



PRELIMINARY REPORT ON THE NOMINATION OF LESLIE H. SOUTHWICK TO THE FIFTH CIRCUIT

On January 9, 2007, President Bush nominated Leslie H. Southwick, a former Mississippi Court of Appeals judge, to the United States Court of Appeals for the Fifth Circuit.¹ Judge Southwick has been unanimously rated well-qualified by the American Bar Association.

As a judge on the Mississippi Court of Appeals for over ten years, Judge Southwick amassed a record that favored business and insurance interests, at the expense of workers, consumers and other victims. In fact, he voted for those interests 89 percent of the time in 180 published split-decision torts and state employment law cases. Moreover, his decisions involving racism in the workplace, the qualifications of gays and lesbians to be parents, women's property rights following the dissolution of a marriage or relationship, and allegations of racial bias in jury selection, raise questions about his commitment to equal dignity and equal justice. This report addresses specific cases which raise concerns about Judge Southwick's suitability for a lifetime appointment to the federal bench.

It is important to note that, due to the enormous volume of Judge Southwick's state court cases, this report focuses on decisions in those areas of law where his record appears to be the most troubling. Additional time is needed to comprehensively review the more than 700 published divided decisions and many unpublished divided decisions in which Judge Southwick participated. Moreover, unpublished decisions in which Judge Southwick joined but did not author an opinion have not yet been provided.

Judge Southwick's views are especially critical because the Fifth Circuit has been subject to extraordinary partisan engineering: during the Clinton administration the Republican Senate blocked two moderate nominees to that court to hold seats open for the next president. For one of the seats, President Clinton first submitted a nominee in mid-1997; for the other he submitted a nominee in early 1999. Indeed, Judge Southwick's home state Senator Trent Lott stated about the Senate's role in confirming Clinton judges: "Do I have any apologies? Only one: I probably moved too many judicial nominations already." Benefiting from this obstructionism, President Bush exploited the opportunity to appoint deeply conservative judges like Priscilla Owen and Edith Brown Clement to the court.

¹ Judge Southwick was originally nominated by President Bush to a Southern District of Mississippi judgeship on June 6, 2006. He received a hearing before the Senate Judiciary Committee on September 19, 2006 and was reported to the full Senate floor on September 26. However, no floor vote was taken on his nomination to the district court and it expired at the end of the 109th Congress.

I. BRIEF BACKGROUND ON THE FIFTH CIRCUIT

There are seventeen seats on the Fifth Circuit, two of which are now vacant. Of the fifteen occupied seats, eleven are held by Republican appointees, including three George W. Bush appointees – Priscilla Owen, Edith Brown Clement and Edward Prado. The Fifth Circuit seat to which Judge Southwick is nominated is one of three seats on the court designated by tradition for Mississippians. President Bush recess appointed the controversial Charles Pickering to the seat in January 2004. Pickering’s nomination was subsequently withdrawn and President Bush nominated Michael Wallace. Wallace’s divisive nomination was also later withdrawn.

Notably, only one of the seats on the Fifth Circuit is held by an African-American, despite the high African-American population in the circuit. Both of the current nominees for vacancies on the circuit, including Judge Southwick, are white. Indeed, there has never been an African-American federal court of appeals judge from Mississippi, even though the state is 37% African-American.

II. BRIEF BIOGRAPHY OF JUDGE SOUTHWICK

Judge Southwick was born in 1950 in Edinburg, Texas. He received a B.A. degree from Rice University in 1972, and a J.D. from the University of Texas in 1975. After law school, Judge Southwick clerked for Judge John F. Onion, Jr. of the Texas Court of Criminal Appeals and then for Judge Charles Clark of the Fifth Circuit Court of Appeals. Following his clerkships, Judge Southwick entered private practice at the Jackson, Mississippi law firm of Brunini, Grantham, Grower and Hewes as an associate from 1977-1983 and as a partner from 1983-1989.² Judge Southwick spent most of his career in private practice defending oil and gas companies. He also worked as an adjunct professor at Mississippi College School of Law, where his courses included Oil & Gas Law, between 1985 and 1989, and again from 1998 until the present. Judge Southwick was a member of the Federalist Society from 1990 to 1998.

Judge Southwick was appointed to a position in the Civil Division of the Department of Justice during the administration of President George H.W. Bush, where he served from 1989-1993.³ In 1994, Judge Southwick was elected one of the first ten judges on the newly-created Mississippi Court of Appeals. He sat on the court until 2006, except for a military leave of absence from August 2004 to January 2006, during which time he served as the

² In his questionnaire for the Senate Judiciary Committee, Judge Southwick named five of these cases as among his ten most significant: *Queen Esther Wooten v. Consolidated Coal Co.*, Cause # 7533, Chancery Court, Kemper County, Miss., decree 9, 1979, *Damson Oil Corp. v. Southeastern Oil Co.*, 370 So. 2d 225 (Miss. 1979), *Berry v. United Gas Pipe Line Co.*, 370 So. 2d 235 (Miss. 1979), *Continental Oil Co. v. Blair*, 397 So. 2d 538 (Miss. 1981), and *Phyfer v. San Gabriel Development Corp* 884 F.2d 235 (5th Cir. 1989).

³ Judge Southwick also listed five of his cases from his time at the Department of Justice as among his most significant: *Doe v. Sullivan*, 756 F. Supp. 12 (D.D.C. 1991) *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), *Long Island Savings Bank v. Federal Savings and Loan Ins. Corp.*, No. CV-89-2699 (E.D. NY 1989), *American Federation of Government Employees v. Cheney*, CA No. CV-92-PT-2453-E (N.D. Ala. 1992) and *Mackie v. Bush* 809 F. Supp. 144 (D.D.C. 1993).

