

SCHOOL OF LAW

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*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.

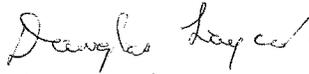
The argument is long and complex, but the practical consequences are clear: *Westside* holds, at Sutton's urging, that the conditions accepted by states when they accept federal funds are not enforceable by a private right of action, and that Congress cannot make them enforceable. States are free to 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