Report of People For the American Way in Opposition to the Confirmation of

Jeffrey Sutton

to the United States Court of Appeals for the Sixth Circuit

People For the American Way

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REPORT OF PEOPLE FOR THE AMERICAN WAY IN OPPOSITION TO THE CONFIRMATION OF JEFFREY SUTTON TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The record of attorney Jeffrey Sutton, nominated for a seat on the U.S. Court of Appeals for the Sixth Circuit, has raised serious concerns about his legal philosophy on a number of questions. Most troubling, however, are Sutton's views on Congress' authority to enact laws protecting individual and other rights and how he would seek to implement those views if confirmed. Over the last ten years, the so-called "states' rights" or "federalism" revolution promoted by the Federalist Society and other right-wing advocates has severely limited federal civil rights and other protections, particularly by restricting the authority of Congress to require compliance with laws it has passed. As a practicing lawyer for just over a decade, Sutton has become a leading activist in these damaging efforts. In fact, he has personally argued key Supreme Court cases that, by narrow 5-4 majorities, have hobbled Congress' ability to protect Americans' rights against discrimination and injury based on disability, race, age and religion.

Particularly with respect to limiting Congress' authority to protect rights, Sutton has gone far beyond simply pursuing the arguments necessary to protect individual clients. In a number of cases, he has voluntarily filed friend-of-the-court briefs and argued for positions that are even further to the right than the 5-4 majority on the Court that has imposed these restrictions. Writing for the Federalist Society, for which he has been an officer in the Federalism and Separation of Powers practice group, Sutton has personally advocated significant restrictions on congressional authority based on his "federalism" theories and has praised the far-right views of Justices Antonin Scalia and Clarence Thomas. In fact, he stated several years ago that he was "always on the lookout" for "federalism" cases, proclaiming that "I believe in this federalism stuff." [1] Sutton's activism against federal protection for the rights of people with disabilities and other civil rights has prompted more than 70 national groups and over 375 regional, state and local organizations to oppose his confirmation.

[1] *Legal Times* (Nov. 2, 1998) at 8.

This report focuses specifically on Sutton's record and legal philosophy concerning the "states' rights" or "federalism" revolution. As discussed below, Sutton has already played a major role in promoting significant and harmful restrictions on Congress' ability to protect Americans, and his views would go even further than the 5-4 Supreme Court majority. This is true with respect to disability rights, religious liberties, other civil rights, and general limits on federal authority to protect individual rights and the environment. In addition, Sutton's writings raise serious questions about his views on other constitutional issues, such as reproductive freedom.

As more than 200 law professors wrote to the Senate Judiciary Committee in July 2001, no federal judicial nominee is presumptively entitled to confirmation. Because federal judicial appointments are for life and significantly affect the rights of all Americans, and because of the Senate's co-equal role with the President in the confirmation process, nominees must demonstrate that they meet the appropriate criteria. These include not only an "exemplary record in the law," but also a "commitment to protecting the rights of ordinary Americans," a "record of commitment to the progress made on civil rights, women's rights, and individual liberties," and a "respect for the constitutional role Congress plays in promoting these rights and health and safety protections, and ensuring recourse when these rights are breached."[2] Based on these criteria, as discussed below, Sutton's confirmation to a lifetime position on the important Court of Appeals for the Sixth Circuit should be rejected.

Sutton's record on federal authority to protect disability rights

The American Association of People with Disabilities and a large number of other disability rights groups are opposing Sutton's confirmation, based primarily on his efforts to challenge and weaken the Americans with Disabilities Act (ADA). Sutton represented the University of Alabama in the recent case of University of Alabama v. Garrett, 531 U.S. 356 (2001), in which the Court ruled 5-4 that it was unconstitutional for the ADA to permit state employees to bring lawsuits for damages to protect their rights against discrimination. The case concerned Patricia Garrett, a nurse and breast cancer survivor who contended that she was improperly harassed and ultimately fired by a state

[2] See Law Professors' Letter of July 13, 2001. A full copy of the letter, which elaborates further on these criteria, is available from People For the American Way.

university hospital in violation of the ADA. Even assuming she could prove her case, Sutton argued that the state agency could not be required to pay her damages under the ADA.

