that the case "fell" to him as Ohio State Solicitor, since it "fell" to the Ohio Attorney General to defend the Commission's decision through the state courts. At his hearing, he testified that he had a choice of which side to take and that it was his job to make a recommendation to the Attorney General. And, in answer to my follow-up questions, he states that he chose to represent the Commission and, thereafter, "did not have discretion to recommend" to the Attorney General that she not weigh in on the state medical schools' side of the case. I still 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 in this case. Regardless, I am troubled by Mr. Sutton's reliance on this case.

Not only do Mr. Sutton's descriptions of his involvement in this case create irreconcilable differences, but his answers display an advocate's skills rather than a judicious consideration of the situation. It troubles me that Mr. Sutton's answers indicate that he believes that the representation of a blind student in one case - and a case in which he acted in his official capacity - balances out the significant detrimental impact that his extreme arguments in Garrett had on millions of disabled individuals. There is nothing that can undo the elimination of rights by Garrett. Mr. Sutton's argument indicates a commitment to ideology over people and convinces me that he is not able to put aside his advocacy even to present his involvement in a case objectively.

More specifically, among his many other attempts to erode essential legal rights passed by Congress are:

Olmstead v. LC, 527 U.S. 581 (1999), a case involving Title II of the ADA, where Mr. Sutton argued on behalf of the petitioners that it should not be a violation of the ADA to force people with mental disabilities to remain in an institutionalized setting rather than a community-based

program despite clear Congressional findings to the contrary. Sutton's arguments in this case were accepted by Justices Scalia and Thomas, but rejected by the majority of the Court.

Pennsylvania Dept of Corrections v. Yeskey, 524 U.S. 206 (1998), where Mr. Sutton filed an amicus brief arguing that the ADA does not apply to state prison systems, a position which would have furthered weakened the ADA and severely limited its applicability, had it been accepted.

Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), where Mr. Sutton argued for severe limits on the ability of state employees to sue under the Age Discrimination in Employment Act, stating that older workers are adequately protected by local anti-discrimination laws, and that Congress had no record of a pattern and practice of prior constitutional violations by the States and that Congress exceeded its authority since the legislation was concerned with age and not with "suspect" classifications like race and national origin. The four Supreme Court Justices dissenting in this case stated that the decision will have a serious impact on Congress's authority and ability to protect civil rights and represented a "radical departure" from the proper role of the Supreme Court.

United States v. Morrison, 529 U.S. 598 (2000), where he filed an amicus curiae brief on behalf of one state, the state of Alabama, challenging the constitutionality of the federal civil remedy for women who are the victims of sexual assault and domestic violence in the Violence Against Women Act. VAWA was passed by a broad and bipartisan coalition, and 36 states submitted briefs in support of the constitutionality of the Act. Mr. Sutton argued, and the 5-4 majority of the Court accepted, that gender-based violence does not substantially affect interstate commerce because it is not an "economic" activity and the impact of such crimes has only an attenuated connection to interstate commerce. He also argued that the civil remedy provision for private acts of gender-motivated violence was not permissible under Section 5 of the Fourteenth Amendment.

Alexander v. Sandoval, 532 U.S. 275 (2001), where he argued that individuals could not privately 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 disparate impact, such as disproportionate toxic dumping in minority neighborhoods, the use of educationally unjustified testing or tracking practices that harm minority students, or the failure to provide appropriate language services in health facilities. Mr. Sutton argued not only that the disparate impact regulations could not be privately enforced, but that these regulations were an invalid exercise of agency power. If this argument had been accepted by the Court, it would have made it impossible for even the federal government to enforce actions with an unjustified disparate impact. In addition, Mr. Sutton argued in his brief and in oral argument that implied rights of actions are never permissible under the spending power, an argument that the Court also did not accept.

Westside Mothers v. Haveman, 1313 F.Supp.2d 549 (E.D. Mich. 2001), where he argued that Medicaid recipients have no legal rights to sue states in order to enforce their rights under Medicaid. Mr. Sutton's primary argument, which formed the core of the district court's ruling, was that Spending Clause statutes were not "federal law," but simply a contract. He then argued that because Spending Clause statutes were simply contracts, the individuals who sought to

enforce the contract were mere third-party beneficiaries to such contracts and were not enforcing any federal laws and thus suit could not be brought under Section 1983. Such far-reaching arguments go well-beyond the Supreme Court's jurisprudence, and were ultimately rejected by the Sixth Circuit Court of Appeals, in a case with significant implications for economically disadvantaged individuals.

