



June 6, 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 express our serious concerns regarding the nomination of Leslie Southwick to the U.S. Court of Appeals for the Fifth Circuit. As an organization dedicated to advancing and protecting women's legal rights, the National Women's Law Center (NWLC) has reviewed Judge Southwick's available record, his testimony before the Committee, and his responses to Senators' written questions in order to assess his commitment to upholding essential civil rights protections. This substantive review has led the Center to conclude that there is a significant basis to doubt that commitment. Under these circumstances, it is especially troubling that hundreds of unpublished opinions that Judge Southwick joined while on the Mississippi Court of Appeals have not been produced to the Committee. As a result, the legal record that serves as the basis for determining his fitness for a lifetime position on the Fifth Circuit remains woefully incomplete. Consequently, we urge the Committee not to advance Judge Southwick's nomination until all of his record has been made available and has been reviewed, and until the substantive concerns have been satisfied.

Judge Southwick's actions in *S.B. v. L.W.*¹ and *Richmond v. Mississippi Department of Human Services*² raise significant concerns. Judge Southwick joined a separate concurrence in *S.B. v. L.W.* and joined the majority opinion in *Richmond*. Although he did not write those opinions, the result and reasoning therein is properly ascribed to him. As Judge Southwick stated in his hearing before the Committee, his decision to join an opinion as a judge on the Mississippi Court of Appeals meant that he at least agreed with the outcome espoused by that opinion.³ He also acknowledged at the hearing that he could have worked with the author of an

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

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

³ *Judicial Nominations: Hearing on the Nomination of Leslie Southwick to be United States Circuit Judge Before the S. Comm. on the Judiciary*, 110th Cong. (May 10, 2007) (responses of Leslie Southwick).

opinion to change its language and at all times had the option of writing his own separate opinion.⁴

In *S.B. v. L.W.*, a 2001 custody case involving the parental rights of a mother in a homosexual relationship, Judge Southwick joined the majority in its holding awarding custody to the father. He also chose to join a concurrence that gratuitously took pains to elaborate the punitive “consequences” that may be imposed on individuals in homosexual relationships, including the loss of custody of a child.⁵ The concurrence expounded upon the state’s ability, grounded in principles of “federalism,” to limit the rights of homosexual Americans in the area of family law and characterized participation in a homosexual relationship as a “choice”⁶ and “exertion of a perceived right.”⁷ In addition, although neither party to the case had raised constitutional questions, the concurrence undertook to discuss constitutional precedent in a highly selective manner to support its conclusion that the Mississippi legislature had permissibly taken a policy position with regard to the rights of homosexual individuals in domestic relations settings that would limit the custody rights of homosexual parents. The opinion cited the Supreme Court’s decision in *Bowers v. Hardwick*,⁸ which upheld criminal penalties for sodomy, but ignored *Romer v. Evans*,⁹ which struck down a ballot initiative that “classifie[d] homosexuals not to further a proper legislative end but to make them unequal.”¹⁰ To make matters worse, when Judge Southwick was questioned about the concurrence’s failure to discuss *Romer*, he answered that neither *Romer* nor *Bowers* was argued by the parties to the case.¹¹ However, his answers do not speak to why the concurrence only cited *Bowers*, and, therefore, do not allay our concerns about the impartiality of the legal analysis in this case.

Furthermore, while Judge Southwick indicated in written responses that the custody decision would be evaluated differently today in light of the Supreme Court’s decision in *Lawrence v. Texas*,¹² he did not directly address concerns raised by the language of the concurrence either in his written answers or in his testimony, although he was asked to do so. He did not clarify whether he considers homosexuality to be a choice as suggested in the concurrence and provided no persuasive justification for his seeming endorsement of extraordinarily harsh penalties for that so-called choice.

Judge Southwick’s decision to join the majority opinion in *Richmond v. Mississippi Department of Human Services*, affirming a state review board’s decision to overturn a state agency’s termination of an employee for referring to an African-American employee as a “good ole n*****,” also raises serious concerns. The majority in *Richmond* concluded that the terminated employee “was not motivated out of racial hatred or racial animosity directed toward

⁴ *Id.*

⁵ *S.B. v. L.W.*, 793 So. 2d 656, 663 (Miss. App. Ct. 2001) (Payne, J. concurring).

⁶ *Id.*

⁷ *Id.*

⁸ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

⁹ *Romer v. Evans*, 517 U.S. 620 (1996).

¹⁰ *Id.* at 635.

¹¹ Responses of Leslie Southwick to the Written Questions of Senator Patrick J. Leahy, Response to Question 3.B., at 6.

