



January 27, 2003

The Honorable Orrin Hatch
Chairman, Senate Judiciary Committee
104 Hart Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy
Senate Judiciary Committee
433 Russell Senate Office Building
United States Senate
Washington, D.C. 20510

re: Jeffrey Sutton

Dear Senators Hatch and Leahy:

I am writing as President of the National Employment Lawyers Association to urge the Senate Judiciary Committee to reject Jeffrey Sutton's nomination for appointment to the Sixth Circuit Court of Appeals. NELA is the country's only professional organization that is exclusively comprised of lawyers who represent individual employees in cases involving employment discrimination and other employment-related matters. NELA and its 67 state and local affiliates have more than 3000 members.

Mr. Sutton has spent much of his career as an attorney trying to use the courts to reconfigure our system of government. He has dedicated himself to pursuing cases that provide an opportunity to convince federal judges to immunize states from suits by private individuals alleging discrimination and other reprehensible conduct by state officials. Mr. Sutton has played a significant role in persuading a narrow, conservative majority on the Supreme Court to strike down congressional enactments aimed at misconduct by state officials based on a relatively new and vague constitutional standard.

As the members of the Senate Judiciary Committee are aware, in recent cases argued by Mr. Sutton, the same five conservatives on the Supreme Court applied this new standard to severely restrict the ability of private individuals to enforce their rights under the Age Discrimination in Employment Act of 1967 ("ADEA") and under the Americans With Disabilities Act ("ADA") against State governments. *Board of Trustees v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000). In *Kimel*, a 5-4 decision, the Court held that, "in the ADEA, Congress did not validly abrogate the states' sovereign immunity to suits by private individuals." 528 U.S. at 91. In *Garrett*, another 5-4 decision, the Court held that applicants for employment, employees and ex-employees cannot bring suit to recover money damages for state violations of their rights under Title I of the ADA. *Garrett*, 531 at 360. The majority opinion in that case held that, even though Congress clearly intended the ADA to cover state employees, it had not gathered sufficient evidence of disability discrimination against state employees in judicial-like findings. *Id.* at 370-72.

These decisions have had a devastating impact on the ability of state employees, including employees of state universities and colleges, to prevent disability and age

Founder
Paul M. Tobias
President
Frederick M. Gimes
Executive Director
Tara E. Chow

Executive Board

William R. Arling
Ft. Lauderdale, Florida

Kathleen L. Bogas
Desert, Arizona

Nancy Bonn
Marina del Rey, California

Kathleen Cahill
Baltimore, Maryland

Dennis E. Egert
Kansas City, Missouri

Bruce A. Fredrickson
Washington, DC

Joseph D. Gerstein
New Haven, Connecticut

Frederick M. Gimes
Columbus, Ohio

Daniel S. Goldberg
Minneapolis, Minnesota

Janice Goodman
New York, New York

Margaret A. Harris
Houston, Texas

Janet E. Hill
Albany, Georgia

Shari J. Manning
Boston, Massachusetts

Arnold H. Radwin
New York, New York

L. Susan Pao
Chicago, Illinois

Barry D. Robinson
Denver, Colorado

Shirley D. Smith
West Orange, New Jersey

Mary Anne Steyer
St. Louis, Missouri

Patricia A. Shiu
San Francisco, California

William J. Smith
Palo Alto, California

Paul M. Tobias
Cincinnati, Ohio

Carly Vanecko-Winters
Cray Chase, Maryland

Blair Vanzant
San Francisco, California

discrimination and to obtain meaningful relief for such discrimination. State governments, by and large, have not amended their statutes to fill the gap caused by these decisions.

Mr. Sutton advocates for judicial activism - - only from a point of view that has been associated with some of the most reactionary and virulent political movements in our Nation's history. Indeed, limiting the power of the federal government to protect citizens from abusive or discriminatory state and local officials (and provide meaningful remedies) has been a rallying cry of such movements as The Dixiecrat Party and other political groups dedicated to preserving and protecting segregation.

As has been exemplified by decades of litigation under the Reconstruction Era Civil Rights Acts and Title VII, state citizens often need protection from dangerous or discriminatory actions by their state officials, and, for many reasons, state remedies may be unavailable or impractical.

