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Senate

The Senate met at 9 a.m. and was called to order by the Honorable KEN SALAZAR, a Senator from the State of Colorado.

PRAYER

The Chaplain, Dr. Barry C. Black, offered the following prayer:

Let us pray:

Almighty and eternal God, thank You for this good land. We are grateful for her hills and valleys, her fertile soil, her trees, her plains, and mountains. We thank You for the brilliant colors of the changing seasons.

Lord, make us a great nation full of truth and righteousness. Lead our leaders to honor Your Name by living with integrity and humility. Teach them to express in words and deeds the spirit of justice, discharging their duties that other nations may respect us.

Give rest to the weary and new vigor to tired hands. Lift us when we fall, and set our feet again on the way everlasting.

Lord, we continue to pray for those facing the challenges of the California fires.

We pray in Your strong Name. Amen.

PLEDGE OF ALLEGIANCE

The Honorable KEN SALAZAR led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore (Mr. BYRD).

The legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, DC, October 24, 2007.

To the Senate:

Under the provisions of rule I, paragraph 3, of the Standing Rules of the Senate, I hereby appoint the Honorable KEN SALAZAR, a Senator from the State of Colorado, to perform the duties of the Chair.

ROBERT C. BYRD,
President pro tempore.

Mr. SALAZAR thereupon assumed the chair as Acting President pro tempore.

RECOGNITION OF THE MAJORITY LEADER

The ACTING PRESIDENT pro tempore. The majority leader is recognized.

SCHEDULE

Mr. REID. Mr. President, we are going to immediately return to executive session to continue the consideration of Judge Southwick to be nominated to one of our circuit courts. The debate time until 11 o'clock is equally divided and controlled. The 20 minutes prior to the 11 a.m. vote on the motion to invoke cloture on the nomination will be for the two leaders who will be recognized to speak, with the majority leader controlling the final 10 minutes. That order is already in effect. The consent agreement says if cloture is invoked the Senate would go to confirmation following that cloture vote. Following disposition of the nomination, there will be 20 minutes of debate, equally divided, prior to the vote on the motion to invoke cloture.

MEASURES PLACED ON THE CALENDAR—S. 2216, S. 2217

Mr. REID. Mr. President, there are two bills at the desk due for a second reading.

The ACTING PRESIDENT pro tempore. The clerk will report the bills by title.

The legislative clerk read as follows:

A bill (S. 2216) to amend the Internal Revenue Code of 1986 to extend the Indian employment credit and the depreciation rules for property used predominantly within an Indian reservation.

A bill (S. 2217) to amend the Internal Revenue Code of 1986 to extend the taxable income limit on percentage depletion for oil and natural gas produced from marginal properties.

Mr. REID. I object to any further proceedings with respect to these bills en bloc.

The ACTING PRESIDENT pro tempore. Objection is heard. The bills will be placed on the calendar.

RESERVATION OF LEADER TIME

The ACTING PRESIDENT pro tempore. Under the previous order, the leadership time is reserved.

EXECUTIVE SESSION

NOMINATION OF LESLIE SOUTHWICK TO BE UNITED STATES CIRCUIT JUDGE FOR THE FIFTH CIRCUIT

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate will now proceed to executive session to resume consideration of the following nomination which the clerk will report.

The legislative clerk read the nomination of Leslie Southwick, of Mississippi, to be United States Circuit Judge for the Fifth Circuit.

The ACTING PRESIDENT pro tempore. Under the previous order, the time until 11 a.m. shall be equally divided between the two leaders or their designee, with the time from 10:40 to 11 a.m. divided and controlled between the two leaders and with the majority leader controlling the final 10 minutes.

The Senator from Pennsylvania is recognized.

Mr. SPECTER. How much time remains on each side?

The ACTING PRESIDENT pro tempore. Fifty-seven and a half minutes on the majority side and 58 minutes on the minority side.

Mr. SPECTER. How much again on the Republican side?

The ACTING PRESIDENT pro tempore. Fifty-eight minutes.

Mr. SPECTER. Mr. President, I spoke extensively last night after Senator LEAHY, the chairman, spoke about the nomination. I will make a few comments now, and I will invite my colleagues to come to the floor on the Republican side. For those who are interested in time, we have only a limited amount, but we will apportion it as best we can, obviously equitably. It is my hope that we will move through the cloture vote to cut off debate and then proceed to confirm Judge Leslie Southwick.

As I said yesterday—and, again, I spoke at some length—Judge Southwick comes to this nomination with an outstanding academic, professional, and judicial record. On the Court of Appeals in the State of Mississippi and the intermediate appellate court, Judge Southwick has distinguished himself by participating in some 6,000 cases and writing some 950 opinions. His critics have singled out only two cases against that extraordinary record. I commented yesterday at length about the fact that in neither of the cases in which he has been criticized did he write the opinion, but only concurred, and there were good reasons for the positions he took.

An extraordinary thing about Judge Southwick is that he got a waiver to join the Army Reserve at the age of 42 and then at the age of 53 volunteered to go to Iraq into harm's way to serve on the Judge Advocate General's staff, receiving the commendation of the major general which I put into the RECORD yesterday.

His record shows that he has been very concerned about plaintiffs in personal injury cases, about defendants in criminal cases, and has looked out for the so-called little guy. As I enumerated yesterday, a number of very prominent members of the African-American community from Mississippi have come forward in his support—one young lady who was his law clerk and others who knew him. It is my view that on the merits, there is no question that Judge Southwick should be confirmed.

There has been some concern about the seat he is filling, whether there should be greater diversity on the seat. That really is a matter in the first instance for the President and then in the second instance for the Senate to consider the merits of the individual. It is the American way to consider Judge Southwick on his merits as to what he has done and as to what he stands for.

We have seen this body very badly divided in the past couple of decades along partisan lines. In the final 2 years of the administration of President Reagan when Democrats had control of the Senate and the Judiciary Committee, President Reagan's nominees were stonewalled to a substantial extent. The same thing happened during the last 2 years of the administration of President George H.W. Bush. Then, Republicans acted in kind during the Clinton administration and refused in many cases to have hearings or to call President Clinton's nominees up for confirmation. I think that was the incorrect approach and said so, in fact, on a number of President Clinton's nominations.

This body had a very tough time 2 years ago when we were considering the so-called nuclear constitutional option which would have taken away the filibuster opportunity to require 60 votes, and we succeeded in a compromise with the so-called Gang of 14. The Judiciary Committee has functioned more smoothly during the course of the past 3 years with Senator LEAHY now the chairman and during the course of the 109th Congress in 2005 to 2006 when I chaired the committee.

So it is my hope that comity will be maintained, that Judge Southwick will be considered as an individual as to whether he is qualified, without any collateral considerations as to the history of nominees to the Fifth Circuit. I think if that is done, Judge Southwick will be confirmed. It would be most unfortunate, in my judgment, if we were to go back to the days of excessive partisanship.

It is an open question as to who the President will be following the 2008 elections, and it would be my hope that however the Presidential election works out and whoever may control the Senate, that we will consider the nominees on their individual merits. To repeat, I think that will lead to the confirmation of Judge Southwick.

I yield the floor.

The PRESIDING OFFICER (Mr. SCHUMER). The Senator from New Jersey is recognized for 10 minutes.

Mr. MENENDEZ. Mr. President, I rise today in opposition to the nomination of Judge Southwick. With a long and consistent history of insensitivity toward discrimination and of siding with the powerful against the powerless, Mr. Southwick is the wrong person to take a seat on the Fifth Circuit Court of Appeals, and he is the wrong person to sit on the Federal bench in the State of Mississippi.

Before I explain why I oppose this nominee, let me say that my concerns are based entirely on Judge Southwick's judicial record. They have absolutely nothing to do with Judge Southwick as a person—whether he is a nice man, a good employer, or a devoted family man. That is not what this confirmation process is all about. This confirmation process is about the kind of judge Leslie Southwick was on the Mississippi State Court of Appeals and what kind of judge he will be if he is confirmed to the Fifth Circuit.

On the basis of Judge Southwick's record on the State court, I have a fairly clear picture of the kind of judge he will be if given a lifetime appointment. He will be the type of judge who consistently rules in favor of big business and corporate interests at the expense of workers' rights and consumer rights. I know this because in 160 out of 180 written decisions, he found a way to achieve that very outcome.

What I do know is that he interprets the law in a way that is not blind to color, blind to race, or blind to sexual orientation, but, in fact, focuses on these factors and sides against them. In fact, his record reveals a long history of discriminating against individuals based on race and sexual orientation, a long history of siding with the powerful over and to the detriment of the powerless.

Finally, what I do know is that when given the opportunity, he stands by those opinions. When asked by my colleagues on the Judiciary Committee, under oath, Judge Southwick was unable to think of a single instance—not even one example—of standing up for the powerless, the poor, minorities, or the dispossessed, not when he was asked during the hearing and not when he was asked for a second time in written followup. This is not the kind of judge we need on the Federal bench.

Remember the circuit this judge was nominated to—the Fifth Circuit. It is the circuit that covers Mississippi, Texas, and Louisiana, the circuit that has the largest percentage of minority residents of any Federal circuit in the United States—44 percent. Let's not forget that he is nominated to take one of the seats within that circuit reserved for a judge from Mississippi—the State with the highest percentage of African Americans in the country.

President Bush made a commitment to the residents of the Fifth Circuit, the people of Mississippi, and the people of this country that he would appoint more African Americans to this circuit. Not only has he gone back on this commitment, he has nominated someone whom the Congressional Black Caucus vehemently opposes on the grounds that he would not provide equal justice in a circuit where racial discrimination has always been the most pronounced. He has nominated someone who the NAACP, the NAACP Legal Defense Fund, the National Urban League, and the Rainbow/PUSH Coalition have all said would fail to protect the civil rights of the millions of minority residents living within the Fifth Circuit. Judge Southwick is an unacceptable nominee to any position on the Federal bench, but he is particularly ill-suited for the Fifth Circuit.

Mr. President, let me give you one example of how Judge Southwick's insensitivity toward racial discrimination affects how he decides cases. In the case of Richmond v. Mississippi Department of Human Services, Judge Southwick had to decide whether it was racial discrimination for a White employer to refer to an African American as ''a good ole'' N word. Reversing

a trial court's finding of discrimination, Judge Southwick joined an opinion stating that the N word was only ''somewhat derogatory'' and compared it to calling someone a ''teacher's pet.'' A teacher's pet?

Judge Southwick was the deciding vote in the 5–4 decision. He had strong opposition from four dissenting judges who wrote:

> The [''N'' word] is, and has always been, offensive. Search high and low, you will not find any non-offensive definition for this term. There are some words, which by their nature and definition are so inherently offensive, that their use establishes the right to offend.

It is incomprehensible to me that anyone could disagree with that statement. It is even more incomprehensible that the President of the United States could nominate an individual who does not believe the law sees such a term as offensive to the Federal appellate bench.

The ''N'' word is one of the most hateful, most denigrating words in the English language. It has no place in our society and certainly should never be tacitly permitted in the workplace.

The fact that Judge Southwick joined the majority opinion—which I should add was reversed by the State supreme court—is not an anomaly. Judge Southwick also has a troubling record in cases reviewing racial bias in the selection of jurors. Of the 59 instances that an African American defendant challenged their conviction on the grounds that the prosecution systematically struck African-American jurors, Mr. Southwick refused the challenge 54 times. That is an over 91 percent refusal rating.

When the color of the juror's skin was different, when African-American defendants challenged their convictions on the grounds that their defense attorneys were prevented from striking Caucasian jurors, Mr. Southwick refused their challenge and allowed the Caucasian juror to remain in the jury 100 percent of the time. So if a defendant claimed an African American was unjustly kept off the jury, Judge Southwick denied his claim. If a defendant claimed a Caucasian was unjustly kept on the jury, Judge Southwick denied his claim. Thus, it seems like Judge Southwick favors keeping Caucasians on juries and keeping African Americans off—even in a State like Mississippi.

One of Judge Southwick's own colleagues criticized this apparent policy because it established a low burden for the state to keep Caucasian jurors on a jury and a high burden for defendants to keep African Americans on a jury. Any double standard of justice, especially one that gives the benefit of the doubt to the Government at the detriment of individual rights, is antithetical to our justice system and its presumption of innocence. It is absolutely unacceptable on a Federal appellate court.

Another area of concern I have involves Judge Southwick's rulings in cases involving discrimination on the basis of sexual orientation. In the case S.B. v. L.W., Judge Southwick joined an opinion that took an 8-year-old child away from her birth mother largely because of the mother's sexual orientation. The fact that Judge Southwick joined this overtly discriminatory opinion is extremely troubling. However, the concurrence he himself authored is even more so.

His concurring opinion stated that homosexuality was a ''choice'' that comes with consequences. Despite the fact that the American Psychological Association has found that sexual orientation is not a choice, Judge Southwick decided to give his personal opinion, his personal belief, that is was a choice, the weight of the law. Judges must always remember the precedential value of their words and their opinions. That a judge would base a legal judgment on personal opinion is disconcerting. That a judge would base a legal judgment on such misguided personal views regarding sexual orientation is absolutely intolerable.

Before I conclude, I would like to discuss one other problem I have with Judge Southwick's nomination. That is the distinct trend in Judge Southwick's decisions of deciding in favor of big business and against the little guy. In fact, Judge Southwick ruled against injured workers and consumers 89 percent of the time when there was a divided court; 89 percent of the time Judge Southwick put the interests of corporations ahead of average Americans; 89 percent of the time injured workers and injured consumers found they were entitled to no relief in Judge Southwick's eyes.

I understand that the individual is not always right. Big business is not always wrong. But no judge should have such a strongly slanted track record in one direction or another. 89 percent is a very strongly slanted track record.

That is one reason why the UAW has also come out in strong opposition to Judge Southwick's nomination. Another reason the UAW is so strongly opposed is Judge Southwick's opinion that the ''employment at will'' doctrine, which allows employers to fire workers for any reason, ''provides the best balance of the competing interests in the normal employment situation.'' In other words, he does not believe in protecting job security. It is no wonder that the UAW has serious concerns about his ability to enforce the National Labor Relations Act, title VII of the Civil Rights Act, and other laws that protect employees in the workplace and limit ''employment at will.'' I share those concerns.

Let me give you an example. In Cannon v. Mid-South X-Ray Co., Judge Southwick refused to allow a woman to receive compensation for the debilitating injuries she suffered as a result of being exposed to toxic chemicals at work. The majority believed the woman should be able to bring her case to trial. Judge Southwick dissented from the 8–2 decision. He rested his decision on a procedural point—that the statue of limitations had tolled—even though the woman did not experience symptoms of her poisoning until years after initially being exposed. He rested his decision on the fact that she should have brought her case before she experienced any symptoms of poisoning. There was a shadow of a doubt as to when the clock should have began to run for her case—and he found in favor of big business.

In another case, Goode v. Synergy Corporation, Judge Southwick's dissent would have kept a family—whose granddaughter was killed in a propane heater explosion—from receiving a new trial even after it became clear that the company responsible for the heater had provided false information in the original trial. Luckily for the family, the majority opinion felt differently.

Mr. President, our Federal appellate courts are the second most powerful courts in our country, deferring only to the Supreme Court on a relatively small number of cases each year. For the majority of Americans, justice stops there. Now more than ever we need an independent judiciary that respects the rights of all Americans, is dedicated to colorblind justice, and protects workers and consumers from corporate America. We cannot afford to get these nominations ''wrong.'' These are lifetime appointments that cannot be taken away once we grant them.

In many ways, Judge Southwick is exactly what a judge should not be. He brings his personal bias into his decision-making process. He consistently sides with the government over defendants, particularly African-American defendants. He routinely finds in favor of big business at the expense of individual workers and consumers. He does not seem to approach his cases with an open mind.

We cannot place a judge like this on the Federal appellate bench. Therefore, I urge my colleagues to vote against the motion to invoke cloture, and should that succeed, to unanimously vote against the nominee and giving a lifetime appointment to someone who consistently decides against African Americans. In a circuit in which they are such a huge part of the population, it is simply unacceptable.

I ask unanimous consent that letters of opposition and concern from groups concerned about the environment, the Bazelon Center for Mental Health Law, the United Auto Workers, and the African-American Bar Association of Dallas, Texas be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

COMMUNITY RIGHTS COUNSEL; EARTHJUSTICE; FRIENDS OF THE EARTH; SIERRA CLUB, ENDANGERED HABITATS LEAGUE, LOUISIANA BAYOUKEEPER, INC., LOUISIANA ENVIRONMENTAL ACTION NETWORK, SAN FRANCISCO BAYKEEPER, TEXAS CAMPAIGN FOR THE ENVIRONMENT, VALLEY WATCH, INC.,

JUNE 13, 2007.

Re nomination of Leslie Southwick to a Lifetime Position on the U.S. Court of Appeals for the Fifth Circuit.

Hon. PATRICK J. LEAHY,
Chairman, Senate Committee on the Judiciary, U.S. Senate, Washington, DC.
Hon. ARLEN SPECTER,
Ranking Member, Senate Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR CHAIRMAN LEAHY AND RANKING MEMBER SPECTER: We are writing to express serious concerns with the pending nomination of Mississippi attorney and former Mississippi Court of Appeals Judge Leslie Southwick to a lifetime seat on the United States Court of Appeals for the Fifth Circuit, which decides the fate of federal environmental and other safeguards in Texas, Louisiana, and Mississippi.

Some of these concerns are based upon points made by Judge Southwick in two Mississippi Law Review articles that were published in 2003, while he was on the Mississippi Court of Appeals:

Leslie Southwick, Separation of Powers at the State Level: Interpretations and Challenges in Mississippi Separation of Powers at the State Level, 72 Miss. L.J. 927 (2003). [Hereinafter Separation of Powers]

Leslie Southwick, Recent Trends in Mississippi Judicial Rule Making: Court Power, Judicial Recusals, and Expert Testimony, 23 Miss. C. L. Rev. 1 (2003). [Hereinafter Recent Trends]

JUDGE SOUTHWICK SUPPORTS THE MAJORITY SIDE IN THE SUPREME COURT'S FEDERALISM REVOLUTION AND, POTENTIALLY, THE ''CONSTITUTION IN EXILE'' MOVEMENT

Between 1990 and 2001, a 5–4 majority of the Supreme Court struck down federal legislation at a rate rivaled only by the discredited ''Lochner-era'' Court, which blocked the labor reforms of the Progressive Era and the Congressional response to the Depression in the early stages of the New Deal The Court's rulings, often grouped together under the inaccurate label of ''federalism,'' undermined important laws protecting women, senior citizens, minorities, the disabled, and the environment. These rulings have engendered withering criticism from both sides of the political spectrum. For example, Judge John Noonan, a conservative appointed by President Reagan to the Ninth Circuit, declared that the Rehnquist Court had acted ''without justification of any kind'' in doing ''intolerable injury to the enforcement of federal standards.'' ''The present damage,'' Judge Noonan warns, ''points to the present danger to the exercise of democratic government.'' As Senator Specter noted in a letter to then Judge John Roberts, these cases represent ''the judicial activism of the Rehnquist Court.''

Judge Southwick, writing in 2003, had a much more positive view of these cases. Indeed, he analogized the Court's ''return to first principles'' to a Christian following the Scriptures: ''The Court is insisting on obedience to constitutional structural commandments. It is as if the text that is being followed begins along these lines: In the Beginning, the New World was without Form, and void, and the Patriot Fathers said 'Let There Be States.' Behold, there were States, and it was Good.'' Separation of Powers, at 929. He noted that the ''return by the Supreme Court to the original scripture of federalism, or as some opposed to the outcomes might claim, to the original sin of the constitutional fathers, began in earnest with United States v. Lopez in 1995.'' Id. at 929. The bulk of his article is devoted to explaining how the model set by the Supreme Court can be employed at the state level by the new conservative majority on the Mississippi Supreme Court.

Even more troubling, at least potentially, is his assertion that ''[f]rom 1937 to 1995, federalism was part of a 'Constitution in exile.'" Id. at 930. Judge Southwick's invocation of this term, coined by D.C. Circuit Judge Douglas Ginsburg, and still relatively obscure outside Federalist Society circles in 2003, suggests that he is supportive of efforts by certain scholars in academia and some judges on the federal bench to restore understandings of the Constitution held by a conservative majority of the Supreme Court in the period before the Great Depression and the New Deal As University of Chicago law professor Cass Sunstein opined in a New York Times Magazine cover story written by Jeffrey Rosen, success of this ''Constitution in Exile'' movement would mean:

many decisions of the Federal Communications Commission, the Environmental Protection Agency, the Occupational Safety and Health Administration and possibly the National Labor Relations Board would be unconstitutional. It would mean that the Social Security Act would not only be under political but also constitutional stress. Many of the Constitution in Exile people think there can't be independent regulatory commissions, so the Security and Exchange Commission and maybe even the Federal Reserve would be in trouble. Some applications of the Endangered Species Act and Clean Water Act would be struck down as beyond Congress's commerce power.