Deputy and then as the Staff Judge Advocate for the 155th Brigade Combat team in Iraq. In 2006, Southwick declined to seek reelection to the state court of appeals.

III. EARLY CAREER

While working in the administration of the first President Bush from 1989-1993 as a Deputy Assistant Attorney General, Judge Southwick was responsible for deposing former president, Ronald Reagan, in the prosecution of Reagan's former National Security Advisor, John Poindexter. Also during his time in the George H.W. Bush Justice Department, Judge Southwick testified, in his capacity as a representative of the administration, before Congress on a number of occasions. He told a Senate subcommittee that the Supreme Court's holding in *Rust v. Sullivan*⁴ could be expanded to other areas. *Rust* held that the government could impose restrictions on doctors receiving federal funds that forbid them from discussing abortion with their patients. Southwick argued that this holding could be expanded to apply to the National Endowment of the Arts, thereby limiting the expressive content of funded projects.⁵ This argument was, in fact, adopted by the Supreme Court in a 1998 case, *National Endowment of the Arts v. Finley*.⁶

IV. SCHOLARLY WRITINGS

Judge Southwick wrote a law review article,⁷ entitled *Separation of Powers at the State Level: Interpretations and Challenges in Mississippi*, which suggested – albeit rather obliquely – that he approved of the Supreme Court's recent federalism jurisprudence. While the article dealt primarily with separation of powers at the state level, specifically in Mississippi, in the introduction Judge Southwick hinted that he approved of the Supreme Court's 1990s decisions placing “constitutional limits on national power vis-à-vis the states,” including both Commerce Clause and Eleventh Amendment immunity cases.

Judge Southwick also authored *The Least of Evils for Judicial Selection*⁸ in 2002, which assessed different methods of choosing state judges, and endorsed partisan elections as the best of several flawed methods. Also of note, Judge Southwick wrote an article assessing the adequacy of military commissions to try prisoners suspected of acts of terrorism against the United States.⁹ Judge Southwick has written a number of other law review articles, dealing primarily with historical issues¹⁰ and state procedural issues¹¹ as well as several articles about

⁴ 500 U.S. 173 (1990).

⁵ Allan Parachini, *Widening Rust; Application of Supreme Court Ruling Limiting Free Speech to the Arts*, THE NATION, Oct. 21, 1991.

⁶ 524 U.S. 569 (1998).

⁷ Judge Leslie Southwick, *Separation of Powers at the State Level: Interpretations and Challenges in Mississippi*, 72 MISS. L.J. 927 (2003).

⁸ 21 Miss. C.L. Rev. 209 (2002).

⁹ Judge Leslie Southwick, *Military Justice for Terrorists and the National Guard: Comparisons and a Mississippi Case Study*, 72 MISS. L.J. 781 (2002).

¹⁰ *Mississippi Supreme Court Elections: A Historical Perspective 1916-1996*, 18 MISS. C.L. REV. 115 (1998); *The Mississippi Court of Appeals: History, Procedures & First Year's Jurisprudence*, 65 MISS. L.J. 593 (1996); *A Tribute to Chief Judge Charles Clark*, 12 MISS. C.L. REV. 355 (1992); *The Colonel, the Judge, & the Bartender: The Presidential Election of 1904*, XXVI (no. 2) THEODORE ROOSEVELT ASSN JOURNAL 3 (2004); *A Judge Runs for President: Alton Parker's Road to Oblivion*, 5 GREEN BAG JOURNAL OF LAW 2D 37 (2001).

constitutional revision¹² and an article about serving as a judge and a member of the National Guard concurrently.¹³ Judge Southwick also wrote a book called *Presidential Also-Rans and Running Mates, 1788-1996* about losing presidential candidates and what their presidencies would likely have been like.

V. RECORD ON THE MISSISSIPPI BENCH¹⁴

There are ten judges on the Mississippi Court of Appeals, which is the intermediate appellate court in the state. Cases in that court may be heard by a three judge panel, or, occasionally, *en banc* by all ten judges. After the judges of a three-judge panel reach a decision, all remaining judges review their opinions(s). Thereafter, any or all of those judges may vote on the decision, and write or join an opinion.

The Court of Appeals has jurisdiction over types of cases assigned to it by the Supreme Court, except in the following areas: imposition of the death penalty; utility rates; annexations; bond issues; election contests; or a trial court's holding a statute unconstitutional. In these six categories, the Supreme Court, by statute, has exclusive appellate jurisdiction. In other areas, the Supreme Court has conferred broad jurisdiction on the Court of Appeals. Decisions by the Court of Appeals in these areas are final unless the Supreme Court grants a discretionary *writ of certiorari*.

Judge Southwick's record consists primarily of state law matters and largely does not include cases of federal constitutional law (other than in the criminal context), civil rights, employment discrimination, or environmental law. However, the frequency with which he votes in favor of businesses and other powerful interests in state torts and employment law cases¹⁵ raises questions as to how he will approach federal law matters involving wronged consumers, workers and other vulnerable parties.

Of all the judges on the Mississippi Court of Appeals, Southwick received the highest rating from a business group in March of 2004 based on his pro-business votes.¹⁶ Indeed, Judge Southwick voted, in whole or in part, against the injured party and in favor of special

¹¹ Recent Trends in Mississippi Judicial Rule Making: Court Power, Recusals, and Expert Testimony, 23 Miss. C.L. Rev. 1 (2003).

