Background: Jeffry S. Sutton

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 environmental, health, and safety legislation. He has characterized a string of cases challenging the federal government's authority to regulate 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 views on states' rights are not even shared by the vast majority of states. For example, thirty-six states advocated in favor of the federal Violence Against Women Act in *United States v. Morrison*. Only one state, Alabama, represented by Mr. Sutton, advocated against federal authority. Likewise, nine northeastern states recently sued the Bush Administration for not aggressively enforcing the Clean Air Act. These states clearly do not share Mr. Sutton's view that federal rules "invariably" and improperly encroach on state legislative prerogatives.

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. U.S.* 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. No less an authority than Justice Oliver Wendell Holmes writing for a 7-2 majority of the Supreme Court in 1920 called the protection of migratory birds a "national interest of very nearly the first magnitude" and held that "[i]t is not sufficient to rely upon the States." By contrast, 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 a federal mandate that can be enforced under *Ex Parte Young*.

Another disturbing aspect of the briefs Mr. Sutton filed in the cases discussed above is his tendency to cavalierly disregard precedent that is unfavorable to his position and his willingness to instruct judges to ignore such precedent in ruling in his favor. 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's extreme views on federal authority and environmental access to courts, coupled with his apparent disdain for unfavorable precedent, strongly suggest that Mr. Sutton's nomination to the Sixth Circuit poses a threat to the Constitution and enforcement of our nation's core environmental protections.