JUDGE SOUTHWICK IS A PRO-CORPORATE PARTISAN IN THE MISSISSIPPI TORT WARS

Over the past decade, Mississippi judges have been engulfed in what Judge Southwick calls ''never-ending and ever-escalating tort wars being fought out at every level of the Mississippi court system.'' Recent Trends at * 11. Judge Southwick is clearly a partisan in this war. He criticizes former Mississippi Supreme Court Justice Chuck McRea for ''an interest in crafting precedents that were favorable to the interests of plaintiffs in personal injury actions.'' He calls former Mississippi Governor Ronnie Musgrove ''the poster boy for trial lawyer campaign contributions.'' Separation of Powers at 1027. Judge Southwick is also deeply critical of the litigation against tobacco companies led by former Mississippi Attorney General Michael Moore, favorably quoting another commentator for the proposition that ''[i]f the fallout from the state tobacco litigation is not addressed quickly, it will further distort and destabilize a number of areas of law, including the separation of powers within state governments.'' Separation of Powers at 1032. Finally, Judge Southwick notes that he has been criticized for taking the defendants' side in such cases: ''[o]ther appellate judges, including the author of this article, may from time to time also appear to various observers to have brought their background experiences into play in their rulings on the bench.'' Recent Trends at * 11. Some of these statements—particularly Judge Southwick's pointed depiction'' of the sitting Mississippi Governor—seem a bit intemperate for a sitting judge.

Moreover, examinations of Judge Southwick rulings by Alliance for Justice and a business advocacy group support a conclusion that Judge Southwick's rulings as a judge favored corporate defendants. In 2004, a business advocacy group gave Judge Southwick the highest rating of any judge on the Mississippi Court of Appeals, based on his votes in cases involving liability issues. B. Musgrave and T. Wilemon, ''Business Group Rates State Justices,'' The Sun Herald (Mar. 24, 2004). According to an analysis by the Alliance for Justice, ''Judge Southwick voted, in whole or in part, against the injured party and in favor of special interests, such as corporations or insurance companies, in 160 out of 180 published decisions involving state employment law and torts cases in which at least one judge dissented.'' Alliance for Justice, Preliminary Report on the Nomination of Leslie H. Southwick to the Fifth Circuit, at 4–5; http://independentjudiciary.com/resources/docs/PreliminaryReportSouthwick.pdf.

One of the cases included in the Alliance report gives us particular concern because it limits access to courts, which is essential to ensure that Americans have a meaningful right to prevent and redress environmental harms including injury to their health and safety, clean water, clean air, and endangered species. State common law tort, nuisance and other civil remedies often provide invaluable supplementation of limited federal safety, health and environmental statutes. Court rulings that unfairly cut off state common law claims can preclude the most effective or only avenue of relief. Unfortunately, that is what Judge Southwick would have done in his dissent in a case in which the court ruled 8–2 that the statute of limitations did not begin to run until the plaintiff had reason to believe the chemicals that she was exposed to caused her illness. Gannon v. Mid-South X-Ray Co. 738 So. 2d 274 (Miss. Ct. App. 1999).

His record as a judge, combined with Judge Southwick's own words, raise questions about his ability to be a fair and neutral arbiter of environment and other cases that involve the interests of corporate defendants. Concerns about the ability of a judicial nominee to be unbiased go to the heart of the Senate's constitutional advice and consent role. We urge you to carefully consider these concerns, raised by Judge Southwick record, before voting on his proposed nomination to a lifetime position on the Fifth Circuit Court of Appeals.

Sincerely,
Doug Kendall, Executive Director, Community Rights Counsel.
Glenn Sugameli, Senior Judicial Counsel, Earthjustice.
Dr. Brent Blackwelder, President, Friends of the Earth.
Pat Gallagher, Director, Environmental Law Program, Sierra Club.
Dan Silver, Executive Director, Endangered Habitats League.
Tracy Kuhns, Executive Director, Louisiana Bayoukeeper, Inc.
Marylee M. Orr, Executive Director, Louisiana Environmental Action Network.
Sejal Choksi, Baykeeper & Program Director, San Francisco Baykeeper.
Robin Schneider, Executive Director, Texas Campaign for the Environment.
John Blair, President, Valley Watch, Inc.

JUNE 14, 2007.

Hon. PATRICK LEAHY,
Chairman, Senate Judiciary Committee, Russell Senate Office Building, Washington, DC.
Hon. ARLEN SPECTER,
Ranking Member, Senate Judiciary Committee, Russell Senate Office Building, Washington, DC.

DEAR SENATOR LEAHY AND SENATOR SPECTER: I write to express the opposition of the Bazelon Center for Mental Health Law to the nomination of Leslie Southwick to the Fifth Circuit Court of Appeals. The Bazelon Center

is a national nonprofit organization that advocates for the rights of individuals with mental disabilities through litigation, policy advocacy, education and training. The Center previously expressed concern about the nomination; we now feel it is appropriate to express our opposition.

Judge Southwick apparently holds a narrow view of federal power that suggests that he would invalidate portions of critical civil rights legislation if appointed. He has characterized the Supreme Court as returning to the ''scripture'' of the Constitution by striking down portions of the Violence Against Women Act and Gun Free School Zones Act, and hampering Congress's power to abrogate sovereign immunity to protect Native Americans. Leslie Southwick, Separation of Powers at the State Level, 72 Miss. L. J. 927, 930–31 (2003). Southwick also indicated his apparent support for the ''Constitution in exile'' movement, a radical ideology that would undo seventy years of Supreme Court rulings, dramatically undermining the federal government's power.

These issues are of paramount concern to the disability community because the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act, and the Individuals with Disabilities Education Act (IDEA) have been the targets of repeated attacks on federalism grounds, and the constitutionality of these laws has been hotly contested in the federal courts.

Southwick's nomination to the Fifth Circuit is especially troubling because that court is already closely divided on the constitutionality of disability rights legislation. See Pace v. Bogalusa City School Bd., 325 F.3d 609 (5th Cir. 2003) (Congress did not validly abrogate state sovereign immunity in the IDEA), rev'd, 403 F.3d 272 (5th Cir. 2005) (5 judges dissenting); McCarthy v. Hawkins, 481 F.3d 407 (5th Cir. 2004) (upholding ADA's community integration mandate against commerce clause challenge in divided vote); Neinast v. Texas, 217 F.3d 275; (5th Cir. 2000) (Congress lacked authority under Fourteenth Amendment Section 5 to enact the ADA's bar on imposing handicapped parking placard surcharges on individuals with disabilities). Southwick's addition to the Fifth Circuit would increase the likelihood that critical disability rights protections would be eliminated in that Circuit.

This lifetime position should be held by someone who respects Congress's authority to enact needed civil rights protections, including protections for individuals with disabilities.

Sincerely,

ROBERT BERNSTEIN,
Executive Director, Bazelon Center for Mental Health Law.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA—UAW,

OCTOBER 22, 2007.

DEAR SENATOR: This week the Senate may take up the nomination of Mississippi Judge Leslie H. Southwick to the 5th Circuit Court of Appeals. The UAW urges you to oppose his nomination and to vote against any attempt to invoke cloture on this nomination.

Judge Southwick's record as a judge on the Mississippi Court of Appeals is deeply troubling. He has consistently ruled against workers seeking compensation for injuries suffered on the job. He has also opined that the ''employment at will'' doctrine, which allows employers to fire workers for any reasons, ''provides the best balance of the competing interests in the normal employment situation.'' This raises serious questions about his ability to enforce the National Labor Relations Act, Title VII of the Civil Rights Act, and other laws that protect employees in the workplace and limit ''employment at will.''

Judge Southwick also joined the court's 5–4 decision in Richmond v. Mississippi Department of Human Services, upholding the reinstatement of a state social worker who was fired for using a despicable racial epithet in a condescending reference to a co-worker. This decision reveals a disturbing lack of understanding for the negative impact of this language. In addition, a review of Judge Southwick's decisions reveals a disturbing pattern in which he routinely rejects defense claims regarding racially motivated prosecutors who strike African-American jurors, but upholds claims of prosecutors that defense attorneys are striking white jurors on the basis of their race.

For all of these reasons, the UAW believes that Judge Southwick's confirmation would endanger core worker and civil rights protections. Accordingly, we urge you to vote against his nomination and against any attempt to invoke cloture to cut off debate on his nomination.

Thank you for considering our views on this issue.

Sincerely,

ALAN REUTHER,
Legislative Director.

THE AFRICAN-AMERICAN BAR ASSOCIATION OF DALLAS, TEXAS,

June 6, 2007.

Re nomination of Leslie Southwick to the United States Court of Appeals for the Fifth Circuit.

Hon. PATRICK LEAHY,
Chairman, Senate Committee on the Judiciary, Russell Office Building, U.S. Senate, Washington, DC.

DEAR SENATOR LEAHY: The J.L. Turner Legal Association (''JLTLA''), the premier organization for African-American attorneys in Dallas, Texas, writes to register its opposition to the nomination of Leslie Southwick to the United States Court of Appeals to the Fifth Circuit. In so doing, we join with Senator Barack Obama, the Magnolia Bar Association, the Alliance for Justice and the National Employment Lawyers Association, among others, in voicing concerns about Judge Southwick's fitness for elevation to a lifetime appointment to the federal appellate bench.

More significantly, the JLTLA is deeply disturbed by the Bush Administration's consistent and highly objectionable pattern of selecting ultra-conservative, non-diverse candidates to serve on the most racially diverse federal circuit in the country. The Fifth Circuit, comprised of Mississippi, Louisiana and Texas, is home to more African-Americans than any other federal circuit, with the possible exception of the Fourth Circuit. Only one African-American judge, Carl Stewart, currently serves on the Fifth Circuit. Bush has, moreover, nominated no African-Americans to the Fifth Circuit. After Charles Pickering and Mike Wallace, Judge Southwick's nomination could only very generously be described as yet another ''slap in the face'' to the diverse populations of the Fifth Circuit.

Further, this appointment reflects the Bush Administration's clear disregard for the will of the American people given the significantly dynamic change in Congress. The dramatic outcome of the midterm Congressional election signals that Americans are seeking a new landscape rather than leaving an even more conservative footprint on what is now one of the most conservative Circuits in the nation.

Historically, the Fifth Circuit served as the vanguard for the advancement of civil and human rights, particularly with regard to the implementation of the U.S. Supreme Court's dictates following its historic ruling in Brown v. Board of Education et al. The last 20 years, however, have marked a notable retrenchment in the Fifth Circuit's commitment to civil rights. Judge Southwick's elevation to the Fifth Circuit would only strengthen the conservative leanings of this Court, and further alienate the diverse citizens of this Circuit.

We trust that you will call upon all of your colleagues on the Judiciary Committee to reject this nomination, and call on the President to select a consensus nominee that would bring greater balance to the Fifth Circuit.

Very truly yours,

VICKI D. BLANTON, Esq.,
President, JLTLA.

The PRESIDING OFFICER (Mr. CARDIN). The Senator from Texas is recognized.

Mr. CORNYN. Mr. President, I rise to make a few brief remarks on this nomination to the United States Court of Appeals for the Fifth Circuit, which serves the residents of Mississippi, Louisiana, and my State of Texas.

Judge Leslie Southwick has served for almost 12 years on the Mississippi Court of Appeals where he has participated in thousands of cases in almost every area of State civil and criminal law. He is, by all accounts—notwithstanding some of the attacks by interest groups that we have heard recounted here today—a respected member of that court and an honorable and decent man. Notably, he took a leave from the bench to volunteer to serve his Nation in Iraq. I ask: What kind of man would give up a cushy job on the Mississippi Court of Appeals to put his life on the line in Iraq?

The American Bar Association has unanimously found Judge Southwick ''well qualified'' to serve on the Fifth Circuit, which is the highest rating the American Bar Association gives. It is important to point out that the American Bar Association investigates the background of these nominees, talks to litigants who appeared before them, talks to other judges and leaders of the legal community, and they have concluded that instead of the comments we have heard today attacking the integrity of this public servant, that he deserves the highest rating of the American Bar Association.

For whatever reason, this honorable public servant has been dragged through the mud in this confirmation proceeding and, in my opinion, has been slandered by some of his critics. Judge Southwick has been called an ''arch-reactionary,'' a ''neoconfederate,'' ''hostile to civil rights,'' everything but the word ''racist,'' although that has been implied time and time again.

Judge Southwick's nomination was opposed by 9 of the 10 Democrats on the Senate Judiciary Committee. But, to her credit, Mrs. FEINSTEIN, the Senator from California, declined to be strong-armed by the interest groups who are whipping up manufactured hysteria when it comes to opposing

this nominee. Announcing that she found ''zero evidence to support the charges against Judge Southwick,'' Senator FEINSTEIN joined the nine Republicans on the committee to advance the nomination to the Senate floor.

What was never answered in the Judiciary Committee's debate over this nomination is why the same panel had, just a year earlier, unanimously approved him for a seat on the Federal District Court bench. I posed this question to my colleagues during the Judiciary Committee debate:

If there is a concern out there that Judge Southwick is not qualified because of some perceived racial problem, why in the world would that opposition deem him acceptable to be a Federal District Court judge?

Think about that a second. The discretion afforded a District Court judge is so much greater than that on the court of appeals—from the start of a trial, through voir dire and juror strikes, through evidentiary rulings, and jury instructions. I trust that my colleagues would never vote for someone with a perceived race problem for life tenure in a role with such enormous discretion. We all know that there was no objection at the time he came before the committee for a Federal District bench because, the fact is, the allegations against him had been manufactured since that time.

There is no legitimate concern about Judge Southwick's character or record. This is just the latest incarnation of the dangerous game being played with the reputations and lives of honorable public servants.

The Republican leader put it this way:

When do we stop for the sake of the institution, for the sake of the country, and for the sake of the party that may not currently occupy the White House? When do we stop?

The Washington Post's editorial page, along with the respected legal affairs columnist Stuart Taylor, both lamented the treatment afforded Judge Southwick who has yet to be confirmed by the Senate but hopefully will be today. Stuart Taylor's column is appropriately titled ''Shortsighted on Judges.'' He writes:

The long-term cost to the country is that bit by bit, almost imperceptibly, more and more of the people who would make the best judges—liberal and conservative alike—are less and less willing to put themselves through the ever-longer, ever-more-harrowing gauntlet that the confirmation process has become.

The attacks on Judge Southwick, unfortunately, have come to typify the kinds of vicious, gratuitous, personal attacks that are occurring with greater frequency against judicial nominees.

I wonder if there is a Member of this body who doesn't think we need to improve the tone and rhetoric of the judicial confirmation process. When good men and women decline the opportunity to serve on the Federal bench out of disdain for this unnecessarily hostile process, the administration of justice in this Nation can only be the worst for it.

I urge my colleagues to send a strong message today with this vote that these unwarranted, baseless attacks on Leslie Southwick are beneath the dignity of the Senate. At some point in time we have to stop it, and I can think of no better time than now with this outstanding public servant.

The PRESIDING OFFICER. The Senator from Pennsylvania is recognized.

Mr. SPECTER. Mr. President, after the Senator from Illinois speaks, I would like to yield 7 minutes to the Senator from Arizona, Mr. KYL.

The PRESIDING OFFICER. The Senator from Illinois is recognized.

Mr. DURBIN. Mr. President, a few weeks ago, our Nation witnessed one of the largest civil rights rallies in decades. It was a rally to condemn hate crimes and racial disparities in our criminal justice system. It occurred in a town in Louisiana that most of us never heard of, Jena, LA. That small town captured the attention of America. Why? Well, because of an incident that occurred at a high school where there was a tree that White students traditionally gathered under.

School officials came to the conclusion it was time that all students could sit under the tree. In protest for that decision, White students hung nooses from the tree. Nooses, the ancient symbol of hatred and bigotry.

Well, that incident led to other incidents, fights between Black and White students at the school. Three White students who put the nooses in the tree were given a 3-day suspension from the school, a 3-day suspension.

In contrast, the Jena district attorney, who was White, brought criminal charges for attempted murder against six African-American teenagers, the so-called Jena 6.

If convicted on all the charges, the African-American students could have served a combined total of more than 100 years in prison. One hundred years in prison for one group of students, a 3-day suspension for others. It is no wonder this captured the attention of the Nation.

Squabbling, fighting among students, led to serious criminal charges for some and a very slight reprimand for others. This is not the first time America has faced this kind of disparity in justice. Sadly, it is not likely to be the last. Some of us in my age group can recall the struggles of the 1960s when civil rights became a national cause in America, when all of us, Black, White, and brown, North and South, were forced to step back and take a look at the America we live in and make a decision as to whether it would be a different country.

We look back now as we celebrate Dr. Martin Luther King's birthday and observances with fond remembrance of that era. But I can remember that era, too, as being one of violence and division in America. I can recall when Dr. King decided to come to the Chicago area and lead a march. It was a painful, violent experience in a State I love.

I look back on it because I want to make it clear: discrimination is not a Southern phenomena, it is an American phenomena. But in the course of the civil rights struggle in the 1960s, there were some real heroes, and one of them was a man I dearly love and served with in the House, JOHN LEWIS.

JOHN LEWIS, a young African-American student, decided to engage in sit-ins, and when that did not succeed, he moved on to the next level, the freedom bus rides. He risked his life taking buses back and forth across the South to establish the fact that all people, regardless of their color, should be given a chance.

And then, of course, the historic march in Selma. JOHN LEWIS was there that day. I know because I returned to that town a few years ago with him and he retraced his footsteps. He showed us how he walked over that bridge as a young man. As he was coming down on the other side of the bridge, he saw gathered in front of him a large group of Alabama State troopers. As they approached the troopers, the troopers turned on the marchers and started beating them with clubs, including JOHN.

JOHN was beaten within an inch of his life, knocked unconscious. Thank God he survived. I thought about that because I wanted to be there at that Selma march. I was a student here in Washington at the time and for some reason could not make it and have regretted it ever since.

But as we were driving back from Selma, I recall that JOHN LEWIS said something to me which stuck. He said: You know, there was another hero on that Selma march who does not get much attention; his name was Frank Johnson. Frank Johnson was a Federal district court judge and later a Federal circuit court judge in the Fifth Circuit, which at the time included the State of Alabama. JOHN LEWIS said: If it were not for the courage of Frank Johnson, who gave us the permission to march, there never would have been a march in Selma. Who knows what would have happened to the civil rights movement.

Well, Frank Johnson is a man who has been celebrated in his career as a jurist for his courage. He and his family faced death threats. They were under constant guard for years because of the courageous decisions he made that moved us forward in the civil rights movement.

I had a chance to meet with two prospective nominees to the Supreme Court before their confirmations, Chief Justice Roberts and Justice Alito. I gave both of them this book, ''Taming the Storm,'' written by Jack Bass—which is a biography of Frank Johnson—hoping that in their busy lives they might take the time to read these words about his courage and his life and be inspired in their own responsibilities.

There are so many things that have been said and written about Frank Johnson's courage as a judge, a circuit judge in the same circuit we are considering today. One of them was written by a fellow who served in the Senate. I didn't have the chance to serve

with him, but I heard so many wonderful things about him, Howell Heflin. Senator Howell Heflin of Alabama introduced a bill to name the U.S. courthouse in Montgomery, AL, for Frank Johnson, Jr.

This is what he said: Judge Johnson's courtroom has been a living symbol of decency and fairness to all who come before his bench. It is from this courthouse that the term ''rule of law'' came to have true meaning; it is from this courthouse that the term ''equal protection of the law'' became a reality; and it is from this courthouse that the phrase ''equal justice under law'' was dispensed despite threats to his personal life.

Frank Johnson, circuit judge, Fifth Circuit, had the courage to make history and the power to change America. It is a high standard, and it is not for all of us, whether you are a Member of the Senate or seek to be on the Federal judiciary.

It is particularly an important standard to consider with the nomination of Leslie Southwick. There are so many good things to say about Leslie Southwick, if you read his biography, things he has done in his military service, his service in many respects.

But he is asking to serve on Frank Johnson's circuit court, the Fifth Circuit. I guess many of us believe it is a particularly important circuit for the same reason it was in the time of Frank Johnson.