Sutton's arguments in the Supreme Court went even further than the Court's damaging decision. During oral argument, Sutton told the Court that the ADA was "not needed." Oral Argument Transcript at 24, University of Alabama v. Garrett, 531 U.S. 356 (2001). When asked by one Supreme Court Justice whether his arguments applied only to the employment aspects of the ADA, Sutton replied "Well, your Honor, it's a challenge to the ADA across the board." Oral Argument Transcript at 11. Not even the Court's 5-4 majority would agree to such a sweeping restriction on the ADA.

Indeed, Sutton's arguments in Garrett underlined just how radical his restrictive theory on Congress' power to protect Americans against discrimination based on disability truly is. As in several other challenges to federal laws, Sutton suggested that Congress had no power to legislate at all to protect disability rights under the Fourteenth Amendment because disability, unlike race or national origin, is not considered a "suspect" classification.[3] Under this theory, none of the ADA's protections against discrimination would be valid at all, at least as applied to government employees. Such an "across the board" restriction on the ADA would be devastating to federal efforts to prevent and remedy discrimination based on disability.

Garrett is not the only case in which Sutton has tried to severely limit the ADA. In Olmstead v. L.C., 527 U.S. 581 (1999), Sutton's brief for the petitioners argued that it should not be a violation of the ADA to force people with mental disabilities to remain in an institutionalized setting without proper justification, despite clear congressional findings to the contrary. 1998 U.S. Briefs 536 (LEXIS). In a third case, Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206 (1998), Sutton filed an amicus curiae brief arguing that the ADA does not apply at all to state prison systems. 1997

[3] *See* Sutton's Brief for Respondents in Kimel v. Florida Board of Regents at 13 (claiming that the Court had never "upheld a prophylactic exercise of [S]ection 5 power in the context of non-suspect classifications"); Sutton's Brief for Petitioners in University of Alabama v.Garrett at 44-45, 47 (arguing that "[c]ommon sense and logic ought to suffice to reject the paradoxical exercise of a prophylactic power in an unprophylactic setting" and "a decision upholding the prophylactic exercise of [S]ection 5 power in the context of rational-basis scrutiny, with no widespread practice of relevant constitutional violations to boot, would break new ground").

U.S. Briefs 634 (LEXIS). The Court rejected Sutton's arguments in Olmstead and Yeskey, which would have further weakened the ADA, had they been accepted.

In particular, Sutton's arguments for limiting the ADA in Olmstead were accepted by Justices Scalia and Thomas, but were flatly rejected by the Court's decision. For example, both Sutton and the dissent by Thomas, which was joined by Scalia and Rehnquist, argued that the ADA should be interpreted narrowly because remedying discrimination under the Rehabilitation Act, a different federal law protecting people with disabilities, does not require equal treatment among members of the same protected class. 527 U.S. at 616 (Thomas, J., dissenting); Brief for Petitioners at 22, 1998 U.S. Briefs 536 (LEXIS). The Court pointed out, however, that the ADA is more comprehensive than the Rehabilitation Act and that the argument advanced by the dissent and Sutton was "incorrect as a matter of precedent and logic." 527 U.S. at 598 (n.10). Similarly, the Court rejected Sutton's claim that the state did not discriminate based on the respondents' disabilities because "no class of similarly situated individuals was even identified, let alone shown to be given preferential treatment." Brief for Petitioners at 20, 1998 U.S. Briefs 536 (LEXIS); *see also* 527 U.S. at 615-625 (Thomas, J., dissenting). The Court disagreed, holding that "[w]e are satisfied that Congress had a more comprehensive view of the concept of discrimination advanced in the ADA." 527 U.S. at 598.

A number of Sutton's defenders have maintained that his record does not reflect animus towards persons with disabilities, pointing to his advocacy when he was Ohio state solicitor in support of a state civil rights commission finding that a state university medical school had violated state law by refusing to admit a blind woman. These arguments miss the point. No one has seriously contended that Sutton is personally biased against people with disabilities. Instead, the concern is that Sutton's legal theories and philosophy "would undermine the core protections and services afforded by Congress to persons with disabilities," including the landmark Americans with Disabilities Act.[4] Sutton's record clearly justifies this serious concern.

[4] Judge David L. Bazelon Center for Mental Health Law, "Jeffrey Sutton: Taking Aim at the Rights of Persons with Disabilities" (July 26, 2001) at 1(emphasis added).

