



Leadership Conference on Civil Rights



July 22, 2008

The Honorable Patrick J. Leahy
Chair
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Arlen Specter
Ranking Member
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Specter:

On behalf of the Leadership Conference on Civil Rights (LCCR) and Alliance for Justice, two coalitions together representing hundreds of civil rights and progressive organizations, we write to express our very serious concerns over the nomination of Michael E. O'Neill to the United States District Court for the District of Columbia.

On June 19, 2008, President Bush nominated Mr. O'Neill to a lifetime seat on the D.C. District Court. This is the court of original jurisdiction for many cases with nationwide implications involving labor standards, the environment, voting rights, and a wide range of other issues, because it is based in Washington, D.C., the site of many federal agencies that regulate in these areas, and because some statutes grant it original jurisdiction. Given the scope of the court's jurisdiction, its decisions can dramatically affect the rights and interests of all Americans.

All nominees to our federal courts must be scrutinized by the Senate, which plays a constitutional role in the appointment of federal judges. By virtue of the importance of the D.C. District Court, it is crucial that any nomination to that court receive careful attention, and that the nominee's record be thoroughly investigated. Moreover, at this late stage in a presidential year, there is widespread agreement that controversial nominations should not be processed.¹

Just two weeks ago, serious questions about Mr. O'Neill's integrity were raised. *The New York Times* reported that Mr. O'Neill's tenure at George Mason University Law School was revoked last year because of his failure to attribute sources in his scholarly writings, and a scholarly article was retracted by its publisher, raising questions about his ethical standards and his judgment, as well as his attention to important job-related details and the quality of his work.²

The *New York Times* pointed out that Mr. O'Neill published at least five articles that "contain passages that appear to have been lifted from other scholars' works without quotation marks or attribution." According to the *Times*, "Deborah L. Rhode, an authority on legal ethics at Stanford, said the retraction [of Mr. O'Neill's entire article] by the Supreme Court Economic Review was 'extremely unusual' and amounted to 'a textbook case of conduct that casts doubt on someone's fitness for judicial office.'" The *Times* also reported that Mr. O'Neill said, "I didn't keep appropriate track of things. I

¹ See Statement of Senator Patrick Leahy, March 7, 2008, at <http://leahy.senate.gov/press/200803/030708a.html>.

² Adam Liptak, *Copying Issue Raises Hurdle for Bush Pick*, N.Y. TIMES, July 4, 2008.

frankly did a poor and negligent job.” Writing about the same subject, the *Washington Post* reported that Mr. O’Neill admitted that he “lost track of stuff, and I just had catastrophic results.”³

Events during Mr. O’Neill’s tenure as chief counsel to Senator Arlen Specter on the Senate Judiciary Committee raise further doubts about his integrity, judgment, and his ability to prioritize the duties of his job over political objectives. Senator Specter has stated that Mr. O’Neill, as his chief counsel, did not notify him about the insertion of language in the 2006 Patriot Act extension that allowed the president to replace U.S. Attorneys indefinitely without Senate approval, eliminating a 120-day limit on interim U.S. Attorney terms that had been in effect for years.⁴ Previously, Senator Specter had stated opposition to the enlargement of executive power at the expense of the Senate, and he opposed this provision once he learned of its existence. After the legislation was passed, Senator Specter said that the language had been inserted at the request of the Bush administration Department of Justice. This new appointment authority enabled the president to replace several U.S. Attorneys in 2007, many of whom apparently were fired for political reasons, with new appointees of his choosing.

Mr. O’Neill knew or should have known that the change would be controversial, and that inserting it without notice would both expose Senator Specter to charges that he had slipped it in and contravene Senator Specter’s stated policy that, “If there is some item which I have any idea is controversial, I tell everybody about it.”⁵ Moreover, he bore a fundamental responsibility to advise Senator Specter and the Senate as a whole of this new language, as his duty was to that body and not the White House. His failure to notify the Senate appears to have been a serious breach of his ethical and professional obligations.

If confirmed, Mr. O’Neill would serve for life on a court with jurisdiction over many key labor and civil rights laws. The D.C. District Court is an unusually important court for working families. It hears all challenges to Department of Labor regulations, such as those addressing the interpretation and application of the Fair Labor Standards Act and the Family and Medical Leave Act, among others. It also hears challenges to the safety regulations promulgated by the Occupational Safety and Health Agency (OSHA) and Mine Health and Safety Agency (MHSA) and to Executive Orders, such as those issued by President Bush effectively barring federal agencies from entering into project labor agreements with building and construction trades unions.

