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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

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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