Sutton's record on federal protection of religious liberty

Sutton has also utilized his narrow theory of federal authority to advocate severely limiting Congress' efforts to protect religious liberty. Led by Senators Kennedy and Hatch, Congress in 1993 enacted the Religious Freedom Restoration Act (RFRA), designed to help protect the free exercise of religion. In City of Boerne v. Flores, 521 U.S. 507 (1997), however, the Court struck down RFRA as exceeding Congress' power under section 5 of the Fourteenth Amendment. Sutton voluntarily filed an amicus curiae brief on behalf of Ohio and other states and personally argued the case in the Court. *See* 1995 U.S. Briefs 2074 (LEXIS).

Sutton vigorously challenged RFRA outside the courtroom as well. He testified before Congress in support of the result in Boerne and, in an essay written for the Federalist Society, praised the decision as a "victory for federalism" and a "welcome blow for states' rights." [5]

In fact, Sutton has argued for restrictions on Congress's ability to protect religious freedoms that are even more severe than those imposed by Boerne. In his brief in that case, Sutton claimed that section 5 of the Fourteenth Amendment does not permit Congress to enact any law to enforce religious freedom, free speech, or any other provision of the Bill of Rights. According to Sutton, such a provision was not and "could not have been ratified in 1870" and "would not be ratified today." *See* 1995 U.S. Briefs 2074 (LEXIS). The Court in Boerne did not accept this claim, and suggested that Congress could adopt some laws protecting religious liberty. 521 U.S. at 519. Had it been adopted, however, Sutton's radical theory would have invalidated virtually all other congressional statutes designed to protect religious freedom and other provisions of the Bill of Rights. This would include key parts of the Religious Land Use and Institutionalized Persons Act (RLUIPA), cosponsored by Senators Hatch and Kennedy and enacted after Boerne to help protect religious liberty.

[5] Sutton, "City of Boerne v. Flores: A Victory for Federalism." 1 Federalism and Separation of Powers News 7 (Fall 1997). *See* Supreme Court Decision on Religious Issues: Hearing Before the House Comm. on the Judiciary, Subcomm. on the Constitution, 105th Cong. (July 14, 1997) (statement of Jeffrey Sutton).

Sutton's views on religious liberty issues most closely resemble the views of Justice Antonin Scalia, for whom he clerked, perhaps the most right-wing Justice on the current Supreme Court on these subjects. Sutton has praised Scalia for his efforts to restrict the Establishment Clause's protection of religious liberty. In another article for the Federalist Society, Sutton criticized the majority decision in Board of Education of Kiryas Joel v. Grumet, 512 U.S. 687 (1994), in which the Court held that school district lines could not be drawn to permit one religious sect to predominate. Sutton lauded Scalia's dissent in the case: according to Sutton, Scalia's dissent "highlighted" each "flaw" in the decision. Jeffrey S. Sutton, "Supreme Court Highlights," Federalist Paper (Nov. 1994) at 16. Sutton praised the fact that the decision did not utilize "the increasingly irrelevant Lemon test." Id. at 16, 17. This again echoes Justice Scalia, who has frequently criticized the Lemon test, an important tool in protecting religious liberty.[6] Sutton's extreme views on religious liberty and on Congress' power to protect it raise troubling concerns about his nomination.

Sutton's record on other federal civil rights protections

Sutton has employed his views on narrow congressional authority and other legal theories to push for significant limitations on other federal civil rights protections. He argued for severe limits on the Age Discrimination in Employment Act (ADEA) in Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), in which the 5-4 Court ruled that state employees who were the victims of age discrimination on the job could not sue for damages under the ADEA. In another case, he filed an amicus curiae brief arguing against the constitutionality of the federal remedy for victims of sexual assault and violence in the Violence Against Women Act in United States v. Morrison, 529 U.S. 598 (2000), a position which the 5-4 Court adopted. In a more recent case, his advocacy made it significantly harder for victims of racial discrimination to obtain justice through the courts by arguing in Alexander v. Sandoval, 532 U.S. 275 (2001), that there was no private right of action under Title VI regulations, as the 5-4 Court ruled. As in other areas, Sutton's arguments in several of

[6] The Lemon test is a 3-pronged review that the Court has often used to determine whether a law violates the Establishment Clause. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, finally, the statute must not foster an excessive government entanglement with religion." Lemon v. Kurtzman 403 U.S. 602, 612-613 (1971) (internal citation omitted). For an example of Justice Scalia's disdain for the Lemon test, see Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 399 (1993) (Scalia, J., concurring).

these cases sought to restrict federal civil rights protections even more severely than has the Supreme Court, as reflected in his own writings on federalism and his work with the Federalist Society's Federalism and Separation of Powers Practice group.

