



Nomination of Leslie H. Southwick to the United States Court of Appeals for the Fifth Circuit

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Introduction

President Bush has nominated Leslie H. Southwick to the United States Court of Appeals for the Fifth Circuit. Judge Southwick shares the President's view that the role of a judge is to neutrally interpret and apply the law, not to legislate from the bench. Judge Southwick has been unfairly criticized by liberal advocacy groups for his refusal to aggressively advance "social justice progress" on the bench, *i.e.*, to use his position as a judge to manipulate the law to advance liberal policy positions. It is especially troubling that groups have opposed Judge Southwick's nomination simply because of his race. Well-qualified judicial nominees like Judge Southwick should not be denied confirmation due to the color of their skin. The Senate should act promptly to confirm Judge Southwick.

Background

Leslie H. Southwick, 57, has had a distinguished legal and military career.¹ Southwick was one of the original ten judges to serve on the Mississippi Court of Appeals from its creation

¹ The White House, *Judge Leslie H. Southwick, Nominee to the United States Court of Appeals for the Fifth Circuit*, <http://www.whitehouse.gov/infocus/judicialnominees/southwick.html> (last visited July 23, 2007).

in January 1995 until December 2006.² Judge Southwick took a military leave of absence from the court to serve in Iraq as a member of the Mississippi National Guard's 155th Brigade Combat Team.³ "While on active duty, he served as Deputy Staff Judge Advocate from August 2004 to July 2005 and then as Staff Judge Advocate from July to January 2006."⁴ He also served in the Judge Advocate General's Corps in the U.S. Army Reserves from 1992 to 1997.⁵

Judge Southwick served as the Deputy Assistant Attorney General for the U.S. Department of Justice Civil Division from 1989 to 1994 and supervised the Office of Consumer Litigation division.⁶ He also worked in the private sector for the Mississippi firm of Brunini, Grantham, Grower and Hewes as an associate from 1977 to 1983 and then as partner from 1983 to 1989.⁷ He graduated cum laude from Rice University in 1972 and earned his J.D. from the University of Texas in 1975.⁸ Southwick is an adjunct professor of law at Mississippi College and is a member of the American Inns of Court.⁹ Southwick and his wife are members of St. Richards' Catholic Church in Jackson, Mississippi.¹⁰ He has been a Habitat for Humanity volunteer since 1993 and has also "served as board member and president of the Jackson Servant Leadership Corps, which provided leadership training, religious support, and housing for recent college graduates who served the inner-city community for a year."¹¹

Unfair Criticism of Judge Southwick

Various liberal groups and politicians have opposed Judge Southwick's nomination

² U.S. Dep't of Justice, *Leslie Southwick*, at <http://www.usdoj.gov/olp/southwickresume.htm> (last visited July 23, 2007).

³ White House, *supra* note 1.

⁴ *Id.*

⁵ *Id.*

⁶ Mississippi Supreme Court, *Judge Leslie H. Southwick, Court of Appeals District Four*, at <http://www.mssc.state.ms.us/bios/courtsofappeals/LeslieSouthwick.htm> (last visited July 23, 2007).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ White House, *supra* note 1.

because he will not use his position to advance their policy agendas.¹² For example, Alliance for Justice (AFJ) has questioned Judge Southwick’s “commitment to equal dignity and equal justice” and have claimed he is part of a plan by the President “to move the courts decisively to the right.”¹³ People For the American Way (PFAW) has called Judge Southwick’s tenure on the Mississippi Court of Appeals “disturbing” and “troubling” because, according to PFAW, judicial nominees must demonstrate their “commitment to social justice progress” in order to be confirmed.¹⁴ It is clear that these groups believe that the role of a judge is to use his position to advance liberal policy positions on issues like gay marriage and abortion. Judge Southwick does not fit this mold because he has sought to neutrally interpret and apply the law—regardless of the issues or parties before him—rather than to seize the role of a legislator for himself.