That Fifth Circuit is still a crucible for civil rights. That Fifth Circuit contains Jena, LA. That is a circuit which many times has been called upon to make important historic decisions about fairness and equality in America.

So, yes, I know we ask more of the nominees for that circuit. We know it has a higher minority population than any other circuit in America. We know the State of Mississippi, the home of Leslie Southwick, has the highest percentage of African Americans.

Yesterday, the Congressional Black Caucus came to meet with the Senate leadership. It is rare that they do that. Congresswomen CAROLYN KILPATRICK and ELEANOR HOLMES NORTON and others came to speak to us.

The depth of emotion in their presentation is something that touched us all. Members of the Senate who have been through a lot of debates and a lot of nominations, many of them were misty-eyed in responding to the feelings, the deep-felt feelings of these African-American Congresswomen about this nomination.

BENNIE THOMPSON of Mississippi, the only Black Congressman from that delegation, talked about what this meant to him, how important it was to have someone who could start to heal the wounds of racism and division in the State he lived in. It touched every single one of us.

I asked Leslie Southwick a question at his nomination hearing under oath; it was as open-ended as I could make it. I asked him:

> Can you think of a time in your life or career where you did bend in that direction, to take an unpopular point of view on behalf of those who were voiceless or powerless and needed someone to stand up for their rights when it wasn't a popular position?

Judge Southwick responded:

> I hope that a careful look—and the answer is, no, I cannot think of something now. But if I can give you this answer. I cannot recall my opinions, and I don't think of them in those terms.

By every standard that was a softball question. I asked this man to reflect on his personal and professional life and talk about a Frank Johnson moment, when he stood up to do something that was unpopular but right for someone who did not have the power in his courtroom.

I even sent him a followup written question because I wanted to be fair about this. And he still could not come up with anything. It is troubling. I hope that if the Senate rejects this nomination, the Senators in the Fifth Circuit, particularly from Mississippi, will bring us a nominee for this circuit who can start to heal the wounds, who can bring us back together, who can give hope to the minorities and dispossessed in that circuit that they will get a fair shake if their cases come to court.

I hope they can reach back and find us a Frank Johnson, someone in that mold, someone who can answer that open-ended question in a very positive way.

Today, I will vote against cloture and oppose the nomination of Leslie Southwick.

I yield the floor.

Mr. SPECTER. Mr. President, how much time remains on the Republican side?

The PRESIDING OFFICER. There is 45 minutes 17 seconds.

Mr. SPECTER. Mr. President, I yield 7 minutes to the Senator from Arizona. I will yield 10 minutes jointly to the senior Senator from Arizona, Mr. MCCAIN, and Senator GRAHAM, which will come in sequence after we alternate with the Democrats.

Mr. WHITEHOUSE. Mr. President, it is my understanding that Senator SCHUMER of New York wishes to be recognized for 10 minutes at 10 o'clock, which just about coincides with what the Senator from Pennsylvania has indicated.

The PRESIDING OFFICER. The Senator from Arizona is recognized.

Mr. KYL. Mr. President, I rise in support of Judge Southwick. There is no question that the nominee is qualified to serve. I do not need to repeat his qualifications. Senators SPECTER and FEINSTEIN did that very well last night. There is no question that he has had an impressive life of service.

Nobody can question the service of a man who joins the Army Reserves at age 42 and then requests duty in a war zone when he is past the age of 50. I will suggest, by the way, that might have been a good answer to the question that Senator DURBIN proposed a moment ago. His life is a life of service, and I believe we should honor him for that.

There is no question the Nation would be well served by his service on the bench. There is also no question the questions about him have been contrived, and there is no question there is more at stake today than the confirmation of Judge Leslie Southwick.

My colleagues should think long and hard about voting against cloture and about what has happened to this nomination. Until the year 2003, no circuit court nominee has been denied confirmation in this body due to a filibuster. Only Abe Fortas faced a real filibuster attempt, and obviously he had ethics issues which caused him to withdraw after it was clear he lacked even majority support.

Since that time, the convention throughout the 1970s and 1980s and 1990s was to reject this path of filibustering nominees. Senators did not like some nominees, but they did not require cloture. When a few Senators tried to impose a cloture standard, the Senate united, on a bipartisan basis, to reject that 60-vote standard.

In fact, then-Majority Leader LOTT and then-Judiciary Chairman HATCH led the fight against requiring cloture in 2000 when we voted on Clinton nominees Paez and Berzon. The vast majority of Republicans rejected any filibuster of judicial nominees.

But in 2003 things began to change. Liberal activist groups pursued many Democrats to apply a different standard. From 2003 to 2005, Democrats actively filibustered several nominees.

> I recall the Senator from Nevada saying: ''This is a filibuster.''

Well, it was a brandnew world, and many realized it was not good. A group of Senators, seven from both parties, got together and worked out an arrangement which would preclude this from happening in the future because it was not good and was setting a very bad precedent in the Senate.

In 2005, most of the people on both sides of the aisle backed down from this precipice and the Democrats agreed that in light of the opposition to what they had been doing, their obstructionism, that they would no longer do that.

Unfortunately, today we are seeing a rise, a rejuvenation of those earlier efforts. It strikes me as exceedingly shortsighted and needs to stop. Senator FEINSTEIN's thoughtful speech last night set the standard.

She concluded the speech with the following words, relating to Judge Southwick:

> He is not outside the judicial mainstream. That's the primary criterion I use when evaluating an appellate nominee. And I expect future nominees of Democratic Presidents to be treated the same way.

Well, that is the real question, Mr. President: Will Senator FEINSTEIN's expectation become the reality? I wish I could say yes, but it may not occur that way if cloture is not granted to

Judge Southwick, and that is the larger question.

Until now, my Republican colleagues and I have been clear that we think judicial filibusters are inappropriate. I suggest today's vote is a watershed. If Senate Democrats decide to filibuster Judge Southwick today, a clearly qualified nominee, they should not be surprised if they see similar treatment for Democratic nominees. This cannot be a one-sided standard. So this isn't just a vote about Judge Southwick; it is about the future of the judicial nomination process. If Leslie Southwick can't get an up-or-down vote, then I suspect no Senator should expect a future Democratic or Republican President to be able to count on their nominees not to be treated in the same fashion. Any little bit of controversy could be created to create the kind of hurdles Judge Southwick is facing today.

Senator SPECTER and Senator FEINSTEIN have made clear there is nothing to these supposed controversies that have been generated around Leslie Southwick. They are largely inventions of the activist left and don't hold up in the light of scrutiny.

So what of the future? If a Republican wants to block a Democratic President's nominee, all one would need would be the allegation of a controversy. Pick out a case. Raise questions about motivation. Ignore the plain language of a court opinion. Speculate. Ignore the man's character.

The Senator from Illinois spoke movingly a little while ago about civil rights, JOHN LEWIS, Frank Johnson, Martin Luther King, all of which are very important to any debate, but very little of Leslie Southwick—no evidence that he would not apply the same standard in judging civil rights matters, just an insinuation because he didn't answer a question about whether he had ever done something unpopular but right. Well, that is not a disqualification from serving on the court.

So think about the nominees whom you might want to recommend. Could an activist group gin up a controversy about your nominee? Is there anything in his or her past that could be misconstrued, distorted, or painted in an unfair light?

Senator FEINSTEIN asked for a system in which we simply asked whether nominees are in the mainstream and, obviously, are they qualified? She asks that we apply that standard in the future. That is the standard we should be applying on both sides. But if things go badly today and Judge Southwick is treated as poorly as he has been treated so far, then I would have to say that nobody can count on what that standard could be in the future.

Vote for cloture today, my friends, because Judge Southwick is an American patriot who has devoted his life to service. Vote for cloture because he is qualified to serve on the bench. But if that isn't enough, vote for cloture to save future nominees from the same kind of problem that has been attendant to this nominee and the potential that a different standard will be applied in the future with respect to confirming our nominees. That would take us down the wrong path.

Senator FEINSTEIN is right. We should confirm this nominee.

The PRESIDING OFFICER. The Senator from Rhode Island.

Mr. WHITEHOUSE. Mr. President, I have a brief unanimous consent request that the Senator from Arizona has given me the courtesy of propounding before he speaks.

Mr. President, I ask unanimous consent to have printed in the RECORD letters of opposition from People For the American Way, the West Texas Employment Lawyers Association, the National Gay and Lesbian Task Force, and the National Council of Jewish Women.

There being no objection, the material was ordered to be printed in the Record, as follows:

PEOPLE FOR THE AMERICAN WAY,
Washington, DC, May 30, 2007.

Re Leslie Southwick.

Hon. PATRICK LEAHY,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

Hon. ARLEN SPECTER,
Ranking Member, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR SENATOR LEAHY AND SENATOR SPECTER: I am writing on behalf of People For the American Way and our more than 1,000,000 members and supporters nationwide to express our strong opposition to the confirmation of Mississippi lawyer and former state court judge Leslie Southwick to the United States Court of Appeals for the Fifth Circuit. Apart from the fact that much of Judge Southwick's record has not yet been provided to the Committee for its consideration, what is known of that record is disturbing, particularly in connection with the rights of African Americans, gay Americans, and workers. Moreover, given that the states within the jurisdiction of the Fifth Circuit (Mississippi, Louisiana, and Texas) have the highest percentage of minorities in the country, we deem it of great significance that the NAACP of Mississippi and the Congressional Black Caucus are among those opposing Southwick's confirmation.

As you know, Judge Southwick has been nominated by President Bush to fill a seat on the Fifth Circuit that the President has previously attempted to fill with Charles Pickering and then with Michael Wallace, both of whose nominations were met with substantial opposition, in large measure because of their disturbing records on civil rights. As you will recall, on May 8, 2007, jointly with the Human Rights Campaign (which has since announced its opposition to Southwick's confirmation), we sent the Committee a letter expressing our very serious concerns about Judge Southwick's nomination, observing that, once again, President Bush had chosen a nominee for this seat who appeared to have a problematic record on civil rights. In particular, our letter discussed in detail the troubling decisions that Judge Southwick had joined in two cases raising matters of individual rights that strongly suggested he may lack the commitment to social justice progress to which Americans are entitled from those seeking a lifetime appointment to the federal bench. Those decisions take on added significance because the intermediate state appellate court on which Judge Southwick sat does not routinely consider the types of federal constitutional and civil rights matters that would shed a great deal of light on a judge's legal philosophy concerning these critical issues. As further discussed below, Judge Southwick's confirmation hearing on May 10 did not allay the concerns raised by these decisions or by other aspects of his record.

In one of the cases discussed in our earlier letter, *Richmond* v. *Mississippi Department of Human Service*, 1998 Miss. App. LEXIS 637 (Miss. Ct. App. 1998), reversed, 745 So. 2d 254 (Miss. 1999), Judge Southwick joined the majority in a 5–4 ruling that upheld the reinstatement with back pay of a white state employee who had been fired for calling an African American co-worker a ''good ole nigger.'' The decision that Judge Southwick joined effectively ratified a hearing officer's opinion that the worker's use of the racial slur ''was in effect calling the individual a 'teachers pet'.'' 1998 Miss. App. LEXIS 637, at *19. The hearing officer considered the word ''nigger'' to be only ''somewhat derogatory,'' felt that the employer (the Mississippi Department of Human Services no less) had ''overreacted'' in firing the worker, and was concerned that other employees might seek relief if they were called ''a honkie or a good old boy or Uncle Tom or chubby or fat or slim.'' Id. at *22–23.

Four of Judge Southwick's colleagues dissented. Two would have upheld the decision by DHS to fire the worker. Two others, also joined by one of the other dissenters, objected to the Employee Appeals Board's failure to impose any sanctions at all on the worker, noting a ''strong presumption that some penalty should have been imposed.'' Id. at *18. The three judges issued a separate dissent and would have remanded the case so that the board could impose ''an appropriate penalty or produce detailed findings as to why no penalty should be imposed.'' Id. at *18. Significantly, Judge Southwick chose not even to join this three-judge dissent that would have remanded the case so that some disciplinary action short of firing the worker could have been imposed on her for having referred to a co-worker by a gross racial slur, ''in a meeting with two of the top executives of DHS.'' Id. at *28.

As we discussed in our earlier letter, the Mississippi Supreme Court unanimously reversed the ruling that Southwick had joined. The Supreme Court majority ordered that the case be sent back to the appeals board to impose a penalty other than termination or to make detailed findings as to why no penalty should be imposed—the position taken by three of Judge Southwick's colleagues. Some of the justices on the Supreme Court would have gone even further and reinstated the decision by DHS to fire the worker. But all of the Supreme Court justices rejected the view of the Court of Appeals majority (which included Southwick) that the board had not erred in ordering the worker's reinstatement without imposition of any disciplinary action.

In the second case that we discussed in our May 8 letter, *S.B.* v. *L.W.*, 793 So. 2d 656 (Miss. Ct. App. 2001), Judge Southwick joined the majority in upholding—over a strong dissent—a chancellor's ruling taking an eight-year-old girl away from her bisexual mother and awarding custody of the child to her father (who had never married her mother), in large measure because the mother was living with another woman in ''a lesbian home.'' In addition to the disturbing substance of the majority's ruling, its language is also troubling, and refers repeatedly to what it calls the mother's ''homosexual lifestyle'' and her ''lesbian lifestyle.''

Judge Southwick not only joined the majority opinion upholding the chancellor's ruling, but alone among all the other judges in

the majority, he joined a concurrence by Judge Payne that was not only gratuitous, but gratuitously anti-gay. As we have previously observed, the concurrence appears to have been written for the sole purpose of underscoring and defending Mississippi's hostility toward gay people and what it calls ''the practice of homosexuality'' (id. at 662), in response to the position of the dissenters that the chancellor had erred. (The word gay is not used; the concurrence refers repeatedly to ''homosexuals'' and ''homosexual persons.'') Among other things, the concurrence suggests that sexual orientation is a choice, and explicitly states that while ''any adult may choose any activity in which to engage,'' that person ''is not thereby relieved of the consequences of his or her choice.'' Id. at 663. In other words, according to Judge Southwick, one consequence of being a gay man or a lesbian is possibly losing custody of one's child.

In addition, and as we noted in our May 8 letter, the concurrence claimed that ''[u]nder the principles of Federalism, each state is permitted to set forth its own public policy guidelines through legislative enactments and through judicial renderings. Our State has spoken on its position regarding rights of homosexuals in domestic situations.'' Id, at 664. Thus, according to the separate concurrence that Southwick chose to join, the states' rights doctrine gave Mississippi the right to treat gay people as second-class citizens and criminals. The views expressed in this concurrence strongly suggest that Judge Southwick is hostile to the notion that gay men and lesbians are entitled to equal treatment under the law.

Unfortunately, Judge Southwick's testimony at his May 10 hearing and his response to post-hearing written questions did not resolve and in fact underscored the very serious concerns that we and others had raised about his record and in particular his decisions in these cases. For example, in response to Senator Kennedy's post-hearing question about why, in the Richmond case, Judge Southwick had ''accept[ed] the employee's claim that [the racial slur] was not derogatory,'' Judge Southwick stated that while the word is derogatory, ''there was some evidence that [the worker] had not been motivated by hatred or by animosity to an entire race,'' and further stated that the opinion he joined had recounted evidence that the employee's use of the racial slur ''was not motivated by a desire to offend.'' Judge Southwick's answers reflect far too cramped an appreciation of the magnitude of the use of this gross racial slur anywhere, let alone to refer to a co-worker in Mississippi.

Senator Kennedy also asked Judge Southwick why, ''[e]ven if you did not think a worker should be fired for using a racial slur—why not at least let the employer impose some form of discipline?'' Southwick replied that ''[n]either party requested that any punishment other than termination be considered.'' However, as noted above, three of Judge Southwick's dissenting colleagues and the state Supreme Court found no impediment to concluding that even if termination were not warranted by the use of this offensive racial slur, the case should have been sent back so that some form of lesser punishment could be considered.

The custody case was also the subject of much questioning at Judge Southwick's hearing and in post-hearing questions. When Judge Southwick was asked at his hearing about his decision to uphold the chancellor's ruling to deprive the mother of custody of her daughter, in large measure because of her sexual orientation, 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. And he also observed that *Bowers* v. *Hardwick,* 478 U.S. 186 (1986), upholding anti-gay ''sodomy'' laws, was then good law (not yet having been overturned by the Supreme Court in *Lawrence* v. *Texas,* 539 U.S. 558 (2003)).

However, when Senator Durbin in his post-hearing questions expressly asked Judge Southwick whether he would have voted with the majority or the dissent in Lawrence (which, as noted, overruled Bowers), Judge Southwick did not answer this question, instead giving what appears to have become the rote answer of all nominees to lower courts—that if confirmed they will be ''bound to'' and will follow precedent. Particularly in light of Judge Southwick's reliance on the much-discredited and since overruled *Bowers* v. *Hardwick,* his refusal to answer Senator Durbin's question is quite disturbing, and further calls into question whether he can apply the law fairly to all Americans.

Judge Southwick's decisions in Richmond and in S.B. raise enormous red flags about his legal views. These are the types of cases that draw back the curtains to reveal critical aspects of a judge's legal philosophy and ideology. We simply cannot conceive of any situation in which calling an African American by the racial slur used in the Richmond case would be akin to calling her ''a teacher's pet,'' and we cannot fathom describing that slur as only ''somewhat'' derogatory, as the hearing officer did in an opinion essentially ratified by Judge Southwick. As America's recent experience with the racially offensive remarks leveled at the young women of the Rutgers University basketball team has shown, most of our country has progressed beyond racial slurs and recognizes the right of every individual to be treated with dignity regardless of race.

And we agree with the Human Rights Campaign, which stated in its May 23, 2007 letter to the Committee opposing Judge Southwick's confirmation, that if Judge Southwick ''believes that losing a child is an acceptable 'consequence' of being gay, [he] cannot be given the responsibility to protect the basic rights of gay and lesbian Americans.'' Every American, regardless of his or her sexual orientation, should likewise be accorded equality of treatment and dignity under the law.

Unfortunately, Judge Southwick's decisions in Richmond and S.B. call into serious question his understanding of and commitment to these fundamental principles. Moreover, these decisions are far from the only troubling aspects of his record. As the Mississippi State Conference of the NAACP has observed in connection with Judge Southwick's rulings on race discrimination in jury selection, ''[d]ozens of such cases reveal a pattern by which Southwick rejects claims that the prosecution was racially motivated in striking African-American jurors while upholding claims that the defense struck white jurors on the basis of their race.'' Indeed, in one such case, three other judges on Southwick's court harshly criticized him in a dissent, accusing the majority opinion written by Southwick of ''establishing one level of obligation for the State, and a higher one for defendants on an identical issue.'' *Bumphis* v. *State,* No. 93–KA–01157 COA (Miss. Ct. App., July 2, 1996).

During his time on the state court of appeals, Judge Southwick also compiled a strikingly pro-business record in divided rulings. According to an analysis by the Alliance for Justice, ''Judge Southwick voted, in whole or in part, against the injured party and in favor of special interests, such as corporations or insurance companies, in 160 out of 180 published decisions involving state employment law and torts cases in which at least one judge dissented. In 2004, a business advocacy group gave Judge Southwick the highest rating of any judge on the Mississippi Court of Appeals, based on his votes in cases involving liability issues.

In one case heard by his court involving an alleged breach of an employment contract, Judge Southwick went out of his way in a dissenting opinion to praise the doctrine of employment-at-will, which allows an employer to fire an employee for virtually any reason. Despite the fact that neither the existence nor merits of the at-will doctrine were at issue in the case, Judge Southwick wrote, ''I find that employment at will, for whatever flaws a specific application may cause, is not only the law of Mississippi but it provides the best balance of the competing interests in the normal employment situation. It has often been said about democracy, that it does not provide a perfect system of government, but just a better one than everything else that has ever been suggested. An equivalent view might be seen as the justification for employment at will.''

Dubard v. *Biloxi H.M.A.,* 1999 Miss. App. LEXIS 468, at *16 (Miss. Ct. App. 1999), rev'd 778 So. 2d 113, 114 (Miss. 2000). The National Employment Lawyers Association has cited this case in particular in explaining its opposition to Judge Southwick's confirmation. According to NELA, ''[t]hat Mr. Southwick would use the case as a platform to propound his views, rather than as a vehicle to interpret laws is problematic and suggests that he may be unable to separate his own views from his judicial duty to follow the law.'' Indeed, when asked about this case at his May 10 hearing, Judge Southwick admitted that he had put his personal ''policy'' views into a decision, but claimed to regret having done so.