As Justices Stevens, Souter, Ginsburg, and Breyer have explained, these and similar decisions by the 5-4 majority have already had a serious impact on Congress' authority and ability to protect civil rights, and threaten further significant harm. These rulings are part of the 5-4 majority's "repeated substitution of its own views of federalism for those expressed in statutes enacted by the Congress and signed by the President" and represent a "radical departure from the proper role of this [Supreme] Court." Kimel v. Florida Board of Regents, 528 U.S. 62, 96, 99 (2000) (Stevens, J., dissenting). Decisions like Kimel and Morrison do "more than simply aggrandize the power of the Judicial Branch." They also severely limit "Congress' options for responding with precise attention to state interests" and for taking action on a national basis to defend civil rights. Id. at 95 (n.3).

Sutton's views, however, are potentially even more dangerous. In several of these and related cases, Sutton has tried to restrict federal authority to protect civil rights even more harshly than did the 5-4 Court majority. For example, as discussed above with respect to disability rights and religious liberty, Sutton suggested that Congress had no power to legislate at all under the Fourteenth Amendment with respect to age discrimination in Kimel because it was not concerned with "suspect" classifications like race and national origin. The Court did not rule on this radical theory but, if accepted, Sutton's position would even more severely limit Congress's authority to protect individual rights.

Similarly, in Sandoval , Sutton did more than argue that there is no private right of action to enforce Title VI regulations that prohibit actions with a discriminatory impact. He suggested that Title VI "does not authorize federal agencies to create rules barring disparate effects" caused by a statewide program. Brief for Petitioners in Sandoval at 26. Although acknowledging that Congress had explicitly recognized that facially neutral actions with discriminatory effects are illegal under some statutes, he criticized the discriminatory effects standard. Sutton noted derisively that "every law has a disparate impact on someone" and that "efforts to regulate disproportionate impacts wherever federal dollars appear" would have "far-reaching" and negative effects, a view that could

significantly undermine federal discrimination protections even beyond the results in Sandoval. Id. at 39, 26. As bipartisan majorities in Congress and numerous court decisions have recognized, conduct with discriminatory effects on minorities "can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme."[7] Sutton's legal theory clearly jeopardizes the important discriminatory effects standard.

In addition, Sutton has advocated other specific steps by the courts to limit federal civil rights protections. In Holder v. Hall, 512 U.S. 874 (1994), the Supreme Court considered the scope of Section 2 of the Voting Rights Act, which prohibits state and local conduct that has a discriminatory effect on minority voters. In a concurring opinion in the case, Justice Thomas joined by Justice Scalia claimed that Section 2 should not apply at all to actions such as candidate eligibility rules, redistricting plans, and any other conduct that does not strictly regulate the process of registering, voting, and having votes counted. In their dissents, Justices Stevens, Blackmun, Souter, and Ginsburg specifically criticized the Thomas-Scalia opinion, explaining that its "radical" view would require overturning or reconsidering at least 28 previous Court decisions holding that the law should be interpreted broadly to prohibit racial discrimination in all aspects of voting. Id. at 963-965 .

In an article for the Federalist Society, however, Sutton praised the Thomas-Scalia opinion. "The soundness of Justice Thomas' analysis is hard to question," he wrote, and "there can be little doubt that he left no stone unturned." Jeffrey S. Sutton, "Supreme Court Highlights," The Federalist Paper (Nov. 1994) at 15. Sutton specifically praised Thomas for providing "persuasive" and "important" reasons to reconsider and overrule prior Court precedent broadly interpreting the Voting Rights Act. Id. In fact, Sutton praised the Thomas-Scalia opinion even more expansively, suggesting that it provided a blueprint for broadly reconsidering and overturning court decisions that right-wing advocates do not like in civil rights and other areas. According to Sutton, the Thomas-Scalia opinion "goes a long way to developing a conservative theory for doing an unconservative thing – overruling precedent." Id. at 21. Although acknowledging the principle of stare decisis, Sutton insisted that "it can't be that all liberal victories become insulated" from being overruled, particularly based on the

[7] United States v. City of Black Jack, 508 F.2d 1179, 1185 (8th Cir. 1974), quoting Hobson v. Hansen, 269 F. Supp. 401, 497 (D.D.C. 1967), aff'd, 408 F.2d 175 (D.C. Cir. 1969).

