



PRELIMINARY REPORT ON THE NOMINATION OF STEVE A. MATTHEWS TO THE FOURTH CIRCUIT COURT OF APPEALS

On September 6, 2007, President Bush nominated Steve A. Matthews, currently the managing director of Haynsworth Sinkler Boyd, South Carolina's fourth largest law firm, to the United States Court of Appeals for the Fourth Circuit. Mr. Matthews has no prior experience as a judge. If confirmed, Mr. Matthews would replace Chief Judge William "Billy" Wilkins of Greenville, who assumed senior status on July 1, 2007. A substantial majority of the American Bar Association's Standing Committee on the Federal Judiciary has rated Mr. Matthews as qualified, and a minority rated him not qualified.

BRIEF BACKGROUND ON THE FOURTH CIRCUIT

The Fourth Circuit is based in Richmond, Virginia, and hears appeals from federal district courts located in South Carolina, North Carolina, Virginia, West Virginia, and Maryland. In recent years, the Fourth Circuit has been considered the most conservative circuit court in the country. Today, however, the Fourth Circuit is more notable for being the court with the most vacancies. Currently, the 15-judge court has 5 vacancies. Of the ten judges currently serving on the court, five were nominated by Republican Presidents, four were named by Democratic Presidents, and one, Judge Roger Gregory, was nominated by President Clinton as a recess appointment and then later confirmed by the Senate during President George W. Bush's presidency. With one-third of its seats now standing vacant, the character of this circuit could shift dramatically in the next few years.

The Bush administration is very aware of the political implications of judicial nominations and has pursued a widely acknowledged and largely successful campaign of packing this court with conservative judges over the past seven years. In addition to Mr. Matthews, President Bush recently nominated Robert J. Conrad, Jr., of North Carolina and E. Duncan Getchell of Virginia to seats on the Fourth Circuit. In nominating Mr. Getchell, President Bush ignored the bipartisan recommendations of Mr. Getchell's home state Senators, Warner and Webb, a decision that ultimately derailed Mr. Getchell's confirmation. In light of the Getchell nomination, many commentators, including President Bush's supporters, have questioned whether President Bush's top priority is filling vacancies on this understaffed court or mollifying his conservative base by picking a fight with the Senate over ultra-conservative nominees.

BRIEF BIOGRAPHY OF STEVE A. MATTHEWS

1. Education and Career

Steve A. Matthews was born in South Carolina in 1956. He received his B.A. in History from the University of South Carolina in 1977, graduating *magna cum laude*. He earned his J.D. from Yale Law School in 1980. During his time at the University of South Carolina, Mr. Matthews completed a semester at the University of Warwick in Coventry, England, where for the first time he lived outside of South Carolina. After law school, Mr. Matthews briefly worked at the law firm of Boyd, Knowlton, Tate & Finlay (now Haynsworth Sinkler Boyd, P.A.). In 1981, he began work at the firm of Dewey Ballantine in Washington, D.C., where he practiced corporate law for five years. Mr. Matthews left Dewey Ballantine in 1985 to work at the Department of Justice under Attorney General Meese.

During his three years at the Justice Department, Mr. Matthews served as the Special Counsel to the Assistant Attorney General for Civil Rights (1985-6), Deputy Assistant Attorney General for Judicial Selection (1986-8), Special Assistant to Attorney General Meese for Iran-Contra Matters (1987), and Executive Assistant to Attorney General Meese (1988). Mr. Matthews' duties included advising President Reagan and the Attorney General on federal judicial nominees, and later in his tenure Mr. Matthews provided legal advice to the Attorney General when he was investigated for his role in the Iran-Contra scandal.¹ While at the Justice Department, Mr. Matthews also worked with Fred Fielding, now White House Counsel, who was then counsel to President Reagan.

In 1988, Mr. Matthews returned to South Carolina to join the firm of Haynsworth Sinkler Boyd, where he is currently the firm's managing director. His areas of practice include Intellectual Property, Business and Commercial Litigation.

2. Justice Department Documents

Mr. Matthews held various positions in the Reagan Justice Department from 1985 to 1988. Between 1985 and 1986, Mr. Matthews served as the Special Counsel to the Assistant Attorney General for Civil Rights. Mr. Matthews' files from this period include an unsigned document in which the author, presumably Mr. Matthews, criticized the *amicus* brief filed by the department on behalf of the petitioners in *Meritor Savings Bank, FSB v. Vinson*.² These files also include a memo, signed by Mr. Matthews, commenting on the Justice Department's proposed changes to the structure and composition of its Honor Program Hiring Committee, of which Mr. Matthews was then a member.³

a. Unsigned Document Criticizing the Department's *Amicus* Brief in *Vinson*

¹ In September 2007, Alliance for Justice and People for the American Way submitted a request under the Freedom of Information Act for documents written by Matthews during this period.

