



Overview of Fifth Circuit Nominee Leslie Southwick

President Bush's nomination of Leslie Southwick to fill a vacancy on the Fifth Circuit is yet another example of the Bush administration's campaign to make a lasting imprint on the federal courts. During a long tenure as a Mississippi state court judge, Judge Southwick compiled a stark and lengthy record of voting on the side of business interests against workers and consumers.

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. A hearing on Judge Southwick is scheduled for May 10, 2007. As a judge on the Mississippi Court of Appeals for over ten years, Judge Southwick's votes overwhelmingly favored business interests in state law cases, and his confirmation to a federal court could place in jeopardy the federal and state rights and protections of American workers and consumers.

Judge Southwick worked in private practice in Mississippi from 1977 to 1989, where his practice mostly involved defending oil and gas companies. In 1989, George H.W. Bush appointed Judge Southwick to a position in the civil division of the Department of Justice. Judge Southwick was a member of the Federalist Society from 1990 to 1998. In 1994, Judge Southwick was elected one of the first ten judges on the newly-created Mississippi Court of Appeals. He served on the court until 2006, when he declined to seek reelection and was subsequently nominated for a Mississippi district court vacancy. His district court nomination expired at the end of the 109th Congress.

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 Pickering's nomination was subsequently withdrawn and President Bush nominated Michael Wallace. Wallace's controversial nomination was also later withdrawn.

At the end of the Clinton presidency, Republican senators held open two seats on the Fifth Circuit, blocking two Clinton nominees. Indeed, 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." President Clinton nominated judges to fill both seats well before the end of his presidency: in one case, he submitted a nominee in mid-1997; in the other he submitted a nominee in early 1999. This political maneuver by the Republican Senate allowed President Bush to later fill these seats with Priscilla Owen and Edith Brown Clement, both deeply conservative jurists.

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 Leslie 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.

Background on the Mississippi Court of Appeals

There are ten judges on the Mississippi Court of Appeals, which is the intermediate appellate court of Mississippi. It handles primarily state law cases, such as torts, contracts, criminal law, and workers' compensation matters. Judge Southwick's record includes virtually no cases involving federal constitutional law, civil rights, employment discrimination, or environmental law. However, his state law record, particularly in torts and employment cases, raises questions as to how he will approach federal law matters pitting businesses and powerful interests against wronged consumers, workers and other vulnerable parties.

Judge Southwick Voted Consistently Against Consumers and Workers In Divided Torts and Employment Decisions

Of all the judges on the Mississippi Court of Appeals, Judge Southwick received the highest rating of any judge on the Mississippi Court of Appeals from a business advocacy group based on his votes in cases involving businesses. Indeed, in 160 out of 180 published decisions involving state employment law and torts case in which at least one judge dissented, Judge Southwick voted against the injured party and in favor of business interests, such as corporations or insurance companies, in whole or in part. Thus Judge Southwick has an *89 percent* record of voting against workers, consumers and other victims in divided decisions.

Judge Southwick's Harsh Interpretation of Procedural Rules Has Benefited Special Interests

- *Cannon v. Mid-South X-Ray Co.*¹ In an 8-2 dissent, Judge Southwick argued that a statute of limitations barred Annie Cannon from seeking compensation from her employer and a chemical company for illnesses that included severe headaches, seizures and burning sensations, which were related to her exposure to chemicals as darkroom technician. In an 8-2 dissent, Southwick argued that a three year statute of limitations had expired because Cannon first experienced her symptoms in 1983, even though a doctor did not tell her that her health issues were connected to her work until 1993. Cannon filed suit in 1995. It is unclear how she, a layperson, could have attributed her symptoms to her job conditions absent medical advice.
- *Goode v. Synergy Corporation.*² The Goode family sued Synergy Corporation after a fire destroyed their home and killed their granddaughter. A jury found for Synergy in a trial where Synergy argued that the fire was caused by a gas leak in the water heater on which it had not performed any work. Post-trial, a Synergy employee who had just learned of the case, approached the Goodes and acknowledged he had worked on the

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

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

water heater. The Goodes moved for a new trial. Judge Southwick joined an 8-2 dissent arguing that the plaintiffs' lack of due diligence prevented them from uncovering this evidence prior to trial. Curiously, the dissent dismissed the fact that the plaintiffs requested information about the case during the discovery process, and that Synergy did not, under oath, mention having worked on the water heater.

Judge Southwick Went Out of His Way to Express Troubling Views on Workers' Rights

- *Dubard v. Biloxi, H.M.A.*³ Judge Southwick's dissenting opinion offered a digression completely unnecessary to deciding the legal merits of the case. He extolled employment-at-will, a doctrine which provides that employers should be able to fire employees for virtually any reason. 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. Gratuitous comments such as this one cast doubt on Judge Southwick's ability to divorce his own views from his judicial role to follow the law in labor and employment cases: "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."

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

- *Richmond v. Mississippi Dep't of Human Services.*⁴ Bonnie Richmond, a social worker for the Mississippi Department of Human Services was fired when she referred to an African American co-worker as a "good ole n*****" at a meeting that included top agency executives. Judge Southwick joined a 5-4 decision that found that, taken in context, this slur was an insufficient ground to terminate her employment in part because it "was not motivated out of racial hatred or racial animosity directed toward a particular co-worker or toward blacks in general." As 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."

In Family Law Case, Judge Southwick Joined Strikingly Homophobic Concurrence

- *S.B. v. L.W.*⁵ In this case, Judge Southwick joined a concurrence marked by its homophobia. It stated that the "choice" to engage in homosexuality comes with consequences, up to and including the consideration of "the homosexual lifestyle" as a determining factor in child custody cases.

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

⁴ 1998 Miss. App. LEXIS 637 (Miss. App. Ct. 1998), *rev'd* 745 So. 2d 254 (Miss. 1999).

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