Thomas-Scalia theory. Id. Sutton did not elaborate on which particular "liberal victories" he thought should be targets for overturning.[8]

It remains unclear just how far Sutton's views and philosophies would take federal civil rights law. It is clear, however, that not only has he vigorously argued for the recent series of 5-4 decisions that have harmed civil rights and severely limited congressional authority, but also that he would go much further in the restrictive direction. Indeed, Sutton's legal philosophy would threaten to overrule numerous court decisions concerning the scope of the Voting Rights Act, the use of discriminatory impact to prove discrimination, and the ability of Congress to act to protect civil rights. As the president of one of the nation's largest independent living centers for people with disabilities has recently written, 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."[9]

Sutton's record on limiting congressional authority and federal rights in other areas

Sutton's narrow views on federal authority go far beyond civil rights and religious liberty. As documented by a number of his articles and amicus curiae briefs, Sutton's restrictive legal philosophy would go so far as to virtually eliminate the ability of Americans to protect their rights under Social Security, Medicaid, and similar programs, and would significantly limit the federal government's ability to protect the environment.

In a recent case, Sutton espoused a radical view of individuals' rights under federal law and the Constitution so narrow that it would, if ultimately upheld by the courts, severely limit the rights

[8] Sutton filed an amicus curiae brief in another recent Supreme Court case in which the Court narrowly limited the scope of another law relating to civil rights. In Buckannon Board and Care Home Inc. v. West Virginia Dept. of Health and Human Resources, 532 U.S. 598 (2001), the 5-4 Court limited the ability of plaintiffs in civil rights cases to obtain attorneys' fees. Sutton's amicus curiae brief advocated that result, suggesting derisively that otherwise the civil rights attorneys' fees law would become a "relief act for lawyers." Amicus Curiae brief in Buckannon, 2000 WL 1873811, 3 (Dec. 20, 2000)(quoting Farrar v. Hobby, 506 U.S. 103 (1992)).

[9] Letter of Marca Bristo, president of Access Living and former chair of National Council on Disability to Sen. Orrin Hatch (January 3, 2003) ("Bristo letter").

of all Americans that are based on federal law. In Westside Mothers v. Haveman, 133 F.Supp.2d 549 (E.D. Mich. 2001), *rev'd by* 289 F.3d 852 (6th Cir. 2002), *cert. denied, 123 S.Ct.. 618* (Dec. 2, 2002), a district court ruled that poor people may not sue state officials to require the provision of important Medicaid benefits guaranteed under federal Medicaid law. The New York Times reported that the decision "shocked some legal scholars and advocates for the poor," quoting one health law expert as explaining that if the decision stands, "it is the end of the Medicaid program as a source of insurance." Once private individuals lose their ability to enforce their rights as in the Haveman decision, she said, they effectively "no longer have health insurance."[10] Sutton played a key role in the case, arguing for a legal theory even more restrictive than that adopted by the lower court.

Specifically, the lower court decision explained that on its own motion, the court had ordered briefing on the issue of whether a suit could be brought at all to require Michigan officials to comply with the Medicaid program. Finding the state's briefs to be "less than fully satisfactory," the court invited amicus curiae participation by Sutton and the Michigan Municipal League, and specifically praised Sutton in its decision. 133 F. Supp. 2d at 553, n. 3. Sutton's brief took the position that not only could people not sue to enforce their rights to receive Medicaid under 42 U.S.C. § 1983, as the court held, but also that Section 1983 does not permit lawsuits by individuals to enforce any legislation enacted under the Spending Clause, similar to his argument in Sandoval . *See* July 18, 2000 brief at 5.[11] As the plaintiffs pointed out in their reply, this theory would "overturn 30 years of Supreme Court jurisprudence" and congressional law providing that people may bring lawsuits to enforce their rights under the Social Security Act, Medicaid, and other federal laws. *See* Aug. 1, 2000 brief at 5. Sutton even suggested that it would be unconstitutional for Congress to pass a specific law requiring that states consent to such lawsuits in order to receive federal funds.