¹² *Methods of Constitutional Revision: Which Way Mississippi?*, 56 MISS. L.J. 17 (1986); *State Constitutional Revision: Mississippi & the South*, XXXII MISS. LAWYER 21 (1985); *A New Constitution?*, JACKSON YOUNG LAWYERS ASS'N NEWSLETTER (Jan. 1987); *Don't Fight Constitution's Rising Tide*, CLARION-LEDGER, Jan. 25, 1987; *Reforming Constitution Path to Righting Power Imbalance*, CLARION-LEDGER, Sept. 2, 1986.

¹³ *Separation of Powers at the State Level, Part II: Service in Civilian Public Office and in the National Guard*, 74 MISS. L.J. 47 (2004).

¹⁴ There are over 700 published, divided decisions from the period on which Judge Southwick was a member of the Mississippi Court of Appeals. This report focuses on those cases which raise concerns about his views on the law. However, the reader should be aware that the decisions highlighted herein arise within the context of a lengthy record as an appellate judge.

¹⁵ The Mississippi Court of Appeals' employment cases are predominantly reviews of decision of the state Workers' Compensation Commission, but also include, for example, reviews of disciplinary actions against state employees..

¹⁶ Beth Musgrave and Tom Wilemon, *Business Group Rates State Justices*, THE SUN HERALD, Mar. 24, 2004, at A4.

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 – an 89 percent voting record.¹⁷

His record also calls into question his commitment to equal dignity and equal justice. As detailed below, in one case, Judge Southwick joined an opinion which held that a woman who used a racial slur to refer to a colleague should not have been terminated for racial discrimination and suggested that the harmfulness of the slur was a function of the context in which it was uttered. In another case, Judge Southwick joined a concurring opinion which argued that a mother's sexual orientation was an appropriate reason to deprive her of custody of her children. In cases where racial bias in jury selection was alleged, Judge Southwick ruled consistently to uphold the verdict both in both cases where prosecutors were allowed to strike African-American jurors despite allegations of racial bias and in cases where defendants were prevented from striking white jurors because of alleged racial bias.

A. Employment and Torts Cases

1. Judge Southwick's Harsh Interpretations of Procedural Rules Have Harmed Workers, Consumers and Other Victims

*Cannon v. Mid-South X-Ray Co.*¹⁸ In 1983, Annie Cannon, a darkroom technician, began to have severe seizures, burning sensations and intense headaches. Her doctors did not connect her health problems with the chemicals she used at work until 1993. Cannon filed suit against her employer and DuPont Chemical. The defendants argued in part that the three-year statute of limitations had run, because Cannon had known of her injuries – if not their cause – between 1981 and 1991. The trial court agreed and dismissed the case. The Mississippi Court of Appeals reversed, 8-2, holding that the statute of limitations did not begin to run until Cannon had reason to believe the chemicals caused her illness, and that a jury should decide when she reasonably should have made the connection.

In dissent, Judge Southwick, joined by Judge McMillin, argued that the claim was time-barred because the statute of limitations begins to accrue whenever the plaintiff knows of the disease in question, not of its cause – even though it is unclear how she, a layperson, could have attributed her symptoms to her job conditions absent medical advice.

*Goode v. Synergy Corporation.*¹⁹ The Goodes sued Synergy Corporation, their propane gas provider, after a fire destroyed their home and killed their granddaughter. Synergy alleged that the fire was caused by a faulty part in the Goodes' water heater on which, Synergy claimed, it had performed no work. After trial, the jury found for Synergy. The Goodes moved for a new trial after they were approached by a Synergy employee who claimed that he had worked on the water heater part in question. The trial court denied the motion for a new

¹⁷ In sixty-four of those cases, Judge Southwick was on the side of the dissenters. In forty-seven of those cases he was out of line with all but one or two other judges on the court; and in twenty-four he was joined by just one other judge.

¹⁸ 738 So. 2d 274 (Miss. Ct. App. 1999).

¹⁹ 852 So. 2d 661 (Miss. Ct. App. 2003).

trial. The Mississippi Court of Appeals reversed, 8-2, holding that the Goodes had met their burden of showing that a new trial was required: the evidence was newly discovered; the plaintiffs had used due diligence to discover the evidence previously; the evidence was material to the case; and the evidence would likely create a different result.

Judge Southwick joined a dissenting opinion written by Judge Griffis, arguing that the plaintiffs had not used due diligence to discover the evidence prior to trial. However, the majority pointed out that the Goodes were diligent in that they served an interrogatory on Synergy which requested information on the types of work Synergy had performed for the Goodes and on every person having knowledge about the matter, but Synergy did not mention the water heater work or the name of the employee who had worked on the water heater part.

*Robinson v. Lee.*²⁰ James Lee hit Pashun Robinson with his truck while Robinson was riding his bicycle. A jury found Lee guilty, but awarded only partial damages. On appeal, Robinson argued that the trial judge erred in admitting the videotaped deposition testimony of the only corroborating defense witness. The witness had allegedly been served a subpoena but had not appeared at the trial. The Court of Appeals reversed and remanded for a new trial, finding that there was no evidence that the witness was served a subpoena; therefore, the court was not allowed to substitute deposition testimony for live testimony. Judge Moore, joined by judges Southwick and Thomas, dissented, arguing that the plaintiff had not been prejudiced and that the deposition witness was the defendant's only corroborating witness.

