May 30, 2007

Hon. Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Hon. Arlen Specter
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Re: Leslie Southwick

Dear Senator Leahy and Senator Specter:

I am writing on behalf of People For the American Way and our more than 1,000,000 members and supporters nationwide to express our strong opposition to the confirmation of Mississippi lawyer and former state court judge Leslie Southwick to the United States Court of Appeals for the Fifth Circuit. Apart from the fact that much of Judge Southwick's record has not yet been provided to the Committee for its consideration, what *is* known of that record is disturbing, particularly in connection with the rights of African Americans, gay Americans, and workers. Moreover, given that the states within the jurisdiction of the Fifth Circuit (Mississippi, Louisiana, and Texas) have the highest percentage of minorities in the country, we deem it of great significance that the NAACP of Mississippi and the Congressional Black Caucus are among those opposing Southwick's confirmation.[1]

As you know, Judge Southwick has been nominated by President Bush to fill a seat on the Fifth Circuit that the President has previously attempted to fill with Charles Pickering and then with Michael Wallace, both of whose nominations were met with substantial opposition, in large measure because of their disturbing records on civil rights.[2] As you will recall, on May 8, 2007, jointly with the Human Rights Campaign (which has since

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[1] Letter of Derrick Johnson, President, NAACP Mississippi State Conference, to Hon. Patrick Leahy and Hon. Arlen Specter (May 9, 2007); Congressional Black Caucus Press Release (May 24, 2007).

[2] President Bush temporarily filled the vacancy through his highly controversial recess appointment of Pickering in January 2004, after Pickering failed to win Senate confirmation.

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announced its opposition to Southwick's confirmation[3]), we sent the Committee a letter expressing our very serious concerns about Judge Southwick's nomination, observing that, once again, President Bush had chosen a nominee for this seat who appeared to have a problematic record on civil rights. In particular, our letter discussed in detail the troubling decisions that Judge Southwick had joined in two cases raising matters of individual rights that strongly suggested he may lack the commitment to social justice progress to which Americans are entitled from those seeking a lifetime appointment to the federal bench. Those decisions take on added significance because the intermediate state appellate court on which Judge Southwick sat does not routinely consider the types of federal constitutional and civil rights matters that would shed a great deal of light on a judge's legal philosophy concerning these critical issues.[4] As further discussed below, Judge Southwick's confirmation hearing on May 10 did not allay the concerns raised by these decisions or by other aspects of his record.

In one of the cases discussed in our earlier letter, *Richmond v. Mississippi Department of Human Services*, 1998 Miss. App. LEXIS 637 (Miss. Ct. App. 1998), *reversed*, 745 So. 2d 254 (Miss. 1999), Judge Southwick joined the majority in a 5-4 ruling that upheld the reinstatement with back pay of a white state employee who had been fired for calling an African American co-worker a "good ole nigger." The decision that Judge Southwick joined effectively ratified a hearing officer's opinion that the worker's use of the racial slur "was in effect calling the individual a 'teachers pet'." 1998 Miss. App. LEXIS 637, at *19. The hearing officer considered the word "nigger" to be only "somewhat derogatory," felt that the employer (the Mississippi Department of Human Services no less) had "overreacted" in firing the worker, and was concerned that other employees might seek relief if they were called "a honkie or a good old boy or Uncle Tom or chubby or fat or slim." *Id*. at *22-23.[5]

Four of Judge Southwick's colleagues dissented. Two would have upheld the decision by DHS to fire the worker. Two others, also joined by one of the other dissenters, objected to the Employee Appeals Board's failure to impose *any* sanctions at all on the worker, noting a "strong presumption that some penalty should have been imposed." *Id*. at *18. The three judges issued a separate dissent and would have remanded the case so that the

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[3] *See* Letter of Allison Hewitt, Legislative Director, Human Rights Campaign, to Senate Judiciary Committee (May 23, 2007).

[4] Indeed, as Judge Southwick himself has stated, "[i]n Mississippi, most of what would be considered civil rights cases are handled in federal courts." Southwick's Responses to the Written Questions of Senator Dick Durbin, answer 6.