Finally, we note that not all of Judge Southwick's record has been provided to the Committee, including more than two years' worth of unpublished decisions by the Mississippi Court of Appeals in cases on which he voted but in which he did not write an opinion. As the Richmond and S.B. cases underscore, the opinions that a judge chooses to join, or elects not to, can be just as revealing of his judicial philosophy as those that he writes. Particularly given what is known about Judge Southwick's record, the notion of proceeding with his nomination on less than a full record would be grossly irresponsible.

With a lifetime position on what is essentially the court of last resort for most Americans at stake, Judge Southwick has failed to meet the heavy burden of showing that he is qualified to fill it. The risks are simply too great to put someone with Judge Southwick's legal views on a federal Court of Appeals for life.

In this regard, we were particularly struck by a very telling moment at Judge Southwick's May 10 hearing. Senator Durbin, in questioning Judge Southwick, noted the great personal courage of federal Judge Frank Johnson of Alabama, whose landmark civil rights rulings were so critical to advancing the legal rights of African Americans in the south. Senator Durbin then asked Southwick, looking back on his career in public service, to cite an instance in which he had ''stepped out'' and taken an unpopular view on behalf of minorities. Judge Southwick could not identify one single instance in response to this question, even when Senator Durbin asked it a second time.

As more than 200 law professors wrote to the Senate Judiciary Committee in July 2001, no federal judicial nominee is presumptively entitled to confirmation. Because federal judicial appointments are for life and significantly affect the rights of all Americans, and because of the Senate's co-equal

role with the President in the confirmation process, nominees must demonstrate that they meet the appropriate criteria. These include not only an ''exemplary record in the law,'' but also a ''commitment to protecting the rights of ordinary Americans,'' and a ''record of commitment to the progress made on civil rights, women's rights, and individual liberties.'' Judge Southwick has failed to meet his burden of showing that he should be confirmed.

We had hoped that after the failed nominations of Charles Pickering and Michael Wallace, the President would nominate someone for this lifetime judicial position in the tradition of Frank Johnson, or at the least someone whose record did not reflect resistance to social justice progress in this country. Unfortunately, the President has not done so. We therefore strongly urge the Judiciary Committee to reject Leslie Southwick's confirmation to the Fifth Circuit.

Sincerely,

RALPH G. NEAS,
President.

WEST TEXAS EMPLOYMENT LAWYERS ASSOCIATION,
El Paso, TX, May 22, 2007.

Hon. PATRICK LEAHY,
Senate Judiciary Committee,
Washington, DC.

DEAR SENATOR LEAHY: I write on behalf of the West Texas Employment Lawyers' Association. Collectively, the members of our group have represented thousands of employees, workers and average folk in matters ranging from employers' failures to pay our clients a minimum wage for work performed, sexual harassment claims, as well as age, race, disability and sex discrimination claims. We routinely practice in front of the Fifth Circuit Court of Appeals and we are very proud of the work we perform on behalf of the hardworking men and women of our nation, vindicating their right to be free from discrimination.

As an organization, we felt it necessary to go on record to oppose Leslie Southwick's nomination to the Fifth Circuit. Please oppose the nomination of Leslie Southwick to the Fifth Circuit. As civil rights and employment discrimination lawyers, it is our humble opinion that Leslie Southwick would do grievous and long-term harm to ordinary workers, and normal Americans whose last names are not ''Inc.'' or ''Ins. Co.''

Please, for the sake of our civil liberties and the average working American, do all in your power to prevent Leslie Southwick's nomination.

Sincerely,

ENRIQUE CHAVEZ, Jr.,
President.

NATIONAL GAY AND LESBIAN TASK FORCE,
Washington, DC, May 29, 2007.

Senator PATRICK LEAHY,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

Hon. ARLEN SPECTER,
Ranking Member, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR SENATOR LEAHY AND SENATOR SPECTER: On behalf of the National Gay and Lesbian Task Force, Inc. a non-partisan civil rights and advocacy group organizing nationwide to secure lesbian, gay, bisexual, and transgender (LGBT) equality, I urge you to oppose the nomination of Leslie Southwick to the United States Court of Appeals for the Fifth Circuit. Judge Southwick has a disturbing record on LGBT rights. His statements during his confirmation hearing and written responses do not allay our concerns about how he would approach cases involving the rights of gay, lesbian, bisexual, and transgender Americans.

While on the Mississippi Court of Appeals, Judge Southwick joined an opinion removing an eight-year-old child from the custody of her mother, citing in part that the mother had a lesbian home. This decision was based on a negative perception about the sexual orientation of the biological mother and ignored findings by the American Psychological Association, along with every other credible psychological and child welfare group that lesbian and gay people are equally successful parents as their heterosexual counterparts.

Further, Judge Southwick was the only judge in the majority to join a deeply troubling concurrence written by Judge Payne. The concurrence asserts that sexual orientation is a choice and an individual who makes that choice must accept the negative consequences, including loss of custody. This statement underscores Judge Southwick's disregard for commonly accepted psychiatric and social science conclusions that sexual orientation is not a choice. Regardless, it also demonstrates Judge Southwick's callous disregard for the rights of LGBT families.

A nominee to the federal bench bears the burden of demonstrating a commitment to rigorously enforce the principles of equal protection and due process for all Americans. The judicial record of Judge Southwick makes clear that he cannot meet that burden. It also makes clear that the individual and equal protection rights of LGBT families would be in real jeopardy if he were confirmed.

We therefore oppose his nomination and request that you vote against his confirmation. It would be unconscionable for this Senate to confirm any judge who has illustrated such a clear anti-LGBT bias to a lifetime seat on the federal bench.

Sincerely,

MATT FOREMAN,
Executive Director.

NATIONAL COUNCIL OF JEWISH WOMEN,
New York, NY, June 5, 2007.

Hon. PATRICK LEAHY,
Chairman, Senate Judiciary Committee,
Washington, DC.

DEAR CHAIRMAN LEAHY: On behalf of the 90,000 members and supporters of the National Council of Jewish Women (NCJW), I am writing to urge the Judiciary Committee to reject the nomination of Judge Leslie H. Southwick to the 5th Circuit Court of Appeals. Much of Judge Southwick's record remains unknown because the opinions in which he concurred were rarely published, but what we do know is deeply troubling. It does not appear that Judge Southwick will uphold federal law, including laws against discrimination on the basis of race, sex, national origin, and religion.

To the contrary. Judge Southwick joined a majority of the Mississippi appeals court in ruling that a state employee's dismissal for referring to a co-worker as ''a good ole n****'' was unwarranted, a ruling unanimously reversed by the Mississippi Supreme Court. In another case Judge Southwick wrote a concurring opinion positing that a ''homosexual lifestyle'' could be used to deprive a parent of custody of her own child.

Historically, the 5th Circuit Court of Appeals has served as a bulwark for the protection of civil rights. Sadly in recent years that record has evaporated. President Bush has twice nominated candidates perceived to be hostile to civil rights that fortunately were never confirmed. Judge Southwick appears to follow in the footsteps of his predecessor nominees in his apparent hostility to civil rights. It is also disappointing that President Bush again failed to take advantage of an opportunity to appoint an African American lawyer to the Mississippi seat on the 5th Circuit Court.

The Judiciary Committee's hearing of May 10, 2007, did not reverse the clear impression that Judge Southwick is unable to serve as an impartial judge on the 5th circuit, and much of his record still remains unavailable for analysis. The committee should reject his nomination and urge the President to submit a consensus nominee committed to respect for fundamental constitutional rights.

Sincerely,

PHYLLIS SNYDER,
NCJW President.

The PRESIDING OFFICER. The Senator from Arizona is recognized.

Mr. MCCAIN. Mr. President, I am pleased the Senate will vote today on Judge Southwick's nomination. I hope my colleagues will join me in voting to confirm this dedicated public servant and courageous soldier.

Judge Southwick has many impressive credentials. Most impressive to me and most revealing of his character is his military service. In 1992, almost 20 years after graduating from law school, Judge Southwick interrupted his successful career as an attorney in private practice and obtained an age waiver to join the U.S. Army Reserves Judge Advocate General's Corps. Ten years later, at age 53, Judge Southwick volunteered to transfer to the 155th Brigade Combat Team of the Mississippi National Guard, a line combat unit that was deployed to Iraq in 2005. Judge Southwick's decision to join the Army is a model of self-sacrifice, and his actions helped to provide equal justice not only to American soldiers but also to the numerous Iraqi civilians whose cases he heard while he was stationed in Iraq. That is the kind of service this individual has provided to his country.

Most disappointing is that some Members of the Senate have questioned Judge Southwick's character by stating that ''He has an inclination toward intolerance and insensitivity.'' That is an interesting criteria that we should set for the confirmation of judges.

It is interesting that we are now going to have, for the first time in a long time, a requirement for 60 votes to move forward. As my colleagues might recall, a couple of years ago there was a proposal from some on this side of the aisle and some others that we should change the rules of the Senate so that only 51 votes would be necessary to confirm a nominee. At that time, I opposed that idea because I thought that it would then put us on a slippery slope to other requirements, other further erosion of the 60 votes upon which this body operates and which separates us from the House of Representatives. So a group of us, who were given the nickname of the ''Gang of 14,'' got together and agreed that we would not filibuster or require 60 votes unless there were ''extraordinary circumstances.'' As a result of that, Justices Roberts, Alito, and many other judges were confirmed by this body.

I think it is pretty obvious that agreement has broken down. I would

like to remind my colleagues that not that many years ago the benefit of the doubt went to the President and his nominees and that elections have consequences. Among those consequences are the appointments of judges—in some respects, perhaps the most important consequence of elections because, as we all know, these are lifetime appointments, and some of us on the conservative side have viewed over the years legislating from the bench in certain kinds of judicial activism as very harmful not only to our principles and philosophy and our view of the role of Government and the various branches of Government but the effects of some of that judicial activism.

So here we are now with a person who is clearly qualified, served in the military, and is now being accused of perhaps having an ''inclination toward intolerance or insensitivity.'' I can assure my colleagues there are some people living in Iraq today who don't believe Judge Southwick has an inclination toward intolerance and insensitivity. In fact, he has earned their gratitude for his efforts in installing the fundamental effects of democracy, and that is the rule of law.

I hope, Mr. President, once we get this over with, perhaps we can sit down again, Republicans and Democrats alike, and try to have a process where we could move forward with these judicial nominations. As we know, there are more vacancies every day. And I would even agree to give them a pay raise, which they seem to feel is rather important.

This is an important decision right now, which I think is larger than just the future of this good and decent man. Will others who want to serve on the bench be motivated to serve or not serve as they watch this process where someone accused of an inclination toward intolerance and insensitivity seems to be a new criteria?

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. GRAHAM. Mr. President, I would like to echo the sentiments of Senator MCCAIN and add my two cents' worth to this debate. In this regard, there will be some good news today. I anticipate that this fine man will have a vote on the floor of the Senate, that the cloture motion will pass, and we will allow an up-or-down vote and he will get confirmed.

To my two colleagues from Mississippi: Well done. You have sent to the Senate an unusually well-qualified candidate by any standard you would like to apply to a person in terms of his humanity, his intellect, and his judicial demeanor. It is one of the best selections I have had the privilege of reviewing since I have been in the Senate.

The unfortunate news is that we are having to go through this particular exercise to get 60 votes. Quite frankly, I think the accusations being made against Judge Southwick are unfounded and just political garbage, to be honest with you.

He has received the highest qualified rating from the American Bar Association. Everyone who has ever served with Judge Southwick, in any capacity, whether it be as a judge, a lawyer, or private citizen, has nothing but glowing things to say about the man. And really, we are trying to use two legal events to cast doubt over the man. Six hundred cases he has sat in judgment upon, and the American Bar Association has reviewed all these cases, I would assume, and come to the conclusion that he is at their highest level in terms of judicial qualification.

Judge Southwick has done things as a person that have really been beneficial to Mississippi. He has tried to bring out the best in Mississippi. These are the types of people you would hope to represent the State of Mississippi—or any other State, for that matter—in terms of their demeanor, their tolerance, their willingness to work together with all groups to move their State forward.

Now, the two cases in question are just complete garbage—the idea that the term ''homosexual lifestyle'' was used in an opinion that he concurred in involving a custody case. That term, if you research it in the law, has been used in hundreds of different cases—over 100 cases. President Clinton mentioned it in 1993 when he was talking about his policy regarding the military. It is a term that was used in the Mississippi court cases that were the precedent for the case involved. And to say that he concurred in an opinion where the authoring judge used that term has somehow tainted him means you better go through the records and throw a bunch of judges off, Democrats and Republicans. That is ridiculous, completely ridiculous, and if applied in any fair way would just be—it would be chaos. You would have politicians, you would have judges, you would have people from all over the country who somehow, because of that term having been used in a judicial opinion, couldn't sit in judgment of others. That is ridiculous. Just go search the record of how this term has been used. To suggest that it means something in Judge Southwick's case but no one else's has a lot to say about this body, not Judge Southwick.

Now, the other case, he was sitting in judgment of an administrative board that decided not to dismiss an employee who used a racial slur in the workplace. To suggest that by somehow giving deference to the administrative board, whether or not their decision was capricious and arbitrary—the review standard at the appellate level—he embraces this term or is intolerant is equally ridiculous. I have an administrative board in the State of Mississippi that is an expert in the area of employment discrimination law, hiring and firing practices. The case is decided at the administrative level, and it comes up to appeal, and every judge involved says this is a terrible word to use but, as a matter of law, the board's finding it was an isolated incident did not justify a complete dismissal was the issue in the case.

Now, do we really want to create a situation in this country where the judges who want to get promoted will not render justice or apply the law, that they will be worried about themselves and what somebody may say about the context of the case? Are we going to get so that you cannot represent someone? What about the person who was being accused of the racial slur? What if you had represented them? Would we come here on the floor of the Senate saying: My God, you represented someone who said a terrible thing; therefore, you can't be a judge? I don't know about you, but as a lawyer, I have represented some pretty bad people. It was my job. And judges have to apply the law and use their best judgment.

So I hope this man will get an up-or-down vote and that this garbage we are throwing at our nominees will stop.

The PRESIDING OFFICER. The Senator from New York is recognized.

Mr. SCHUMER. Mr. President, could you tell me how much time we have remaining on our side?

The PRESIDING OFFICER. Thirty-three minutes 45 seconds, including the——

Mr. SCHUMER. The 10 minutes, yes. And how about on the other side?

The PRESIDING OFFICER. Twenty-seven minutes.

Mr. SCHUMER. Mr. President, I yield myself 10 minutes.

This is, indeed, an important debate, and I think you can look at it at two different levels.

First, I wish to argue strongly against the confirmation of Leslie Southwick to the Fifth Circuit Court of Appeals. We do not assess judicial nominees in a vacuum. In addition to the particular record of the nominee, there are a number of factors that figure into a Senator's proper evaluation of a candidate. We may consider, among other things, the history behind the seat to which the candidate has been nominated; the ideological balance within the court to which the nominee aspires; the diversity of that court; the demographics of the population living in that court's jurisdiction; the legacy of discrimination, injustice, and legal controversy in that jurisdiction. In this case, the context and circumstances of the nomination require us to view it with particular scrutiny. In this case doubt must be construed not for the nominee, as some of my colleagues—the Senator from Arizona and the Senator from South Carolina—have argued, but, rather, against the nominee.

The Fifth Circuit is perhaps the least balanced and least diverse in the country. The circuit has deservedly earned a reputation as being among the most conservative in the Nation. It has 15

judges, 11 filled by Republican Presidents. It has a large African-American population. There is only one African-American judge serving on it. The circuit has three seats traditionally reserved for Mississippians. That honor has never gone to an African American, even though Mississippi's population is more than one-third African American. Of course, the Fifth Circuit services areas that still suffer the scars and effects of decades of deep racial inequality and discrimination.

So you have to put things in context. We have had two other nominees who were extremely unsuitable candidates: Judge Pickering, whom this body rejected, and Michael Wallace, whom many, when you speak to them in Mississippi and in the African-American community there, said an African American might not get a fair trial in Michael Wallace's court. But they were nominated. The exact same reasoning could have been used for them. Those were the two previous nominees. We have to evaluate Judge Southwick against this backdrop.

When we do so, we cannot have confidence that he is a moderate jurist who will apply the law evenhandedly. Most disturbingly, Judge Southwick's judicial record provides no comfort that he understands or can wisely adjudicate issues relating to race, discrimination, and equal treatment. In this circuit above all, that should be a criterion. Whether you are from Mississippi or Arizona or South Carolina or New York, we should all care about that.

Let's go over some of the record. There is the Richmond case. The majority opinion in the Richmond case reflects an astonishingly bad decision. In that case, Judge Southwick joined a 5-to-4 ruling that essentially ratified the bizarre finding of a hearing officer who reinstated a State worker who had insulted a fellow worker by using the worst racial slur, the ''n'' word. To join that wrongheaded decision was to ignore history and common sense and common decency, to find a basis for excusing the most deeply offensive racial slur in the language. As the dissenters in Richmond pointed out, and there were four of them, the term ''is and always has been offensive. Search high and low, you will not find any non-offensive definition for this term. There are some words which by their nature and definition are so inherently offensive their use establishes the intent to offend.''

Of course, the Mississippi Supreme Court, the highest court in Mississippi, unanimously reversed. The Richmond case cannot be dismissed, as some would like, as just one case that Judge Southwick merely joined. He could have joined the very vocal dissent. He could have written a separate concurrence. He did neither. It is fair and proper to ascribe to Judge Southwick every word of the Richmond majority opinion—and the case is a touchstone, the case is a benchmark. It is a predictor and it is all the more important because there is little or nothing in the record to offset the impression it gives about Judge Southwick's jurisprudence.

Judge Southwick, at his hearing, said some of the hearing officer's analysis ''does not now seem convincing to me,'' even though he endorsed it only 9 years ago. This mild attempt at backtracking at his confirmation hearing does not provide comfort. In fact, it smacks of a nominee trying in some small way to please Senators who will decide his fate.

Beyond this defining case, moreover, Judge Southwick has shown over more than a decade of adjudicating cases that we should be concerned about his legal philosophy in so many areas: consumer rights, workers' rights, race discrimination in jury selection. He has shown a bias. I am not going to get into those cases, but, again, I would say there is a special onus on us all here.

Most of my colleagues—some on this side of the aisle—have said: Well, he issued thousands of opinions and only made one mistake. First, I am not sure that is true. When you look at his opinions, there are more mistakes than that. But let's even say he made this one mistake. Normally that would be a good argument. We all make mistakes. None of us before God is flawless, is perfect. Of course we are human beings. But certain mistakes are not forgivable. They may be forgivable of a person as a man or a woman, but not forgivable when you are elevating someone to the Fifth Circuit.

We have had a poison in America since the inception of this country. This is a great country. I am a patriot. I love this country dearly. It is in my bones. But the poison in this country, the thing that could do us in, is race and racism. Alexis de Tocqueville, the great French philosopher, came here in the 1830s. He made amazing predictions about this country. We were a tiny nation of farmers, not close to the power of Britain or France or Russia, the great European nations. De Tocqueville comes from France and says this country, America—this is in the 1830s—this country is going to become the greatest country in the world. He was right. Then he said one thing could do us in—race, racism and its poison. He was right again.

When it comes to the area of race and racism, we have to bend over backwards. The African-American community in Mississippi, in the country, is strongly against the Southwick nomination. They know this discrimination, this poison of America, better than anybody else. They know, even in 2007, the little winks and gestures that indicate a whole different subplot. When you condone using the ''n'' word, you are doing just that. Unfortunately, Judge Southwick—he may be a good man and I certainly don't think he is a racist, but his words have to be seen in context. Like it or not, when he is nominated to the Fifth Circuit he is carrying 200-some-odd years of bigotry that has existed in this country, and particularly in this circuit, on his back. That is the issue here. This is not just any mistake; this is not just any flaw. This comes in a whole subcontext.

Then I heard yesterday that Judge Southwick has not met with the one African Member of the Mississippi delegation, BENNIE THOMPSON. He has not met with, I believe it was called the Magnolia Bar Society, the African-American bar society in Mississippi. Should not Judge Southwick, after these allegations, have gone out of his way? He called yesterday, after BENNIE THOMPSON, Congressman THOMPSON, presented this to us. Shouldn't he have been camped out at BENNIE THOMPSON's door to try to explain what he did? It is the same kind of attitude. It is the same kind of subtext that, frankly, unless you are African American, you don't see.