The D.C. District Court also has exclusive jurisdiction for certain types of voting cases. Section 5 of the Voting Rights Act provides that the U.S. District Court for the District of Columbia has jurisdiction in declaratory judgment actions by states or political subdivisions seeking judicial preclearance of voting changes under that Section. This court also has exclusive jurisdiction over “bailout” matters under the Voting Rights Act, and over constitutional challenges involving the Act. In recent years, a number of voting rights matters have come before three-judge panels including judges from the D.C. District Court. *See, e.g., Louisiana House of Representatives v. Ashcroft*, No. 1:02-cv-00062 (D.D.C. dismissed May 21, 2003) (Louisiana state redistricting plan); *Georgia v. Ashcroft*, 195 F. Supp. 2d 25 (D.D.C. 2002) (federal and state legislative redistricting), *vacated*, 539 U.S. 461 (2003); *Bossier Parish Sch. Bd. v. Reno*, 907 F.

³ Carrie Johnson and Del Quentin Wilber, *Court Nominee Accused of Plagiarism Won’t Withdraw*, WASH. POST, July 8, 2008.

⁴ *See* Dahlia Lithwick, *Specter Detector*, SLATE, March 5, 2007, at <http://www.slate.com/id/2161260/>, citing Senate Judiciary Hearing Transcript, Feb. 6, 2007, at http://www.accessmylibrary.com/coms2/summary_0286-29538076_ITM. *See also* Joe Conason, *Alberto Gonzales’ coup d’etat*, SALON, Feb. 9, 2007, at http://www.salon.com/opinion/conason/2007/02/09/united_states_attorneys/.

⁵ Senate Judiciary Hearing Transcript, Feb. 6, 2007, at http://www.accessmylibrary.com/coms2/summary_0286-29538076_ITM.

Supp. 434 (D.D.C. 1995) (redistricting of Louisiana parish school board), *vacated*, 520 U.S. 471 (1997), on remand, 7 F. Supp. 2d 29 (D.D.C. 1998), *aff'd*, 528 U.S. 320 (2000).

Given this special jurisdiction over the important subject of voting rights, it is imperative that nominees to this particular court possess an abiding respect for the civil rights laws that have helped to ensure that our democracy lives up to its ideals. However, based on Mr. O'Neill's record, we are not confident Mr. O'Neill, if confirmed, would be a fair decisionmaker in voting cases. Mr. O'Neill served as chief counsel to then-Judiciary Committee Chairman Arlen Specter during a time in which a number of civil rights issues were under consideration by the Committee. Through our interactions, and those of our member organizations, with Mr. O'Neill, we have reason to believe that Mr. O'Neill may hold a limited view of the breadth and depth of voting discrimination still plaguing our political system and other social structures, and share less than robust support for the ideal of full participation in our democracy by all of our nation's citizens.

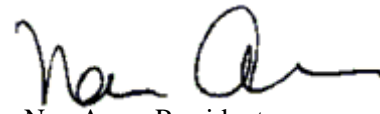
In addition, if confirmed to the D.C. District Court, Mr. O'Neill would decide many cases concerning the scope of congressional legislative authority. Based on Mr. O'Neill's record, we have concerns that he might take a restrictive view of Congress's power under Section 5 of the Fourteenth Amendment, which would threaten critical civil rights protections for people with disabilities. Congress's power to authorize suits against states under the Americans with Disabilities Act (ADA) has been hotly disputed in the courts. *Compare University of Alabama Board of Trustees v. Garrett*, 531 U.S. 356 (2001) (Congress exceeded its Fourteenth Amendment power in authorizing suits against state employers under the ADA) *with Tennessee v. Lane*, 541 U.S. 509 (2004) (Congress acted within its Fourteenth Amendment power in authorizing ADA suits concerning access to state courts). If Mr. O'Neill takes an overly narrow view of Congressional power, this would jeopardize many protections that people with disabilities fought hard to secure, including the ADA, the Fair Housing Act, and other protections. A narrow interpretation of Congress's lawmaking authority could also threaten civil rights legislation protecting women, racial and religious minorities, and older Americans.

It is clear that Mr. O'Neill's nomination is controversial. We believe that there is no basis for the Committee to deviate from the Thurmond Rule; therefore the nomination should not be processed. Please contact LCCR Executive Vice President Nancy Zirkin at 202-263-2880, or Alliance for Justice Legislative Counsel Lanae Erickson at 202-822-6070, if you have further questions.

Sincerely



Wade Henderson, President & CEO
Leadership Conference on Civil Rights



Nan Aron, President
Alliance for Justice

CC: Senate Judiciary Committee Counsels