



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.

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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

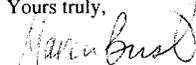
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designed to reverse over four decades of civil rights legislation, enacted with overwhelming bipartisan support, that are the cornerstone of independent living for people with disabilities. This is "judicial activism" in its purest sense. While Mr. 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 altar 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