JOHN MCCAIN is right. Elections have consequences. I do not expect our President to nominate to the Fifth Circuit somebody who has my views or the views of other Members of this side. Elections do have consequences. But on the issue of race, the poison of America, where the Fifth Circuit has been a cauldron, I do expect the President to nominate someone who is above reproach. Because we are not just judging a man or a woman as he or she treads on this Earth. We are judging somebody to go to the second highest court in the land. There must be—there must be—thousands of jurists of every race who meet the President's views but do not have this unfortunate, serious, and irremovable blemish upon them.

This one to me is not an ordinary situation. It is not one mistake out of 7,000 opinions. It is not judging whether Judge Southwick is a good man. Let's assume he is. It goes far deeper than that. It is not saying, as so many of my colleagues have said: We may have a Democratic President and we need, next time out, to make sure we come together on judges. I wish to do that. You know, when you vote for 90-some-odd percent of the President's nominees, almost every one of whom you disagree with philosophically, you are doing that. I have done that. Most Members on this side have done that. But that does not forgive this—again, in the context, not of somebody as a person but in the context of something to be elevated to the Fifth Circuit.

In conclusion, we have to make every effort to bend over backwards on the issue of race and racism in the Fifth Circuit and in the other circuits as well. We have not done that here. We are sort of casting it aside, finding an excuse, pushing it under the rug. Again, I do not believe Judge Southwick is a racist, but I do believe when it comes to the issue of race, one on the Fifth Circuit must be exemplary. This case shows he is not. He has failed

that standard. I urge my colleagues, every one of them on both sides of the aisle, to look into their hearts when they cast this important vote.

Mr. President, I ask unanimous consent that several letters regarding this Nomination be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

MAY 8, 2007.

Re Leslie Southwick

Hon. PATRICK LEAHY,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.
Hon. ARLEN SPECTER,
Ranking Member, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR SENATOR LEAHY AND SENATOR SPECTER: We are writing on behalf of People for the American Way and the Human Rights Campaign and our combined grassroots force of more than 1,700,000 members and other supporters nationwide to express our serious concerns regarding the nomination of Mississippi lawyer and former state court judge Leslie Southwick to the United States Court of Appeals for the Fifth Circuit. As you know, Judge Southwick has been nominated by President Bush to fill a seat on the Fifth Circuit that the President has previously attempted to fill with Charles Pickering and then with Michael Wallace, both of whose nominations were met with substantial opposition, in large measure because of their disturbing records on civil rights. Now, with Judge Southwick, President Bush once again appears to have chosen a nominee for this seat who has a problematic record on civil rights, as further discussed below. And once again the President has passed over qualified African Americans in a state with a significant African American population that has never had an African American judge on the Fifth Circuit.

At the outset, we are constrained to note that there are significant concerns regarding the insufficient time provided to the Judiciary Committee to consider Judge Southwick's record in the careful manner required by the Senate's constitutional responsibilities in the confirmation process, as well as concerns raised by the fact that Judge Southwick's complete record does not appear to have been provided to the Committee. The confirmation hearing for Judge Southwick was scheduled with only a week's notice to the Committee, providing insufficient preparation time for the consideration of a controversial appellate court nominee. In addition, there has not been sufficient time since Judge Southwick submitted his responses to the Committee's questionnaire, in late February, for his entire judicial record to be reviewed; indeed, it appears that some of his record has not yet even been provided to the Committee.

Leslie Southwick served as a judge on the Mississippi Court of Appeals from 1995–2006. The number of cases in which he participated during that time is voluminous, well in excess of 7,000 by his own estimation. Moreover, according to Judge Southwick, many of the court's decisions during that time were not published at all (including all of the court's rulings—some 600 cases a year according to Southwick—issued over a period of approximately two and a half years during his tenure). While Judge Southwick in late February provided to the Committee a compact disc containing thousands of pages of his own unpublished opinions, to the best of our knowledge he has not provided copies of the court's unpublished opinions as to which he voted but that he did not write. As the cases discussed below underscore, it is critical that the Committee examine those rulings as well, for the opinions that a judge chooses to join, or elects not to, can be just as revealing of his judicial philosophy as those that he writes.

In addition, and to our knowledge, the Committee also has not been provided with Department of Justice records relevant to Southwick's tenure as a Deputy Assistant Attorney General during the administration of the first President Bush. These records would shed additional light on Southwick's legal philosophy and views, particularly on federal law issues that simply did not come before him while he served on the Mississippi Court of Appeals but that likely would if he were confirmed to a federal Court of Appeals. It is axiomatic that the Committee should not consider any judicial nominee without the nominee's full record or adequate time in which to review it.

Apart from these significant procedural issues, a preliminary review of Judge Southwick's record raises serious concerns about his record on civil rights. As an intermediate state appellate court, the Mississippi Court of Appeals hears appeals in state law criminal cases and typical state law civil cases such as contract disputes, tort claims, workers compensation matters, trusts and estates matters, and the like. It does not routinely consider the types of federal constitutional and civil rights matters that would shed a great deal of light on a judge's legal philosophy concerning these critical issues. Nonetheless, Judge Southwick's positions in two cases before that court during his tenure raising matters of individual rights are highly disturbing, and strongly suggest that Southwick may lack the commitment to social justice progress to which Americans are entitled from those seeking a lifetime appointment to the federal bench. We discuss each of these cases below.

Richmond v. *Mississippi Department of Human Services*, 1998 Miss. App. LEXIS 637 (Miss. Ct. App. 1998), *reversed*, 745 So. 2d 254 (Miss. 1999)

In Richmond, Judge Southwick joined a 5–4 ruling upholding the reinstatement of a white state social worker, Bonnie Richmond, who had been fired for referring to an African American co-worker as ''a good ole nigger'' at an employment-related conference. Richmond worked for the Mississippi Department of Human Services (''DHS''), which terminated her employment after other employees raised concerns about her use of the racial slur. The ruling that Southwick joined was unanimously reversed by the Supreme Court of Mississippi. The facts are as follows.

After she was fired, Richmond appealed her termination to the state Employee Appeals Board (''EAB''), which ordered her reinstatement. The hearing officer opined that Richmond's use of the racial slur ''was in effect calling the individual a 'teachers pet'.'' 1998 Miss. App. LEXIS 637, at *19. He considered the word ''nigger'' only ''somewhat derogatory,'' felt that DHS had ''overreacted,'' and was concerned that other employees might seek relief if they were called ''a honkie or a good old boy or Uncle Tom or chubby or fat or slim.'' Id. at *22–23.

The opinion that Southwick joined upheld the EAB's reinstatement of Richmond, essentially ratifying the astonishing findings and conclusions of the hearing officer. Moreover, the opinion that Southwick joined accepted without any skepticism Richmond's testimony that her use of the racial slur was ''not motivated out of racial hatred or animosity directed at her co-worker or toward blacks in general, but was, rather, intended to be a shorthand description of her perception of the relationship existing between the [co]-worker and [a] DHS supervisor.'' Id. at *9–10 (emphasis added).

There was a strong dissent by two judges who were obviously appalled by the hearing officer's findings and opinion. Unlike the majority, they openly criticized the hearing examiner's findings and also criticized the majority for presenting a ''sanitized version of [those] findings.'' Id. at *29. According to the dissenters,

The hearing officer's ruling that calling [the co-worker] a 'good ole nigger' was equivalent to calling her 'teacher's pet' strains credulity. . . . The word 'nigger' is, and has always been, offensive. Search high and low, you will not find any nonoffensive definition for this term. 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 dissenters would have held that the EAB's actions were not supported by substantial evidence, and would have upheld the decision by DHS to fire Richmond. Another judge wrote a separate dissent, joined by two other judges, in which he would have remanded the case to the EAB so that some penalty could be imposed on Richmond, or detailed findings made as to why no penalty was appropriate.

DHS appealed the ruling of Southwick's court to the Mississippi Supreme Court, which unanimously reversed. The Supreme Court majority ordered that the case be sent back to the EAB to impose a penalty other than termination or to make detailed findings as to why no penalty should be imposed. Some of the justices on the court would have gone even further and reinstated the decision by DHS to fire Richmond. But all of the Supreme Court justices rejected the view of the Court of Appeals majority (which included Southwick) that the EAB had not erred in ordering Richmond's reinstatement.

S.B. v *L.W.*, 793 So. 2d 656 (Miss. Ct. App. 2001).

In this case, Judge Southwick joined a decision by the Mississippi Court of Appeals, upholding—over a strong dissent—a chancellor's ruling taking an eight-year-old girl away from her bisexual mother and awarding custody of the child to her father (who had never married her mother). The mother was living at the time with another woman, and in awarding custody to the father, the chancellor was plainly influenced by the mother's sexual orientation and his obvious concern about having the girl continue to live in what he called ''a lesbian home.'' Judge Southwick not only joined the majority opinion upholding the chancellor's ruling, but alone among all the other judges in the majority, he joined a concurrence by Judge Payne that was not only gratuitous, but gratuitously anti-gay.

In taking the girl away from her mother (with whom she lived), the chancellor cited a number of factors that he claimed weighed in favor of the father, but it is clear that he was heavily influenced by the mother's sexual orientation. For example, the chancellor stated that the factor of ''[s]tability of the home environment'' weighed in favor of the father, because ''he is in a heterosexual environment. Has a home there that is an average American home.'' 793 So. 2d at 666. Meanwhile, the chancellor said, ''[t]o place the child with [the mother], the child would be reared in a lesbian home, which is not the common home of today. To place a child with [the father], the child would be reared in a home which is considered more common today.'' Id.

The mother appealed to the Court of Appeals which, as noted above, upheld the chancellor's ruling taking her daughter away from her. The majority opinion, which Southwick joined, held that the chancellor had not erred in taking the mother's sexual

orientation into consideration as what it viewed as one factor in his ruling. In addition to the disturbing substance of the majority's ruling, its language is also troubling, and refers repeatedly to what it calls the mother's ''homosexual lifestyle'' and her ''lesbian lifestyle.''

Not only did Southwick sign on to the majority opinion, but he also made an affirmative decision to join a concurrence by Judge Payne that was gratuitously anti-gay—and was the only other judge in the majority to do so. The concurrence appears to have been written for the sole purpose of underscoring and defending Mississippi's hostility toward gay people and what it calls ''the practice of homosexuality'' (id. at 662), in response to the position of the dissenters (see below) that the chancellor had erred. (The word gay is not used; the concurrence refers repeatedly to ''homosexuals'' and ''homosexual persons.'') The concurrence begins by stating that the Mississippi legislature has ''made clear its public policy position relating to particular rights of homosexuals in domestic relations settings.'' Id. at 662. It then proceeds to note that Mississippi law prohibits same-sex couples from adopting children—although this law had nothing to do with the case, since the mother was the birth mother—and also notes that state law makes '''the detestable and abominable crime against nature'''—which it says includes ''homosexual acts''—a ten-year felony. Id.

Finally, the concurrence takes a huge and troubling states' rights turn, claiming that ''[u]nder the principles of Federalism, each state is permitted to set forth its own public policy guidelines through legislative enactments and through judicial renderings. Our State has spoken on its position regarding rights of homosexuals in domestic situations.'' Id. at 664. In other words, according to the separate concurrence that Southwick chose to join, federalism gives Mississippi the right to treat gay people as second-class citizens and criminals. The views expressed in this concurrence strongly suggest that Judge Southwick is hostile to the notion that gay men and lesbians are entitled to equal treatment under the law.

Two judges dissented, and in particular noted that there had been no finding that there was any conduct harmful to the child, and that ''it is the modern trend across the United States of America to reject legal rules that deny homosexual parents the fundamental constitutional right to parent a child.'' Id. at 668.

As more than 200 law professors wrote to the Senate Judiciary Committee in July 2001, no federal judicial nominee is presumptively entitled to confirmation. Because federal judicial appointments are for life and significantly affect the rights of all Americans, and because of the Senate's co-equal role with the President in the confirmation process, nominees must demonstrate that they meet the appropriate criteria. These include not only an ''exemplary record in the law,'' but also a ''commitment to protecting the rights of ordinary Americans,'' and a ''record of commitment to the progress made on civil rights, women's rights, and individual liberties.''

The burden is on Judge Southwick to demonstrate that he satisfies these important criteria for confirmation. In addition to addressing the serious concerns raised by the matters discussed herein and those that have been raised by others, Judge Southwick must also make his full record available, and the Committee must have a reasonable opportunity to examine it. Because the Supreme Court hears so few cases, the Courts of Appeals really are the courts of last resort in most cases and for most Americans. It is therefore imperative that the Committee not engage in a rush to judgment over anyone seeking a lifetime seat on a federal appellate court, and that it insist upon being provided with the nominee's complete legal record.

It is critical that the Committee closely scrutinize Judge Southwick's full record and his jurisprudential views and legal philosophy, particularly with respect to matters critical to individual rights and freedoms. Until the Committee has the opportunity to do that, and unless the significant questions raised to date by Judge Southwick's record are resolved satisfactorily, the Committee should not proceed with consideration of Judge Southwick's nomination.

Sincerely,

JOE SOLMONESE,
President, Human Rights Campaign.
RALPH G. NEAS,
President, People For the American Way.

MAGNOLIA BAR ASSOCIATION, INC.,
Jackson, Mississippi, May 30, 2007.

Re Nomination of Leslie Southwick

Hon. PATRICK LEAHY,
Chairman, United States Senate, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR SENATOR LEAHY: The Magnolia Bar Association, Inc. opposes the nomination of Leslie Southwick to the United States Court of Appeals for the Fifth Circuit.

Founded in 1955, the Magnolia Bar was formed as all organization of African-American lawyers in Mississippi at a time when the Mississippi Bar was only open to white attorneys. The Magnolia Bar, an affiliate of the National Bar Association, is now a biracial organization whose membership is committed to the same ideals of racial equality that drove our founders to form the Magnolia Bar in the first place.

A federal judgeship is a lifetime position. Any time there is an opening, there are a number of people who could be considered, and no one is necessarily entitled to such an appointment. While the President has a right to nominate, the Senate and its Judiciary Committee must insure that the nominations do not form a pattern that is racially discriminatory in purpose or effect. President Bush has demonstrated an absolute disdain for appointing African-Americans to the federal judiciary; particularly within the states representing the Fifth Circuit. Of his seven nominations to the Fifth Circuit Court of Appeals and his 32 nominations to the district courts, not one nominee is an African-American. This is particularly painful as African-Americans comprise 37% of the population of Mississippi according to the most recent census. This is the highest of the fifty states. Louisiana is the second highest while Texas also has a high African-American population percentage. Confirmation should focus not simply on the nominee, but on the impact the person's appointment will have on the federal judiciary and the interpretation of the law.

Leslie Southwick's nomination continues a stark pattern of racial discrimination and racial exclusion in appointments by President Bush to the Fifth Circuit and to the federal judiciary from Mississippi. If the Senate Judiciary Committee approves this nomination, it will perpetuate this pattern of exclusion and will, in our view, bear equal responsibility for it. Moreover, Judge Southwick's record as a state court of appeals judge in Mississippi suggests that he is not the right person for the Fifth Circuit Court of Appeals at this time in our history, and that his presence there could lead to an improperly narrow interpretation of the constitution and the civil rights laws. There are many others from Mississippi who would make good federal judges, some of whom are African-American. We ask that you not approve this nomination, but instead allow President Bush to reconsider and perhaps nominate someone who will add to the Fifth Circuit's stature, diversity, and sensitivity to the need to enforce fully the civil rights laws.

Despite an ever-growing pool of highly qualified candidates from which to choose, all seventeen Mississippi nominees for federal judgeships the past twenty-two years have been white. The only appointment of an African-American federal judge in the history of Mississippi, the twentieth state to join the union, was when Judge Henry Wingate was appointed by President Reagan to the district court in 1985. Of the sixteen active and senior judges from Mississippi on the federal district courts and court of appeals, only one is African-American. Of the nineteen active and senior judges on the Fifth Circuit, only one is African-American—Carl Stewart of Louisiana, who was appointed by President Clinton. Incidentally, Judge Stewart is only the second African-American to have been appointed to the Fifth Circuit since the court was created by the Judiciary Act of 1869.

Having an appreciation of Mississippi's long history of racial apartheid, disenfranchisement, interposition and massive resistance, it is scandalous that President Bush has not seen fit to nominate not one African-American from our state to the federal judiciary.

Fortunately, the Senate Judiciary Committee has not ratified all of these nominees. It did not approve the earlier nominations of Charles Pickering and Mike Wallace to this seat. Yet, President Bush continues his pattern of racial exclusion by submitting only white people for these appointments, and submitting those who have not shown a sufficient appreciation of the need for racial progress in Mississippi. It is vitally important for the Senate Judiciary Committee to stand firm and not ratify President Bush's brazen disregard of the need to integrate the federal judiciary and to nominate those who have demonstrated they will fully enforce the civil rights laws. If President Bush is unwilling to help create a racially integrated federal judiciary that is his prerogative. The Senate, however, should not be an accomplice to this unjustifiable behavior. It should keep the seats open until he is willing to do so or until we have a new President who will have a fresh opportunity to do so.

Several organizations have already expressed concern about the decisions of Judge Southwick and whether he will fairly and properly interpret the law with respect to the civil rights of all. We share those concerns. Particularly troubling is the decision Judge Southwick joined in the case of Richmond v. Mississippi Department of Human Services. The Mississippi Court of Appeals does not review many cases involving racial issues in employment. This is not a situation where this decision is an outlier in what otherwise is a progressive record on issues of race in the workplace. Judge Southwick and his colleagues in the 5–4 majority basically held that the Mississippi Department of Human Services—an agency of the State of Mississippi—could not discipline this worker who called a co-worker a ''good ole nigger.'' This decision was the subject of publicity in Mississippi, Clarion Ledger, August 5, 1998, and seemed to send a message that the Court of Appeals majority did not believe state officials should have the power to eliminate this sort of behavior from the workplace.

In written questions by Senator Durbin, Judge Southwick was asked why he believed

that the hearing officer was not acting arbitrarily and capriciously when he (the hearing officer) concluded that the use of the word ''nigger'' was similar to the terms ''good old boy or Uncle Tom or chubby or fat or slim.'' Judge Southwick responded by saying that ''[i]t was the EAB's [Employee Appeals Board] decision, though, not that of the hearing officer, that was subject to our analysis . . .'' But that statement is misleading. The Richmond majority opinion, which Judge Southwick joined, states: ''The hearing officer's findings, subsequently adopted by the full Board, address two separate aspects of the matter under consideration.'' 1998 Miss. App. LEXIS 637 *4. The opinion adds: ''In order to reverse the EAB, we must determine that there was not substantial evidence in the record to support the findings made by the hearing officer and ratified by the full board.'' Id. *7. As explained by the dissent of Judge King (a distinguished African-American from Mississippi who is now Chief Judge of the Mississippi Court of Appeals having been appointed as Chief by the Chief Justice of the Mississippi Supreme Court and who would make an excellent federal appellate judge): ''Because the EAB made no findings of its own, we can only conclude that it incorporated by reference and adopted the findings and order of the hearing officer.'' Id. * 19. As Judge King later said: ''The majority opinion is a scholarly, but sanitized version of the hearing officer's findings and is subject to the same infirmities found in that opinion.'' Id. *28–29.

Moreover, we agree with Judge King, that one can ''[s]earch high and low, [and] you will not find any non-offensive definition for [the] term [nigger], and it ''is so inherently offensive that it is not altered by the use of modifiers, such as 'good ole.'' Id. at 26–27 Having used the term, which has always been offensive, within a 60% black division of a state agency with more than 50% black employees demonstrated a gross lack of judgment that the agency should have dismissed the employee. As Justice Fred Banks, the African-American member of the Supreme Court at the time, explained in his concurring opinion:

[I]t is clear [the Department of Human Services] had an interest in terminating Bonnie Richmond because not to have taken some sort of action regarding the comment made by her, could possibly have subjected the agency to a claim of racially hostile environment claim under federal law, and therefore retaining Bonnie Richmond could constitute negligence. *Richmond* v. *Mississippi Dept. of Human Services,* 745 So.2d 254, 260 (Miss. 1999)(Banks, J., concurring)(joined by Sullivan, P.J., and Smith, J.)

We are also troubled by the other decisions and positions cited in the various questions propounded by members of the Judiciary Committee and in the statements issued by other organizations expressing concern over this nomination. We question whether Judge Southwick will properly enforce the law when it comes to the rights of those who are unpopular and who are marginalized by the political process. The Fifth Circuit needs a moderating influence at this point in history, but it appears this appointment will have the opposite effect.