¹² *Lawrence v. Texas*, 539 U.S. 558 (2003).

a particular co-worker or toward blacks in particular,”¹³ and that there was no “credible proof” that the use of this highly inflammatory racial epithet caused substantial problems within the agency workplace.¹⁴ This majority opinion failed to adequately consider the discrimination inherent in the use of that particular racial epithet and required an unnecessarily stringent showing of disruption from the employing agency. The Mississippi Supreme Court unanimously reversed the Court of Appeals’ decision, remanding to the review board to make findings as to whether the agency acted properly under state personnel rules, and as to whether a lesser penalty than termination should be imposed.¹⁵

Judge Southwick’s testimony before the Senate Judiciary Committee and his responses to written questions did not alleviate NWLC’s concerns. It is disturbing that Judge Southwick continues to consider the majority opinion in *Richmond* well-reasoned and declined to criticize the opinion he joined in part so as not to “change horses mid-stream.”¹⁶ In addition, Judge Southwick’s characterization of the standard of review in his written questions as whether *no* evidence supported the review board’s decision¹⁷ (rather than whether *substantial* evidence supported it¹⁸) is incorrect. Whether the mischaracterization represents his original understanding of the standard of review or a post-hoc attempt to justify joining the majority, his position is equally troubling. Further, although the Mississippi Supreme Court concluded that the employee should not have been terminated, two strong dissents raised grounds for Judge Southwick to consider whether his decision to join the majority opinion was correct: first, that the Court of Appeals improperly placed the burden of proof upon the agency with regard to the issue of the disruptive effect of the epithet; second, that failing to terminate the employee could have subjected the agency to a federal discrimination action and thus would have constituted negligence; and third, that the majority of the Mississippi Supreme Court substituted its judgment for the review board’s.¹⁹ As a result, Judge Southwick’s reliance on the Mississippi Supreme Court opinion in answer to questions about whether he believed his decision to join the majority in *Richmond* was correct does not eliminate our concerns.

Although our concerns are primarily grounded in only two of the reported cases that came before Judge Southwick on the Mississippi Court of Appeals, these cases are significant because they are among the few in his available record that raise constitutional and civil rights issues that Judge Southwick would face if confirmed to the Fifth Circuit. Moreover, hundreds of unpublished opinions that Judge Southwick joined during his first two years on the Mississippi Court of Appeals have not been turned over to the Committee. These opinions could implicate an even broader range of legal issues and could shed light on Judge Southwick’s approach to the

¹³ *Richmond v. Mississippi Dep’t of Hum. Servs.*, 1998 Miss.App.LEXIS 637 at *13 (1998).

¹⁴ *Richmond v. Mississippi Dep’t of Hum. Servs.*, 1998 Miss.App.LEXIS 637 at *12 (1998).

¹⁵ *Richmond v. Mississippi Dep’t of Hum. Servs.*, 745 So.2d 254, 258 (Miss. 1999).

¹⁶ *Judicial Nominations: Hearing on the Nomination of Leslie Southwick to be United States Circuit Judge Before the S. Comm. on the Judiciary*, 110th Cong. (May 10, 2007) (responses of Leslie Southwick).

¹⁷ See, e.g., Responses of Leslie Southwick to the Written Questions of Senator Patrick J. Leahy, Response to Question 1.A., at 1; Responses of Leslie Southwick to the Written Questions of Senator Edward M. Kennedy, Response to Question 1.b., at 2; Responses of Leslie Southwick to the Written Questions of Senator Dick Durbin, Response to Question 1, at 1.

¹⁸ *Richmond v. Mississippi Dep’t of Hum. Servs.*, 1998 Miss.App.LEXIS 637 at *7 (1998) (“In order to reverse the EAB, we must determine that there was not substantial evidence in the record to support the findings made by the hearing officer and ratified by the full board.”).

¹⁹ *Richmond v. Mississippi Dep’t of Hum. Servs.*, 745 So.2d 254, 259-263 (Miss. 1999).

constitutional and federal legal issues that come before the Fifth Circuit. It is critical for Senators and the public to be able to review a nominee's complete record when a lifetime appointment to the federal bench is at stake. To allow this already-questionable nomination to move forward while substantial gaps in the record exist would be highly unfortunate and unwarranted.

No judicial nominee enjoys a presumption in favor of confirmation; rather, it is the nominee who carries the burden of convincing the Senate that he or she should be confirmed. NWLC respectfully urges the Committee not to vote Judge Southwick out of committee while his record remains incomplete, and while substantive concerns raised by his available record have not been allayed. If you have questions or if we can be of assistance, please contact us at (202) 588-5180.

Sincerely,



Nancy Duff Campbell
Co-President



Marcia D. Greenberger
Co-President

Cc: Senate Judiciary Committee