AFJ NOMINEE REPORT

ELIZABETH L. BRANCH

U.S. Court of Appeals for the Eleventh Circuit

CONTENTS

INTRODUCTION

On September 7, 2017, President Trump nominated Elizabeth L. "Lisa" Branch to the United States Court of Appeals for the Eleventh Circuit.[1] Branch is nominated to replace Judge Frank M. Hull who, on July 4, 2017, notified the President of her intent to take senior status at the end of this year.[2]

After reviewing Branch's record, Alliance for Justice has concerns regarding her views on substantive due process under the 14th Amendment. And, we have identified some cases that we believe are relevant to the Senate Judiciary Committee during the confirmation process.

BIOGRAPHY

Branch was born in Atlanta, Georgia in 1968 and graduated from Davidson College in 1990 and Emory University School of Law in 1994.[3] After law school, Branch clerked for Judge J. Owen Forrester of the U.S. District Court for the Northern District of Georgia. Following her clerkship, Branch practiced law at Smith, Gambrell & Russell, LLP in Atlanta.

In 2004, Branch served in the George W. Bush Administration as Associate General Counsel for Rules and Legislation at the U. S. Department of Homeland Security and then as Counselor to the Administrator of the Office of Information and Regulatory Affairs (OIRA) at the U. S. Office of Management and Budget during the first half of the George W. Bush Administration. In *Managing the Regulatory State: The Experience of the Bush Administration*, 33 Fordham Urban L.J. 953 (2005), Branch and her co-authors John D. Graham and Paul R. Noe discuss their time serving in OIRA.

After working for the Bush Administration, Branch returned to Smith, Gambrell & Russell. In 2012, Governor Nathan Deal appointed Branch to the Georgia Court of Appeals, where she currently serves.

Since 2001, Branch has been a member of the Federalist Society.[4] She is currently a member of the Board of Advisors of the Federalist Society's Atlanta Lawyers Chapter, after serving on the Executive Board from 2009 to 2012.

LEGAL AND OTHER VIEWS

I. 14TH AMENDMENT AND SUBSTANTIVE DUE PROCESS

Branch, who refers to herself as an

1 Press Release, President Trump Announces Seventh Wave of Judicial Candidates, The White House (Sept. 7, 2017), https://www.whitehouse.gov/the-press-office/2017/09/07/president-donald-j-trump-announces-seventh-wave-judicial-candidates.
2 R. Robin McDonald, *Hull to Take Senior Status on 11th Circuit*, DAILY REPORT (Aug. 17, 2017), http://www.dailyreportonline.com/id=1202795783974/Hull-to-Take-Senior-Status-on-11th-Circuit.
3 *Elizabeth L. Branch*, http://www.gaappeals.us/biography/bio_judges.php?jname=elizabeth%20l.%20branch (last visited Oct. 11, 2017).
4 Sen. Comm. On the Jud., 115th Cong., Elizabeth Branch: Questionnaire for Judicial Nominees, 4.

"originalist and textualist," has criticized "substantive due process."[5] Illustrative of this, Branch praised Justice Antonin Scalia's narrow description of substantive due process in his dissent in *Lawrence v. Texas*.[6]

In a May 2017 speech to the Hall County Bar Association, Branch said that she still "struggle[s] with" the 14th Amendment's "application and predictability," and "*that's the issue*[,] by getting away from the plain language of the 14th Amendment, has the Supreme Court been legislating their own policy preferences?"[7]

In fact, Branch said that she believes Justice Clarence Thomas's concurrence in *McDonald v. City of Chicago* is "absolutely correct."[8] There, Justice Thomas wrote that substantive due process "distorts the constitutional text." As Branch said, "the text [of the 14th Amendment] itself only guarantees whatever *process* is due before a person is deprived of life, liberty, and property."[9] She added, "[i]t is a stretch to come up with *substantive* protections from the actual text of the due process clause."[10]

Branch, again describing Justice Thomas – whom she believes is "absolutely correct" – notes that he "also believes that it is a 'dangerous fiction' to treat the Due Process Clause as a font of substantive rights[.]"[11] She added:

