

The Southwick Nomination: *Will Democrats Be Bullied Into a Judges Fight?*

Background: Judge Leslie Southwick has been nominated to serve on the U.S. Court of Appeals for the Fifth Circuit, a judgeship located in Mississippi. Both Mississippi senators support the nomination, but he has not been reported to the floor for a fair, up-or-down vote. Democrats' left-wing activist supporters have made a political decision to restart the judicial nominations wars, and have chosen Judge Southwick as their first target. Judiciary Chairman Patrick Leahy has indicated that all Democrats on the committee will likely oppose the nomination, despite having unanimously supported him for a lifetime position on the federal district court in 2006.

Judge Southwick's Qualifications For This Judgeship Are Not In Question.

- Mr. Southwick has a distinguished legal career that includes:
 - 11 years of service as a Mississippi state appellate court judge, in which he wrote nearly 1,000 opinions and participated in approximately 7,000 cases;
 - military service in Iraq as a Staff Judge Advocate for the National Guard (after Judge Southwick specifically requested to be transferred to a line combat unit that anticipated deployment);
 - a decade of experience as an adjunct law professor at the Mississippi College of Law;
 - service as a senior Justice Department official from 1989-1993;
 - more than 20 years in private practice in Jackson, Mississippi.
- The ABA has rated Judge Southwick ***unanimously well qualified***, and the Mississippi State Bar honored him in 2004 with its Judicial Excellence Award.
- The Senate Judiciary Committee ***unanimously*** recommended Judge Southwick to be a federal district court judge in 2006, after the ABA also found him "well qualified." (Judge Southwick did not receive a floor vote before the 109th Congress adjourned, and the President nominated him to the appeals court in January 2007.)

The Objections to Judge Southwick Are Extraordinarily Weak.

- Democrats and their activists have scoured through 11 years of cases in which Judge Southwick participated and found **two** decisions ***that he did not even write*** upon which to base their campaign against him.
- **Racial Slur Case** — Judge Southwick has been criticized for joining a 1998 opinion upholding a state administrative board's refusal to dismiss a public employee who used an offensive racial slur in the workplace, *Richmond v. Mississippi Dep't of Human Services*, 1998 Miss. App. LEXIS 637 (Miss. App. Ct. 1998), *rev'd*, 745 So.2d 254 (Miss. 1999).
 - **Judge Southwick did not write this opinion; he merely joined the majority opinion.**
 - The question in the case was whether a public employee could be fired for using a racial slur. A state administrative review board (set up to protect workers' rights) concluded that the public employee could not be dismissed solely on that basis.
 - The state appeals court concluded that the board's decision was not arbitrary and capricious (the legal standard for reviewing an administrative decision). The state supreme court **agreed** that the dismissal was unwarranted, but ordered the administrative review board to address whether sanctions less than dismissal were warranted.

- In agreeing to the opinion, Judge Southwick and his colleagues in the majority correctly predicted how the Mississippi Supreme Court would rule on the lawfulness of the dismissal. This is an essential role of a lower court judge.
- In Judiciary Committee testimony, Judge Southwick reiterated his disdain for racial slurs and said that *the racial slur in question is “always offensive” and “inherently and highly derogatory.”*
- “Homosexual Lifestyle” — Judge Southwick has been criticized for joining a 2001 concurring opinion that used the phrase “homosexual lifestyle.” *S.B. v. L.W.*, 793 So.2d 656, 663 (Miss Ct. App. 2001). The opinion has been criticized and the use of the term has been attacked as anti-gay.
 - Judge Southwick did not write this opinion; he joined a concurring opinion.
 - This phrase is very commonly used in American legal opinions. Indeed, the U.S. Supreme Court, in its landmark *Lawrence v. Texas* decision, used the phrase in a benign fashion, describing the case as involving “sexual practices common to a homosexual lifestyle.” 539 U.S. 558, 578 (2003). That opinion was joined by the liberal wing of the Court.
 - As just one other example of many, President Bill Clinton used the phrase when announcing his “Don’t Ask, Don’t Tell” policy in 1993.

Judge Southwick Faces Opposition Because of His Race.

- Many of Judge Southwick’s critics have candidly criticized the fact that a white (rather than black) man has been nominated for this particular judgeship.
 - Note, however, that these critics did *not* oppose Judge Southwick when he was nominated to the federal *district* court in 2006 (and unanimously reported out by the Judiciary Committee). It is difficult to take seriously the present allegations of racial insensitivity when none of the left-wing activist groups and none of the Democrat senators opposed him for a lifetime appointment less than a year ago.
- For examples of the left’s *advocacy* of racial profiling in the judicial nomination process, see Letter from the Congressional Black Caucus to President Bush, May 24, 2007 (noting an “egregious problem” with the racial composition of the federal bench in Mississippi and arguing that the “Southwick nomination would compound the absence of diversity”); Joint Letter from People for the American Way and the Human Rights Campaign, May 8, 2007; Alliance for Justice Preliminary Position Paper, available at www.afj.org; Letter from the Black Leadership Forum, June 6, 2007; and Letter from the NAACP, June 1, 2007.
- The above activist groups urging a racial test for this judgeship have longstanding working relationships with Senate Democrats on judicial nomination issues.
- Chief Justice John Roberts recently wrote: **“The way to stop discrimination based on race is to stop discriminating based on race.”** *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. ___, slip op. at 40-41 (June 28, 2007).

Democrats Have an Ongoing Vendetta Against This Judgeship.

- Judge Southwick is the 3rd consecutive nominee to this particular judgeship to whom Democrats have objected during the 6 ½ years of the Bush presidency. This judgeship is now labeled a “judicial emergency” by the nonpartisan Administrative Office of the Courts.
 - Charles Pickering was nominated for this judgeship in 2001, but Democrats denied him an up-or-down vote and he later accepted a recess appointment.
 - Michael Wallace was nominated in 2006, but Democrats likewise blocked his nomination and he asked the President to withdraw his nomination.
- All three nominees have had strong support from both Mississippi senators. ***Democrats’ repeated refusal to allow an up-or-down vote on a nominee with home state support threatens the prerogatives of all senators.***