



## **BLACK LEADERSHIP FORUM, INC.**

June 6, 2007

The Honorable Patrick Leahy  
Chairman, Senate Judiciary Committee  
224 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Arlen Specter  
Ranking Member, Senate Judiciary Committee  
152 Dirksen Senate Office Building  
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Specter:

The undersigned members of the Black Leadership Forum, Inc. urge you to reject the nomination of Leslie Southwick to the Court of Appeals for the Fifth Circuit.

The Black Leadership Forum is a twenty-seven-year-old confederation of this nation's most prominent civil rights and service organizations and their leaders. The Black Leadership Forum regularly monitors nominations to the federal courts, paying particular attention to the circuits located in the Deep South in which many African-American citizens live and which therefore play a prominent role in deciding the course of our nation's civil rights jurisprudence. Perhaps more than most, we understand the importance of the federal courts in protecting the rights and advances for which our organizations and leaders have fought so hard throughout the years.

The Black Leadership Forum strongly opposes the confirmation of Leslie Southwick to a seat on the Fifth Circuit. The Fifth Circuit is comprised of Mississippi, Louisiana and Texas. The circuit has the highest percentage of minority residents (44%) of any circuit. More may be at stake here for the future of civil rights than in any other circuit. The court issues seminal decisions in voting rights, employment discrimination, school desegregation, affirmative action, public accommodations, discriminatory jury selection and the death penalty. In recent years, the court has grown increasingly hostile toward civil rights. The court desperately requires balance that can be accomplished only by confirming a moderate nominee. Leslie Southwick is not such a nominee.

The Mississippi seat on the Fifth Circuit is no stranger to controversy. President Bush has repeatedly nominated to this seat persons with records of hostility toward civil rights. This is the seat to which Judge Charles Pickering was nominated in 2001. The Senate rejected Pickering based on his civil rights record. President Bush then gave him a recess appointment, which expired in 2004. Shortly thereafter, President Bush nominated Michael Wallace to the same seat. After the American Bar Association found Mr. Wallace to be "unqualified," largely because of his judicial temperament regarding civil rights issues, Wallace withdrew his nomination.

To our great dismay, Leslie Southwick also possesses an extremely troubling record on civil rights. As a state appellate court judge, Southwick has not had occasion to rule on many civil rights issues, which are more likely to be filed in federal court. However, *all* signs in the record he has developed point to a probable retreat on civil rights. There are no redeeming or countervailing cases suggesting that Judge Southwick would take a balanced approach to interpreting civil rights laws once on the Fifth Circuit.

The most alarming case in Judge Southwick's civil rights record is *Richmond v. Mississippi Department of Human Services*, 1998 Miss. App. LEXIS 637 (Miss. Ct. App. 1998). Southwick joined a decision reinstating a white employee who was fired by a Mississippi state agency for using the word "nigger" toward an African-American coworker. At a business conference, the white employee called the black employee "a good ole nigger" and used the term toward the employee the next day back at the office.

The ruling joined by Judge Southwick made remarkable conclusions. (It was the subject of an Associated Press article, *Slur Didn't Merit Firing*, JACKSON CLARION-LEDGER, Aug. 5, 1998.) The opinion credited findings by a hearing officer, who had concluded that calling the employee "a good ole nigger" was equivalent to calling her "teacher's pet." *Richmond*, 1998 Miss. App. LEXIS 637, at \*24. The opinion also stated that the employee "presented proof that her remark, though undoubtedly ill-advised and indicative of a rather remarkable insensitivity on her part, was not motivated out of racial hatred or racial animosity directed toward a particular co-worker or toward blacks in general." *Id.* at \*13. The opinion noted that the remark was "intended to be a shorthand description of the relationship existing between the worker and a supervisor." *Id.* at \*9.

Judge Southwick's colleagues vigorously dissented. They found that it "strained credulity" for the hearing officer to compare calling the employee "a good ole nigger" with calling her "teacher's pet." *Id.* at \*26 (King, J., dissenting). The dissent wrote: "There are some words, which by their nature and definition are so inherently offensive, that their use establishes the intent to offend." *Id.* at \*26. The dissent concluded: "The hearing officer's and majority opinion seem to suggest that absent evidence of a near race riot, the remark is too inconsequential to serve as a basis for dismissal. Such a view requires a level of myopia inconsistent with the facts and reason." *Id.* at \*28.

