

June 7, 2007

Honorable Patrick Leahy
Chairman
Senate Judiciary Committee
433 Russell Senate Office Building
Washington, DC 20510

Honorable Arlen Specter
Ranking Member
Senate Judiciary Committee
433 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Leahy and Senator Specter:

We write to express the grave concerns of the Bazelon Center for Mental Health Law and ADA Watch/National Coalition for Disability Rights concerning the nomination of Leslie Southwick to the Fifth Circuit Court of Appeals. The Bazelon Center is a national nonprofit organization that advocates for the rights of individuals with mental disabilities through litigation, policy advocacy, education and training. The National Coalition for Disability Rights is a nonprofit alliance of hundreds of disability, civil rights, and social justice organizations united to defend and strengthen the rights of people with disabilities.

Judge Southwick apparently holds a narrow view of federal power that suggests that he would invalidate portions of critical civil rights legislation if appointed. In a 2003 article, he characterized the Supreme Court as returning to the “scripture” of the Constitution by striking down portions of the Violence Against Women Act and Gun Free School Zones Act, and hampering Congress’s power to abrogate sovereign immunity to protect Native Americans. Leslie Southwick, *Separation of Powers at the State Level*, 72 Miss. L. J. 927, 930-31 (2003). Southwick also indicated his apparent support for the “Constitution in exile” movement, a radical ideology that would undo seventy years of Supreme Court rulings, dramatically undermining the federal government’s power to address significant national issues.

These issues are of paramount concern to the disability community because the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act, and the Individuals with Disabilities Education Act (IDEA) have been the targets of repeated attacks on federalism grounds, and the constitutionality of these laws has been hotly contested in the federal courts. Indeed, Senators on both sides of the aisle have expressed serious concerns about the Supreme Court’s decision in *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001), invalidating Congress’s authority to enact portions of the Americans with Disabilities Act.

Southwick’s nomination to the Fifth Circuit is especially troubling because that court is already closely divided on the constitutionality of disability rights legislation. See *Pace v. Bogalusa City School Bd.*, 325 F.3d 609 (5th Cir. 2003) (Congress lacked the power in passing the IDEA to abrogate state sovereign immunity), *rev’d*, 403 F.3d 272 (5th Cir. 2005) (5 judges dissenting); *McCarthy v. Hawkins*, 481 F.3d 407 (5th Cir. 2004) (community integration mandate upheld against commerce clause challenge in divided vote); *Neinast v. Texas*, 217 F.3d 275; (5th Cir. 2000) (ADA prohibition against states placing a surcharge on individuals

with disabilities to cover the costs of increasing accessibility exceeded Congress's power under Article 14 section 5, and thus could not abrogate state sovereign immunity). Southwick's addition to the Fifth Circuit would increase the likelihood that critical disability rights protections would be eliminated in that Circuit.

Congress has repeatedly reaffirmed its commitment to eradicating discrimination against individuals with disabilities. Southwick's views on federal power suggest that he would vote to strike down duly-enacted legislation promoting this policy. Therefore, we urge the committee to give careful consideration to these views when voting on his nomination. We hope that you will insist that the judge who fills this lifetime appointment is someone who respects Congress's authority to enact needed civil rights protections, including protections for protect individuals with disabilities.

Sincerely,

Robert Bernstein
Executive Director
Bazelon Center for Mental Health Law

Jim Ward
President
National Coalition for Disability
Rights