City of Boerne v. Flores, 521 U.S. 507 (1997), where he argued in an amici curiae brief on behalf of 16 states that the Religious Freedom Restoration Act (RFRA) exceeded Congress' power under Section 5 of the Fourteenth Amendment and violated state sovereignty, stating that Congress could not enact a sweeping law without any evidence that religious freedoms were being interfered with and urging that the states "be the principal bulwark when it comes to protecting civil liberties." Mr. Sutton applauded the court's ruling as "a watershed case . . . respecting states' ability to govern themselves and to look after religious liberties themselves," according to a Washington Post article, and, in an essay written for the Federalist Society, he praised the decision as a "victory for federalism."

Mr. Sutton's record shows his tendency to present arguments with broad implications that go well-beyond where even the activist, conservative majority on the Supreme Court has been willing to go. For example, in Garrett and Kimel, he advocated a very narrow view of Section 5 of the Fourteenth Amendment (the clause which allows for legislation to enforce that Amendment) so that little remedial legislation in the civil rights area could pass muster unless the plaintiffs can prove longstanding and well documented abuses by the states.

Mr. Sutton's arguments in the case involving the Violence Against Women Act also went beyond what the Court accepted. For example, he stated that "the record is utterly devoid of support for the notion that the States . . . have violated the rights of their citizens." Amicus Curiae Brief in Support of Respondents, 1999 WL 1191432 at 19. Mr. Sutton took a more jaundiced view than the Supreme Court of evidence of discrimination; which could certainly translate into harsher rulings against women and minority interests. Moreover, in an article after the VAWA decision, Mr. Sutton demonstrates his support for the court's outcome and his view of Congress. He wrote:

Once accepted, only the most unimaginative lawmaker would lack the resources to contend that all manner of in-State activities will have rippling effects that ultimately affect commerce. Such an approach would have a disfiguring effect on the constitutional balance between the States and the National Government . . . and would ultimately make irrelevant virtually every other delegation of power to Congress under Article I.

Unexamined deference to the VAWA factfindings would have created another problem as well. It 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.

These condescending comments toward Congress are troubling. In general, Congress is uniquely situated to gather facts from across the nation, obtain information from constituents who have first-hand experience with the issues, and assess the magnitude of the problem. Moreover, VAWA was passed after numerous hearings, extensive inquiry and fact-finding, and with the bipartisan support of the Senate and House, the President and most states.

The Record Reveals That Sutton Has Made a Personal Crusade of "Federalism"
Mr. Sutton stated at his hearing that he has not attacked disability or other civil rights but has, instead, merely acted as an advocate for his clients, advancing a theory of limited government.

Yet the record reveals that he has not simply taken an unpopular position in the name of zealously representing the interests of his clients. As discussed above, he has often taken extreme positions and his record is one of activism in order to limit the ability of Congress to act to prevent discrimination and protect civil rights. It is no coincidence that Mr. Sutton has been the chief lawyer in case after case arguing that individuals have no right to enforce the civil rights protections that Congress has given them.

As noted previously, Mr. Sutton has said that he has been "on the lookout" for cases where he can raise issues of "federalism" or that will affect local and state government interests. And his "federalism" practice boomed as he actively pursued cases attractive to his ideology and his contacts among the members of the Federalist Society. In answer to my follow-up questions, Mr. Sutton admitted that he had taken no case in which he argued against a state claiming immunity from suit under the Eleventh Amendment. Despite his protestation that he might argue either side of any case, it must certainly be more than a coincidence that every time he has argued before the Supreme Court, he has always been on the same side of this issue.

Despite numerous questions, Mr. Sutton did not adequately address these concerns at his hearing nor show that he has the ability to put aside his years of passionate advocacy and treat all parties fairly. On the contrary, he demonstrated that he has not considered the impact that his arguments have on the lives of millions of women, seniors, the disabled, low-income children, and state employees, and that he favors ideas over people, states' rights over civil rights, and a patchwork of local rules over national standards.

