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May 31, 2007

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

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

Dear Chairman Leahy and Ranking Member Specter:

On behalf of the Leadership Conference on Civil Rights (LCCR), the nation's oldest, largest, and most diverse civil and human rights coalition, we write to express our opposition to the confirmation of Judge Leslie H. Southwick, of Mississippi, to the United States Court of Appeals for the Fifth Circuit. His record, to the extent that he has disclosed it, raises too many questions about his commitment to civil and human rights for him to be entrusted, for life, with such an important position in our judiciary.

Of the records that we have been able to review thus far, we are troubled by his involvement in several decisions in particular:

In *Richmond v. Mississippi Dep't of Human Services*,¹ Judge Southwick joined a 5-4 ruling upholding the reinstatement of a white state social worker who had been fired for calling an African-American co-worker "a good ole nigger." The ruling he joined had declared that, taken in context, this slur was an insufficient ground to terminate the white plaintiff's employment in part because it "was not motivated out of racial hatred or racial animosity directed toward a particular co-worker or toward blacks in general."

The reasoning offered by Judge Southwick and his colleagues in the majority is nothing short of baffling, and it was fortunately unanimously reversed by the Supreme Court of Mississippi. As two dissenters in the 5-4 decision rightfully pointed out:

The word 'nigger' is, and has always been, offensive. Search high and low, you will not find any non-offensive definition for this term. There are some words, which by their nature and definition are so inherently offensive, that their use establishes the intent to offend.

¹ 1998 Miss. App. LEXIS 637 (Miss. App. Ct. 1998), *rev'd* 745 So. 2d 254 (Miss. 1999).

In another case, *S.B. v. L.W.*,² Judge Southwick upheld the removal of an eight-year-old girl from the custody of her bisexual mother. In addition to joining the majority opinion, he was the only other judge in the majority to join a gratuitously anti-gay concurring opinion. The concurrence argued the “choice” to engage in homosexuality comes with consequences, up to and including the consideration of “the homosexual lifestyle” as a determining factor in child custody cases. The views expressed in the concurring opinion raise doubts about Judge Southwick’s interest in ruling fairly in cases that involve the civil rights of gays and lesbians.

In *Dubard v. Biloxi, H.M.A.*,³ Judge Southwick wrote a dissenting opinion in which he extolled the virtues of employment-at-will, a doctrine that provides that employers should be able to fire employees for virtually any reason, even though his analysis was not relevant to reaching a decision in the case. He wrote that “I find that employment at will, for whatever flaws a specific application may cause, is not only the law of Mississippi but it provides the best balance of the competing interests in the normal employment situation. It has often been said about democracy, that it does not provide a perfect system of government, but just a better one than everything else that has ever been suggested. An equivalent view might be seen as the justification for employment at will.” His gratuitous comments raise questions about his ability to separate his own views from his duty to follow the law in labor and employment cases.

Judge Southwick has a troubling record in cases involving race discrimination in jury selection. He has routinely rejected defense claims that prosecutors struck African-American jurors based on race. At the same time, however, he has usually upheld allegations by prosecutors that defendants tried to strike white jurors on the basis of race. One of Southwick’s own colleagues, in response, accused him of “establishing one level of obligation for the State, and a higher one for defendants on an identical issue.”

His record also shows a troubling tendency, in employment law and tort cases, to favor business and insurance interests over injured parties. He did so in 160 out of 180 such published cases in which at least one judge dissented, giving him an 89 percent pro-business voting record.⁴

As concerned as we are by the above aspects of his record, we are equally troubled by the fact that Judge Southwick has not yet released hundreds of unpublished and otherwise unavailable decisions in cases where he joined an opinion during his tenure on the Mississippi Court of Appeals. Opinions that he joined can be just as revealing as opinions that he himself authored. Given the above examples, combined with the Bush administration’s continuing efforts to pack the federal courts with judges who will turn the clock back on civil and human rights, Judge Southwick’s failure to disclose all relevant records should give this committee great pause.

Given the tremendous impact that federal judges have on civil rights and liberties, and because of the lifetime nature of federal judgeships, no judge should be confirmed unless he or she demonstrates a solid commitment to protecting the rights of all Americans. Because Judge Southwick has failed to meet this burden, we must oppose his confirmation.

² 793 So. 2d 656 (Miss. App. Ct. 2001).

³ 1999 Miss. App. LEXIS 468 (Miss. App. Ct. 1999), *rev’d* 778 So. 2d 113, 114 (Miss. 2000).

⁴ Alliance For Justice, *Preliminary Report on the Nomination of Leslie H. Southwick to the Fifth Circuit*, May 9, 2007 at 5.



Thank you for your consideration. If you have any questions, please contact Nancy Zirkin, LCCR Director of Public Policy, at 202-263-2880.

Sincerely,

Wade Henderson
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