



## POST-HEARING REPORT ON THE NOMINATION OF LESLIE SOUTHWICK TO THE FIFTH CIRCUIT

The Senate Judiciary Committee held a hearing on Judge Leslie Southwick's nomination to the Fifth Circuit on May 10, 2007. Judge Southwick's record as a judge on the Mississippi Court of Appeals raises serious doubts about his fitness to serve on the federal appellate bench. His consistent votes against the interests of injured workers and consumers in divided decisions paint a picture of a judge who has favored powerful interests over those of vulnerable workers and consumers in close cases. And troubling decisions in cases involving race and sexual orientation call into question his commitment to equal justice and dignity.

At the hearing and in written follow-up questions, senators afforded Judge Southwick ample opportunity to address these doubts.<sup>1</sup> However, in neither his live testimony nor his written responses has Judge Southwick allayed the serious concerns over his record. Indeed, when asked pointedly by Senator Durbin (D-IL) during live questioning if he could think of one example of an unpopular decision he made in favor of the powerless, the poor, minorities or the dispossessed, Judge Southwick responded, "no." Judge Southwick should not be confirmed to the Fifth Circuit, and the Judiciary Committee should reject his lifetime appointment to that court.

### I. RACIAL INSENSITIVITY

In response to a written question posed by Senator Durbin (D-IL), Judge Southwick indicated that he could not find a single non-unanimous case, of the more than 7000 opinions that he wrote or joined, in which he voted in favor of a civil rights plaintiff or wrote a dissent on behalf of a plaintiff. In his written answers Judge Southwick, while noting that his court did not hear many civil rights cases, mentioned two unanimous decisions which supposedly vindicated his civil rights record: *Clary v. Lee*,<sup>2</sup> and *Mid-Delta Home Health, Inc. v. Robertson*.<sup>3</sup> However, it is a stretch to say that these cases indicate a pro-civil rights view. *Clary* involved a charge of discrimination by a white prison employee, which was rejected by Judge Southwick and the court. *Mid-Delta* involved a workers' compensation claim in which the claimant argued mental injury arising in part from racial harassment. Judge Southwick voted to uphold the claimant's award from the workers' compensation board, but only in part. The court in fact reduced her benefit level.

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<sup>1</sup> Senators Whitehouse (D-RI), Kennedy (D-MA), Feingold (D-WI), Durbin (D-IL), Hatch (R-UT), Brownback (D-KS), and Coburn (D-OK), were in attendance. Senators Whitehouse, Kennedy, Feingold, Durbin, and Leahy submitted supplemental question which were answered in writing by Judge Southwick.

<sup>2</sup> 763 So. 2d 921 (Miss. Ct. App. 2000)

<sup>3</sup> 749 So. 2d 379 (Miss. Ct. App. 1999)

### A. *Richmond v. Mississippi Dep't of Human Services*

Judge Southwick joined the very troubling opinion, *Richmond v. Mississippi Dep't of Human Services*,<sup>4</sup> which upheld the reinstatement of an employee who used a vile racial epithet at work, referring to a coworker as a “good ole n\*\*\*\*\*.”<sup>5</sup> This case is one of the few which shed light on Judge Southwick’s views on civil rights, and Committee members questioned him extensively about it. His responses failed to offer a convincing explanation for the position he took in *Richmond*.

In answer to several of the questions expressing concern about *Richmond*, Judge Southwick explained that he joined the majority opinion largely out of deference to the state’s Employee Appeals Board, which was to be affirmed if supported by substantial evidence.<sup>6</sup> In his written answers, Judge Southwick stated that he joined the *Richmond* majority because the Board’s decision was supported by “some evidence” that the slur “had not so affected the workplace as to require termination.” In his live testimony, Judge Southwick noted that he “didn’t see evidence in the record” that the word was “so serious that every workplace is permanently damaged.” In fact, as the dissent in *Richmond* argued, *specific evidence of harm should have been unnecessary* because the word itself is so “inherently offensive.” Judge Southwick’s attempt to justify upholding the Board’s decision based on the lack of evidence of the word’s harmfulness thus strains credulity.

Judge Southwick was given numerous opportunities to distance himself from this opinion at his hearing. He was asked whether, in hindsight, he should have written a separate opinion in the case giving more weight to the offensiveness of the epithet. In reply, Judge Southwick characterized the opinion as “carefully written,” and later said the opinion he joined “treated the issue well.” While no one expected Judge Southwick to repudiate the opinion, he failed to offer even the slightest criticism of its reasoning, instead giving the opinion deliberate approbation.