[5] Judge Southwick has attempted in his post-hearing written testimony to distance himself from the hearing officer's disturbing findings and opinion by stating that "[i]t was the EAB's decision, though, not that of the hearing officer, that was subject to our analysis under the limited review standard." Southwick's Responses to the Written Questions of Senator Dick Durbin, answer 3. However, as pointed out by dissenting judges in this case, "[b]ecause the EAB made no findings of its own, we can only conclude that it incorporated by reference and adopted the findings and order of the hearing officer. It is therefore the findings and opinion of the hearing officer which we subject to our review." *Richmond*, 1998 Miss. App. LEXIS 637, at *19.

board could impose "an appropriate penalty or produce detailed findings as to why no penalty should be imposed." *Id*. at *18. Significantly, Judge Southwick chose not even to join this three-judge dissent that would have remanded the case so that *some* disciplinary action short of firing the worker could have been imposed on her for having referred to a co-worker by a gross racial slur, "in a meeting with two of the top executives of DHS." *Id*. at *28.

As we discussed in our earlier letter, the Mississippi Supreme Court unanimously reversed the ruling that Southwick had joined. The Supreme Court majority ordered that the case be sent back to the appeals board to impose a penalty other than termination or to make detailed findings as to why no penalty should be imposed -- the position taken by three of Judge Southwick's colleagues. Some of the justices on the Supreme Court would have gone even further and reinstated the decision by DHS to fire the worker. But all of the Supreme Court justices rejected the view of the Court of Appeals majority (which included Southwick) that the board had not erred in ordering the worker's reinstatement without imposition of any disciplinary action.

In the second case that we discussed in our May 8 letter, *S.B. v. L.W.*, 793 So. 2d 656 (Miss. Ct. App. 2001), Judge Southwick joined the majority in upholding -- over a strong dissent -- a chancellor's ruling taking an eight-year-old girl away from her bisexual mother and awarding custody of the child to her father (who had never married her mother), in large measure because the mother was living with another woman in "a lesbian home." In addition to the disturbing substance of the majority's ruling, its language is also troubling, and refers repeatedly to what it calls the mother's "homosexual lifestyle" and her "lesbian lifestyle."

Judge Southwick not only joined the majority opinion upholding the chancellor's ruling, but *alone among all the other judges in the majority*, he joined a concurrence by Judge Payne that was not only gratuitous, but gratuitously anti-gay. As we have previously observed, the concurrence appears to have been written for the sole purpose of underscoring and defending Mississippi's hostility toward gay people and what it calls "the practice of homosexuality" (*id*. at 662), in response to the position of the dissenters that the chancellor had erred. (The word gay is not used; the concurrence refers repeatedly to "homosexuals" and "homosexual persons.") Among other things, the concurrence suggests that sexual orientation is a choice, and explicitly states that while "any adult may choose any activity in which to engage," that person "is not thereby relieved of the consequences of his or her choice." *Id*. at 663. In other words, according to Judge Southwick, one consequence of being a gay man or a lesbian is possibly losing custody of one's child.

In addition, and as we noted in our May 8 letter, the concurrence claimed that "[u]nder the principles of Federalism, each state is permitted to set forth its own public policy guidelines through legislative enactments and through judicial renderings. Our State has spoken on its position regarding rights of homosexuals in domestic situations." *Id*. at 664. Thus, according to the separate concurrence that Southwick chose to join, the states' rights doctrine gave Mississippi the right to treat gay people as second-class citizens and criminals. The views expressed in this concurrence strongly suggest that Judge Southwick is hostile to the notion that gay men and lesbians are entitled to equal treatment under the law.

Unfortunately, Judge Southwick's testimony at his May 10 hearing and his response to post-hearing written questions did not resolve and in fact underscored the very serious concerns that we and others had raised about his record and in particular his decisions in these cases. For example, in response to Senator Kennedy's post-hearing question about why, in the *Richmond* case, Judge Southwick had "accept[ed] the employee's claim that [the racial slur] was not derogatory," Judge Southwick stated that while the word is derogatory, "there was some evidence that [the worker] had not been motivated by hatred or by animosity to an entire race," and further stated that the opinion he joined had recounted evidence that the employee's use of the racial slur "was not *motivated* by a desire to offend."[6] Judge Southwick's answers reflect far too cramped an appreciation of the magnitude of the use of this gross racial slur anywhere, let alone to refer to a co-worker in Mississippi.

