



February 26, 2008

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

Dear Senator Leahy:

On behalf of ADA Watch/National Coalition for Disability Rights, the National Council on Independent Living, the American Association of People with Disabilities, and the Bazelon Center for Mental Health Law, we urge you to resist pressure to confirm controversial judicial nominations for the federal courts.

ADA Watch/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. The National Council on Independent Living (NCIL) is the longest-running national cross-disability, grassroots organization run by and for people with disabilities. NCIL represents thousands of organizations and individuals including Centers for Independent Living, Statewide Independent Living Councils, individuals with disabilities, and other organizations that advocate for the human and civil rights of people with disabilities throughout the United States. With over 100,000 members, the American Association of People with Disabilities (AAPD) is the largest national nonprofit cross-disability member organization, dedicated to ensuring political empowerment and economic self-sufficiency for the more than 50 million Americans with disabilities. The Bazelon Center is a nonprofit organization that is a leading national advocate for the rights of individuals with mental disabilities using litigation, policy advocacy, education and training.

Over the past seven years the White House has nominated, and the Senate has confirmed, a number of federal judges who have issued hostile decisions weakening the Americans with Disabilities Act and other protections for people

with disabilities. The now-lame duck Bush Administration has recently submitted a number of new nominees for the judiciary whose records exhibit a similar callousness regarding disability rights. Following longstanding Senate tradition, it is inappropriate for the Senate to confirm these controversial nominees in an election year. If the Senate cares about disability rights and other civil rights, it should not act upon these nominations.

The Rights of People with Disabilities are at Risk

Over the past decade, the federal courts have become increasingly hostile to the rights of people with disabilities. In decision after decision, federal judges have chipped away at core protections that are of extraordinary importance to people with disabilities. The courts' attacks on the ADA have been so damaging that members of Congress on both sides of the aisle have introduced the ADA Restoration Act in an effort to restore rights that the courts have taken away. Even if the Restoration Act passes Congress, it will address only one of the problems created by the courts – the shrinking of the group of people protected by the ADA. Many other rights under the ADA, Section 504 of the Rehabilitation Act, the Fair Housing Act, and the Medicaid Act have been rolled back by the courts. In fact, numerous court decisions challenge the power of Congress itself, making it difficult or impossible for Congress to fix the damage that the courts have done.

The judicial confirmation process has allowed this damage to disability rights to continue for too long. With a few exceptions, nearly all of President Bush's controversial judicial nominees who have been voted on to date have been confirmed by the Senate. Many of them have gone on to author decisions that are of grave concern to the disability community. For example:

- Bush appointee Michael McConnell recently found that a man with serious heart disease requiring two open heart surgeries and implantation of a prosthetic valve that prevented him from working during his postoperative period could not bring an ADA claim to challenge his termination because he had not produced sufficient evidence that he had a disability. *Zwygart v. Board of County Comm'rs of Jefferson County*, 483 F.3d 1086 (10th Cir. 2007).
- Bush appointee William Pryor held that a woman with a mobility disability did not suffer retaliation when a state agency employee drove into her car after she had filed a complaint challenging that employee's refusal to accommodate her disability. The employee had refused to

permit her to wait in a shorter line designated for people with disabilities. *Higdon v. Jackson*, 393 F.3d 1211 (11th Cir. 2004).

- Bush appointee Edith Brown Clement held that an employee with HIV disease was not a person with a disability, and so was not entitled to any protection under the ADA. Judge Clement refused to follow Supreme Court precedent holding that even asymptomatic HIV is a disability because it substantially limits reproduction, reasoning that the employee in this case was unable to have children. *Blanks v. Southwestern Bell Communications, Inc.*, 310 F.3d 398 (5th Cir. 2002).
- Bush appointee Michael McConnell held that the Medicaid Act's requirement that states furnish medical assistance to all eligible individuals means only that states must pay for medical services, but not ensure that they are provided. McConnell's ruling meant that people with disabilities who were on waiting lists for home-based services for months and even years had no recourse under the Medicaid Act because the state had no duty to furnish the services promptly. The ruling leaves all Medicaid recipients in Tenth Circuit states without any effective way to ensure that their rights to health care through the Medicaid program are protected. *Mandy R. v. Owens*, 464 F.3d 1139 (10th Cir. 2006).

Current Controversial Nominees

Fourteen federal appellate vacancies and 30 district court (trial court) vacancies now exist in the last year of the Bush presidency. The administration has submitted 27 nominations to the Senate to fill these seats. Unfortunately, President Bush has nominated several candidates with extremely controversial records on disability rights and other civil rights.

- For example, the Bush Administration has nominated Gene E.K. Pratter, currently a district court judge, to the Third Circuit Court of Appeals. In one controversial case, Judge Pratter dismissed a disability rights group's claims seeking to require the Philadelphia area transit authority to comply with the ADA by making two major subway stations accessible to people with disabilities. Judge Pratter held that the plaintiff's ADA claims were barred because they were filed too late. Her ruling has been opposed by the United States Department of Justice on appeal, as it ignores the clear language of the ADA. As a result of this ruling, individuals who use

wheelchairs and other individuals with mobility impairments remain unable to use these critical transit access points.

- For the Fourth Circuit Court of Appeals, the administration has nominated Robert Conrad, who has never ruled for a plaintiff in an employment discrimination case while serving as a district court judge. In one of his employment cases, in which an employee alleged that her supervisor verbally abused, humiliated, and intimidated her, causing her to develop post-traumatic stress syndrome, Judge Conrad found for the employer, holding that “even if Roper intentionally caused a disability to frustrate Boggess’s performance,” the employee had not attempted to address the issue or request a reasonable accommodation. *Boggess v. Roper*, 2006 WL 2569206 (W.D.N.C. 2006).
- President Bush has also nominated corporate lawyer Steve Matthews for the Fourth Circuit. Matthews has no judicial experience; instead, he selected judges for the Reagan Administration, and served on the board of an organization that nominated Rush Limbaugh for the 2007 Nobel Peace Prize. He received a partial “Not Qualified” rating from the American Bar Association on his nomination.

The Thurmond Rule: A Senate Tradition

The disability community is deeply concerned about the prospect of these judicial nominees being confirmed to the bench, where they are expected to issue opinions that weaken the critical rights of persons with disabilities. Under a longstanding Senate tradition, none of the pending controversial judicial nominations should be acted upon at this stage. The Senate has long practiced the “Thurmond Rule,” whereby nominations are not processed in a presidential election year unless they are uncontroversial or otherwise have bipartisan support. There is no reason for the Senate not to follow this tradition this year.

Indeed, there are ample reasons to follow the Thurmond Rule: if the Senate continues to allow more judicial vacancies to be filled with controversial nominees, the courts will be packed with even more judges who are dismissive or hostile to disability rights. At the same time, the opportunity to fill these vacancies under a more progressive president in 2009 will be lost. Rather than risk filling a vacancy with the lifetime appointment of a nominee hostile to disability rights, the vacancy should be held open to help ensure that the rights of people with

disabilities under the ADA and other disability rights laws are not weakened further.

Federal court seats become available only rarely. This year the Senate should follow its longstanding policy that nominations are not processed during a presidential election year unless they are uncontroversial. Federal courts have inappropriately rolled back many important rights of people with disabilities, and the nomination of controversial nominees who are hostile to disability rights must come to an end.

Respectfully,

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