Unfortunately, many of Southwick’s opponents have argued that he is a poor nominee simply because he is white. For example, AFJ has stated in opposition to the nomination:

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 Judge Southwick, are white. . . .¹⁵

Representative Al Green (D-TX) has stated, “We are demanding that this nominee be withdrawn. We beg that the President give consideration to other persons who are capable, competent and qualified, and please Mr. President, please do not exclude minorities.”¹⁶ It is unfortunate that, in the Twenty-First Century, a person may be denied a position he is well qualified for simply because of his race. It is also likely that Judge Southwick’s race would not be an issue if he

¹² See Save Our Courts, *Opposition to Leslie Southwick, Formally Opposed*, at <http://www.saveourcourts.org/nominees/opposition-to-leslie.html> (last visited July 23, 2007).

¹³ See Alliance for Justice, *Preliminary Report on the Nomination of Leslie H. Southwick to the Fifth Circuit*, at <http://www.afj.org/assets/resources/nominees/PreliminaryReportSouthwick.pdf> (last visited July 23, 2007) (“AFJ Report”).

¹⁴ People for the American Way, *Letter from Ralph Neas to Senator Patrick Leahy* (May 30, 2007), at http://media.pfaw.org/05-30-07_Southwick_Letter.pdf (“PFAW Letter”).

¹⁵ AFJ Report.

¹⁶ Cindy George, *Local Groups Oppose Bush Choice*, Houston Chronicle, June 1, 2007, at B2.

sought to advance liberal policy positions from the bench as an agent of “social justice progress.”

Employment Termination Case

Opponents of Judge Southwick’s nomination have mischaracterized a case involving the use of racial slurs in order to insinuate that Judge Southwick condones the use of such language. In *Richmond v. Mississippi Department of Human Services*,¹⁷ an employee used a racial slur regarding another employee during a meeting with two superiors and was subsequently terminated. An Employee Appeals Board reinstated the employee and held that the offense did not merit termination. A majority of the Mississippi Court of Appeals (including Judge Southwick) upheld the reinstatement.¹⁸ The majority opinion explained:

[W]e do not suggest that a public employee’s use of racial slurs or other terms of opprobrium directed toward a co-worker is a matter beyond the authority of the employing agency to discipline. *The unwarranted use by a state employee of any inflammatory or derogatory term when referring to or directly addressing a co-worker is an action that cannot be justified by any argument.* . . . However, whether such language is so inflammatory or disruptive that it warrants the ultimate sanction of loss of employment is not a question that is [sic] can be answered by an arbitrary, across-the-board rule. The totality of the circumstances . . . must be analyzed.¹⁹

The Mississippi Supreme Court agreed with the position of the Court of Appeals—including Judge Southwick—that “in this case . . . the harsh penalty of dismissal . . . is not warranted under the circumstances.”²⁰ However, the Mississippi Supreme Court ultimately remanded the case to the Employee Appeals Board with instructions to either impose some lesser disciplinary action or “to make detailed findings on the record why no penalty should be imposed.”²¹

Judge Southwick’s opponents have tried to use the *Richmond* case to imply that he has a bias against minorities. AFJ went so far as to say that “Judge Southwick *excused* [the] use of [a]

¹⁷ *Richmond v. Miss. Dep’t. of Human Serv.*, 1998 Miss. App. LEXIS 637, *7-8 (Ct. App. 1998).

¹⁸ *Id.* at *4-5.

¹⁹ *Id.* at *15-16 (emphasis added).

²⁰ *Richmond v. Miss. Dep’t of Human Serv.*, 745 So. 2d 254, 258 (Miss. 1999).

