

CLEAN WATER ACTION · COMMUNITY RIGHTS COUNSEL
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ENDANGERED SPECIES COALITION · FRIENDS OF THE EARTH
NATURAL RESOURCES DEFENSE COUNCIL · OCEANA
PHYSICIANS FOR SOCIAL RESPONSIBILITY · SIERRA CLUB
THE WILDERNESS SOCIETY

February 13, 2003

RE: Opposition to Nomination of Jeffrey S. Sutton to Sixth Circuit Court of Appeals

Dear Senator:

We are writing to express our opposition to the nomination of Jeffrey S. Sutton to a lifetime position on the U.S. Court of Appeals for the Sixth Circuit. The Senate will soon vote on this very important nomination to the court that decides the fate of federal environmental safeguards in Kentucky, Michigan, Ohio, and Tennessee.

In his writings and speeches, Mr. Sutton has advanced a view that pits the federal government against the states, doing violence to notions of cooperative federalism that underlie most health and safety legislation, as well as a wide range of environmental safeguards for clean air, clean water, wetlands, and endangered species. He has characterized a string of cases challenging the federal government's authority as "invariably a battle between the states and the federal government over legislative prerogative" and a "zero-sum game—in which one, or the other law making power must fall."

Mr. Sutton's positions on federal constitutional power and citizen access to the courts are extreme and go far beyond the already disturbing 5-to-4 Rehnquist Supreme Court rulings on these topics. For example:

- Mr. Sutton argued to the U.S. Supreme Court in *Solid Waste Authority of Northern Cook County (SWANCC) v. United States*, that the federal government did not have authority under the Constitution's Commerce Clause to prevent destruction of waters and wetlands that serve as critical habitat for migratory birds. Mr. Sutton called these concerns "uniquely a matter of local oversight." The *SWANCC* Court decided the case on statutory grounds, declining to decide Mr. Sutton's constitutional argument.
- Mr. Sutton has been a leading advocate for aggressively limiting private causes of action that permit citizens to bring civil rights and environmental justice claims to the courts. In *Alexander v. Sandoval*, he convinced a

deeply divided Supreme Court that regulations under Title VI of the Civil Rights Act, which form the primary source of rights to ensure environmental justice, did not permit citizens to sue the states directly. Mr. Sutton asked the *Sandoval* Court to go much further: his position would have also prevented vindication of environmental claims under § 1983 of the Civil Rights Act, a question specifically left open by the *Sandoval* Court.

- Mr. Sutton has also advocated for a dramatic narrowing of the category of federal rights that can be enforced under the Court's landmark 1908 ruling in *Ex Parte Young*. Effective, enforceable, cooperative federalism in environmental laws is dependant upon *Ex Parte Young*, which permits suits to enjoin state officials from violating federal law even where the Eleventh Amendment would bar a suit against the state seeking money damages. In *Westside Mothers v. Haveman*, Mr. Sutton took the extreme position that federal legislation passed under the Constitution's Spending Clause never creates federal mandates that can be enforced under *Ex Parte Young*.

There are multiple examples of cases in which Mr. Sutton failed to bring relevant precedent to the court's attention. For example, in his opening brief in *Westside Mothers*, Mr. Sutton ignored a landmark Supreme Court case on point, *Maine v. Thiboutot*, and in a reply brief, admitting his error, advised the district judge not to "be overly concerned with whether its decision can be reconciled with the facts—as opposed to the rationale—of *Thiboutot* and its progeny." In that same brief, he argued that Spending Clause legislation creates a federal/state "contract" despite a 1985 Supreme Court ruling in *Bennett v. Kentucky Dep't of Education* to the contrary, which he again failed to cite. After convincing a district court to adopt his position, the Sixth Circuit reversed, finding that "binding precedent has put the issue to rest."

Mr. Sutton testified at length before the Committee on the Judiciary but did not dispel concerns with his positions in these and other cases. Instead, his testimony raised new questions about his fitness to serve in a lifetime position on the nation's Court of Appeals. When asked about his role in the *SWANCC* case (Transcript at 123-129, 287-289), Mr. Sutton told the Committee that he had only argued how the Supreme Court should interpret the statute and that it should avoid the constitutional issues. After Senator Feingold confronted Mr. Sutton with language from his brief, Mr. Sutton admitted that he also urged the Court to find the Clean Water Act regulations at issue unconstitutional, but downplayed the argument. In fact, Mr. Sutton devoted six of the brief's ten pages to his major argument that the Clean Water Act wetlands regulations at issue were beyond Congress' constitutional authority under the Commerce Clause. What's more, Mr. Sutton was asked whether he personally believed his own major argument on this issue. Mr. Sutton implausibly testified that, despite writing a Supreme Court brief on the subject, he had "no idea" what his own view was on the merits of the

arguments that he made in *SWANCC*. (Transcript at 288). Mr. Sutton's testimony raised candor and credibility issues that are deeply disturbing.

In the words of Chief Judge J. Harvie Wilkinson of the Fourth Circuit Court of Appeals, we are in the midst of a "third wave of judicial activism," activism being led by judges and advocates who purport to be conservatives. Mr. Sutton's extreme views on federal authority and environmental access to courts, coupled with his lack of candor and apparent disdain for unfavorable precedent, give every indication that he would be a leading supporter of this new and virulent form of activism that is advancing an anti-environmental policy agenda from the federal bench.

Based upon a full evaluation of his record, we strongly urge you to reject the nomination of Mr. Sutton to the Sixth Circuit Court of Appeals.

Sincerely,

Paul Schwartz
National Campaigns Director
Clean Water Action

Doug Kendall
Executive Director
Community Rights Counsel

William Snape
Vice President and Chief Counsel
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