



June 21, 2007

VIA FACSIMILE

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

The Honorable Arlen Specter, Ranking Member
Senate Judiciary Committee
711 Hart Building
Washington, DC 20510

Re: Nomination of Leslie Southwick to the U.S. Court of Appeals for the Fifth Circuit

Dear Senators Leahy and Specter:

We write to urge you to reject the nomination of Leslie Southwick for a seat on the United States Court of Appeals for the Fifth Circuit. As an organization committed to protecting and promoting women's rights and eradicating discrimination in the workplace, the National Partnership for Women & Families is troubled by Judge Southwick's record and its implications for rights that are vital to ensuring equal opportunity and access to justice. Judge Southwick's failure to produce significant portions of his record – effectively thwarting the thorough, comprehensive review every federal appellate nomination deserves and demands – only exacerbates these concerns.

Incomplete Record

For the committee to consider fairly any nominee for a lifetime appointment to a seat on the federal court of appeals – the court of last resort in the vast majority of cases – the nominee's entire record must be fully reviewed and evaluated. Judge Southwick's failure to produce unpublished opinions in which he participated and joined during his first two years on the Mississippi Court of Appeals makes such review impossible. These gaps in Judge Southwick's record alone should give the committee pause in moving Judge Southwick's nomination forward.

A Setback for Civil Rights

A review of Judge Southwick's record calls into question his commitment to the full enforcement of rights critical to ensuring fair workplaces and access to justice. In *Richmond v. Mississippi Department of Human Services*, 1999 Miss. App. LEXIS 468 (Miss. Ct. App. 1999), Richmond, a social worker, was terminated by the Mississippi Department of Human Services

for using a derogatory racial epithet. Richmond appealed the decision and was reinstated by the state Employee Appeals Board (EAB). A sharply divided Mississippi Court of Appeals affirmed the EAB ruling. Judge Southwick joined the Court of Appeals's 5-4 decision, which credited Richmond's testimony that "her remark was not motivated out of racial hatred or animosity directed toward her co-worker or toward blacks in general." The Mississippi Supreme Court was unanimous in reversing the Court of Appeals, holding instead that the EAB should either impose some penalty on Richmond or make detailed findings why no penalty should be imposed. *Richmond v. Mississippi Department of Human Services*, 778 So. 2d 113, 114 (Miss. 2000). Three justices would have gone further by reversing the EAB's reinstatement decision and upholding Richmond's termination.

Judge Southwick's decision to join the majority in this case is deeply troubling. The EAB's written decision is limited and provides little explanation of its reasoning. The primary record about the incident at issue consists of the hearing officer's findings. The hearing officer found that the racial epithet used by Richmond – referring to an employee as a "good ole n*****" – was once considered "derogatory," but was no longer evidence of racial discrimination. Instead, he characterized the phrase as akin to calling someone a "teacher's pet," "chubby," or "slim." These statements indicate a failure to take this incident seriously and are wildly out of touch with the deeply offensive and charged nature of racial slurs. The hearing officer's findings should have raised a red flag, particularly in light of the diversity of the agency where Richmond worked, where more than half of the employees were African American, and the undoubtedly very diverse client base the agency served – all factors that further heightened the need for sensitivity to issues of race.

Although Judge Southwick's ability to alter the outcome in this case may have been constrained by the posture of the case and the deferential standard of review, he still had every opportunity to object to the use of the epithet and demand a fuller explanation of why Richmond was reinstated by writing a separate concurring opinion or working with the authoring judge to modify the opinion. Judge Southwick did neither of these things. That the dissenting judges on his own court and each of the justices on the Mississippi Supreme Court recognized the gravity of this incident while Judge Southwick did not makes plain that Judge Southwick is out of step with his peers on issues of racial justice. If the opinion Judge Southwick joined had been the final word in this case, Richmond would have been reinstated without any discipline and would have faced no consequences for using a horrible racial slur. Moreover, the underlying record and the questionable assessment of the hearing officer would have been left un rebutted, perhaps influencing the outcome of future cases. Judge Southwick's deference to the decision of the EAB despite the suspect findings on which that decision was based calls into question his ability to apply the law to ensure that workplaces in the Fifth Circuit – the circuit with the largest minority population – are free of discrimination.

Judge Southwick displayed similar insensitivity to the rights of minorities in *S.B. v. L.W.*, 793 So. 2d 656 (Miss. Ct. App. 2001), a case in which the Mississippi Court of Appeals granted custody of a child to the child's father based on a number of factors, including the mother's sexual orientation. Not content simply to review the lower court's application of the custody standard and explain why the application was or was not correct, Justice Southwick joined a

separate opinion to emphasize the immorality of the mother's "choice" to engage in a "homosexual lifestyle." His decision to join an opinion that injected personal views and divisive rhetoric into the legal analysis raises concerns about whether he will apply the law without prejudice to all who may come before him as a judge on the Fifth Circuit Court of Appeals.

Hurdles for Injured Parties

Judge Southwick's ability to apply the law fairly is also called into question by his lopsided record favoring business interests over individuals and his tendency to deny plaintiffs their right to have their cases decided by a jury of their peers. According to published reports, Judge Southwick voted, in whole or in part, against the injured party and in favor of the defendant, in 160 out of 180 non-unanimous published decisions involving state employment and tort law. In a troubling number of cases, Judge Southwick voted to prevent an injured party's case from being heard by a jury based on cramped legal interpretations that erect unreasonable barriers to pursuing one's day in court. *See, e.g., Cannon v. Mid-South X-Ray Co.*, 738 So. 2d 274 (Miss. Ct. App. 1999).

Curtailing Civil Rights Protections

Finally, Judge Southwick's view of the "federalism revival" raises doubts about his commitment to civil rights laws that have been essential to advancing equal employment opportunities. In a 2003 article, Judge Southwick indicated that he approved of the Supreme Court's recent limitations on Congress's ability to pass civil rights legislation under its commerce power, and on Congress's power to abrogate state immunity and allow state employees to sue to vindicate their rights under federal law. *See Judge Leslie Southwick, Separation of Powers at the State Level: Interpretations and Challenges in Mississippi*, 72 MISS. L. J. 927 (2003). This narrow view of Congress's authority to combat and remedy domestic violence and workplace discrimination raises significant concerns for those who have looked to Congress to ensure that crucial rights and protections extend to every American.

Conclusion

It is critical to ensure that judges elevated to the federal appellate bench inspire confidence that the law is being administered fairly, consistently, and without bias. Because of the concerns outlined above, we urge the committee to reject Judge Southwick's nomination.

Sincerely,



Debra Ness
President

Cc: Senate Judiciary Committee