As Senator Durbin pointed out at the hearing on Judge Southwick's nomination, the Fifth Circuit Court of Appeals was once a collection of several heroic judges who steadfastly enforced the civil rights of African-Americans and other dispossessed groups even though many white people in the South were quite hostile to the notion of equal rights under the law. Unfortunately, the present-day Fifth Circuit has often retreated from that legacy by applying a narrow and overly technical interpretation of the constitution and the civil rights laws. Moreover, at a time when the bars of Mississippi, Louisiana, and Texas have become racially integrated, and when many governmental bodies in those states have achieved significant racial diversity, the Fifth Circuit presently stands as an almost all-white judicial body in the heart of the Deep South. This is a sad legacy and the Senate Judiciary Committee should do everything it can to end that legacy rather than perpetuate it.

Thank you for your consideration.

Sincerely,

CARLTON W. REEVES,
President,
Magnolia Bar Association, Inc.

NATIONAL EMPLOYMENT LAWYERS ASSOCIATION,
San Francisco, California, May 30, 2007.

Hon. PATRICK J. LEAHY,
Chairman, Committee on the Judiciary,
Washington, DC.
Hon. ARLEN SPECTER,
Ranking Member, Committee on the Judiciary,
Washington, DC.

DEAR SENATORS LEAHY AND SPECTER: I am writing to you as President of the National Employment Lawyers Association (NELA) to express our strong opposition to the nomination of Leslie Southwick to the Fifth Circuit Court of Appeals. After reviewing Mr. Southwick's background and legal experience, we believe he is not qualified to be appointed to the federal bench.

Mr. Southwick has been nominated to the same Fifth Circuit seat that has been steeped in controversy: President Bush recess appointed Charles Pickering to the seat in January 2004 and nominated Michael Wallace to the seat in 2006. NELA strongly opposed both of those nominees and takes a similar position on Mr. Southwick's nomination.

Like Pickering and Wallace, Mr. Southwick has espoused extreme views reflecting a lack of commitment to equality and justice in the workplace. For example, Mr. Southwick joined a troubling 5–4 decision from the Mississippi Court of Appeals that excused the use of a racial slur by a white state employee. In Richmond v. Mississippi Dep't of Human Services, Bonnie Richmond, an employee with the Mississippi Department of Human Services (DHS), was terminated when she referred to an African-American coworker as a ''good ole n*****'' at a meeting that included agency executives. Richmond appealed her termination to the Mississippi Employee Appeals Board (EAB). A hearing was conducted by one member of the EAB who had been designated to act as hearing officer.

Among other things, the hearing officer concluded that the ''DHS overreacted'' to Richmond's comments, because the term ''was not a racial slur, but instead was equivalent to calling [the African American employee] 'teacher's pet.''' The hearing officer stated, ''I understand that the term 'n*****' is somewhat derogatory, but the term has not been used in recent years in the conversation that it was used in my youth, and at that point—at that time it was a derogatory remark . . . I think that in this context, I just don't find it was racial discrimination.''

The majority, which included Mr. Southwick, affirmed the EAB hearing officer's decision without reservation. They found that, taken in context, the slur was an insufficient ground to terminate Richmond's employment in part because it ''was not motivated out of racial hatred or racial animosity directed toward a particular co-worker or towards blacks in general.'' The dissent, rightly disturbed by the majority's failure to acknowledge the inherent offensiveness of the epithet, stated that ''the hearing officer and the majority opinion seem to suggest that absent evidence of a near race riot, the remark is too inconsequential to serve as a basis of dismissal.''

When Judiciary Committee member Senator Russ Feingold, at Mr. Southwick's hearing earlier this month, characterized the argument relied upon by Mr. Southwick in the case as ''a pretty shocking piece of analysis,'' Mr. Southwick even admitted that the reasoning ''does not now seem convincing to me.'' However, his backpedaling comes too late and fails to allay NELA's concerns that Mr. Southwick, if confirmed to the Fifth Circuit, will turn a blind eye to discrimination in the workplace.

Indeed, NELA is troubled by Mr. Southwick's views on other workplace issues, particularly his zealous support for the employment-at-will doctrine, a doctrine which provides that employers can fire employees for virtually any reason. In Dubard v. Biloxi, H.M.A., the court addressed the issue, among others, of whether there was sufficient evidence to show that the defendant did not breach the plaintiff's employment contract or that the defendant did not wrongfully discharge the plaintiff. In a dissenting opinion that focused less on the merits of the case and more on the virtues of the employment-at-will doctrine, Mr. Southwick went to great lengths to justify a legal theory that has been the subject of intense legal, judicial and academic controversy. He wrote: ''I find that employment at will, for whatever flaws a specific application may cause, is not only the law of Mississippi but it provides the best balance of the competing interests in the normal employment situation. It has often been said about democracy, that it does not provide a perfect system of government, but just a better one than everything else that has ever been suggested. An equivalent view might be seen as the justification of employment at will.''

Mr. Southwick casually, and without any supporting citations, equated the doctrine of employment at will with democracy. In fact, it is its polar opposite. That doctrine is often used to justify employers' decisions to discharge employees who have engaged in prounion activities or in other conduct protected by anti-discrimination, minimum wage and overtime, occupational safety and health, family and medical leave, whistleblower protection, and other federal and state statutes. An employer can cause devastating financial and emotional harm to an employee; an individual employee rarely has that same power. Mr. Southwick's endorsement of that doctrine calls into question his willingness to vigorously enforce federal legislation that imposes restrictions on an employers ability to fire employees without a good reason or, for that matter, without any reason.

Based on his demonstrated insensitivity to race issues, combined with his apparent inability to divorce his views from his judicial obligation to be fair and independent, NELA believes that Mr. Southwick would be in the mold of previous nominees like Charles Pickering and Michael Wallace who had never been friendly to employee rights. As such, NELA is strongly opposed to Mr. Southwick's nomination to the Fifth Circuit Court of Appeals and believes he should not be confirmed by the Senate.

Thank you for your consideration. If you have any questions, please feel free to contact NELA Program Director Marissa Tirona.

Sincerely,

KATHLEEN L. BOGAS,
President,
National Employment Lawyers Association.

Mr. WARNER. Mr. President, I rise today in support of the nomination of Judge Leslie Southwick to serve on the U.S. Circuit Court of Appeals for the Fifth Circuit.

Article II, section 2 of the U.S. Constitution explicitly provides the responsibilities of the executive branch of Government and the Senate with respect to judicial nominations. Article II, section 2 of the Constitution reads, in part, that the President ''shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court and all other Officers of the United States . . . .''

Thus, the Constitution provides the President of the United States with the responsibility of nominating individuals to serve on our Federal bench.

The Constitution provides the Senate with the responsibility of providing advice to the President on those nominations and with the responsibility of providing or withholding consent on those nominations.

In this respect, article II, section 2 of our Constitution places our Federal judiciary—a coequal branch of Government—in a unique posture with respect to the other two co-equal branches of our Federal Government. Unlike the executive branch and unlike the Congress, the Constitution places the composition and continuity of our Federal judiciary entirely within the coordinated exercise of responsibilities of the other two branches of Government. Only if the President and the Senate fairly, objectively, and in a timely fashion exercise these respective constitutional powers can the judicial branch of Government be composed and maintained so that our courts can function and serve the American people.

For this reason, in my view, a Senator has no higher duty than his or her constitutional responsibilities under article II, section 2—the advice and consent clause.

During the course of my 28 years in the Senate, I have always tried to fairly and objectively review a judicial nominee's credentials prior to deciding whether I will vote to provide consent on a nomination. I look at a wide range of factors, primarily character, professional career, experience, integrity, and temperament for lifetime service on our courts. While I certainly recognize political considerations, it is my practice not to be bound by them.

Having reviewed Judge Southwick's nomination, in my view, he is eminently qualified to serve on the Federal bench. I note that the American Bar Association, often cited as the ''gold standard'' of review of judicial nominees, agrees with me as it has given Judge Southwick its highest rating of ''well-qualified.''

Judge Southwick's credentials are well-known but worth repeating. He received his bachelor's degree, cum laude, from Rice University and then proceeded to law school at the University of Texas.

Subsequent to his law school graduation, he served as a law clerk for two jurists: a judge on the U.S. Court of Appeals for the Fifth Circuit—the court for which he now has been nominated—and for a judge on the Texas Court of Criminal Appeals.

Upon completing his clerkships, Mr. Southwick entered private practice with a law firm in Mississippi, starting as an associate but rising to the level of partner 6 years later. After 12 years of private practice, he joined the U.S. Department of Justice in the George H. W. Bush administration, working as Deputy Assistant Attorney General for the Civil Rights Division.

From 1995 until 2006, Leslie Southwick served as a member of the Mississippi Court of Appeals. During this time, Judge Southwick also served his country in uniform.

From 1992 through 1997, he was a member of the Judge Advocate General's Corps in the U.S. Army Reserve. In 2003, he volunteered to serve in a line combat unit, the 155th Separate Armor Brigade. In 2004, he took a leave of absence from the bench to serve in Iraq with the 155th Brigade Combat Team of the Mississippi National Guard.

Mr. President, Judge Southwick is obviously very well qualified to serve on the Federal bench. Not only does he meet the requisite academic requirements, he also has real world experience in private practice and a dedication to public service.

In my view, he deserves to be confirmed to the Federal bench. I urge my colleagues to support this eminently qualified nominee.

Mr. HATCH. Mr. President, I strongly support the nomination of Judge Leslie Southwick to the U.S. Court of Appeals for the Fifth Circuit. His confirmation is compelling for two reasons. Judge Southwick should be confirmed because of his merits, and Judge Southwick should be confirmed because of the traditions of this body.

Judge Southwick's merits are obvious. He is a good man and a good judge. Leslie Southwick has long been active serving his community, his church and his country. He is a man of character and integrity.

Our colleagues from Arizona, South Carolina, and Virginia, Senators MCCAIN, GRAHAM, and WARNER, have spoken forcefully and eloquently from their perspective as veterans about Judge Southwick's military service. He volunteered for service in Iraq when he was old enough to have children serving in Iraq. He did not have to do that, he offered to do that. It seems to me that we want men and women on the Federal bench who have this selfless commitment to serving others.

Leslie Southwick is also a good judge. What could be more directly relevant to a Federal appeals court nomination than 12 years of State appeals court service? During that time, he participated in more than 7,000 cases and wrote nearly 1,000 opinions.

Earlier this year, the Congressional Black Caucus said that, in deciding whether to confirm Judge Southwick, we should consider how often his majority and concurring opinions were reversed on appeal. I do think that is a legitimate factor to consider. I thought I would find an unusually high number, that he has been repeatedly rebuked, rebuffed, and reversed, that Mississippi Supreme Court had to routinely put him in his judicial place. I found just the opposite. Only 21 of Judge Southwick's majority or concurring opinions were reversed or even criticized by the Mississippi Supreme Court. That is less than 2 percent. I am indeed impressed by that low figure because it shows that Judge Southwick's work as a judge stands up under scrutiny. If that is an appropriate standard for evaluating his nomination, we should confirm him immediately.

Judge Southwick's critics suggest that he is supposedly out of the mainstream. That is the phrase liberals invented 20 years ago to attack judicial nominees who they predict will not rule a certain way on certain issues. This is a completely illegitimate standard for evaluating judicial nominees and is based on a tally of winners and losers, as if judges are supposed to decide winners and losers by looking at the parties rather than at the law and the facts. Perhaps my liberal friends could publish a confirmation rate card, telling us how often judges are supposed to rule for one party or another in certain categories of cases. But the case against Judge Southwick is even more ridiculous than that. The case against Judge Southwick's nomination rests on just two, of the 7,000 cases in which he participated. It rests on two opinions, just two, that he did not even write. No one has argued that those cases were wrongly decided. No one has argued that the court ignored the law. No one is making that argument because no one can. In fact, the Washington Post editorialized that Judge Southwick should be confirmed and said that while they might not like the results in these two cases, they could not argue with what the Post admitted was a ''legitimate interpretation of the law.''

I ask my colleagues a very important, perhaps the most important, question: Are judges supposed to be legally correct or politically correct? Are judges supposed to decide cases based on legitimate interpretation of the law or based on which side wins or loses? Are judges supposed to apply the law or ignore the law? That question of what judges are supposed to do lies at the heart of every conflict over a judicial nominee, including the one before us today.

The case against Judge Southwick is that, in just two cases with opinions he did not write, the court was legally correct instead of being politically correct. The case against Judge Southwick is that, in just two cases, the court did not ignore the law. What

kind of crazy, topsy-turvy argument is this, that Judge Southwick should not be confirmed because as a state court judge he stuck to the law? I think that exposing the real argument against him is enough to show that there is no real argument against him at all. I thought we wanted judges on the Federal bench who would rule based on the law, who would be committed to equal justice for every litigant coming before them.

When it comes to evaluating Judge Southwick's record, whom should we believe—partisan and ideological critics here in Washington or lawyers and judges who have worked with Judge Southwick for many years? That is not even a close call. Everyone who actually knows him, everyone who has actually worked with him, says that Judge Leslie Southwick is fair, decent, hard-working, and committed to equal justice under law. You would have to twist and contort his record into something else entirely to conclude otherwise.

The American Bar Association also looked at Judge Southwick's fitness for the Federal bench. They evaluated his qualifications and record not once but twice, last year when he was nominated to the U.S. District Court and again this year after his nomination to the U.S. Court of Appeals. I must be candid with my colleagues regarding the ABA's two ratings of Judge Southwick. In the interest of full disclosure, I must be honest that the ABA's two ratings of Judge Southwick are not the same and, quite frankly, I think this must be considered when we vote. The ABA's rating for Judge Southwick's current appeals court nomination is higher than their rating for his district court nomination. The ABA says that it looks specifically at a nominee's compassion, freedom from bias, openmindedness and commitment to equal justice under law. The ABA's highest ''well qualified'' rating means Judge Southwick receives the highest marks for these qualities. I thought we wanted judges on the Federal bench who are compassionate, free from bias, openminded, and committed to equal justice under law. Judge Southwick's critics have offered nothing, absolutely nothing, to rebut this conclusion. Nothing at all.

I think the record, the evidence, and the facts are clear. Judge Southwick is a good man and a good judge, and, based on his merits, he should be confirmed.

Judge Southwick should also be confirmed because of the traditions of this body. Traditionally, the Senate has respected the separation of powers when it comes to the President's appointment authority. Under the Constitution, the President has the primary appointment authority. We check that authority, but we may not hijack it. We may not use our role of advise and consent to undermine the President's authority to appoint judges. That is why, as I have argued on this floor many times, it is wrong to use the filibuster to defeat judicial nominees who have majority support, who would be confirmed if only we could vote up or down. That is why I have never voted against cloture on a judicial nomination. That is why I argued against filibusters of even President Clinton's most controversial judicial nominees. And believe me, the case against some of those nominees was far greater, far more substantial, by orders of magnitude, than the nonexistent case against Judge Southwick.

Traditionally, the Senate has not rejected judicial nominees based on such thin, trumped-up arguments. We have not rejected nominees who received the ABA's unanimous highest rating. In fact, I remember when this body confirmed judicial nominees of the previous President whom the ABA said were not qualified at all. We have not rejected judicial nominees who received such uniform praise from those who know them and worked with them. We have not rejected judicial nominees for refusing to ignore the law.

Traditionally, the Senate has respected the views of home-state Senators. Our colleagues from Mississippi, Senators COCHRAN and LOTT, are respected and senior members of this body. They strongly support Judge Southwick, and we should respect their views. Such home-state support was an important factor in moving even the most controversial Clinton judicial nominees to this floor and onto the Federal bench.

So I say to my colleagues that Judge Southwick's merits and our traditions mean that he should be confirmed. Judge Southwick is a good man and a good judge. Our traditions respect the separation of powers, respect the obvious merits of nominees, and respect the views of home-state Senators. I urge my colleagues not to veer from that path, but to support this fine nominee and keep the confirmation process from slipping further into the political mire.

I urge my colleague to vote for cloture and to vote for confirmation.

Mr. FEINGOLD. Mr. President, I will vote against the nomination of Judge Leslie Southwick to the U.S. Court of Appeals for the Fifth Circuit. I believe he should not be confirmed.

The context for this nomination is important, so I want to turn to that first.

During the last 6 years of the Clinton administration, this committee did not report out a single judge to the Fifth Circuit Court of Appeals. And, as we all know, that was not for lack of nominees to consider. President Clinton nominated three well-qualified lawyers to the court of appeals. None of these nominees even received a hearing before this committee. When Chairman LEAHY held a hearing in July 2001 on the nomination of Judge Edith Brown Clement, only a few months after she was nominated, it was the first hearing for a Fifth Circuit nominee since September 1994. Judge Clement was quickly confirmed. We have also confirmed two other Fifth Circuit nominees during this administration, Edward Prado and Priscilla Owen.

So there is a history here. Some may think it is ancient history, but the fact is that nominees to this circuit were treated particularly unfairly during the Clinton administration, and there was a special burden for the current administration to work with our side on nominees for it. To ignore this history would be to simply reward the behavior of the Republicans during the last 6 years of the Clinton administration. And the numbers tell a very clear tale—three judges confirmed for this circuit during the first 6 years of this administration, versus none in the last 6 years of President Clinton's term.

President Bush did not act in a bipartisan way, of course, in the case of the seat for which Judge Southwick has been nominated. First, he nominated Judge Charles Pickering, leading to one of the most contentious floor fights of his first term. Judge Pickering was never confirmed by the Senate, but in a further slap to this institution, the President put him on the court through a recess appointment. Then, when Judge Pickering retired, the President nominated Michael Wallace, whom the ABA judicial nominations screening committee unanimously gave a rating of ''not qualified'' based on comments from judges and lawyers in his own State concerning his temperament and commitment to equal justice. Mr. Wallace ultimately withdrew his nomination when it became clear he could not be confirmed.

Another important part of the context of this nomination is that except for the DC Circuit, the Fifth Circuit has the largest percentage of residents who are minorities of any circuit—over 40 percent. Thirty-seven percent of the residents of Mississippi are African American. Yet only 1 of the 19 seats on the circuit is currently held by an African American judge. The Fifth Circuit is a court that during the civil rights era issued some of the most significant decisions supporting the rights of African-American citizens to participate as full members of our society. It is a circuit where cases addressing the continuing problems of racism and discrimination in our country will continue to arise.

In this context, as we come to the end of this President's term, I wanted very much to see, if not an African-American nominee, at least a nominee whose commitment to equal rights for all Americans and equal justice under law is unassailable. Judge Southwick is not that nominee. While the record we have been able to review is not extensive, two decisions he made as a judge raise real red flags.

In the Richmond case, Judge Southwick joined the majority in a split decision upholding a hearing examiner's decision that an employee's use of the most offensive racial slur in our Nation's history was not adequate

grounds for dismissal. That hearing examiner said that the slur was ''somewhat derogatory, but the term has not been used in recent years in the conversation that it was used in my youth, and at that point—at that time it was a derogatory remark. I think that in this context, I just don't find it was racial discrimination.''

A unanimous Mississippi Supreme Court reversed the decision that Judge Southwick joined. Mr. Chairman, in the year 2007, in a State where 37 percent of the residents are African Americans, we need a judge on the Fifth Circuit who recognizes that such a decision had to be overturned.

I am also disturbed by Judge Southwick's role in the child custody case, S.B. v. L.W., and particularly by his joining a stridently antigay opinion concurring in the decision to take a woman's child away from her and give custody to the unmarried father of the child. I found Judge Southwick's explanation of his reasoning in joining this opinion, and his assurances that he harbors no bias against gay Americans, unconvincing. I am simply not convinced by his assurances that he will give all litigants who come before him a fair hearing.

Mr. President, it gives me no pleasure to vote against this nominee. As my colleagues know, I do not start with a predisposition against the President's choices. I have supported well over 200 of the President's judicial nominees. But no one is entitled to a lifetime appointment to our powerful Federal courts, and Judge Southwick has not demonstrated that he is the right nominee for this vacancy. I will vote no.

I ask unanimous consent that letters of opposition and concern from the Congressional Asian Pacific American Caucus, the National Partnership for Women and Families, the California State Conference of the National Association for the Advancement of Colored People, the Congressional Black Caucus, and the NAACP be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

CONGRESS OF THE UNITED STATES,
Washington, DC, July 25, 2007.

Re Jude Leslie Southwick nomination.

