

EARTHJUSTICE • COMMUNITY RIGHTS COUNSEL

October 11, 2002

The Honorable Patrick J. Leahy
Chairman, Senate Judiciary Committee
United States Senate
Washington, DC 20510

Dear Chairman Leahy:

We are writing to thank you for recognizing the need for a complete review of the record and a full debate on the nomination of U.S. District Judge Dennis Shedd to a lifetime position on the U.S. Court of Appeals for the Fourth Circuit. Given the disturbing recent record of the Fourth Circuit on critical issues such as the constitutional power of the federal government, and Judge Shedd's own record on these topics, we believe the Senate Judiciary Committee must fully debate this important nomination.

As you know, under Chief Justice William Rehnquist, the Supreme Court has been striking down federal legislation at a rate without precedent in our nation's 225 year history. These rulings, often grouped together under the inaccurate label of "federalism," have undermined important laws protecting women, senior citizens, minorities, the disabled, and the environment.

These rulings have engendered withering criticism from all sides of the political spectrum. For example, Judge John Noonan has declared in a recent book that the Rehnquist Court has already acted "without justification of any kind" in doing "intolerable injury to the enforcement of federal standards." "The present damage," Judge Noonan warns, "points to the present danger to the exercise of democratic government."

The Fourth Circuit has been the most aggressive appeals court in the country in advancing this "federalism" agenda and in striking down and undercutting environmental, safety, health, civil rights, privacy, and other federal statutory safeguards. To give just one example, the Fourth Circuit recently relied upon the Eleventh Amendment in reversing a district court ruling which held that state officials had violated federal law surface mining requirements by permitting one of the most environmentally destructive practices imaginable: mountaintop removal coal mining that buries and destroys valleys, rivers, and streams. *Bragg v. West Virginia Coal Ass'n*, 248 F.3d 275 (4th Cir. 2001), *cert. denied*, 122 S. Ct. 920 (2002). As Solicitor General Ted Olson stated in response to a petition for Supreme Court review, the Fourth Circuit's "Eleventh Amendment ruling in this case is incorrect." As Solicitor General Olson continued, however, the Supreme Court generally will not review even an incorrect decision when no other appellate court has yet decided the precise issue involved. The Supreme Court's subsequent denial of

review demonstrates the critical role of Fourth Circuit appeals judges, who are the final authority in nearly all federal environmental and other cases from Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

Against this backdrop, Judge Shedd's ruling in *Crosby v. South Carolina DHEC*, C.A. No. 3:97-3588-19BD is enormously troubling. In *Crosby*, Judge Shedd held that "Congress did not properly enact the [Family and Medical Leave Act] under § 5 of the fourteenth amendment and, therefore, has not abrogated defendant's eleventh amendment immunity from suit." (Order dated October 14, 1999). Judge Shedd reached this significant constitutional holding in a two-paragraph order that merely rubber-stamps the cursory analysis of a magistrate judge. The magistrate judge noted a split in authorities by other district courts on the constitutionality of the FMLA, but made no effort to analyze or critique the rulings upholding Congressional authority.

Judge Shedd's *Crosby* decision is inexplicably terse given: (1) the fact that he was ruling that an important law passed by Congress was unconstitutional; (2) the absence of directly-controlling precedent; (3) the split among other district court opinions on the issue; and (4) the fact-specific nature of the Supreme Court's "congruence and proportionality" test under Section 5 of the Fourteenth Amendment. *See City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). In light of the unsettled and sweeping nature of constitutional federalism rulings generally and of the importance of the specific ruling that Congress did not properly enact the FLMA under Section 5 of the Fourteenth Amendment, this is deeply disturbing.

Equally unsettling is Judge Shedd's testimony in defense of his *Crosby* ruling. When Senator Charles Schumer (D-NY) asked about *Crosby*, Judge Shedd defended his conduct by noting that instead of "rubber-stamp[ing]" the initial constitutional ruling by the magistrate judge he "asked the Justice Department to intervene and give us their views." TR at 58. Judge Shedd testified that if he had not notified the Justice Department "nobody maybe would have ever learned about it." *Id.*

What Judge Shedd failed to tell the Committee is that federal law (28 U.S.C. § 2403) requires federal judges to notify the Justice Department whenever the constitutionality of any act of Congress comes into question and to allow the United States to intervene:

In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, where the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence . . ."

In light of this clear statutory mandate, the magistrate judge in *Crosby* erred seriously in not notifying the Department of Justice before he struck down the FMLA. Judge Shedd would have broken federal law if he "rubber-stamped that" with the expectation that "nobody maybe would have ever learned about it." Judge Shedd's

attempt to defend his decision in *Crosby* is astonishing -- he did ultimately rubber-stamp a cursory analysis by the magistrate judge, he did not publish either his Order or the magistrate judge's report, and his notification of the Justice Department was required by law, a fact that he failed to disclose.

Judge Shedd's cavalier treatment of the important constitutional questions presented in the *Crosby* case raise serious concerns about his fitness for a lifetime appointment to the Fourth Circuit. Thank you for taking these concerns seriously in exercising your constitutional advice and consent authority.

Sincerely yours,

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