2. Judge Southwick Has Interpreted Contestable Facts to Support Outcomes Favorable to Special Interests

Judge Southwick's record reveals that he has consistently interpreted contestable sets of facts²¹ to support a result that favors defendant corporations, businesses and other powerful interests..

*Ainsworth v. Capform.*²² Construction worker Michael Ainsworth was injured when he tripped over a piece of partially buried metal. He sued the contractor for negligence, arguing it failed to adequately mark the hazard. The trial court granted summary judgment for the contractor because there was no proof it was responsible for the buried metal. The Court of Appeals reversed the summary judgment, finding that there was enough evidence to create a material fact issue as to whether the primary contractor had negligently caused Ainsworth's injury. The majority reasoned that a jury could infer that a piece of metal buried in the ground at a construction site was the responsibility of the primary contractor, especially since it was dropping pieces of metal from high off the ground, which might have caused a piece to become deeply embedded. Judge Southwick, joined only by Judge McMillin, dissented, saying he would affirm summary judgment because it was "quite unlikely" that the contractor was responsible for the buried metal and there were "more rational explanations."

²⁰ 821 So. 2d 129 (Miss. Ct. App. 2000).

²¹ E.g., to determine whether summary judgment was justified, whether a jury verdict should be upheld, or whether the evidence was sufficient to support a state agency determination.

²² 784 So. 2d 1008 (Miss. App. 2001).

*General Motors v. Pegues.*²³ Jimmy Pegues alleged that he was injured when a defective ball joint in his truck broke, causing the truck to veer off the road and crash. Pegues was unconscious for three weeks, spent extensive time in the hospital, and underwent fourteen surgeries, including the amputation of his leg. General Motors argued that the ball joint did not break until impact, and that the accident was caused by Pegues speeding and driving while intoxicated. Pegues' expert witness testified that the ball joint had broken before the vehicle left the road, and even some of GM's testimony seemed to confirm this possibility. A jury unanimously found in favor of Pegues and awarded damages. On appeal, in a 7-3 decision, the Court of Appeals agreed with Pegues and affirmed the verdict. Judge Southwick dissented, joined by Judges McMillin and Hinkebein. They argued that "there was no proof upon which the jury could rely that any negligence by the defendant contributed to the accident."

*Mitchell v. Glimm.*²⁴ Kimberly Mitchell was injured when a car behind her rammed her car. She suffered numerous injuries and underwent multiple surgeries to attempt to lessen the pain and allow her to regain the use of her arms. Mitchell sued Olive Glimm, the driver of the other car. A jury found in her favor but awarded no damages, apparently because there was some evidence that she already suffered some lesser arm problems before the accident. The Mississippi Court of Appeals reversed, finding the jury's verdict "against the overwhelming weight of the evidence." Although the question of "[w]hether all the injuries suffered by Mitchell were a result of the accident is not a question for this Court to resolve... it is undisputed that Mitchell suffered some injury as a result of the accident." The majority also held that the trial court had erred in excluding evidence of Glimm's liability insurance to show bias of her witness, employed by the same insurance company. Judge McMillin dissented, joined by Judge Southwick. The dissent found that there was sufficient evidence for the jury to conclude that none of Mitchell's injuries were caused by the accident. The dissent also agreed with the trial court acted within its discretion when it excluded the evidence of liability insurance.

3. Judge Southwick Took Narrow View of Duty of Care for Medical Professionals and Landlords

*Strangi v. Gollott.*²⁵ An ongoing conflict arose between neighbors in an apartment complex, culminating when Richard Gollott struck Santo Strangi in the jaw. Strangi sued Gollott, as well as William and Judith Byrd, the owners of the apartment complex. The trial court granted summary judgment in favor of the Byrds. The Mississippi Court of Appeals reversed, finding that, based on the growing animosity between the parties over a period of months, the Byrds could have been reasonably expected to anticipate violence breaking out. Judge Southwick joined a dissent written by Judge McMillin, which argued that a property owner does not have "a duty to mediate or resolve property disputes between tenants."

²³ 738 So. 2d 746 (Miss. Ct. App. 1998).

²⁴ 819 So. 2d 548 (Miss. Ct. App. 2002).

²⁵ 1998 Miss. App. LEXIS 925 (Miss. Ct. App. 1998).

*Smith v. Gilmore Memorial Hospital.*²⁶ Stephanie Smith brought suit against Gilmore Memorial Hospital when a nurse at first failed to inform Smith of the physician’s mistake in operating on the wrong eye of her toddler son despite the mother’s inquiry. The trial court granted summary judgment for the Hospital because Smith failed to submit an expert opinion regarding whether the Hospital breached a duty of care. In a 7-2 vote, the majority reversed summary judgment, holding that “[t]his is a negligence case where there is no evidence needed that require special skills, knowledge, learning or experience. ... This is a factual determination of whether or not it was negligent for [the nurse] to not tell [Smith] of the incision on the wrong eye. It is not the duty of this Court, but the duty of the jury to make this factual determination.” Judge Southwick joined the dissent which would affirm summary judgment, arguing that an expert is indeed needed to establish the standard of care for a nurse working under the direction of an operating physician. On appeal, the Mississippi Supreme Court agreed with the dissent, reinstating the trial court’s summary judgment order.