Mr. Sutton has stated in several articles that states should be the principal bulwark in protecting civil liberties, a claim that has serious implications given a history of state discrimination against individuals. In numerous papers for the Federalist Society, he has repeatedly stated his belief that federalism is a "zero-sum situation, in which either a State or a federal lawmaking prerogative must fall." In his articles he has said the federalism cases are a battle between the states and the federal government, and "the national government's gain in these types of cases invariably becomes the State's loss, and vice versa."

He also states that federalism is "a neutral principle" that merely determines the allocation of power. This view of federalism is not only inaccurate but troubling. First, these cases are not battles in which one law-making power must fall, but in which both the state and the federal government -- and the American people-- may all win. Civil rights laws set federal floors or minimum standards but states remain free to enact their own more protective laws. Moreover, "federalism" in his approach is not a neutral principle as Mr. Sutton suggests, but has been used by those critical of the civil rights progress of the last several decades to limit the reach of federal laws.

Mr. Sutton tried to disassociate himself from these views, by saying that he does not specifically recall these remarks and that, in the ones he recalls, he was constrained to argue the positions that he argued on behalf of his clients. As far as I know, no one forced Mr. Sutton to write any article,

and most lawyers are certainly more careful than to attribute their name to any paper that professes a view with which they strongly disagree. Mr. Sutton's suggestions that he does not personally believe what he has written are unconvincing.

Conclusion

In sum, Mr. Sutton's extreme theories would restrict Congress' power to pass civil rights laws and close access to the federal courts for people challenging illegal acts by their state governments (limiting individuals' ability to seek redress for violation of civil rights). In the name of the concept of sovereign immunity, Mr. Sutton threatens to undermine uniform national laws protecting individuals' rights to welfare, housing, clean air, equality, and a harassment-free environment and to undermine the core protections and services afforded by Congress to workers, the disabled, the aged, women and members of religious minorities. This view of federalism undermines the basic principle, announced in Marbury v. Madison, that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." The judicial role of enforcing and upholding the Constitution becomes false when the government has complete immunity to suit. The burden should be on Mr. Sutton to show that he will protect individual rights and civil rights as a lifetime appointee to the Sixth Circuit court of appeals. This he has not done.

As I have said on other occasions, when the President sends us a nominee who raises concerns over qualifications or integrity or who displays an inability to treat all parties fairly, I will make my concerns known. This is one of those times. In his selection of Mr. Sutton for the Sixth Circuit, the President and his advisors are attempting to skew its decisions out of step with the mainstream and in favor of their concept of "states' rights" over the civil rights of the American people.

The Sixth Circuit is one on which Senate Republicans stalled three nominees of President Clinton during his last four years in office. They closed and locked the gates to the court in 1997. Professor Kent Markus' courageous testimony about that partisan process rings in my ears. Despite those excesses by Senate Republicans, during my chairmanship the Senate confirmed two new conservative members to the Sixth Circuit. With this nomination, the plan of Republicans to pack this court and tilt it sharply out of balance is evident for all to see.

Before and after he took office, President Bush said that he wants to be a uniter and not a divider, and yet he has sent and resubmitted to the Senate several nominees who divide the American people. The Senate has just this week unanimously confirmed three of his other judicial nominees. The Committee and the Senate made the judgment that those nominees will fulfill their duties to act fairly and impartially. They were not divisive or extreme. I urge the President to choose nominees who fit that profile, rather than the alternative he seems intent on imposing for so many circuit court nominees. End the court-packing effort and work with all in the Senate to name consensus, fair-minded federal circuit judges.

The oath taken by federal judges affirms their commitment to "administer justice without respect to persons, and do equal right to the poor and to the rich." No one who enters a federal courtroom should have to wonder whether he or she will be fairly heard by the judge. Jeffrey Sutton's record does not show that he will put aside his years of passionate advocacy in favor of "states' rights" and against civil rights, and his extreme positions favoring severe restrictions on Congress'

authority to act on behalf of the American people.

Accordingly, I will not vote to report his nomination favorably to the Senate for appointment to one of the highest courts in the land.

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