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Subject: : Sutton editorial

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CREATOR:Tucker A. Eskew (CN=Tucker A. Eskew/OU=WHO/O=EOP [WHO])

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TO:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

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TO:Gian-Carlo A. Peressutti (CN=Gian-Carlo A. Peressutti/OU=WHO/O=EOP@EOP [WHO])

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A pretty good defense of Jeffrey Sutton on the Columbus Dispatch editorial page.

Injustice

Federal court nominee unfairly targeted

<http://www.dispatch.com/news/editorials01/may01/709845.html>

Injustice

Federal court nominee unfairly targeted

Saturday, May 26, 2001

One of the most vexing problems in American justice was crystallized outside the law offices of Jones, Day, Reavis & Pogue in Downtown Columbus on Friday. There, several dozen disability activists demonstrated against President Bush's nomination of Columbus attorney and former Ohio solicitor Jeffrey Sutton to the U.S. 6th Circuit Court of Appeals in Cincinnati. They want Bush to withdraw the nomination on the grounds that Sutton is hostile to the civil rights of the disabled.

Last year, Sutton successfully argued before the U.S. Supreme Court that the Constitution limits the ability of citizens to sue state governments in federal court for discrimination against the disabled.

Disability activists regard this as a serious setback to the Americans with Disabilities Act, the landmark federal law prohibiting discrimination against those with handicaps. On that basis, they consider Sutton unfit for the federal bench.

Sutton "hasn't demonstrated the ability to uphold federal law in federal court as a federal judge," said Sue Hetrick of The Ability Center of Greater Toledo and spokeswoman for those gathered in protest outside Sutton's office.

Strictly speaking, Sutton can be counted on to uphold federal law, at least as far as the ADA is concerned, because it was his argument before the Supreme Court that helped justices decide what federal law is regarding the rights of the disabled.

What Hetrick's statement really means is, "We can't count on Sutton to rule our way on our favorite issue."

Therein lies the problem. Since the 1980s, interest groups of the left and right have mounted increasingly shrill and vicious campaigns against federal court nominees, not because these nominees lacked experience, competence or judgment but because they failed a special-interest litmus test.

The judiciary is intended to be the objective and independent branch of government, the one that rules on the constitutionality of the actions of the legislative and executive branches.

Judicial independence is essential. Plaintiffs and defendants must have faith that the cases they bring to court will be decided on the basis of law, not on a judge's whim or preference.

But special-interest groups increasingly try to promote judicial nominees they think will vote their way and to block those they suspect won't. This is a blatant attempt to rig the judicial system to produce favored outcomes, not necessarily justice.

Both parties in the U.S. Senate have shown themselves willing to give these groups a forum and to allow capable and decent nominees to be publicly savaged and humiliated, smeared with half-truths and subjected to character assassination.

Sutton's "sin" is that he believes the 11th Amendment to the Constitution, which limits lawsuits against states, takes precedence over the ADA. Reasonable people can disagree about this, and some very capable attorneys did disagree with Sutton in arguments before the Supreme Court. Among them was Mike Gottesman, a Georgetown University law professor. He still disagrees with Sutton's views but regards Sutton as a competent, smart and ethical attorney. Gottesman says he saw nothing in Sutton's brief to the Supreme Court indicating that he opposes the Americans with Disabilities Act.

Gottesman also thinks it's very dangerous to try to deduce an attorney's personal beliefs from the arguments he makes in court. An attorney's job is to make the best arguments he can for his client, whether he agrees with those arguments or not.

These views are seconded by Seth Waxman, former U.S. solicitor general for the Clinton administration. Waxman, who said he and Sutton have been legal adversaries on a number of occasions, considers Sutton a friend and a top-notch attorney.

Waxman said he saw nothing in Sutton's handling of the ADA lawsuit that leads him to believe Sutton disagrees with the aims of the Americans with Disabilities Act.

Sutton, acting on behalf of his client, the state of Alabama, argued that the Constitution offers state government employers protection from such lawsuits. Sutton did not argue that "the ADA is an unimportant piece of legislation," Waxman said.

He added that it is legitimate for activists for the disabled to question Sutton's views but that Sutton deserves the opportunity to deliver his answer before the Senate in confirmation hearings.

Just how does Sutton feel about the rights of the disabled?

One indication is his membership on the board of the Equal Justice Foundation, a Columbus-based nonprofit group that provides legal representation to the disadvantaged, including the disabled. The

foundation sued in 1999 to compel the city to comply with the ADA by installing curb cuts for wheelchairs on city streets. Sutton was invited to join the foundation's board last year, said executive director Kimberly M. Skaggs. Skaggs says she disagrees with Sutton politically but supports his nomination to the federal bench because he is "smart enough and fair enough to be a good judge."

Cheryl Fischer has no doubts about where Sutton's sympathies lie. When the medical school at Case Western Reserve University denied her admission because she is blind, Sutton represented her before the Ohio Supreme Court, arguing passionately that she had a right to attend medical school and that doing so would not put an undue burden on the university. Sutton lost the case but won Fischer's gratitude.

"I think he believes thoroughly in the civil rights of all people,"

Fischer said. "He is not someone who would want to minimize the rights of disabled people. He helped me stand up for what I believe in."

Fischer is dismayed to see activists for the disabled oppose Sutton's nomination.

"I know how difficult it is to be judged unfairly and how it feels when those standing in judgment of you do not consider all the facts."

Fischer has no doubt about Sutton's qualifications. "I would definitely like to see him on the federal court," she said.

Sutton deserves the chance to make that case before the Senate.