4. Judge Southwick Espoused Limiting Availability of Workers’ Compensation, Even Though His Position Was at Odds with Prevailing Legal Views

*Financial Institute Insurance Service v. Hoy.*²⁷ In a 7-3 decision, the majority affirmed the holding of the lower court – and Worker’s Compensation Commission – which held that Teresa Hoy was entitled to receive benefits as a result of an injury she received when she was traveling for work and slipped in a hotel bathroom in the middle of the night. The majority emphasized that it was bound by the Commission’s holding so long as it was supported by “substantial evidence.” Judge Southwick joined Judge Moore’s dissent, which argued that Mississippi law provided that “the single fact that the employer caused the employee to be away from home does not ... mean that the injury is work related and compensable.” However the dissent conceded that reversing the lower court’s decision might be “inequitable or even unwise,” and recognized that “other states have held just this sort of injury to be compensable.”

5. Judge Southwick Imposed Heavy Burden on Unsophisticated Signatories of Damage Waivers

*Whitehead v. Johnson.*²⁸ Laura Whitehead sustained injuries in a car accident that she claimed was caused by the other driver’s negligence. When she received payment from the insurance company for the damages to her vehicle, she signed a form that she believed released the defendants from further liability for her property damages, but allowed her to seek compensation for her personal injuries. Whitehead claimed that she was assured by the representative of the insurance company that the release was for property damage only. Whitehead sued to recoup personal injury damages. The trial court granted summary judgment for the defendants based on the release, but the Mississippi Court of Appeals reversed 8-2. The majority found that Whitehead had raised sufficient factual questions as to whether the release had been procured by fraud or misrepresentation.

²⁶ 2006 Miss. App. LEXIS 402 (Miss. Ct. App. 2006), *rev’d* 2007 Miss. LEXIS 179 (Miss. 2007).

²⁷ 770 So. 2d 994 (Miss. Ct. App. 2000).

²⁸ 797 So. 2d 317 (Miss. Ct. App. 2001).

Judge Southwick joined Judge McMillin's dissent, which would have upheld the summary judgment, finding that the "release is an absolute bar to this action." The dissent argued that the onus for reading and understanding the release was on Whitehead, and "[a]ny reliance by Whitehead upon telephonic representations that the release meant something other than what it plainly stated on its face would be patently unreasonable and, thus, not ground to set aside the duly-executed release based on an allegation of fraud or misrepresentation."

6. Judge Southwick Went Out of His Way to Express Troubling Views on Doctrine of Employment-at-Will

*Dubard v. Biloxi H.M.A.*²⁹ Robert Dubard moved to Biloxi from Granada, Mississippi after being offered employment at the Biloxi Regional Medical Center. He was terminated by the Center after failing to show up for a medical screening. Dubard sued for breach of contract. The lower court granted summary judgment to the Center. On appeal, the Circuit Court of Appeals found that there were genuine issues of material fact as to whether the pre-employment conditions had been waived for other employees in similar circumstances and whether Dubard had been led to believe that the pre-employment screening could be waived. Judge Southwick, joined by Judge McMillin, dissented. He argued that, because Dubard was an at-will employee, he had no contract claim. On appeal, the Mississippi Supreme Court agreed with the dissent's holding and reversed.

In his dissent, Judge Southwick offered a gratuitous digression on the controversial doctrine of employment-at-will (which provides that employment relationships are not contractual and employers should be able to fire employees for virtually any reason) that was completely unnecessary to deciding the legal merits of the case. Employment-at-will is not a universally-accepted doctrine. In fact, federal judges are called upon to interpret laws, such as those covering labor unions, where Congress intended to repudiate employment-at-will. Interestingly, the dissenting opinion extolled the doctrine: "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."

B. Views On the Rights and Status of Women and Minorities

1. In Rare Pro-Employee Vote, Judge Southwick Excused Use of Racial Epithet

*Richmond v. Mississippi Dep't of Human Services.*³⁰ Bonnie Richmond, a social worker for the Mississippi Department of Human Services was fired when, at a meeting that included top agency executives, she used a racial slur, referring to an African American co-worker (who was not present at the meeting) as a "good ole n*****." The Mississippi Court of Appeals, in a 5-4 decision joined by Judge Southwick, upheld the Mississippi Employee Appeals Board's decision to reinstate her. The majority found that, taken in context, this slur

²⁹ 1999 Miss. App. LEXIS 468 (Miss. Ct. App. 1999), *rev'd* 778 So. 2d 113, 114 (Miss. 2000).

³⁰ 1998 Miss. App. LEXIS 637 (Miss. Ct. App. 1998), *rev'd* 745 So. 2d 254 (Miss. 1999).

was an insufficient ground to terminate her employment, because there was no specific rule she violated, because it “was not motivated out of racial hatred or racial animosity directed toward a particular co-worker or toward blacks in general,” and because it did not give rise to workplace problems other than offending the coworker who was called a “n*****.” Two of the dissenters, deeply troubled by the majority’s preoccupation with context and its failure to acknowledge the “inherent offensive[ness]” of the slur, observed: “The ... majority opinion seem[s] to suggest that absent evidence of a near race riot, the remark is too inconsequential to serve as a basis of dismissal. Such a view requires a level of myopia inconsistent with facts and reason.”

The Mississippi Supreme Court, while holding that discharge was not warranted under the unique circumstances of this case, reversed the Court of Appeals insofar as it upheld the Employee Appeals Board’s decision to render no penalty against Richmond. The case was remanded to the Board “for the imposition of a lesser penalty, or to make detailed findings on the record why no penalty should be imposed.”

2. Judge Southwick Has Troubling Record in Cases Involving Allegations of Racial Discrimination in Jury Selection

Judge Southwick has participated in numerous cases involving challenges to the racial makeup of a jury under *Batson v. Kentucky*,³¹ in which the United States Supreme Court held that peremptory challenges to jurors cannot be used in a racially discriminatory manner. In 59 of the 70 *Batson* cases reviewed for this report, the defendants challenged their convictions on the ground that the prosecution had used peremptory challenges to strike African-American jurors. Judge Southwick, voting with a majority of the Court in every case, voted to uphold the convictions in all but five of these cases.