² 477 U.S. 57 (1986).

³ All documents referenced in this section are on file with Alliance for Justice.

In *Vinson*, a female bank employee was fired from her job. She filed an action under Title VII of the Civil Rights Act of 1964 alleging that her supervisor frequently pressured her to have sexual relations with him, which she eventually acquiesced to on approximately 40-50 occasions. She also alleged that the same supervisor had created a hostile work environment by fondling her in front of other employees, following her into the restroom, exposing himself to her, and forcibly raping her on a number of occasions. The Supreme Court affirmed the judgment of the court of appeals, which held that a claim of “hostile environment” sexual harassment is a form of sex discrimination that is actionable under Title VII of the Civil Rights Act of 1964, and found that the employee in this case had adequately established such a claim. The Court also held that Title VII can be violated by sexual harassment that leads to non-economic injury. Thus, as in this case, a Title VII violation may exist even when the victim received appropriate promotions and raises.

In the memo found in Mr. Matthews’ files, the author (presumably Mr. Matthews) took issue with this interpretation and instead questioned the Justice Department’s acceptance, in its *amicus* brief, of the “incomprehensible” position that “creation of an intimidating, hostile, or offensive work atmosphere through sexual harassment is a violation of Title VII.” The memo goes on to reject that sexual harassment can ever be a Title VII violation, stating:

“[M]ore significantly, sexual harassment is almost certainly not discrimination in employment. That is, harassment will almost never have anything to do with an intent to deprive women of job benefits of any kind... [;] it is less plausible [than in racially motivated harassment] to believe that fellow employees would intend to force out an attractive companion.”

In short, the memo argues that sexual harassment, while perhaps an unfortunate workplace reality, can never violate Title VII. It reasons that harassment cannot be described as “discrimination in employment,” as one who sexually harasses a fellow employee would *want* to keep that coworker nearby—a desire that would actually protect the harassment victim’s employment. Such an analysis would allow a Title VII claim to go forward only when the perpetrator’s *intent* was to make the victim leave his or her job; the fact that continued harassment or even sexual assault might make the victim’s daily work life unbearable would be irrelevant.

Perhaps even more disconcerting than the extremely limited view of Title VII advocated by the document’s author is the author’s willingness to dismiss all relevant precedents in reaching his conclusions. Specifically, when outlining his objections to the *amicus* brief, the memo’s author document seems incredulous that the brief “simply follows the precedents of the circuit court—never endorsed by the Supreme Court—and the rulings of the EEOC in concluding that sexual harassment does state a claim under Title VII.” In this way, the memo’s author demonstrates disregard for both the interpretation of the administering agency and that put forth by several circuit courts.

b. Memo on Proposed Changes to Honor Program Hiring Committee

On January 30, 1986 Mr. Matthews drafted a memo in response to an internal report that recommended structural changes to the Honor Program Hiring Committee, of which Mr. Matthews was then a member.

Mr. Matthews began his memo by questioning whether a report recommending changes to the committee was even appropriate as, in his view, the report was only written in response to a *perceived* problem “that the Honors Program hiring process will now be based more on political rather than merit considerations.” After making his objection to the report’s existence known, Mr. Matthews continued his memo by criticizing the recommendations put forth in the report. Most significantly, Mr. Matthews objected to the inclusion in the report of the following paragraph, which emphasized the need for diversity on the hiring committee:

“Efforts should also be made to obtain some representatives of both sexes and the different racial and ethnic groups. Such a cross section will aid in recruiting efforts as committee members interview across the country and may add some perspective to the decisionmaking process which might otherwise be lacking.”

In Mr. Matthews’ view, though “diversity of perspective” is “critical,” he felt the above statement inappropriate in that it “denies the individuality of particular members of a given race or gender.” Instead, he suggested that the report limit itself to a more truncated statement favoring diversity.

2. Political Activities and Associations

Mr. Matthews is a frequent and consistent contributor to the Republican Party. Since 1994 he has donated almost \$24,000 to various candidates, with the majority going to his home state Senators, James DeMint and Lindsey Graham. Additionally, Mr. Matthews is an active member and former South Carolina State Chapter President of the conservative Federalist Society. In the organization’s 2006 annual report, the Federalist Society lists Mr. Matthews as a “Madison Club member,” which means he donated between \$1000 and \$1,999 to the organization during that fiscal year.⁴ The Federalist Society also lists Mr. Matthews as a contact person for journalists seeking “expertise on legal issues from a conservative or libertarian perspective.” Mr. Matthews is listed as an expert on constitutional law, copyright law, the judiciary, legal ethics, state/federal relations, takings of private property for public use, and trademark law.⁵ In 2003, he served on the Federalist Society Judicial Appointments White Paper Task force, which produced a paper entitled *The Case for Judicial Appointments*. Mr. Matthews, however, is not listed as an author of this document.⁶ He is also a member of the Philadelphia

⁴ The Federalist Society, available at http://www.fed-soc.org/doclib/20070511_2006AnnualReport.pdf.