Hon. PATRICK LEAHY,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.
Hon. ARLEN SPECTER,
Ranking Member, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR SENATOR LEAHY AND SENATOR SPECTER: On behalf of the Congressional Asian Pacific American Caucus (CAPAC), we write to express our strong opposition to the nomination of Judge Leslie Southwick to the United States Court of Appeals for the Fifth Circuit.

The Southwick nomination fails to address the lack of diversity on Mississippi's federal branch. As you know, the Fifth Circuit presides over the largest percentage of minority residents (44%) of any circuit. Mississippi has the highest African American population (36%) of any state in the country. Yet, out of the seventeen seats on the Fifth Circuit, only one is held by an African-American. Additionally, the Fifth Circuit has issued decisions important to minority communities such as employment discrimination, voting rights and affirmative action. The lack of diversity of the Fifth Circuit, compounded with Judge Southwick's flawed record on race, further exemplifies the unacceptability of Southwick's nomination.

Judge Southwick's record as a judge on the Mississippi State Court of Appeals clearly demonstrates that he is an objectionable nominee for the Fifth Circuit. In the case of Richmond v. Mississippi Department of Human Services, Judge Southwick joined a 5–4 decision that upheld the reinstatement of a white state social worker, Bonnie Richmond, who had been fired for calling an African American co-worker a ''good ole n*****'' at a meeting that included top agency executives. The ruling that Southwick joined was unanimously reversed by the Supreme Court of Mississippi.

CAPAC is furthered disturbed by Judge Southwick's rulings against consumers and workers in divided torts and employment cases and worker rights. In 160 out of 180 published decisions, Judge Southwick votes against the injured party and in favor of business interests, such as corporations or insurance companies.

With the lifetime judicial position at stake, Southwick's record has failed to reflect the values of social justice, fairness and equality in this country. We strongly urge the Judiciary Committee to reject Leslie Southwick's confirmation to the Fifth Circuit.

Sincerely,

MICHAEL M. HONDA,
Chair, CAPAC.
BOBBY SCOTT,
Chair, CAPAC Civil Rights Task Force.

NATIONAL PARTNERSHIP
FOR WOMEN & FAMILINES,
Washington, DC, June 21, 2007.

Re nomination of Leslie Southwick to the U.S. Court of Appeals for the Fifth Circuit.

Hon. PATRICK J. LEAHY,
Chair, Senate Judiciary Committee, Dirksen Senate Office Building, Washington, DC.
Hon. ARLEN SPECTER,
Ranking Member, Senate Judiciary Committee, Hart Building, Washington, DC.

DEAR SENATORS LEAHY AND SPECTER: We write to urge you to reject the nomination of Leslie Southwick for a seat on the United States Court of Appeals for the Fifth Circuit. As an organization committed to protecting and promoting women's rights and eradicating discrimination in the workplace, the National Partnership for Women & Families is troubled by Judge Southwick's record and its implications for rights that are vital to ensuring equal opportunity and access to justice. Judge Southwick's failure to produce significant portions of his record—effectively thwarting the thorough, comprehensive review every federal appellate nomination deserves and demands—only exacerbates these concerns.

INCOMPLETE RECORD

For the committee to consider fairly any nominee for a lifetime appointment to a seat on the federal court of appeals—the court of last resort in the vast majority of cases—the nominee's entire record must be fully reviewed and evaluated. Judge Southwick's failure to produce unpublished opinions in which he participated and joined during his first two years on the Mississippi Court of Appeals makes such review impossible. These gaps in Judge Southwick's record alone should give the committee pause in moving Judge Southwick's nomination forward.

A SETBACK FOR CIVIL RIGHTS

A review of Judge Southwick's record calls into question his commitment to the full enforcement of rights critical to ensuring fair workplaces and access to justice. In *Richmond* v. *Mississippi Department of Human Services*, 1999 Miss. App. LEXIS 468 (Miss. Ct. App. 1999), Richmond, a social worker, was terminated by the Mississippi Department of Human Services for using a derogatory racial epithet. Richmond appealed the decision and was reinstated by the state Employee Appeals Board (EAB). A sharply divided Mississippi Court of Appeals affirmed the EAB ruling. Judge Southwick joined the Court of Appeals's 5–4 decision, which credited Richmond's testimony that ''her remark was not motivated out of racial hatred or animosity directed toward her co-worker or toward blacks in general.'' The Mississippi Supreme Court was unanimous in reversing the Court of Appeals, holding instead that the EAB should either impose some penalty on Richmond or make detailed findings why no penalty should be imposed. *Richmond* v. *Mississippi Department of Human Services*, 778 So. 2d 113, 114 (Miss. 2000). Three justices would have gone further by reversing the EAB' s reinstatement decision and upholding Richmond's termination.

Judge Southwick's decision to join the majority in this case is deeply troubling. The EAB's written decision is limited and provides little explanation of its reasoning. The primary record about the incident at issue consists of the hearing officer's findings. The hearing officer found that the racial epithet used by Richmond—referring to an employee as a ''good ole n*****''—was once considered ''derogatory,'' but was no longer evidence of racial discrimination. Instead, he characterized the phrase as akin to calling someone a ''teacher's pet,'' ''chubby,'' or ''slim.'' These statements indicate a failure to take this incident seriously and are wildly out of touch with the deeply offensive and charged nature of racial slurs. The hearing officer's findings should have raised a red flag, particularly in light of the diversity of the agency where Richmond worked, where more than half of the employees were African American, and the undoubtedly very diverse client base the agency served—all factors that further heightened the need for sensitivity to issues of race.

Although Judge Southwick's ability to alter the outcome in this case may have been constrained by the posture of the case and the deferential standard of review, he still had every opportunity to object to the use of the epithet and demand a fuller explanation of why Richmond was reinstated by writing a separate concurring opinion or working with the authoring judge to modify the opinion. Judge Southwick did neither of these things. That the dissenting judges on his own court and each of the justices on the Mississippi Supreme Court recognized the gravity of this incident while Judge Southwick did not makes plain that Judge Southwick is out of step with his peers on issues of racial justice. If the opinion Judge Southwick joined had been the final word in this case, Richmond would have been reinstated without any discipline and would have faced no consequences for using a horrible racial slur. Moreover, the underlying record and the questionable assessment of the hearing officer would have been left unrebutted, perhaps influencing the outcome of future cases. Judge Southwick's deference to the decision of the EAB despite the suspect findings on which that decision was based calls into question his ability to apply the law to ensure that workplaces in the Fifth Circuit—

the circuit with the largest minority population—are free of discrimination.

Judge Southwick displayed similar insensitivity to the rights of minorities in *S.B.* v. *L.W.*, 793 So. 2d 656 (Miss. Ct. App. 2001), a case in which the Mississippi Court of Appeals granted custody of a child to the child's father based on a number of factors, including the mother's sexual orientation. Not content simply to review the lower court's application of the custody standard and explain why the application was or was not correct, Justice Southwick joined a separate opinion to emphasize the immorality of the mother's ''choice'' to engage in a ''homosexual lifestyle.'' His decision to join an opinion that injected personal views and divisive rhetoric into the legal analysis raises concerns about whether he will apply the law without prejudice to all who may come before him as a judge on the Fifth Circuit Court of Appeals.

HURDLES FOR INJURED PARTIES

Judge Southwick's ability to apply the law fairly is also called into question by his lopsided record favoring business interests over individuals and his tendency to deny plaintiffs their right to have their cases decided by a jury of their peers. According to published reports, Judge Southwick voted, in whole or in part, against the injured party and in favor of the defendant, in 160 out of 180 non-unanimous published decisions involving state employment and tort law. In a troubling number of cases, Judge Southwick voted to prevent an injured party's case from being heard by a jury based on cramped legal interpretations that erect unreasonable barriers to pursuing one's day in court. See, e.g., *Cannon* v. *Mid-South X-Ray Co.*, 738 So. 2d 274 (Miss. Ct. App. 1999).

CURTAILING CIVIL RIGHTS PROTECTIONS

Finally, Judge Southwick's view of the ''federalism revival'' raises doubts about his commitment to civil rights laws that have been essential to advancing equal employment opportunities. In a 2003 article, Judge Southwick indicated that he approved of the Supreme Court's recent limitations on Congress's ability to pass civil rights legislation under its commerce power, and on Congress's power to abrogate state immunity and allow state employees to sue to vindicate their rights under federal law. See Judge Leslie Southwick, Separation of Powers at the State Level: Interpretations and Challenges in Mississippi, 72 Miss. L. J. 927 (2003). This narrow view of Congress's authority to combat and remedy domestic violence and workplace discrimination raises significant concerns for those who have looked to Congress to ensure that crucial rights and protections extend to every American.

CONCLUSION

It is critical to ensure that judges elevated to the federal appellate bench inspire confidence that the law is being administered fairly, consistently, and without bias. Because of the concerns outlined above, we urge the committee to reject Judge Southwick's nomination.

Sincerely,

DEBRA NESS,
President.

CALIFORNIA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,
Sacramento, CA, June 13, 2007.

Re California State Conference of the NAACP opposition to the nomination of Lesley Southwick to the 5th Circuit U.S. Court of Appeals.

Senator PATRICK LEAHY,
Chairman, Senate Judiciary Committee, Washington, DC.

DEAR SENATOR: The California State Conference of the National Association for the Advancement of Colored People (NAACP), our nation's oldest, largest and most widely recognized grassroots civil rights organizer for stands in strong opposition to the nomination of Lesley Southwick to the U.S. Court of Appeals for the 5th Circuit. After thoughtful review and careful analysis of Judge Southwick's record, it is clear that Judge Southwick has a disdain for civil rights, evidenced by a substantial sentencing disparity on the basis of ethnic identity where African Americans are overwhelmingly incarcerated. It is equally important to note that the 5th Circuit, which covers Louisiana, Mississippi and Texas, has the highest concentration of racial and ethnic minorities in the country.

Judge Southwick's record as a jurist on the Mississippi State Court of Appeals clearly demonstrates that he is an inappropriate nominee for the U.S. Court of Appeals for the 5th Circuit. In the case of *Richmond* v. *Mississippi Department of Human Services*, 1998 Miss. App. LEXIS 637 (Miss. Ct. App. 1998), reversed, 745 So. 2d 254 (Miss. 1999). Judge Southwick joined a 5–4 ruling upholding the reinstatement of a white state social worker, Bonnie Richmond, who had been fired for referring to an African American co-worker as ''a good ole nigger'' at an employment-related conference. Richmond worked for the Mississippi Department of Human Services (''DHS''), which terminated her employment after other employees raised concerns about her use of the racial slur. The ruling that Southwick joined was unanimously reversed by the Supreme Court of Mississippi.

The California State Conference of the NAACP is further disturbed by Judge Southwick's rulings on race discrimination in jury selection. His rulings demonstrate a clear lack of support for or even understanding of the basis for civil rights for African Americans in the American legal system. Dozens of cases in this area reveal a pattern in which Judge Southwick rejected the claims that the prosecution was racially motivated in striking African American jurors while upholding claims that the defense struck white jurors on the basis of their race. In Bumphis v. State, and appellate colleague accused Judge Southwick of ''establishing one level of obligation for the State, and a higher one for defendants on an identical issue.''

The 5th Circuit Court of Appeals has a history of protecting and even promoting the civil rights of the racial and ethnic minorities living within its jurisdiction. The current court, however, does not appear to be following this trend; indeed they appear more interested in curbing civil rights and retarding civil liberties. Given Judge Southwick's record, we believe he would only perpetuate this discriminatory trend if he were confirmed. Therefore the California State Conference of the NAACP must oppose Judge Southwick's nomination to the 5th Circuit Court of Appeals and urge you to do the same when his nomination is considered by the Senate Judiciary Committee.

On behalf of the California State Conference of the NAACP, I want to thank the Senate Judiciary Committee for its consideration of our letter of opposition to the Southwick nomination. Should you have any questions, please do not hesitate to contact me.

Sincerely,

ALICE A. HUFFMAN,
President.

CONGRESSIONAL BLACK CAUCUS OF THE 110TH UNITED STATES CONGRESS,
Washington, DC, May 24, 2007.

Hon. GEORGE W. BUSH,
President, United States of America, The White House, Washington, DC.

MR. PRESIDENT: On behalf of the nearly forty million Americans we represent, including those in Louisiana, Mississippi and your home state of Texas, we urge you to withdraw the nomination on Leslie Southwick to the U.S. Court of Appeals, Fifth Circuit. To say that our opposition to Mr. Southwick is strong and unequivocal would be an understatement.

As you know, the Fifth Circuit presides over the largest percentage of minority residents (44%) of any circuit. It has issued seminal decisions on voting rights, affirmative action, employment discrimination, discriminatory jury selection, and the death penalty.

The Southwick nomination fails to remedy the egregious problem with the lack of diversity on Mississippi's federal bench. It bears noting that Mississippi has the highest African-American population (36%) of any state in the country. Yet, you have nominated ten individuals to the federal bench in Mississippi, none of whom has been African-American. While you have nominated three individuals to the Fifth Circuit, none of them has been approved. The Southwick nomination would compound the absence of diversity with a nominee with an unacceptable record on race.

Please consider Mr. Southwick's judicial record in the following cases:

In *Richmond* v. *MS Dep't of Human Services*, 1998 Miss. App. LEXIS 637 (Miss. App. Ct. 1998), Southwick joined a decision reinstating the job of a white employee who had used the word ''nigger'' toward an African-American coworker.

At an employment related conference, the white employee had called the black employee ''a good ole nigger,'' and then used the very same term toward the employee the next day back at the office. The white employee was fired.

The opinion joined by Southwick was reversed by the Mississippi Supreme Court. 745 So. 2d 254 (Miss. 1999). No one on the Supreme Court thought that the ruling of Southwick's court was correct. They reversed and remanded the case on the nature of the penalty or to make detailed findings on the record why no penalty should be imposed. Some members of the Supreme Court would not only have reversed, but would have reinstated the judgment of the Circuit Court upholding the termination.

In *Brock* v. *Mississippi*, No. 94–LA–00634 (Miss. App. Ct. Dec. 2, 1997), Southwick authored an opinion upholding a conviction where the defendant had challenged the prosecution's strike of an African-American juror.

The prosecution had responded by stating that the juror was struck because he lived in a high crime area.

Southwick held that ''striking a juror based upon residency in a high crime area is a race neutral explanation.'' Another Court of Appeals judge disagreed with such a broad holding: ''While [another state] has adopted the position that being a resident of a high crime area is automatically a race neutral reason to strike a potential juror, I am not

prepared to do so. Given existing housing patterns and common sense, there are generally, common racial characteristics shared by persons, who reside in so-called high crime areas. To accept without reservation, a strike which on its face, appears geared toward a racially identifiable group, has the potential for great mischief.'' (King, J., concurring in result).

It is clear from this record that Mr. Southwick is not properly suited to serve on the Fifth Circuit. In 160 out of 180 published decisions on state employment law or torts in which one judge dissented, Southwick voted in favor of the corporate defendant, in whole or in part.

Mr. Southwick's intolerant racial views and his fixed right-wing worldview make support for him a vote against everything the CBC and African-Americans are striving for in 2007. Your continued support of Mr. Southwick would make a bad Fifth Circuit problem worse. We trust that your reconsideration of this nomination will result in a fairer Fifth Circuit that is truly representative of the diverse populations served by the Circuit.

Sincerely,

CAROLYN CHEEKS KILPATRICK,
Chair, Congressional Black Caucus.
BENNIE THOMPSON,
Member, Congressional Black Caucus.

WASHINGTON BUREAU, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,
Washington, DC, August 1, 2007.

Re NAACP reiteration of strong opposition to the nomination of Lesley Southwick to the 5th Circuit U.S. Court of Appeals.

MEMBERS,
U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR SENATORS; On behalf of the National Association for the Advancement of Colored People (NAACP), our nation's oldest, largest and most widely-recognized grassroots civil rights organization, I am writing to reiterate our organization's strong opposition to the nomination of Lesley Southwick to the U.S. Court of Appeals for the 5th Circuit. Our opposition comes after a careful and thorough review of Judge Southwick's record, and our resulting dismay with his dismal record on civil rights. Our opposition to his nomination is amplified by the fact that the 5th Circuit, which covers Louisiana, Mississippi and Texas has the highest concentration of racial and ethnic minority Americans in our country.

Judge Southwick's record as a judge on the Mississippi State Court of Appeals clearly demonstrates that he is an inappropriate nominee for the U.S. Court of Appeals for the 5th Circuit. In the case of *Richmond* v. *Mississippi Department of Human Services*, 1998 Miss. App. LEXIS 637 (Miss. Ct. App. 1998), reversed, 745 So. 2d 254 (Miss. 1999), Judge Southwick joined a 5–4 ruling upholding the reinstatement of a white state social worker, Bonnie Richmond, who had been fired for referring to an African American co-worker as ''a good ole nigger'' at an employment-related conference. Richmond worked for the Mississippi Department of Human Services (''DHS''), which terminated her employment after other employees raised concerns about her use of the racial slur. The ruling that Southwick joined was unanimously reversed by the Supreme Court of Mississippi.

The NAACP is further disturbed by Judge Southwick's rulings on race discrimination in jury selection. They demonstrate a clear lack of support for, or even understanding of the basic civil rights of African Americans in the American legal system. Dozens of cases in this area reveal a pattern in which Judge Southwick rejected the claims that the prosecution was racially motivated in striking African American jurors while upholding claims that the defense struck white jurors on the basis of their race. In Bumphis v. State, an appellate colleague accused Judge Southwick of ''establishing one level of obligation for the State, and a higher one for defendants on an identical issue.''

The 5th Circuit Court of Appeals has a history of protecting and even promoting the civil rights of the racial and ethnic minorities living within its jurisdiction. The current court, however, does not appear to be following this trend; indeed they appear more interested in curbing civil rights and retarding civil liberties. Given Judge Southwick's record, we believe he would only perpetuate this sad trend if he were confirmed. Thus, the NAACP must oppose Judge Southwick's nomination to the 5th Circuit Court of Appeals and urge you to do the same when his nomination is considered by the Senate Judiciary Committee.

Finally, given Mississippi's long history of racial apartheid, disenfranchisement, interposition, nullification and massive resistance, it is unfathomable that President Bush has not nominated a single African American to serve on the Court of Appeals for the 5th Circuit or any of the district courts during his tenure in office. This is especially mind-boggling, given that 37% of Mississippi's population is African American, the highest percentage of all 50 states. While it certainly is the President's prerogative to nominate the individuals of his choice to the federal judiciary, and while the NAACP does not advocate the nomination of unqualified individuals simply because of the color of his or her skin, we unequivocally reject the notion that there are no qualified African Americans to fill this vacancy on the 5th Circuit. Lesley Southwick's nomination continues a stark pattern of racial discrimination and racial exclusion in appointments by President Bush in a state and a region that continues to need integration. The Senate Judiciary Committee must defeat Lesley Southwick's nomination based on his clear lack of qualifications and merit. This will provide President Bush with the opportunity to nominate a well-qualified racial or ethnic minority individual with the appropriate judicial temperament to dispense justice as intended by our Constitution.

Thank you in advance for your attention to the NAACP's strong opposition to the Southwick nomination. Please do not hesitate to contact me if there is any more information I can provide you on our position, or if you have any questions or comments.

Sincerely,

HILARY O. SHELTON,
Director.

Mr. LEVIN. Mr. President, I will oppose the nomination of Leslie Southwick to the Fifth Circuit Court of Appeals because I have serious questions about his ability to be an impartial jurist.

I am concerned that Judge Southwick's views of racial discrimination in jury selection reflect a lack of adequate respect for Supreme Court precedent. In Batson v. Kentucky, the Supreme Court ruled against preemptory dismissal of jurors without stating a valid cause for doing so may not be used to exclude jurors based solely on their race.

The contrast between Judge Southwick's votes in jury challenge cases is particularly troubling. In the majority of cases where African-American defendants have challenged their convictions on the ground that the prosecution used peremptory challenges to strike African-American jurors, Judge Southwick voted against the defendant's challenge. Further, in the majority of cases where African-American defendants challenged their convictions on the ground that the prosecution had unfairly prevented them from using their peremptory challenges to exclude White—or in one case Asian American—jurors, the defendants, with Judge Southwick joining the majority, lost the challenges.