In 10 of these 70 *Batson* cases, the defendants challenged their convictions on the ground that the prosecution had unfairly prevented them from using their peremptory challenges to exclude white jurors (in one case the juror whom defendant sought to strike was Asian American). Defendants, with Judge Southwick again joining the majority of the Court in every case, lost all ten of these challenges. In the final case, the defendant challenged his conviction on both grounds and lost on both grounds, with Judge Southwick again in the majority.

In other words, Judge Southwick and a majority of the judges on the Court of Appeals routinely rebuffed allegations of prosecutorial racism against African Americans in jury selection while upholding allegations of anti-white discrimination levied against defendants.

Webb v. Mississippi.³² Kenneth Webb challenged his conviction on several grounds, including the racial makeup of the jury. The trial judge had sustained the state’s peremptory striking of two African American jurors despite Webb’s challenge that the strikes were racially motivated. At the same time, the trial judge prevented Webb from striking a white juror following the state’s reverse-*Batson* challenge to Webb’s peremptory strike. On appeal,

³¹ 476 U.S. 79 (1986).

³² 877 So. 2d 399 (Miss. Ct. App. 2003).

the Mississippi Court of Appeals affirmed on both issues in an opinion joined by Judge Southwick. Judge Irving dissented, pointing out the incongruousness of the Court's decision:

The majority finds that it is legally defensible for the trial judge to accept as race neutral the striking of a juror by the prosecution because of where the juror lives but reject as race neutral the striking of another juror by the defense because of where the juror works. What is even more perplexing is that the majority makes this finding while at the same time acknowledging that striking a juror because of the location of the juror's residence (in a high crime area) and striking a juror because of the nature of the juror's employment (director of finance for a state agency) are both recognized in the jurisprudence of this state as race neutral reasons for striking jurors in the face of a *Batson* challenge. In my opinion, the majority, by affirming what happened in this case, has placed its stamp of approval on the arbitrary and capricious selection of jurors.

Webster v. Mississippi.³³ J.W. Webster challenged his conviction, contending that the trial judge had improperly prevented him from using a peremptory strike on a juror. Webster attempted to strike a white juror because Webster's sister-in-law had sued the company where the juror worked. The trial judge found that this explanation was pretext for racial discrimination because an African-American juror who worked for the same company was not struck. In an opinion joined by Judge Southwick, the Mississippi Court of Appeals affirmed 10-0. On appeal, the Mississippi Supreme Court reversed because "Webster offered a sufficient race neutral reason for striking the juror, i.e. he was a member of management at Cooper Rubber and Tire when his attorney successfully sued the company for discriminatory employment practices on behalf of Webster's sister-in-law."

McWilliams v. State.³⁴ James McWilliams's challenged his conviction, arguing that the prosecution had improperly used five of its six peremptory challenges to strike African Americans from the jury panel. Judge Southwick joined the 7-3 decision majority in affirming the conviction. The dissent pointed out that the prosecution's so-called benign reasons for striking the African American jurors, taken together, "appear[ed] to be racially disposed" and "suggest[ed] a pattern of malevolence." The reasons included incomplete juror forms and the fact that one juror worked as a detail man at state auto actions.

3. In Family Law Case, Judge Southwick Joined Strikingly Homophobic Concurrence

*S.B. v. L.W.*³⁵ In this child custody case, the Mississippi Court of Appeals held that a parent's sexual orientation could not be the sole basis on which to make a custody determination, but found that a lower court decision to award custody to the father, rather than the lesbian mother, was based on sufficient additional factors – such as greater stability, a larger house, excellent schools, and extended family connections. Judge Southwick joined a concurrence which went beyond the majority's holding to contend that, based on the legislature's condemnation of same sex relationships, sexual orientation was a perfectly

³³ 755 So. 2d 451 (Miss. Ct. App. 1999), *rev'd* 754 So. 2d 1232 (Miss. 2000).

³⁴ 1998 Miss. App. LEXIS 409 (Miss. Ct. App. 1998).

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

appropriate basis on which to make custody determinations. Specifically, the concurrence stated:

I do recognize that any adult may choose any activity in which to engage; however, I also am aware that such person is not thereby relieved of the consequences of his or her choice. ... As with the present situation, the mother may view her decision to participate in a homosexual relationship as an exertion of her perceived right to do so. However, her choice is of significant consequence, as described before in the discussion of our State's policies, in that her rights to custody of her child may be significantly impacted. ... [It is appropriate to] consider[] the homosexual lifestyle of one of the parents in this case as a factor in determining suitability for custody.

4. Judge Southwick Has Joined Troubling Opinions Concerning Women's Rights

Dupree v. Plantation Pointe.³⁶ Annie Sanders, a resident at Windsor Place nursing home, was sexually assaulted by another resident, and her daughter sued on her behalf. The resident who assaulted Sanders had exhibited considerable behavioral problems during his stay. The jury found that the defendant nursing home was not negligent. On appeal, the Mississippi Court of Appeals held that the trial judge abused his discretion in failing to grant a new trial: "The overwhelming weight of the evidence show[ed that the nursing home was] aware of the potential dangers [the man] posed and did not take action to prevent it."