Mr. Sutton's notion of states' rights is extreme. For example, he convinced the district court in *Westside Mothers v. Haveman*, 133 F. Supp. 2d 549 (E.D. Mich. 2001) that spending-power programs such as Medicaid were not the supreme law of the land and that a state government cannot be sued, even for injunctive relief, based on its failure to comply with federal statutory and regulatory requirements. The case involved federal requirements for medical care for needy children. Fortunately, the Sixth Circuit rejected the incredible proposition asserted by Sutton that state governments could both accept federal money and snub federal statutory requirements all in the name of states' rights. *Westside Mothers v. Haveman*, 289 F.3d 852 (6th Cir. 2002). He even argued unsuccessfully in *Olmstead v. L.C.*, 527 U.S. 581 (1999), that states have no duty under the ADA to provide services for people with disabilities in integrated settings and that keeping people with disabilities in institutions was not a form of discrimination.

At least one historian has pointed out that views of state rights like that espoused by Mr. Sutton reflect the federal state relationship under the Articles of Confederation. As we all know, government under the Articles failed and led to the adoption of the Constitution with its provisions for a stronger Congress and President in our system of federalism.

Of course, we recognize that lawyers have a duty to represent their clients zealously. We do not criticize a nominee merely because he or she has taken a position in litigation that benefits the institutions being represented. However, it is clear that Mr. Sutton has a strong personal commitment to enhancing state government immunity regardless of the consequences on individuals who may be subjected to discriminatory or dangerous conduct which violates federal law. Mr. Sutton's role in these cases went beyond that of a lawyer merely arguing for a client.

For example, as state solicitor, Mr. Sutton actively interjected Ohio in a Texas case to advance his views of states' rights and he presented part of the oral argument in *City of Boerne v. Flores*, 521 U.S. 507 (1997). See *City of Boerne v. Flores*, 519 U.S. 1088 (1997). Mr. Sutton clearly saw that decision has having ramifications far beyond the zoning dispute and the statute at issue in that case. In "City of Boerne v. Flores: A Victory for Federalism," an article published in the newsletter of the Federalist Society's Federalism & Separation of Powers Practice Group, he described that decision as "strick[ing] a welcome blow for States' rights" and as a "federalism decision[] with muscia." See Federalist Society Web site, <http://www.fed-soc.org/Publications/practicegroupnewsletters/federalism/fdb10304.htm>.

He also defended that decision against the charge of judicial activism and suggested that individual rights would benefit from strengthening state immunity from citizen suits under federal law because it would encourage state litigation to the same purpose. This view has been disproven by events following the recent decisions discussed above and praised by Mr.

Sutton. States have not rushed forward after these decisions to strengthen the statutory protections afforded to their employees and citizens. More important, it is naive to believe that state officials will jump to pass laws dismantling their protection from civil liability simply because the Supreme Court has granted them further protection by applying strained principles of constitutional construction which limit the authority of Congress.

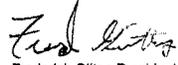
As Congress well knows, the core conceit of states' rights advocates is to trust the states. Sutton has persistently cited state laws purporting to provide private individuals meaningful enforcement alternatives to federal law. In fact, what states have on paper rarely provides a meaningful alternative, and Sutton has not urged the Court to consider seriously the viability of those state laws he cites, relying instead on their mere existence. In contrast, Congress knew from hearings that the states too often act like the proverbial fox assigned to guard duty at the hen house. His insistence on deference to the states and reluctance to demand that the states provide a meaningful alternative remedy reveals the depth of his commitment to states' rights and the superficiality of his concern for those victimized by discrimination and other misconduct by state officials.

Mr. Sutton has made it clear in interviews that his legal advocacy is personal, not just professional. As he told the *Legal Times*, he and his staff are always on the lookout for cases coming before the Court that raise issues of federalism. He added, "But I love these issues. I believe in this federalism stuff."

NELA strongly opposes Mr. Sutton's nomination. His words and actions demonstrate that he is a zealous advocate for states' rights and preclude his judging cases with an open mind. Essentially, his philosophical commitment has crossed the line from adherence to a particular viewpoint or set of values and become a defining characteristic of his mission as a lawyer. In both reality and perception, the nation would be better served were he to continue on that mission in the capacity of a lawyer and not as a decisionmaker on the bench.

The Sixth Circuit Court of Appeals does not need crusaders for state rights. It needs judges who can fairly balance the interests of individuals with those of government and business under the Constitution.

Very truly yours,


Frederick Gittes, President,
National Employment Lawyers Association