Even the lower court's decision did not fully accept Sutton's radical theory, and the Court of Appeals for the Sixth Circuit – the very court to which Sutton has been nominated -- rejected it outright, reversing the district court's holding. 289 F. 3d 852 (6th Cir. 2002). The Court of Appeals

[10] Robert Pear, "Ruling in Michigan Bars Suits Against State Over Medicaid," New York Times, May 12, 2001, p. A18 (quoting George Washington University professor Sara Rosenbaum).
[11] 42 U.S.C. 1983, a federal law critical to the enforcement of federally-protected rights, specifically authorizes an individual to file suit for deprivation of such rights by state officials.

held that Medicaid has the force of law and that it creates privately enforceable rights against state officials, contrary to what Sutton had argued. Id. at 858, 863. It rejected the lower court's reasoning and Sutton's radical theory point by point. First, Medicaid and similar programs "are not merely contract provisions; they are federal laws" according to Supreme Court precedent. Id. at 858. Nor is Medicaid unenforceable as a product of the Spending Clause: "The well-established principle that acts passed under Congress's spending power are supreme law has not been abandoned in recent decisions," contrary to what Sutton had argued. Id. at 860. The district court was also mistaken in accepting Sutton's theory that the suit was barred by Eleventh Amendment sovereign immunity, the appellate court held. "Plaintiffs seek only prospective injunctive relief from a federal court against state officials for those officials' alleged violations of federal law, and they may proceed." Id. at 862. Finally, the court held, the plaintiffs do indeed have a private cause of action under the analysis set forth in Blessing v. Freestone, 520 U.S. 329, 340-341 (1997), precedent that Sutton and the district court neglected to apply. 289 F.3d 852, 862. The Supreme Court declined to review the Haveman case.

Other courts have formally rejected the lower court's holding in Haveman, including Sutton's theory on sovereign immunity and the Spending Clause, as "at odds with existing, binding precedent." Antrican v. Odom, 290 F.3d 178 (4th Cir. 2002).[12] Sutton's constricted theory of

[12] See also. e.g., Boudreau v. Ryan, 2001 WL 840583 at 94 (N.D. Ill. 2001) (explicitly rejecting the theory that there is no private cause of action to enforce Spending Clause legislation under 42 U.S.C. § 1983); Bryson v. Shumway, 177 F.Supp.2d 78, 87 (D. N.H. 2001) (rejecting the district court's holding in Haveman and holding that in the First Circuit, "a state official acting in violation of federal law is not insulated by the Eleventh Amendment"); Markava v. Haveman, 168 F.Supp.2d 695, 709 (E.D.Mich. 2001) (rejecting its own district's Haveman holding because "the Supreme Court and the Sixth Circuit have held that private parties may enforce rights established by federal Medicaid statutes against state officers in the federal courts pursuant to 42 U.S.C. § 1983"); Wilder v. Virginia Hospital Association, 496 U.S. 498, 508 (1990)); Memisovski v. Patla, 2001 WL 1249615, n.8 (N.D. Ill) (rejecting the district court's ruling in Haveman as "unpersuasive and inconsistent with other settled law"); Oklahoma Chapter of the American Academy of Pediatrics v. Fogarty, 205 F.Supp.2d 1265, 1270 (N.D. Okla.2002) (rejecting the district court's holding in Haveman as "not supported by the law of the Tenth Circuit"); Rancourt v. Concannon, 175 F.Supp.2d 60, 62 (D. Maine 2001) (rejecting the district court's ruling in Haveman as unpersuasive authority because its reasoning has been specifically rejected by at least three district courts).