Judge Griffis dissented, joined by Judges McMillin and Southwick. In addition to disagreeing with the majority as to whether the evidence supported a finding of no negligence, the dissent argued that Sanders suffered no damages. Despite the fact that the man was found naked from the waist down on top of Sanders, holding her down and spreading her legs, the dissent argued that there was no evidence of compensable injury because Sanders was not agitated afterwards, there was "no evidence to establish that Ms. Sanders incurred a physical injury or that she was conscious enough to know that the incident even occurred.... no evidence of any bleeding, discharge, bruising, cuts, scratches or scraping to the skin of Ms. Sanders and no evidence of any sexual touching or penetration." On appeal, the Mississippi Supreme Court reversed and adopted the dissent's holding, although not its precise reasoning.

Wade v. State of Mississippi.³⁷ Deanna Wade owned a nightclub and lived with her boyfriend, Ralph Simpson, who, over the four years of their relationship, was often physically abusive, especially when drunk. One night, after Simpson had been drinking heavily at a nightclub next door to their home, he picked up an automatic pistol and shot it to get Wade's attention. She and Simpson then got in an altercation, and he beat her severely. Then he pulled out the automatic weapon, at which point he was restrained by some male patrons. Wade attempted to leave the vicinity but Simpson had the keys to her car. Wade ran to their house and retrieved a revolver. She returned to the nightclub and, when Simpson started towards her, she shot and killed him. Wade was convicted of murder and sentenced to life in prison.

³⁶ 881 So. 2d 832 (Miss. Ct. App. 2003), *rev'd*, 892 So. 2d 228 (Miss. 2004).

³⁷ 724 So. 2d 1007 (Miss. Ct. App. 1998), *aff'd* 748 So. 2d 771 (Miss. 1999).

On appeal, the Mississippi Court of Appeals, 7-3, found that the evidence only supported a manslaughter conviction, rather than a murder conviction, because Wade lacked the element of malice. The court found that defendant's "ill will was engendered by the earlier unlawful acts of [her boyfriend] and what appeared to be a renewed attack. This clearly was a killing in the heat of passion and arguably a case of imperfect self defense and as such, manslaughter was the appropriate verdict." Judge Payne dissented, arguing that Wade should have been acquitted because she was acting in self defense. Judge Southwick also dissented, joined by Judge McMillin, but he would have affirmed Wade's conviction, arguing that it was supported by the evidence. On appeal, the Mississippi Supreme Court affirmed, rejecting Judge Southwick's arguments.

*Nichols v. Funderburk*³⁸ and *Byars v. Byars*.³⁹ In the first of this pair of cases, Judge Southwick joined a majority opinion which denied a share of assets to the woman following the dissolution of a long-time relationship in part because the couple were not formally married and did not jointly hold property. In stark contrast, in the latter case Judge Southwick joined a dissent which argued that a woman's sexual relationship, involving no financial support from her sexual partner, was sufficiently similar to a marriage to trigger a clause in an alimony agreement with her former husband that cut off her benefits in the event she remarried or entered a marriage-like arrangement. Thus, Judge Southwick has adopted divergent, almost irreconcilable, views of what constitutes marriage or a marriage-like relationship. Interestingly, in each of these cases his definition of marriage would have terminated the financial benefits the woman received from the man on whom she depended financially.

Nichols v. Funderburk concerned the distribution of assets of a nonmarried couple who had lived together for fourteen years. Lori Nichols, who was fourteen when she moved in with David Funderburk, sought equitable division of the property that she shared with him. Nichols claimed that she was entitled to an equitable division of the assets despite the lack of a marital relationship based on her financial contribution to the property, including her participation in the management of Funderburk's restaurant and the improvement of the home they shared. The Court of Appeals, including Judge Southwick, affirmed the lower court judgment in favor of Funderburk, 5-5, holding that Nichols chose not to marry Funderburk, that Nichols was not on the title of the home or a formal partner in the restaurant, and that Nichols was paid for her work in the restaurant. The dissenters pointed to the compelling evidence of the contributions that Nichols made to the couple's joint assets that should entitle her to an equitable share. The Mississippi Supreme Court affirmed the decision of the Court of Appeals.

Byars v. Byars concerned an alimony agreement entered into by Gloria and William Byars pursuant to their divorce. The agreement stated that William's alimony obligation is terminated if Gloria got married or "carr[ie]d on a lifestyle with another man so as to afford said man sexual exclusivity and the benefits of marriage without ceremonial endorsement." Gloria had a sexually exclusive relationship with a man, but they did not live together nor intermingle their finances. The Court of Appeals held that, under Mississippi law, the

³⁸ 881 So. 2d 266 (Miss. Ct. App. 2003), *aff'd*, 883 So. 2d 554 (Miss. 2004).

³⁹ 850 So. 2d 147 (Miss. Ct. App. 2003).

relevant consideration was whether the ex-spouse received financial support from the new partner, and Gloria did not. The Court of Appeals further stated that Gloria did not provide her boyfriend with the benefits of marriage: they lived forty miles apart, lived separate lives, and had no plans to marry or move near each other. Judge Irving's dissent, which Judge Southwick joined, urged that Gloria's "becom[ing] sexually active with one man . . . was about the same as a marriage." The dissent determined that Gloria bestowed upon her boyfriend "the benefits of marriage without ceremonial endorsement" because "[i]n this modern culture of changing norms and mores, couples are increasingly creative in finding ways to reap the benefits of marriage without making the trip to the altar or necessarily physically living with each other."