> [Thomas] propose[d] that, rather than the Due Process clause, the analysis should instead focus on the privileges or immunities clause of the 14th Amendment . . . What are privileges or immunities? He argues that, at the time of Reconstruction, these terms were understood to mean "rights." So what rights are protected? Justice Thomas argues that historical evidence demonstrates that such rights included the rights specifically enumerated in the Constitution.[12]

She added, "[y]ou may ask, 'what about unenumerated rights?' As for such rights, Justice Thomas suggests that any inquiry would focus on what the people in the ratifying era (just after the Civil War) understood their rights to encompass."[13]

In a 2013 speech before the National Association for Legal Professionals, Branch criticized "judicial activism," explaining how an "activist judge will decide cases in ways that have no plausible connection to the law they purport to be applying, perhaps even stretching or contradicting the law."[14] In this context, her notes cite only two books, Robert Bork's *Coercing Virtue* and Mark Levin's *Men in Black: How the Supreme Court is Destroying America*.

- In his book, Bork wrote that the Supreme Court "has used its invented privacy right exclusively to enforce sexual freedoms. The most drastic instance was the success of the pro-abortion movement in evading democratic processes to lodge its desires in the Constitution, effectively making abortion a convenient birth control technique."[15]

5 Fourteenth Amendment: Transforming Democracy, Speech at Hall County Bar Association, Fourteenth Amendment: Transforming American Democracy (May 12, 2017), https://www.afj.org/wp-content/uploads/2017/12/Fourtheenth-Amendment-speech.pdf.
6 *Id.*
7 *Id.* (emphasis in original).
8 *Id.*
9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.*
14 Speech Before National Association for Legal Professionals, with Attorney General Sam Olens (Oct. 18, 2013), https://www.afj.org/wp-content/uploads/2017/12/Speech-before-NALS.pdf.
15 Robert Bork, Coercing Virtue: the Worldwide Rule of Judges 70 (2003).

» In his book, Levin says that "America has turned from the most representative form of government to a de facto judicial tyranny. From same-sex marriage, illegal immigration, and economic socialism to partial-birth abortion, political speech, and terrorists' 'rights,' judges have abused their constitutional mandate by imposing their personal prejudices and beliefs on the rest of society. And we, the people, need not stand for it."[16]

» In his book, Levin says that "[f]our landmark decisions by the U.S. Supreme Court stand out as examples of the terrible consequences that can arise when activist Supreme Court justices substitute personal policy preferences for constitutional imperatives."[17] He cites *Dred Scott v. Sandford*, *Plessy v. Ferguson*, *Korematsu v. United States*, and *Roe v. Wade*. He says all these decisions, including *Roe*, "had tragic and far-reaching consequences."[18]

II. NOTEWORTHY CIVIL CASES

Gary v. State

In *Gary v. State*, 338 Ga. App. 403 (Ga. Ct. App. 2016), Brandon Lee Gary used his cell phone to record under a woman's skirt as she walked down the aisle of a grocery store. Gary was convicted for violating Georgia's Invasion of Privacy Act, which makes it illegal for "[a]ny person, through the use of any device, without the consent of all persons observed, to observe, photograph, or record the activities of another, which occur in any private place and out of public view[.]" Gary appealed and claimed his conduct, also known as "upskirting," did not violate the statute because he filmed the victim in a public store, not in a private place. *Id.* at 404. The trial court rejected Gary's claim, finding that the area of the victim's body underneath her skirt qualified as a "private place" within the meaning of the statute.

Branch disagreed. Writing for the majority, Branch said the term "private place" refers only to "some physical location, out of public view and in which an individual may reasonably expect to be safe from intrusion or surveillance[.]" *Id.* at 408. As a result, she held, Gary's conduct was not covered by Georgia law, due to "a gap in Georgia's criminal statutory scheme." *Id.* at 409.