Senator Kennedy also asked Judge Southwick why, "[e]ven if you did not think a worker should be fired for using a racial slur - why not at least let the employer impose some form of discipline?" Southwick replied that "[n]either party requested that any punishment other than termination be considered."[7] However, as noted above, three of Judge Southwick's dissenting colleagues *and* the state Supreme Court found no impediment to concluding that even if termination were not warranted by the use of this offensive racial slur, the case should have been sent back so that some form of lesser punishment could be considered.

The custody case was also the subject of much questioning at Judge Southwick's hearing and in post-hearing questions. When Judge Southwick was asked at his hearing about his decision to uphold the chancellor's ruling to deprive the mother of custody of her daughter, in large measure because of her sexual orientation, Judge Southwick repeatedly insisted that a parent's "morality" was a relevant factor in a Mississippi custody case, the clear implication being that Southwick considers gay men and lesbians to be immoral. And he also observed that *Bowers v. Hardwick*, 478 U.S. 186 (1986), upholding anti-gay "sodomy" laws, was then good law (not yet having been overturned by the Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003)).

However, when Senator Durbin in his post-hearing questions expressly asked Judge Southwick whether he would have voted with the majority or the dissent in *Lawrence* (which, as noted, overruled *Bowers*), Judge Southwick did not answer this question, instead giving what appears to have become the rote answer of all nominees to lower courts -- that if confirmed they will be "bound to"and will follow precedent.[8] Particularly in light of Judge Southwick's reliance on the much-discredited and since overruled *Bowers v. Hardwick,* his refusal to answer Senator Durbin's question is quite disturbing, and further calls into question whether he can apply the law fairly to all Americans.

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[6] Southwick's Responses to the Written Questions of Senator Edward M. Kennedy, answers 1.b. and 2 (emphasis in original).

[7] Southwick's Responses to the Written Questions of Senator Edward M. Kennedy, answer 3.

[8] Southwick's Responses to the Written Questions of Senator Dick Durbin, answer 9.B.

Judge Southwick's decisions in *Richmond* and in *S.B.* raise enormous red flags about his legal views. These are the types of cases that draw back the curtains to reveal critical aspects of a judge's legal philosophy and ideology. We simply cannot conceive of any situation in which calling an African American by the racial slur used in the *Richmond* case would be akin to calling her "a teacher's pet," and we cannot fathom describing that slur as only "somewhat" derogatory, as the hearing officer did in an opinion essentially ratified by Judge Southwick. As America's recent experience with the racially offensive remarks leveled at the young women of the Rutgers University basketball team has shown, most of our country has progressed beyond racial slurs and recognizes the right of every individual to be treated with dignity regardless of race.

And we agree with the Human Rights Campaign, which stated in its May 23, 2007 letter to the Committee opposing Judge Southwick's confirmation, that if Judge Southwick "believes that losing a child is an acceptable 'consequence' of being gay, [he] cannot be given the responsibility to protect the basic rights of gay and lesbian Americans."[9] Every American, regardless of his or her sexual orientation, should likewise be accorded equality of treatment and dignity under the law.

Unfortunately, Judge Southwick's decisions in *Richmond* and *S.B.* call into serious question his understanding of and commitment to these fundamental principles. Moreover, these decisions are far from the only troubling aspects of his record. As the Mississippi State Conference of the NAACP has observed in connection with Judge Southwick's rulings on race discrimination in jury selection, "[d]ozens of such cases reveal a pattern by which Southwick rejects claims that the prosecution was racially motivated in striking African-American jurors while upholding claims that the defense struck white jurors on the basis of their race."[10] Indeed, in one such case, three other judges on Southwick's court harshly criticized him in a dissent, accusing the majority opinion written by Southwick of "establishing one level of obligation for the State, and a higher one for defendants on an identical issue." *Bumphis v. State*, No. 93-KA-01157 COA (Miss. Ct. App., July 2, 1996).[11]

During his time on the state court of appeals, Judge Southwick also compiled a strikingly pro-business record in divided rulings. 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

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[9] Letter of Allison Hewitt, Legislative Director, Human Rights Campaign, to Senate Judiciary Committee (May 23, 2007), at 2.

[10] Letter of Derrick Johnson, President, NAACP Mississippi State Conference, to Hon. Patrick Leahy and Hon. Arlen Specter (May 9, 2007), at 2.