⁵ The Federalist Society, available at http://www.fed-soc.org/docLib/20070326_JournalistGuide.pdf.

⁶ The Federalist Society, available at http://www.fed-soc.org/publications/pubID.89/pub_detail.asp.

Society and, until his nomination to the Fourth Circuit; he served as an officer and board member of the Landmark Legal Foundation.

The Landmark Legal Foundation regularly files lawsuits attacking labor unions, particularly the National Education Association, and opposes efforts to desegregate public schools. The organization has fought for legislation that would allow parents to direct public education funding toward their children's private schools. Last year, while Mr. Matthews was still a member of its board, the Landmark Legal Foundation nominated Rush Limbaugh for the 2007 Nobel Peace Prize, calling him "the foremost advocate for freedom and democracy in the world today." Rush Limbaugh also serves as an unpaid member of Landmark's Board of Advisors. Landmark Legal's president, Mark R. Levin, wrote a book entitled *Men in Black: How the Supreme Court is Destroying America*, in which he argues that the federal judiciary is "subverting democracy" in favor of its "own liberal agenda" and is consequently "robbing us of our freedom."⁷ Additionally, in a chapter entitled "Socialism from the Bench,"⁸ Levin praises as "merely upholding the Constitution" the Supreme Court's long-discredited 1936 opinion in *Carter Coal Co.*, which held that Congress lacks authority to regulate employer-employee relations, including "wages, working conditions, the right of collective bargaining, etc."⁹ This extremely limited view of Congressional constitutional authority under the Commerce Clause would not only invalidate federal laws and agency regulations that protect worker safety and wages, it would also target other laws that are based on the Commerce Clause. These include laws to combat global warming as well as long-established environmental, civil rights, health, and safety, laws and other legal protections for workers and consumers. In the book, Levin thanks Steve Matthews by name for "support[ing] me in everything I do."¹⁰

SIGNIFICANT LITIGATION

Though Mr. Matthews has practiced law since 1980, his courtroom experience is sparse. He is the chief counsel in only nine reported cases argued in either state or federal court. The bulk of these cases were disputes involving municipalities and local utility providers over issues of fees and taxes. Mr. Matthews has no criminal law experience and has litigated only one case involving a significant issue of federal law.

Sundeman v. Seajay Society, Inc.:¹¹ Mr. Matthews represented the Seajay Society pro bono in a suit by Mr. Sundeman, who sought to recover a manuscript and various other documents from the society that he claimed were assets of his late wife's estate. Mr. Sundeman also sought damages and injunctive relief for the society's alleged violation of the estate's copyright. The district court determined that the society's use of the manuscript was permissible under the "fair-use" exception to copyright infringement, and the Fourth Circuit affirmed.

⁷ Mark R. Levin, *Men in Black: How the Supreme Court Is Destroying America*, 2005, inside flap.

⁸ *Id.*, at 131.

⁹ *Carter v. Carter Coal Co.*, 298 U.S. 238, 308 (1936).

¹⁰ *Men in Black*, at 239.

¹¹ 142 F.3d 194 (4th Cir. 1998).

CONCLUSION

No nominee comes to the Senate Judiciary Committee with a presumption of confirmation. As Senator Leahy himself has stated, the Senate's constitutional "advice and consent" role is a serious responsibility, by which "those 100 of us privileged to serve in the Senate are entrusted with protecting the rights of 280 million of our fellow citizens." Therefore, the committee must thoroughly review each nomination in order to uphold the integrity of this constitutional duty.

Steve A. Matthews has served as lead counsel in only nine published cases. He has authored no published articles or speeches that shed light on his judicial philosophy and has never before served as a judge. His slim record undermines the committee's ability to perform its constitutional role of providing advice and consent on judicial nominees. Indeed, Mr. Matthews' main qualifications for a lifetime appointment to the federal judiciary are a long-term commitment and large contributions to the Republican Party and a strong belief in an extremely conservative agenda. His dedication to this ideology is evidenced by his leadership in various conservative legal organizations, including the Federalist Society, the Philadelphia Society, and the Landmark Legal Foundation, an organization whose president believes the federal judiciary is undermining American society and endangering our freedom.

After reviewing Matthew's record, Alliance for Justice does not believe that he is qualified to serve on the U.S. Court of Appeals for the Fourth Circuit. The committee should perform its constitutional duty and reject this nomination.