### B. Cases Involving Allegations of Discrimination in Jury Selection

Judge Southwick offered little explanation for his disturbing pattern in jury discrimination cases of upholding prosecutors’ challenges levied against defendants’ strikes of white jurors while rejecting defendants’ claims that prosecutors struck African-American jurors for discriminatory reasons. Indeed, rather than arguing why this pattern is not troubling, he began his answer to a written question on this issue by stating that the other judges exhibited the same conduct: “Whatever pattern can be found in dozens of cases, it is a pattern that applies to all the judges on the court.” However, in some cases, dissenting opinions on his court have criticized this disparity.<sup>7</sup> Moreover, considering the seriousness of this charge of disparate

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<sup>4</sup> 1998 Miss. App. LEXIS 637 (Miss. Ct. App. 1998), *rev’d* 745 So. 2d 254 (Miss. 1999).

<sup>5</sup> While some of Judge Southwick’s problematic decisions are ones he joined but did not author, as he explained in response to questioning by Senator Feingold (D-WI) he was permitted to write his own opinion in every case in which he participated if he disagreed with the other opinions. In addition, he often worked with the author of the opinion he signed onto, to craft language he could agree with. If he was still not happy with the language, he could and often would write his own opinion. Therefore, even those opinions he merely joined still reflect his reasoning and legal views.

<sup>6</sup> Judge Southwick, in his written answers, suggested that the Board’s decision was to be upheld if supported by any evidence; but in the *Richmond* decision, the court said that *substantial evidence* was required.

<sup>7</sup> See *Webb v. Mississippi*, 877 So. 2d 399 (Miss. Ct. App. 2003).

treatment of claims of discrimination against white jurors versus claims of jury discrimination, Judge Southwick's main response that the other judges on his court are guilty of the same pattern seems flimsy indeed.

## **II. DIMINISHING THE RIGHTS OF LESBIAN AND GAY AMERICANS**

Judge Southwick was also questioned extensively about *S.B. v. L.W.*,<sup>8</sup> a case in which he joined a concurrence that went well beyond the majority opinion – which allowed sexual orientation as a mere factor in child custody decisions – to argue that a mother's sexual orientation alone was a legitimate reason to deny her custody of her children. Notably, while urging in his hearing answers that he followed what he believed was the intent of the legislature, Judge Southwick did not discuss the dissent in *S.B. v. L.W.* nor the Mississippi Supreme Court case<sup>9</sup> decided six weeks after *S.B. v. L.W.*, both of which criticized the placement of too much emphasis on a parent's sexual orientation. Indeed these opinions call into question Judge Southwick's contention that the legislature of Mississippi intended one's sexual orientation to be a factor in child custody cases.

## **III. LACK OF SYMPATHY FOR CONSUMERS AND WORKERS**

In response to written questions about his consistent anti-consumer and anti-worker record, Judge Southwick responded to the assertion that he had voted against the injured parties in 160 out of 180 divided published opinions. Judge Southwick suggested it might be fairer to consider his many unanimous opinions where he ruled for workers and consumers. However, this contention overlooks the fact that non-unanimous opinions tend to involve the most closely contested and difficult issues, and they point to areas of the law in which there is more room for interpretation, where the facts and law did not compel the position taken by Judge Southwick.

## **IV. CONCLUSION**

The Bush administration has shown determination to push the conservative Fifth Circuit – once a court that courageously stood up for civil rights – even farther to the right. In fact, Judge Southwick's nomination, after the failed nominations of Judge Charles Pickering and Michael Wallace led Derek Johnson, the president of the Mississippi NAACP, to say “we must conclude that the administration is determined to place a person hostile to civil rights in the Mississippi seat.”<sup>10</sup> Judge Southwick's record indicates a lack of sympathy for racial minorities, gays and lesbians, workers and consumers. The Senate Judiciary Committee should reject his nomination.

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<sup>8</sup> 793 So. 2d 656 (Miss. Ct. App. 2001)

<sup>9</sup> *Hollon v. Hollon*, 784 So. 2d 943 (Miss. 2001).

<sup>10</sup> Ana Radelat, *Bush's 5<sup>th</sup> Circuit Pick Faces Senate Scrutiny Today*, CLARION-LEDGER, May 10, 2007.