

**COMMUNITY RIGHTS COUNSEL
EARTHJUSTICE**

June 6, 2007

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

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

**Re: Nomination of Leslie Southwick to a Lifetime Position on the
U.S. Court of Appeals for the Fifth Circuit**

Dear Chairman Leahy and Ranking Member Specter:

We are writing to express serious concerns with the pending nomination of Mississippi attorney and former Mississippi Court of Appeals judge Leslie Southwick to a lifetime seat on the United States Court of Appeals for the Fifth Circuit, which decides the fate of federal environmental and other safeguards in Texas, Louisiana, and Mississippi.

Some of these concerns are based upon points made by Leslie Southwick in two Mississippi Law Review articles that were published in 2003, while he was on the Mississippi Court of Appeals:

Leslie Southwick, *Separation of Powers at the State Level: Interpretations and Challenges in Mississippi* *Separation of Powers at the State Level*, 72 Miss. L.J. 927 (2003). [Hereinafter *Separation of Powers*]

Leslie Southwick, *Recent Trends in Mississippi Judicial Rule Making: Court Power, Judicial Recusals, and Expert Testimony*, 23 Miss. C. L. Rev. 1 (2003). [Hereinafter *Recent Trends*]

Southwick Supports the Majority Side in the Supreme Court's Federalism Revolution and, Potentially, the "Constitution in Exile" Movement

Between 1990 and 2001, a 5-4 majority of the Supreme Court struck down federal legislation at a rate rivaled only by the discredited "*Lochner*-era" Court, which blocked

the labor reforms of the Progressive Era and the Congressional response to the Depression in the early stages of the New Deal. The Court's rulings, often grouped together under the inaccurate label of "federalism," undermined important laws protecting women, senior citizens, minorities, the disabled, and the environment. These rulings have engendered withering criticism from both sides of the political spectrum. For example, Judge John Noonan, a conservative appointed by President Reagan to the Ninth Circuit, declared that the Rehnquist Court had 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." As Senator Specter noted in a letter to then Judge John Roberts, these cases represent "the judicial activism of the Rehnquist Court."

Then-judge Southwick, writing in 2003, had a much more positive view of these cases. Indeed, he analogized the Court's "return to first principles" to a Christian following the Scriptures: "The Court is insisting on obedience to constitutional structural commandments. It is as if the text that is being followed begins along these lines: In the Beginning, the New World was without Form, and void, and the Patriot Fathers said 'Let There Be States.' Behold, there were States, and it was Good." Separation of Powers, at 929. He noted that the "return by the Supreme Court to the original scripture of federalism, or as some opposed to the outcomes might claim, to the original sin of the constitutional fathers, began in earnest with *United States v. Lopez* in 1995." *Id.* at 929. The bulk of his article is devoted to explaining how the model set by the Supreme Court can be employed at the state level by the new conservative majority on the Mississippi Supreme Court.

Even more troubling, at least potentially, is his assertion that "[f]rom 1937 to 1995, federalism was part of a 'Constitution in exile.'" *Id.* at 930. Southwick's invocation of this term, coined by D.C. Circuit Judge Douglas Ginsburg, and still relatively obscure outside Federalist Society circles in 2003, suggests that he is supportive of efforts by certain scholars in academia and some judges on the federal bench to restore understandings of the Constitution held by a conservative majority of the Supreme Court in the period before the Great Depression and the New Deal. As University of Chicago law professor Cass Sunstein opined in a *New York Times Magazine* cover story written by Jeffrey Rosen, success of this "Constitution in Exile" movement would mean:

many decisions of the Federal Communications Commission, the Environmental Protection Agency, the Occupational Safety and Health Administration and possibly the National Labor Relations Board would be unconstitutional. It would mean that the Social Security Act would not only be under political but also constitutional stress. Many of the Constitution in Exile people think there can't be independent regulatory commissions, so the Security and Exchange Commission and maybe even the Federal Reserve would be in trouble. Some applications of the

Endangered Species Act and Clean Water Act would be struck down as beyond Congress's commerce power.

Southwick is a Pro-Corporate Partisan in the Mississippi Tort Wars

Over the past decade, Mississippi judges have been engulfed in what Southwick calls “never-ending and ever-escalating tort wars being fought out at every level of the Mississippi court system.” *Recent Trends* at *11. Southwick is clearly a partisan in this war. He criticizes former Mississippi Supreme Court Justice Chuck McRea for “an interest in crafting precedents that were favorable to the interests of plaintiffs in personal injury actions.” He calls former Mississippi Governor Ronnie Musgrove “the poster boy for trial lawyer campaign contributions.” *Separation of Powers* at 1027. And Southwick is deeply critical of the litigation against tobacco companies led by former Mississippi Attorney General Michael Moore, favorably quoting another commentator for the proposition that “[i]f the fallout from the state tobacco litigation is not addressed quickly, it will further distort and destabilize a number of areas of law, including the separation of powers within state governments.” *Separation of Powers* at 1032. Finally, Southwick notes that he has been criticized for taking the defendants’ side in such cases: “[o]ther appellate judges, including the author of this article, may from time to time also appear to various observers to have brought their background experiences into play in their rulings on the bench.” *Recent Trends* at *11. Some of these statements – particularly Southwick’s pointed depiction of the sitting Mississippi Governor – seem a bit intemperate for a sitting judge.

Moreover, examinations of Judge Southwick rulings by Alliance for Justice and a business advocacy group support a conclusion that Judge Southwick’s rulings as a judge favored corporate defendants. In 2004, a business advocacy group gave Judge Southwick the highest rating of any judge on the Mississippi Court of Appeals, based on his votes in cases involving liability issues. B. Musgrave and T. Wilemon, “Business Group Rates State Justices,” *The Sun Herald* (Mar. 24, 2004). According to an analysis by the Alliance for Justice, “Judge Southwick voted, in whole or in part, against the injured party and in favor of special interests, such as corporations or insurance companies, in 160 out of 180 published decisions involving state employment law and torts cases in which at least one judge dissented.” Alliance for Justice, Preliminary Report on the Nomination of Leslie H. Southwick to the Fifth Circuit, at 4-5; <http://independentjudiciary.com/resources/docs/PreliminaryReportSouthwick.pdf>.

One of the cases included in the Alliance report gives us particular concern because it limits access to courts, which is essential to ensure that Americans have a meaningful right to prevent and redress environmental harms including injury to their health and safety, clean water, clean air, and endangered species. State common law tort, nuisance and other civil remedies often provide invaluable supplementation of limited federal safety, health and environmental statutes. Court rulings that unfairly cut off state

common law claims can preclude the most effective or only avenue of relief. Unfortunately, that is what Judge Southwick would have done in his dissent in a case in which the court ruled 8-2 that the statute of limitations did not begin to run until the plaintiff had reason to believe the chemicals that she was exposed to caused her illness. *Cannon v. Mid-South X-Ray Co.* 738 So. 2d 274 (Miss. Ct. App. 1999).

These studies, combined with Judge Southwick's own words, raise questions about his ability to be a fair and neutral arbiter of environment and other cases that involve the interests of corporate defendants. Concerns about the ability of a judicial nominee to be unbiased go to the heart of the Senate's constitutional advice and consent role. We urge you to carefully consider these concerns, raised by Southwick record, before voting on his proposed nomination to a lifetime position on the Fifth Circuit Court of Appeals.

Sincerely,

Doug Kendall
Executive Director
Community Rights Counsel

Glenn Sugameli
Senior Judicial Counsel
Earthjustice

C: Members, Senate Committee on the Judiciary