Congress' Spending Clause authority, however, is extremely disturbing, and would deprive all Americans of the ability to enforce their rights under Social Security and similar laws.[13]

Sutton has also argued for an extremely narrow view of Congress' authority to protect the environment. Sutton advocated this theory clearly in an amicus curiae brief in Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001) ("SWANCC"). The issue in SWANCC concerned whether the Army Corps of Engineers had the authority to regulate disposal of solid wastes into wetlands within a state that serve as important habitats for migratory birds. The Court ruled 5-4 that Congress had not specifically granted such authority to the Corps, a result supported in Sutton's brief. But Sutton went a significant step further. He claimed (along with SWANCC) that Congress did not have the ability under the Commerce Clause to exercise such authority. According to Sutton, the basis for the rule was "non-economic", it concerned the "eminently local activity" of land use, and allowing such federal authority would improperly give Congress a "general police power" over "local zoning and landuse matters." Amicus Curiae Brief for State of Alabama in SWANCC, 2000 WL 1052159 at 14, 9 (July 27, 2000).

The radical and potentially destructive nature of Sutton's restrictive theories was explained by four justices in the SWANCC case. Justices Stevens, Souter, Breyer, and Ginsburg believed that Congress had in fact given the Corps the authority to regulate the wetlands, and went on to explain why the argument that this violated the Commerce Clause had "no merit." 531 U.S. at 197 (Stevens, J., dissenting). Contrary to Sutton's claim, the basis of the rule clearly did relate to economic activity, since it was premised on the discharge of industrial and other solid wastes into the wetlands "for economic reasons." Id. at 193. Nor was the matter truly "local," since "the protection of migratory birds is a textbook example of a national problem." Id. at 195 (emphasis in original).[14]

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[13] Significantly more inquiry on Sutton's federalism theories and his role in the Haveman case is warranted in considering his nomination. For example, the plaintiffs in Haveman suggested that Sutton may not have had authorization to represent the Michigan Municipal League itself. Attorneys in Michigan have also questioned the events surrounding the judge's decision to request that Sutton's participate in the case.

[14] Justice Holmes first stated that the matter of migratory birds is a "national interest of . . . the first magnitude" in Missouri v. Holland, 252 U.S. 416, 435 (1920). This case involved Missouri's challenge to a treaty between the U.S. and Great Britain that sought to protect many species of migratory birds in the U.S. and Canada by regulating their killing, capture, and sale. In a 7-2 decision, Holmes and the majority rejected the argument that the federal government had no power to take action that allegedly

Accepting Sutton's theory could make Congress powerless to deal effectively with many water pollution and other environmental problems in one state that produce significant harmful effects across state lines. The dangers of such limits on federal power are far from hypothetical. As Justice Stevens pointed out, the very same clean water legislation at issue in SWANCC was prompted by the dramatic 1969 industrial waste fire on Ohio's Cuyahoga River and other similar incidents. Id. at 174. Sutton's narrow view of Congress' authority under the Commerce Clause could literally have devastating consequences.

Sutton's restrictive philosophy of congressional authority came to the forefront yet again in a recent Supreme Court decision, United States v. Craft, 122 S.Ct. 1414 (2002). In Craft, Sutton argued for the respondent that based on an interpretation of Michigan state law, the federal tax lien statute does not allow the IRS to impose a lien on property owned by two spouses when only one spouse has been delinquent in paying taxes. Brief for Respondent at 1-2, 2001 WL 1631569. The Court summarized this view as "absurd" because it would lead to individuals being able to "shield their property from federal taxation." 122 S.Ct. at 1424. Writing for the 6-3 majority, Justice O'Connor also rejected Sutton's argument that Michigan law, rather than federal law, should govern the outcome, because "this was a federal question, and in answering that question we are in no way bound by state courts' answers to similar questions involving state law." 122 S.Ct. at 1425-1426.

Sutton's views in Haveman, SWANCC, and Craft are clearly consistent with his overall philosophy on limiting the authority of Congress. In several articles for the Federalist Society, he has praised the Supreme Court's decisions since 1995 limiting Congress's power under the Commerce Clause, the Fourteenth Amendment, and other constitutional provisions. This has included, for example, the Court's 5-4 decisions striking down the Gun-Free School Zones Act and parts of the Brady Act. *See* Jeffrey S. Sutton, "Federalism 2000: A Review of the Supreme Court's Federalism Decisions," Federalism & Separation of Powers Law Newsletter (Fall 2000), Jeffrey S. Sutton, "Supreme Court 2000 - A Review and Preview," The Federalist Paper (Summer 2000). Sutton has derided congressional efforts to support its authority to enact such legislation by making "extensive findings," commenting that this would "give to any congressional staffer with a laptop" the ability to