The Mississippi Supreme Court unanimously reversed the opinion joined by Southwick. 745 So. 2d 254 (Miss. 1999). No one on the Supreme Court thought that the ruling was correct. The Court remanded the case for findings regarding the penalty, and some members would have upheld the termination. *Id.* at 262 (Banks, J., concurring in part and dissenting in part).

The significance of this ruling cannot be overstated. In a sign of progress for Mississippi, a state agency chose to fire an employee for using the term "nigger" in the workplace. However, Judge Southwick effectively impeded that progress by voting to reinstate the employee. In joining the ruling and the reasoning, he condoned use of that word in the workplace. There is simply no other word that embodies the virulence of racism as the word "nigger" does. As Judge Southwick's colleagues noted in dissent:

“The word ‘nigger’ is, and has always been offensive. Search high and low, you will not find any non-offensive definition for this term.” 1998 Miss. App. LEXIS 637, at \*26.

Judge Southwick’s performance at his hearing before the Senate Judiciary Committee only confirmed his lack of sensitivity to racial issues. Southwick repeatedly refused to distance himself from the *Richmond* ruling and then did so only grudgingly after persistent questioning from several Senators. Importantly, this is the *only* ruling by Judge Southwick in a case addressing race discrimination in employment, which is the most common type of civil rights case heard by the Fifth Circuit. Accordingly, this is the only glimpse we have into Southwick’s judicial philosophy in a pivotal area of civil rights law. Given Judge Southwick’s rulings overwhelmingly in favor of employers and corporate defendants in other cases, we find it distressing that, in one of the few instances in which he ruled *for* an employee, the employee used “nigger” in the workplace.

We are also troubled by Judge Southwick’s record in cases involving race discrimination in jury selection. Under *Batson v. Kentucky*, 476 U.S. 79 (1986), parties are prohibited from exercising peremptory challenges to remove jurors if the reasons offered for such strikes, though facially neutral, are seen as pretexts for racially based motivations. Generally, Southwick has upheld the rejection of claims by defendants that the prosecution was motivated by race discrimination in striking African Americans from juries. However, Southwick appears to have less difficulty finding race discrimination when the prosecution makes “reverse *Batson*” claims that defendants have struck white jurors for racial reasons. Southwick’s record on this issue is particularly troubling for a Fifth Circuit nominee. In its current composition, the Fifth Circuit is legendary for its extremist rulings in jury discrimination cases. In a well-known case, *Miller-El v. Dretke*, the Supreme Court reversed the Fifth Circuit’s ruling that a defendant had not demonstrated a *Batson* violation in the face of evidence “too powerful to conclude anything but discrimination.” 545 U.S. 231, 265 (2005).

In *McWilliams v. Mississippi*, 1998 Miss. App. LEXIS 409 (Miss. Ct. App. 1998), Southwick was strongly criticized by his colleagues for upholding a finding that a prosecutor’s use of five of six peremptory challenges against African Americans was not racially motivated. The dissent found that the prosecutor’s reasons for the strikes, when viewed together, suggested a “pattern of malevolence” and appeared to be “racially disposed.” *Id.* at \*13-14. (King, J., dissenting). The dissent continued: “The majority summarily dismisses [the] claim of discriminatory jury selection by saying, ‘the reasons given by the State are among those which the supreme court has previously found to be race neutral.’ In my opinion, more is required of this Court, and more was required of the trial court. ... The requirement of specific on the record findings means more than merely reaching the conclusion that these reasons are facially race neutral. The trial court has an obligation to also consider whether the stated reason is merely a pretext for discrimination. Even reasons which upon their face are race neutral, may be a pretext to mask a discriminatory motive. ... The pattern of strikes and reasons offered appear to be sufficiently dubious to suggest pretext.” *Id.* at \*6-7.

In *Robinson v. Mississippi*, 1999 Miss. App. LEXIS 320 (Miss. Ct. App. 1999), dissenting judges criticized another opinion joined by Southwick holding that a *Batson* hearing was properly conducted. The dissent wrote that, while the reasons offered by the prosecutor were race-neutral on their face, the trial court did not discharge its obligation to determine whether the reasons were a pretext for race discrimination. “When these matters are viewed as a whole, it is highly indicative of a pretextual motive, a motive which should not be credited by the allowance of these challenges.” *Id.* at \*31-32 (King, J., dissenting). On appeal, the Mississippi Supreme Court agreed with the dissent and remanded the case on the ground that a proper *Batson* hearing had not been conducted. 761 So. 2d 209 (Miss. 2000). The court wrote: “It is clear from the record that the trial court did not make the necessary findings as required by [caselaw].” *Id.* at 213.