C. Challenges to the Fairness of Procedures in Criminal Cases and in Civil Contempt Matters

Judge Southwick has been willing to overturn criminal convictions based on improper trial procedures.⁴⁰ However, as the following cases show, he has a mixed record as to the rights of criminal defendants and persons charged with civil contempt, and is particularly hesitant to overturn criminal convictions based on constitutional infirmities.⁴¹

*Morrison v. Mississippi Dep't of Human Services.*⁴² Gary Morrison agreed to pay child support for his teenage son. Five years later, the mother filed a petition for contempt and modification, alleging that Morrison had not fulfilled his child support obligations. Neither Morrison nor his counsel attended the hearing at which the petition was heard. The chancellor found Morrison in contempt and ruled against him. Six years later, a second petition for contempt was filed. Morrison filed a motion to dismiss, claiming that he had never been served the first petition. A hearing was held, and the chancellor ruled against Morrison, finding that he had been properly served by mail, even though there was no evidence demonstrating service. He also ordered Morrison to pay almost \$50,000 in back support and ordered him jailed for ninety days.

In an opinion by Judge Southwick, the Court of Appeals affirmed 6-4. Southwick held that, under Mississippi rules of procedure, it was insufficient for Morrison to show that there was no service of process in the record and no docket entry of service; rather, he was required to make an affirmative showing that he was not served. On appeal, the Mississippi Supreme Court reversed 8-0.

*Beckum v. State of Mississippi.*⁴³ Judge Southwick joined the majority in a 6-4 decision which upheld Beckum's conviction for armed robbery and affirmed the trial court's decision not to suppress his statement made to an investigating detective after his arraignment. The

⁴⁰ See, e.g., *McGrone v. State of Mississippi*, 2001 Miss. App. LEXIS 140 (Miss. Ct. App. 2001), *rev'd* 807 So. 2d 1232 (Miss. 2002); *Millsap v. State*, 767 So.2d 286 (Miss. Ct. App. 2000); *J.L.W.W. v. Clarke County Dep't of Human Services*, 1999 Miss. App. LEXIS 476 (Miss. Ct. App. 1999).

⁴¹ See especially *Logan v. State of Mississippi*, 1999 Miss. App. LEXIS 182 (Miss. Ct. App. 1999), in which Judge Southwick ruled for the defendant on several non-constitutional issues but against him on constitutional claims.

⁴² 852 So. 2d 578 (Miss. Ct. App. 2002), *rev'd* 863 So. 2d 948 (Miss. 2004)..

⁴³ 2000 Miss App. LEXIS 568 (Miss. Ct. App. 2000), *rev'd* 786 So. 2d 1060 (Miss. 2001).

majority found that an apparently contradictory magistrate's order which indicated both that Beckum was represented by counsel, and that he was unrepresented by counsel was insufficient to prove that Beckum properly invoked his right to counsel before he was questioned by the police. Beckum failed to produce "any affirmative evidence that [he] accepted the representation of [counsel] at the time of his initial appearance."

On appeal, the Mississippi Supreme Court reversed Beckum's conviction by an 8-1 vote, holding that his statement made to the police should have been suppressed. The Court found sufficient evidence in the record to support Beckum's claim that he was represented by counsel at the time he was questioned by the police. Furthermore, the Court found that the Court of Appeals was in error when it placed the burden on establishing whether representation was sought is on the defendant: "[I]t is the state that has the burden of establishing a valid waiver. Doubts must be resolved in favor of protecting the constitutional claim."

Sheppard v. State of Mississippi.⁴⁴ Judge Southwick joined the 9-1 majority opinion authored by Judge McMillan which upheld Sheppard's conviction for manslaughter. Sheppard challenged his conviction, claiming, *inter alia*, that statements made by the prosecutor during summation were so inflammatory as to deny him a fair trial. The majority found that the prosecutor's statements, although "improper" were brief and "did not so undermine the integrity of the trial as to require us to set aside the jury's verdict." Specifically, the prosecutor stated to the jurors that if they were to believe the defendant's version of the facts, they were to contact the prosecutor with their reasons so that he could in turn explain the jury's findings to the victim's family. One judge dissented without written opinion. On appeal, the Supreme Court of Mississippi reversed Sheppard's conviction, and remanded for a new trial. That court found, *inter alia*, that the prosecutor's statements did constitute reversible error, in that it created "in the minds of the jurors ... an extra-legal burden of accountability to the State prejudicial to the rights of the accused."

VI. CONCLUSION

No nominee is presumptively entitled to confirmation to the federal bench. The Bush administration thus far has striven to fill seats on the courts of appeals – many of which were held open by senators who blocked President Clinton's nominees – with judges who threaten to move the courts decisively to the right. Therefore the Senate must be especially careful and thorough in reviewing the record of nominees before determining whether they are qualified to receive a lifetime appointment to the federal bench. A nominee must possess not only a superb legal mind and the highest professional integrity, but also a commitment to equal justice and a willingness to apply the law fairly to all parties. In particular, Judge Southwick's record raises serious questions about his ability to fairly interpret and apply laws protecting workers and consumers. The Senate must scrutinize his record carefully, demand a full and complete accounting from Judge Southwick regarding his views about equal justice

⁴⁴ 2000 Miss App. LEXIS 244 (Miss. Ct. App. 2000), *rev'd* 777 So. 2d 659 (Miss. 2000).

and the rights of workers and consumers, and take the time necessary to determine whether he is entitled to confirmation.⁴⁵

⁴⁵ Alliance for Justice would like to thank People For the American Way, the National Partnership for Women & Families, the National Women's Law Center, and the NAACP Legal Defense Fund for their generous assistance with this report.