Judges Amanda Mercier, John Ellington and Herbert Phipps dissented, finding no alleged gap in the law, but "[r]ather, the majority has in fact created one by judicial fiat." *Id.* at 412. The dissent argued that "the plain and unambiguous language of [the statute] criminalizes the act of filming up a woman's skirt without her consent." *Id.* at 412.

Mercier argued that Branch used the Oxford English Dictionary definition of the word "place" to support her interpretation of the statutory term "private place." *Id.* at 410. However, Mercier said, Branch and the majority relied on "only selective portions of definitions to support its analysis," leaving out the latter part of the definition which defines "place" as a "*particular area or spot in or on a larger body, structure, or surface; an area on the skin*." *Id.* at 410-11.

Overall, the dissent summarized the

16 Mark R. Levin, Men in Black: How the Supreme Court is Destroying America 10 (2005).
17 *Id.* at 14.
18 *Id.* at 14.

implications of Branch's opinion:

> We have decades of Fourth Amendment jurisprudence setting forth limitations on law enforcement's ability to merely pat down an alleged suspect on top of their clothing to protect the sacrosanct bodily privacy of even those who are accused of violating criminal laws. But today, with a stroke of a pen, we are in effect negating the privacy protections from the intrusions of fellow citizens afforded to every person in this State because one definition of "place" is afforded more weight than another.

Id. at 413.

Subsequent to Branch's opinion, in April 2017, the Georgia state legislature passed a measure that would ban "upskirting," making it illegal for any person to "surreptitiously take a video of a person's private parts in a public place in Georgia."[19] Governor Deal signed the bill into law on May 8, 2017.[20]

Warren v. State

Gary was not the first case in which Branch narrowly construed Georgia's Invasion of Privacy laws. In 2014, Branch joined the court's opinion in *Warren v. State*, 755 S.E.2d 171 (Ga. Ct. App. 2014). There, Charles Warren sent a text message containing a nude image of his genitals from his cell phone to a woman. *Id.* at 171. Warren argued that a 1970 Georgia law did not prohibit his conduct. That law prohibited sending unsolicited material containing nudity or sexual conduct "through the mail" or behavior that otherwise "causes to be delivered material depicting nudity or sexual conduct to [a] person" unless "there is imprinted upon the envelope or container" a notice that the material contains nudity or sexual conduct. *Id.* at 172.

Branch concluded that the notice requirement referenced an envelope or container, and thus implied that it does not cover intangible items, like a text message. *Id.* at 173.

Georgia Dept. of Transp. v. King

In *Georgia Dept. of Transp. v. King*, 341 Ga. App. 102 (Ga. Ct. App. 2017), Shenita King sued the Georgia Department of Transportation after an employee caused a collision in which King was injured. *Id.* at 102. The state moved to dismiss on the grounds that when a plaintiff sues the state, he or she must provide written notice of "the amount of the loss claimed." And, here, it argued, King only claimed "the full amount of damages allowed by law," but did not specify in dollars the amount of the loss. *Id.* at 102.

The trial court rejected the state's claim. It held that since Georgia law capped the amount of damages at $1 million in the case, King's notice sufficiently indicated that King was seeking $1 million in damages. *Id.* at 102.

Branch, however, reversed the lower court decision. *Id.* at 106. She held, for a majority of the court, that King's notice failed because while it referred to the amount she might be allowed to recover,

19 Kristina Torres, '*Upskirting' ban in Georgia is a step closer to becoming law,* The Atlanta Journal-Constitution (Apr. 4, 2107), http://www.ajc.com/news/state--regional-govt--politics/upskirting-ban-georgia-step-closer-becoming-law/tdWzUk4ejJxN0Vl4B6jo2L/.

20 2017-2018 Regular Session- SB 104: Kidnapping, False Imprisonment and Related Offenses; human trafficking hotline model notice in government buildings; require posting, http://www.legis.ga.gov/Legislation/en-US/display/20172018/SB/104.

she provided no "information about the amount she can claim to the jury; and it fails to provide meaningful information to the state for purposes of the settlement." *Id.* at 106.