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encroached upon the states' asserted regulatory powers for the purpose of environmental protection. Id. at 434. Sutton's arguments could jeopardize this long-accepted principle.

define "the limits on Congress' Commerce Clause powers." "Federalism 2000" at 2; "Supreme Court 2000" at 6. In Sutton's view, moreover, decisions in this area are "zero-sum decisionmaking" – simply by upholding a federal law like the ADA, Sutton claimed, courts are "slighting the states' capacity." "Federalism 2000" at 12. Lost in this recitation, of course, are the rights of individuals that the ADA and other federal laws seek to protect.

From this review, it is clear that Sutton is a proponent of a radical restriction of individuals' rights under federal law and the ability of Congress to protect interests like the environment. Sutton, if able to wield his views from the federal bench, could devalue protections enacted by Congress by reducing them to little more than empty words on paper, leaving the American people with rights but no remedies.

Sutton and other constitutional issues

Serious questions about Sutton's views on other constitutional law questions are raised by the amicus curiae brief he filed on behalf of a number of states in Chicago v. Morales, 527 U.S. 41 (1999). *See* Brief in Support of Petitioner, 1998 WL 328367 (U.S. Amicus Brief). That case involved a Chicago anti-loitering ordinance that was so broad that, as the Court explained, it would prohibit a person from waiting outside Wrigley Field "just to get a glimpse of Sammy Sosa leaving the ballpark." 527 U.S. at 60. The Court struck down the ordinance 6-3, with only Scalia, Thomas, and Rehnquist dissenting. Sutton's arguments were endorsed by the dissenters, but squarely rejected by a majority of the Justices. For example, the Court refused to accept Sutton's claims that the ordinance was not vague and that it provided fair warning of the prohibited conduct. *See* 527 U.S. at 55, 58-59. *See also* 527 U.S. at 64, 69, 73 (O'Connor, J., concurring) (Kennedy, J., concurring) (Breyer, J., concurring). Sutton asserted that there is no constitutionally protected right to move from place to place and "loiter" for innocent purposes. As the plurality opinion specifically stated, however, the Court has recognized this freedom as "part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." 527 U.S. at 53. The courts have similarly ruled that the rights of privacy and reproductive freedom are part of the "liberty" protected by the Due Process Clause, raising even more troubling questions about Sutton's views.

Sutton does not have a specific record on privacy or reproductive rights, something that NARAL has cited as "worrisome, particularly in light of [his] affiliation with Justice Scalia, one of the Supreme Court's most vociferous opponents of reproductive rights."[15] The closest Sutton appears to have come to taking a position on reproductive rights is an article for the Federalist Society, in which he wrote that 1999-2000 was "not a good Term for anti-abortion advocates." Jeffrey S. Sutton, "Supreme Court 2000 - A Review and Preview," The Federalist Paper (Summer 2000) at 6-7. The basis for Sutton's pronouncement was a pair of 5-4 Court rulings striking down a Nebraska statute restricting so-called partial-birth abortions and upholding a Colorado law helping protect abortion clinic patients from unruly protesters. Stenberg v. Carhart, 530 U.S. 914 (2000); Hill v. Colorado, 530 U.S. 703 (2000). Both decisions, Sutton stated, dealt a "blow to efforts to minimize the number of abortions in this country." Id. at 8. Further inquiry is clearly warranted on this important issue.

CONCLUSION

This review of Sutton's record raises deeply troubling questions about the views he has advocated and the potentially sweeping and damaging implications of those views, both for the fundamental rights of all Americans and for the proper authority of Congress under the Constitution. If approved as a federal appeals court judge, Sutton would have a lifetime appointment to a post with direct authority to help turn these theories into reality. Particularly in light of the tens of thousands of cases decided by the courts of appeals each year, and the relatively few decided by the Supreme Court, that power would be quite significant. As the president of one of the nation's largest independent living centers for people with disabilities has recently put it, however, "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."[16] The nomination of Jeffrey Sutton to the United States Court of Appeals for the Sixth Circuit should be rejected.

[15] *See* http://www.now.org/issues/legislat/nominees/sutton.html.
[16] Bristo letter