²¹ *Id.*

racial epithet” in *Richmond*.²² PFAW inexplicably focused on language in the hearing officer’s opinion, *not the Mississippi Court of Appeals’ opinion*, and even drew a parallel between Judge Southwick and Don Imus.²³ These groups have essentially argued that, because Judge Southwick ruled in favor of the employee in that particular case, he does not “recognize[] the right of every individual to be treated with dignity regardless of race.”²⁴ This is absurd. A judge does *not* signal his agreement with a person’s conduct by simply holding that the punishment he received for that conduct was excessive. If this were true, judges who routinely overturn the imposition of the death penalty could be accused of taking the crime of murder lightly, or of not “recogniz[ing] the right of every individual to be treated with dignity”²⁵

Homosexuality and States’ Rights

Judge Southwick has also been improperly criticized for joining the majority and concurring opinions in a child custody case, *S.B. v. L.W.*²⁶ The case involved a decision to grant custody of a girl to her father rather than to her lesbian mother.²⁷ In line with various Supreme Court of Mississippi cases, the lower court had considered, among other factors, the moral implications of the mother’s sexual preferences and behavior.²⁸ The Mississippi Court of Appeals (including Judge Southwick) affirmed the decision.²⁹ The dissenting opinion asserted that the mother’s sexual preferences and behavior should not have been a factor in the lower court’s decision.³⁰ The dissent argued that a “modern trend” of accepting homosexual behavior

²² AFJ Report (emphasis added).

²³ PFAW Letter.

²⁴ *See id.*

²⁵ *See id.*

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

²⁷ *Id.* at 661.

²⁸ *Id.* at 658-61.

²⁹ *Id.* at 661.

³⁰ *Id.* at 664 (Thomas, J., dissenting).

had emerged, as evidenced through several out-of-state cases.³¹ The concurrence, which Judge Southwick joined, responded to the dissent by citing several Mississippi statutes that evidenced a statewide policy limiting homosexual rights in “domestic relations settings.”³² The concurrence argued that Mississippi policy was relevant while an alleged out-of-state trend was not.

Judge Southwick has been unfairly criticized for his respect for the Mississippi legislature’s authority to shape public policy and family law as well as his refusal to impose a liberal agenda upon the citizens of Mississippi. For example, AFJ called the concurring opinion Judge Southwick joined “strikingly homophobic.”³³ PFAW called the concurring opinion “gratuitously anti-gay” and argued that the opinion’s recognition of each state’s authority to set its own public policy on issues of family law “gave Mississippi the right to treat gay people as second-class citizens and criminals.”³⁴ This is a veiled way of stating that Judge Southwick is not an activist judge that would be likely to overturn the federal Defense of Marriage Act, or state laws defining marriage as the union of one man and one woman, in the name of “progress.”

PFAW’s true disagreement with Judge Southwick stems from its apparent view that a judge should rule according to his own sense of morality:

[At a hearing,] Judge Southwick repeatedly insisted that a parent’s “morality” was a relevant factor in a Mississippi custody case, *the clear implication being that Southwick considers gay men and lesbians to be immoral*.³⁵

This would only be a “clear implication” if a judge decided for himself what factors should be relevant in custody cases based on his own personal sense of morality rather than on what the people—through their elected legislators—have decided as a matter of public policy. In other words, PFAW apparently believes that only people that hold liberal viewpoints and will use their

³¹ *Id.* at 668 (Thomas, J., dissenting).

³² *Id.* at 662 (Payne, J., concurring).

³³ AFJ Report.

³⁴ PFAW Letter.

³⁵ *Id.* (emphasis added).

positions as judges to redefine the law to conform to their personal sense of morality are qualified to serve on the federal bench. The fact that Judge Southwick does *not* hold this disturbing view of a judge's role is reason to support his nomination, not oppose it.

Conclusion

Judge Leslie Southwick is a well-qualified judicial nominee with extensive legal experience in both the private and public sectors. The unwarranted criticism of Judge Southwick's tenure on the Mississippi Court of Appeals is simply a smokescreen for the real reason why liberal groups oppose him: he will not use his position as a judge to manipulate the law to advance liberal policy goals. The fact that Judge Southwick will fairly apply the law to all parties before him, rather than legislate from the bench, is ample reason for the Senate to act promptly to confirm him.