Judge Ron Ellington dissented. He noted that "the notice effectively did communicate a specific dollar amount, although it did so without using the word 'dollar' or the symbol '$'." *Id.* at 108 (Ellington, J., dissenting). Moreover, Ellington emphasized that the Georgia Supreme Court "has cautioned that 'strict compliance does not require a hyper-technical construction that would not measurably advance the purpose'" of the notice. *Id.* at 108 (citing *Bd. of Regents of Univ. System of Ga. v. Myers*, 295 Ga. 843, 846 (764 SE2d 543) (2014). As Ellington noted, the purpose of the notice requirement is to "ensure that the state receives adequate notice of the claim to facilitate settlement before the filing of a lawsuit." *Id.* at 108. In this case, King's notice stating that she would claim "the full amount of damages allowed by law" clearly satisfied this purpose. *Id.* at 109.

Norwich v. Shrimp Factory, Inc.

In *Norwich v. Shrimp Factory, Inc.*, 770 S.E.2d 357 (Ga. Ct. App. 2015), Franceska Norwich fell while leaving a toilet stall in the bathroom at the Shrimp Factory restaurant and dislocated and fractured her ankle. *Id.* at 357-58. She sued Shrimp Factory, arguing the restroom was negligently designed and that Shrimp Factory was liable because it failed to take appropriate measures to make the restroom safe. *Id.* at 358.

In an opinion by Branch, the court of appeals affirmed summary judgment for the restaurant. Branch held that Norwich had "equal knowledge of the allegedly hazardous step" because she "had successfully traversed" the step when she entered the toilet stall. *Id.* at 361.

Judges Barnes and Ellington dissented. As Judge Barnes noted, Branch's reliance on the rule that "a person who has successfully negotiated a hazardous condition before is presumed to have equal knowledge of it and cannot recover for any injuries resulting from the hazard" was erroneous because that rule only applies to cases involving a "readily discernible" condition. *Id.* at 362 (Barnes, J., dissenting).

Barnes also emphasized that the Georgia Supreme Court has stated that the "'routine' issues of premises liability, i.e. the negligence of the defendant and the plaintiff, and the plaintiff's lack of ordinary care for personal safety are generally not susceptible of summary adjudication." *Id.* at 364 (citing *Robinson v. Kroger Co.*, 268 Ga. 735, 748 (2) (b) (493 SE2d 403) (1997)). Here, she argued, Norwich provided sufficient evidence, including expert testimony, demonstrating that the change in elevation of the step was indeed not "readily discernible." *Id.* Thus, a genuine issue of material fact existed and summary judgment was improper.

As a result of Branch's affirmation of the trial court's decision to grant summary judgment to the defendant restaurant, Norwich was denied the opportunity to have a jury consider the evidence and properly evaluate her claim.

In a similar case, *Joe Enterprise, LLC v. Kane*, 341 Ga. Ct. App. 12 (2017), Branch also sided with a restaurant, holding that

there was no genuine issue of material fact since the plaintiff had successfully negotiated the same ramp prior to the fall.

In re Feldhaus

In the case *In re Feldhaus*, 796 S.E.2d 316 (Ga Ct. App. 2017), Branch reversed a trial court that had denied two transgender persons petitions to change their names. Branch held that the trial court had abused its discretion in denying the name change petitions because there was no "evidence that [the petitioners] had any fraudulent purpose in seeking a name change." *Id.* at 318.

III. NOTEWORTHY CRIMINAL CASES

Hamlett v. State and other Fourth Amendment cases

In *Hamlett v. State*, 753 S.E.2d 118, (Ga. Ct. App. 2013), Branch dissented in a decision involving the unlawful use of GPS devices.