[11] In post-hearing questions, Senator Durbin asked Southwick to respond to the Mississippi NAACP's criticism of his pattern of rulings in these cases. Southwick replied, "Whatever pattern can be found in dozens of cases, it is a pattern that applies to all the judges on the court." Southwick's Responses to the Written Questions of Senator Dick Durbin, answer 5. Whatever the accuracy of this claim, it is only Judge Southwick, and not any of his former colleagues, who is seeking a lifetime position on a federal Court of Appeals.

judge dissented."[12] 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.[13]

In one case heard by his court involving an alleged breach of an employment contract, Judge Southwick went out of his way in a dissenting opinion to praise the doctrine of employment-at-will, which allows an employer to fire an employee for virtually any reason. Despite the fact that neither the existence nor merits of the at-will doctrine were at issue in the case, Judge Southwick wrote,

> 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.

Dubard v.Biloxi H.M.A., 1999 Miss. App. LEXIS 468, at *16 (Miss. Ct. App. 1999), *rev'd* 778 So. 2d 113, 114 (Miss. 2000). The National Employment Lawyers Association has cited this case in particular in explaining its opposition to Judge Southwick's confirmation. According to NELA, "[t]hat Mr. Southwick would use the case as a platform to propound his views, rather than as a vehicle to interpret laws is problematic and suggests that he may be unable to separate his own views from his judicial duty to follow the law."[14] Indeed, when asked about this case at his May 10 hearing, Judge Southwick admitted that he had put his personal "policy" views into a decision, but claimed to regret having done so.

Finally, we note that not all of Judge Southwick's record has been provided to the Committee, including more than two years' worth of unpublished decisions by the Mississippi Court of Appeals in cases on which he voted but in which he did not write an opinion. As the *Richmond* and *S.B.* cases underscore, the opinions that a judge chooses to join, or elects not to, can be just as revealing of his judicial philosophy as those that he writes. Particularly given what *is* known about Judge Southwick's record, the notion of proceeding with his nomination on less than a full record would be grossly irresponsible.

With a lifetime position on what is essentially the court of last resort for most Americans at stake, Judge Southwick has failed to meet the heavy burden of showing that he is qualified to fill it. The risks are simply too great to put someone with Judge Southwick's legal views on a federal Court of Appeals for life.

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12 Alliance for Justice, Preliminary Report on the Nomination of Leslie H. Southwick to the Fifth Circuit, at 4-5.

13 B. Musgrave and T. Wilemon, "Business Group Rates State Justices," *The Sun Herald* (Mar. 24, 2004).

14 NELA statement in opposition to the confirmation of Leslie Southwick.

In this regard, we were particularly struck by a very telling moment at Judge Southwick's May 10 hearing. Senator Durbin, in questioning Judge Southwick, noted the great personal courage of federal Judge Frank Johnson of Alabama, whose landmark civil rights rulings were so critical to advancing the legal rights of African Americas in the south. Senator Durbin then asked Southwick, looking back on his career in public service, to cite an instance in which *he* had "stepped out" and taken an unpopular view on behalf of minorities. Judge Southwick could not identify *one single instance* in response to this question, even when Senator Durbin asked it a second time.

As more than 200 law professors wrote to the Senate Judiciary Committee in July 2001, no federal judicial nominee is presumptively entitled to confirmation. Because federal judicial appointments are for life and significantly affect the rights of all Americans, and because of the Senate's co-equal role with the President in the confirmation process, nominees must demonstrate that they meet the appropriate criteria. These include not only an "exemplary record in the law," but also a "commitment to protecting the rights of ordinary Americans," and a "record of commitment to the progress made on civil rights, women's rights, and individual liberties."[15] Judge Southwick has failed to meet his burden of showing that he should be confirmed.

We had hoped that after the failed nominations of Charles Pickering and Michael Wallace, the President would nominate someone for this lifetime judicial position in the tradition of Frank Johnson, or at the least someone whose record did not reflect resistance to social justice progress in this country. Unfortunately, the President has not done so. We therefore strongly urge the Judiciary Committee to reject Leslie Southwick's confirmation to the Fifth Circuit.

Sincerely,

Ralph G. Neas
President

cc: All Members, Senate Judiciary Committee

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[15] *See* Law Professors' Letter of July 13, 2001. A full copy of the letter, which elaborates further on these criteria, is available from People For the American Way.