Even Southwick’s own colleagues have confronted him about using a double standard for prosecutors and defendants with regard to challenges to jurors based on race. In *Bumphis v. Mississippi*, No. 93-KA-01157 (Miss. Ct. App. Mar. 12, 1996), a prosecutor successfully challenged the defense’s strikes of white jurors as racially motivated. Writing the opinion, Southwick remanded the case for findings regarding the reasons for rejecting the jurors. Slip. op. at 49. However, the dissent considered such findings unnecessary because the prosecution had made no effort to show pretext in the reasons offered by the defense, as required under *Batson*. The dissent accused Southwick of “establishing one level of obligation for the State, and a higher one for defendants on an identical issue.” *Bumphis*, No. 93-KA-01157 (Miss. Ct. App. July 2, 1996), slip. op. at 237 (King, J., dissenting). The dissent wrote:

The majority opinion appears to either misapprehend or apply unequally the mandates of *Batson*. The defense is not obligated to prove that its challenges are not racially motivated. Instead, a defendant is only required to articulate a race-neutral reason for exercising the challenge. If the State felt that the challenges were in fact predicated upon race, it then bore the burden of establishing that the stated reasons were (1) pretextual and (2) in fact based upon race. This is the standard which we have applied to the State. Justice requires that it be applied with equal measure to the defense.

*Id.* at 236-37. (After remand, the appellate court upheld the trial court’s ruling denying the defendant’s two peremptory challenges. No. 93-KA-01157 (July 2, 1996).)

Judge Southwick’s differential treatment in considering racial challenges to jurors is highlighted in a case in which the prosecution and defendant objected to each other’s challenges. In *Webb v. Mississippi*, 877 So. 2d 399 (Miss. Ct. App. 2003), Southwick and the majority upheld the prosecution’s strikes of two African Americans on the ground that the prosecution had accepted four African-American jurors and had articulated non-racial reasons that the defendant did not rebut: “The reasons given by the State for rejecting these jurors are that one lived in a high crime area and the other had an incomplete juror card (not employed). These reasons are included in the list of non-racial reasons given in [*Davis v. Mississippi*].” *Id.* at 404. In sharp contrast, Southwick

refused to accept the race neutral reason, relating to the juror's employment, offered by the defendant for striking a white juror: "[A]lthough employment is cited in the *Davis* case as being a race neutral reason, the judge is afforded great deference and he is in the best position to observe the attorneys as well as all the jurors. ... [A] judge must look at all of the evidence before him. Therefore, we find this issue is without merit." *Id.* at 405-06 (citations omitted). In dissent, Judge Irving highlighted the inconsistency:

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. ... Without a doubt, it cannot be said that a defendant has received a fair trial when he has been subjected to an uneven playing field in the jury selection process, one of the most important components in the whole process of trial by jury.

*Id.* at 406 (Irving, J., dissenting).

Finally, we are troubled by the manner in which the Senate has proceeded with the Southwick nomination. Several of our organizations objected to holding a hearing on Judge Southwick before all of his rulings were disclosed. This position is a lifetime appointment. If confirmed, Southwick will often provide the final word on the civil rights of millions of minority residents within the Fifth Circuit. Accordingly, it is imperative that the Senate knows everything about the nominee that may be relevant to his qualifications for the job. Certainly, his entire record on Mississippi's Court of Appeals is relevant to the Senate's consideration. It is unwise to proceed with consideration of this nomination when hundreds of rulings that he authored or joined have not been made available. Given the distressing aspects of his appellate court record about which we are already aware, it is all the more important to ensure that the Senate has the entire record before providing its "advice and consent" on this nomination.

For these reasons, we urge you and each member of the Senate Judiciary Committee to reject the Southwick nomination.

Respectfully yours,

NAACP Legal Defense and Educational Fund, Inc.  
National Association for the Advancement of Colored People (NAACP)  
National Urban League  
Rainbow/PUSH Coalition