In the case, an unknown person committed a burglary, stealing computers, a television and jewelry from a home. The next night, "a man" the victim "did not know came to the front door and offered to perform yard work, even though it was raining and almost dark." *Id.* at 121. Alarmed by the situation, the victim followed the man as he walked to his truck and took down the truck's tag number. The truck was registered to Jalim Hamlett, who had been wanted for selling stolen property in Atlanta. Armed with that information, detectives obtained an order allowing them to place a GPS device on Hamlett's truck. Months later, Hamlett was stopped by police who had been monitoring his whereabouts via the GPS tracker and officers observed the "possible proceeds of a suspected burglary lying in plain sight in the truck's bed following the stop[.]" *Id.* at 123. Hamlett was convicted of burglary and appealed, arguing the trial court erred in denying motions to suppress evidence that "the State improperly seized [] following the illegal placement of a [GPS] tracking device on his truck[.]" *Id.* at 121.

First, the court held, citing *United States v. Jones*, 132 S.Ct. 945 (2012) that the placement of the GPS tracker was a search that required a valid warrant. *Hamlett*, 753 S.E.2d at 125. Next, the court held that the detectives failed to establish probable cause to justify the warrant. The court reasoned that while there was a seven-month-old warrant for Hamlett's arrest, the detective admitted that there was no evidence tying Hamlett or his truck to the Atlanta burglary. Moreover, it was undisputed that the black male who offered to do yard work had committed no crime in making that offer. *Id.* at 125. Finally, the court factored in the facts that the police had Hamlett's home address for seven months prior to placing the GPS tracker on his truck and made no effort to locate him.

Branch dissented. She argued that "the judicial officer who made the decision to grant the warrant had a substantial basis for concluding that probable cause existed to issue the order allowing installation of a GPS device on Jalim Hamlett's truck." *Id.* at 129 (Branch, J., dissenting). Branch urged the court to give "substantial deference to the presiding judge's decision to grant the warrant[.]" *Id.* at 131.

On other occasions, during her time on

the Georgia Court of Appeals, Branch has ruled to suppress evidence based on Fourth Amendment violations. See, e.g. *Williams v. State*, 734 S.E.2d 535 (Ga. Ct. App. 2012) (finding that an officer who initiated a traffic stop for driving too closely went beyond the bounds of a Terry pat-down when he ordered the defendant out of the car and seized and opened a paper bag from defendant's pocket where the officer had no basis to believe that the defendant was armed or was carrying contraband); *Watts v. State*, 780 S.E.2d 431 (Ga. Ct. App. 2015) (finding that a traffic stop, which began due to an illegally-tinted license plate, was illegally extended by four minutes when the arresting officer called for a K-9 unit after identifying all four passengers and uncovering no additional evidence of wrongdoing); *State v. Carr*, 744 S.E.2d 341 (Ga. Ct. App. 2013) (holding that because the arresting officer failed to testify at the suppression hearing, there was no evidence supporting the state's argument that the officer arrested the defendant and searched the car out of fear for her own safety).

State v. Hartsfield

In *State v. Hartsfield*, 734 S.E.2d 513 (Ga. Ct. App. 2012), Eugene Hartsfield was arrested in April 2005 and the investigation in his case was completed in June 2005, yet he was not indicted until April 2009. Branch held that the evidence was insufficient to determine that a defendant suffered actual prejudice from delay in violation of his Sixth Amendment constitutional right to a speedy trial. The state provided no explanation for the 48-month delay from Hartsfield's arrest to his indictment, nor the subsequent 15-month delay from the indictment to the trial. *Id.* at 516.

Despite the state even conceding that the trial court correctly weighed the length of the delay in favor of Hartsfield, Branch vacated the trial court's decision, finding that the other factors overcame the presumption that the delay was prejudicial. *Id.* at 516.

Prophitt v. State

In *Prophitt v. State*, 784 S.E.2d 103 (Ga. Ct. App. 2016), Branch reversed Jason Prophitt's child molestation conviction, holding that Prophitt's action in going underneath his house and masturbating while he watched his 10-year-old daughter's friend shower through a small hole in the bathroom floor did not constitute child molestation because Prophitt was not "in the presence" of the child as required by the statute, even though he was only seven or eight feet away. *Id.* at 104, 107-08.

CONCLUSION

Judge Lisa Branch must explain her views on the 14th Amendment and on whether she will follow key Supreme Court opinions that protect the substantive due process rights of Americans. She should also be asked questions about key cases.