There is other evidence of racial insensitivity that concerns me. In Richmond v. Mississippi Department of Human Services, Judge Southwick joined a 5–4 ruling upholding the reinstatement of a White State social worker who had been fired for referring to an African-American co-worker as a ''good ole n*****'' during a meeting with high level company officials. After she was fired, Richmond appealed her termination to the State Employee Appeals Board, EAB, which ordered her reinstatement. The hearing officer opined that Richmond's use of the racial slur ''was in effect calling the individual a 'teacher's pet.''' On appeal, Judge Southwick joined a majority that held that the use of the racial slur was ''not motivated out of racial hatred or animosity directed at her coworker or toward blacks in general, but was, rather, intended to be a shorthand description of her perception of the relationship existing between the [co-]worker and [a] DHS supervisor.''

In dissent, two judges criticized the hearing officer and majority opinion for having a ''sanitized version'' of the facts and for suggesting that ''absent evidence of a near race riot, the remark is too inconsequential to serve as a basis of dismissal.'' The dissent found that the racial epithet of ''n*****'' is ''inherently offensive, and [its] use establishes the intent to offend.''

The ruling Judge Southwick joined was unanimously reversed and remanded on appeal by the Mississippi Supreme Court.

Further, in Brock v. Mississippi, a case which upheld a criminal conviction where the prosecution used a preemptory challenge against an African-American juror purportedly because he lived in a high crime area, the dissenting judge criticized Judge Southwick's opinion for accepting the action of the prosecutor, which, ''on its face appears geared toward a racially identifiable group.''

Some have tried to make the point that Judge Southwick did not write most of these opinions; rather that he merely signed on to them. If Judge Southwick did not agree with those opinions, he could have dissented. If he agreed with the holding but not the reasoning, he could have written a separate concurrence. To the contrary, he simply voted with the majority and supported their opinions.

Because I do not believe that his record reflects the objectivity and even-handedness necessary to serve in a lifetime appointment on the Federal bench, I cannot vote to confirm his nomination.

Mr. COBURN. Mr. President, today the Senate has a golden opportunity to take a big stride forward in working its way out of this judicial nomination mess we are in. At some point we as a body are going to have to take partisanship out of this judicial nomination process if we hope to continue to attract great candidates to the Federal bench. We have seen other great nominees withdraw because of the stress and difficulty of this process. Fortunately, Judge Southwick has stood firm so that the Senate has a chance to confirm him.

Leslie Southwick is an Iraq veteran and has already demonstrated that he is a great jurist. From the testimonials of people in Mississippi, regardless of political or cultural differences, he is fairminded, not biased, and is an outstanding pick for this seat.

It is incredible to observe the vitriolic opposition to this nomination that is built wholly on two written opinions in question that Judge Southwick did not even write. How can the Senate seriously say that those two opinions, in a vacuum, show that Judge Southwick is racist or insensitive to minority litigants? The support from African-Americans in Mississippi exposes that the opposition is politically motivated.

The Senate and the Judiciary Committee must step away from the politically based litmus tests that currently control the nominations process. We must also stop focusing purely on the results of cases, without any context to the facts and law at issue, as the sole indicator of a nominee's judicial philosophy.

I ask my colleagues to seriously reconsider our current course and let Judge Southwick have a fair up-or-down vote.

When we are reviewing judicial nominees, we should ask ourselves three questions:

First, does the nominee have the basic qualifications to be a good judge?

In this case, the answer is yes. The American Bar Association twice rated Judge Southwick ''well qualified,'' with the ABA actually increasing their rating to ''unanimously well qualified'' when he was nominated to the Fifth Circuit vacancy.

Second, does the nominee possess the appropriate judicial temperament so that every litigant will be treated fairly when they come before this nominee?

The answer again is yes. If you read the many letters from lawyers and judges in the Mississippi legal community, they clearly believe litigants are treated fairly and impartially before Judge Southwick.

Third, does the nominee respect the proper constitutional role of a judge to not create law from the bench?

Again the answer is yes. The record clearly demonstrates that Judge Southwick is and will be a restrained jurist.

As Congress we should be thrilled when a judge shows that he will be restrained in his rulings from the bench. We write the laws, and we should be grateful that a judge knows he is not a Member of Congress and will defer to us in the task of writing law.

Again, I ask my colleagues to move beyond petty partisanship with quality nominees like Judge Southwick, and let's give him a vote.

I yield the floor.

Mr. SPECTER. Mr. President, how much time remains?

The PRESIDING OFFICER. There remain 27 minutes, including leadership time.

Mr. SPECTER. Is that 27 minutes on the Republican side?

The PRESIDING OFFICER. Correct.

Mr. SPECTER. How much on the Democratic side?

The PRESIDING OFFICER. Twenty minutes.

Mr. SPECTER. I thank the Chair.

Might I inquire of the senior Senator from Mississippi how much time he would like?

Mr. COCHRAN. Mr. President, I would be happy to speak for up to 10 minutes.

Mr. SPECTER. I yield 10 minutes to the Senator from Mississippi.

The PRESIDING OFFICER. The Senator from Mississippi is recognized.

Mr. COCHRAN. Mr. President, it is very difficult to listen to the criticism of those who have not known Leslie Southwick in the context and with the experiences of those, obviously, who have worked with him, observed him in close range as a fellow lawyer, seen him take positions of public support for candidates who were running for office in Mississippi, being active in our Republican Party in Mississippi; being admired widely by all who have come to know him, practicing law with him, observing him as a lecturer at the Mississippi College School of Law, observing him serving voluntarily as an officer in the Mississippi National Guard, the U.S. Army Reserves, being deployed to Iraq, volunteering for duty to serve as a judge advocate, and accompanying Mississippi soldiers who were deployed to that region in time of war.

He didn't have to do that. He is way beyond the age of most of those who were engaged in that operation and in that responsibility to protect the security interests of our country.

It is so inconsistent—all of that—to those of us who know this nominee compared with the harsh, shrill pronouncements being made on this floor of the U.S. Senate by leaders of the opposition to this nomination. I am not going to criticize their right to disagree with those of us who support Judge Southwick, but I do want to point out that I hope Senators will look at the record that has been accumulated in the Senate as a result of statements made by Senator LOTT, me, and others who have known Judge Southwick and others who are the most respectable and trustworthy people in our State and Nation who have a totally different view of him as a person and of his record as an appellate judge, as a lawyer, and as a professor of law.

I hope Senators will take a look at who is saying what and base a judgment on this nomination on the things that have been said and the information that has been made available to the Senate from those who have spent time with Judge Southwick, who know him, or whether that will be outweighed by the harsh and shrill blandishments and criticisms and hyperbole and exaggerations and inaccuracies in the description of this person as a lawyer, as an individual, as a citizen who is here being subjected to totally unfounded criticism.

I hope those words aren't too harsh. I believe they are just as true and accurate as can be. And it would be a disgrace on this body to block the confirmation, to vote against invoking cloture which, in effect, would kill the nomination. We are going to vote on whether to invoke cloture. It will take 60 votes to shut off debate so we can get to a vote on the confirmation.

I have spoken on the floor on two or three occasions on this subject, back in June, I think, the first time. I have been reading the RECORD and looking at what I said July 19, 2007. I included after my remarks letters that I had received and that the committee had received from lawyers, judges, and acquaintances of Leslie Southwick over the past 30 years of his life. I am not going to burden the RECORD by putting all those letters in or reading them or reading excerpts from them, but these are some of the finest people, and some of them are liberal Democrats. Some of them are active today as elected officials in our State. Others are just fellow lawyers, people who have worked with him closely, a State supreme court justice. Former Gov. William Winter is an example.

This morning, I found on my desk in my office when I came to work a letter that had been faxed to me, I guess, this morning. At 9:01 a.m. it was received in my office. It is from the Secretary of State of Mississippi, Eric Clark. And because this is a new letter, I think I will read it. It is actually addressed to me and Senator LOTT:

Dear Senator Cochran and Senator Lott:

I sat at home last night and listened on C–SPAN to the debate on Judge Leslie Southwick, and I feel compelled to write you this letter.

I am the senior Democratic elected official in Mississippi. I have been elected to office eight times as a Democrat. I am retiring from politics in January, so I have no ax to grind by commenting on this debate. During my entire career in public service, I have aggressively promoted the inclusion of all Mississippians, and particularly African-Americans, at the decision-making table in Mississippi. I take a back seat to no one in promoting inclusion in our state.

It has been my pleasure to know Leslie Southwick for more than twenty years. If I had to name one person who is kind, fair, smart, thoughtful, and open-minded, it would be Leslie Southwick. For any Senators who have been told or who have concluded otherwise, that is wrong—as wrong as it can be.

We in Mississippi are quite accustomed to being the objects of negative stereotyping. Of course, it is much easier to believe a stereotype about someone than to make the effort to get to know that person. It is perfectly clear to me that this is what is happening to Judge Southwick.

It seems to me that what is being decided in this case is not whether Leslie Southwick would be a good and fair judge—we could not have a better or fairer one. What is being decided, I think, is whether the United States Senate considers judicial nominees based on truth and merit, or based on politics and partisanship.

Let me make my point as plainly as I can: Leslie Southwick is the polar opposite of an ignorant and bigoted judge—the polar opposite of that stereotype. I hope that the Senate passes the test of recognizing the truth and acting accordingly.

Thank you. Sincerely, Eric Clark, Secretary of State of Mississippi.

The PRESIDING OFFICER. The Senator's time has expired.

Mr. COCHRAN. I yield the floor.

Mr. SPECTER. Mr. President, how much time remains on the Republican side?

The PRESIDING OFFICER. There is 16½ minutes remaining, including the leadership time.

Mr. SPECTER. I see the distinguished Senator from Mississippi, Mr. LOTT, on the Senate floor. How much time would Senator LOTT like?

Mr. LOTT. Just a couple minutes.

Mr. SPECTER. Senator LOTT can have as much time as he wants. It sounds as if he wants 5 minutes. I yield to Senator LOTT.

The PRESIDING OFFICER. The Senator from Mississippi is recognized.

Mr. LOTT. Mr. President, I don't want to repeat everything that has been said. I was going to read this letter from our secretary of state, Eric Clark. My senior colleague just read it, and I am glad he did. I appreciate how he feels.

I do feel hurt in some ways by what has happened in this particular case. This is a good and honorable man, qualified by education, by experience, by temperament. He deserves to have an up-or-down vote. We should vote for cloture, and then we should have an up-or-down vote on this judge for a position that is a judicial emergency for the Fifth Circuit Court of Appeals, which is a very broad-based circuit court of appeals. He will be a fine addition to that court.

I want to end on a positive note because Judge Southwick has waited a long time, has been open and available to anybody who was willing to meet with him, not just the Judiciary Committee members but others, including House Members.

We are here because Senator DIANNE FEINSTEIN showed unbelievable courage by voting to report this nominee out of the Judiciary Committee after very careful analysis, looking at the cases, meeting with the nominee. I will always be indebted to her and appreciative of what she did.

I have to acknowledge that the Judiciary Committee, in this case led by the very aggressive support of Senator SPECTER, has done its job, and has done it well, and we have reached a point of final determination.

I also thank the majority leader and the Republican leader for working together to find time to make this happen. I know from experience, majority leaders do not have to allow votes such as this to occur, and I suspect the majority leader has been criticized for it.

I do believe that this is a moment in time—I hope it is not fleeting—where we can return to some modicum, some small amount of bipartisanship, nonpartisanship, and civility. I think Senator REID, Senator MCCONNELL, Senator FEINSTEIN, and Senator SPECTER have made the right steps to make that possible.

I urge my colleagues to vote for cloture and vote for this nominee. He will be a credit to the court on which he will serve, the Fifth Circuit Court of Appeals. He will exhibit the character and the positions that I believe the people in the Senate will think are appropriate for the rest of his life.

I believe confirmation of this judge will reflect well on the Senate and will pay dividends in many ways not visible at this moment.

I thank Senator SPECTER for yielding this time.

I yield the floor.

Mr. SPECTER. How much time remains, Mr. President?

The PRESIDING OFFICER. There is 12½ minutes remaining.

Mr. SPECTER. Mr. President, we only have the Senators from Mississippi and myself on the floor. For any other Republicans who wish to speak, now would be a good time to come to the floor. I know our leader, Senator MCCONNELL, will be speaking shortly, at 10:40 a.m., but there is still 11 minutes remaining.

I yield 10 minutes to the distinguished Senator from Florida, Mr. MARTINEZ.

Mr. President, that will take us right up to 10:40 a.m., at which time it is my understanding there is an order for the two leaders to speak. I yield 10 minutes now to Senator MARTINEZ.

The PRESIDING OFFICER. Without objection, the Senator from Florida is recognized for 10 minutes.

Mr. MARTINEZ. Mr. President, I thank the Senator from Pennsylvania. I am very pleased to speak on behalf of a good man to occupy a very important position. The Fifth Circuit is a very important court. I want to talk about this nomination as a person who practiced law for a quarter of a century. Twenty-five years of my life I spent in courtrooms in Florida. As a result of that experience, I have a great and abiding respect for our judicial system and for what it does for people to reasonably and in an orderly way settle disputes, and also for those who run afoul of the law to be brought through a justice system that is fair, that is just, and that works for all Americans.

At the pinnacle of all that, at the very centerpiece of the judicial system that functions is the judiciary. And in the judiciary, we need to have the best. We need to have people of dedication. We need to have people of competence and people with impeccable credentials. That is the kind of judge Judge Southwick is and the kind of person he will make as a judge on the Fifth Circuit.

I wish to talk about the process. It is a process that has become much too poisoned. It has become much too divisive and increasingly hostile. What occurs then is that between the inadequate salaries judges in the Federal judiciary now make in comparison to what they could easily be making in the private sector, as well as the difficult gauntlet they must run in order to be confirmed and to then have the opportunity of serving their Nation as a member of the judiciary, I do believe it is very important that judicial candidates be given a fair and timely hearing, that they be given fair and timely consideration.

I believe all too often we allow dissident groups to gain our attention, not mine but some of those who do pay attention to the outside noise when it comes to judicial candidates. I don't believe it is appropriate that we should allow for outside influences to steer us in different directions that become more and more divisive.

When it comes to judicial candidates, we ought to look for qualifications. We ought to look for experience. We ought to look for those things we could consider. I always think, is this the kind of judge I would like to try a case in front of, is this the kind of judge I would like to take my clients' affairs in front of to have a fair, impartial, and reasoned disposition of the matter I bring before the judge? If he or she is that kind of person, they should be given confirmation. To allow outside and distracting political debates to be a part of the confirmation process is simply wrong.

I was pleased when Chief Justice Roberts was going through the process and he used language in his confirmation hearing that ought to ring true with all of us. He said he viewed his role as a judge as that of an umpire. He viewed his role as someone who could come into the courtroom and call it as he sees it, call balls and strikes. For the vast majority of what a judge does, that is what it is about. It is about calling balls and strikes. It is not about pitching. It is not about catching, not about hitting. It is about calling balls and strikes. That is the role of the judge. That is the role of the judiciary. We honor that role when we accept a judicial candidate who is otherwise qualified, who has an impeccable record. I used to be called from

time to time by the ABA committee, the American Bar Association, that looks at candidates and they would ask: What kind of judge would he make? Would he have the right judicial temperament? These are the things we want to know. Is he knowledgeable of the law? Would he be a fair and impartial judge? Does he have the ethical considerations to be the kind of person who is going to set higher standards for those on the bar, who is going to be the kind of person society will accept when he makes a difficult ruling that sometimes has to come from the court?

It is with great pleasure that I support this nominee. I hope my colleagues will do so as well. It is important we restore a certain normalcy to the confirmation process. I say this fully understanding that in about a year and some months, there could very well be someone of a different party who has a very different philosophy about who should be on the bench than the current President. At that time, I will be prepared to live by the standard I have laid out today, which is a standard of qualifications, a standard that puts aside political considerations, a standard that looks at a judicial nominee, as we have done for most of the history of our country. The departure we have had over the last several years is not a healthy one. It is not positive for the judicial system and for the admission of justice. This is a standard I will be prepared to live with, even if someone from a different party than mine is making judicial nominations. I will look to their qualifications, experience, ethical standing. Is this the kind of judge I would have been happy to have my client take matters before.

I would expect a fair and impartial judge to make a learned and reasonable decision based on the facts, the evidence, and the law. That is what judges are about, analyzing facts and law and making a judicial determination of how to rule in a given case. It is not about politics that more belong in a body such as ours and not on the bench.

How much time remains?

The PRESIDING OFFICER. There remains 5½ minutes before leadership time.

Mr. MARTINEZ. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. MCCONNELL. I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Republican leader is recognized.

Mr. MCCONNELL. Mr. President, shortly we will have an extremely important vote in terms of our ability to deal with judicial confirmations in the future. There has been widespread bipartisan concern that the confirmation process has descended to a point with which most of the Members on both sides of the aisle are uncomfortable. We will have an interesting test shortly as to whether the Senate can use cloture not to defeat a judge but to move a nomination forward. That is the way it has been done in the past. We have had controversial judicial nominations from time to time over the years, controversial with a few but not all of the Senate. The way cloture was used in those situations was to advance a nomination, not to stop it. I am reminded when Senator LOTT was the majority leader, there were a couple of controversial nominations from California. His view was they were entitled to an up-or-down vote. We invoked cloture on the nomination. I remember voting for cloture because I believed judges were entitled to an up-or-down vote and then not supporting the judge on final passage.

We have before us the nomination of a Mississippi lawyer named Leslie Southwick. He wanted to serve his country in the Armed Forces. At 42, he was too old to do so. But service to others is a duty Leslie Southwick has always taken very seriously, whether in the Justice Department or on the State bench or with Habitat for Humanity or in doing charity work for inner-city communities. So in 1992, 42-year-old Leslie Southwick sought an age waiver to join the U.S. Army Reserves. The country had the good sense and the good fortune to grant this request.

Leslie Southwick continued to serve in the Armed Forces after he was elected to the State court of appeals in 1994. He conscientiously performed his military and judicial duties, even using his vacation time from the court to satisfy the required service period in the Mississippi National Guard.

In 2003, LTC Southwick volunteered for a line combat unit, the 155th Separate Armor Brigade. His commanding officer, MG Harold A. Cross, notes that his decision ''was a courageous move; as it was widely known at the time that the 155th was nearly certain to mobilize for overseas duty in the near future.'' Colleagues such as attorney Brian Montague were not surprised. ''Despite the love of wife and children,'' Leslie Southwick volunteered for a line combat unit over a safer one ''because of a commitment to service to country above self-interest.''

In August of 2004, Leslie Southwick's unit mobilized in support of Operation Iraqi Freedom. His commanding officer states he distinguished himself at forward bases near Najaf. Another officer, LTC Norman Gene Hortman, Jr., described Leslie Southwick's service in Iraq as follows:

> Service in a combat zone is stressful and challenging, often times bringing out the best or the worst in a person. Leslie Southwick endured mortar and rocket attacks, travel through areas plagued with IEDs, extremes in temperature, harsh living conditions . . .—the typical stuff of Iraq. He shouldered a heavy load of regular JAG Officer duties which he performed excellently. He also took on the task of handling the claims of numerous Iraqi civilians who had been injured or had property losses due to accidents involving the U.S. military . . .
>
> Leslie always listened to these Iraqi claimants patiently and treated them with the utmost respect and kindness. He did this not just out of a sense of duty but because he is a genuinely good and caring person. His attitude left a very positive impression on all those that Leslie came in contact with, especially Iraqi civilians he helped. This in turn helped ease tensions in our unit's area of operations . . . and ultimately, saved American lives.

Lieutenant Colonel Hortman concludes that Leslie Southwick ''has the right stuff''—the right stuff—for the Fifth Circuit Court of Appeals: ''profound intelligence, good judgment, broad experience, and an unblemished reputation.'' He adds:

> I know him and can say these things without reservation. Anyone who says otherwise simply does not know him.

Stuart Taylor writes in the National Journal that Leslie Southwick ''wears a distinctive badge of courageous service to his country,'' and that he ''is a professionally well-qualified and personally admirable'' nominee to the Fifth Circuit.

Judge Southwick does not seek thanks or notoriety or charity for his military and other civic service. He asks to be judged fairly—to be judged on the facts, to be judged on his record. It is the same standard he has applied to others as a judge, a military officer, and a teacher. It is a standard for which he is well known and admired. By that standard, he is superbly fit to continue serving his country, this time on the Fifth Circuit. Senators COCHRAN and LOTT, his home State Senators, know this. They are strongly behind him. As everyone knows, his peers on the State bar know this. They honored him as one of the State's finest jurists, saying he is ''an example of judicial excellence; a leader in advancing the quality and integrity of justice; and a person of high ideals, character and integrity.''

The American Bar Association knows this. It has twice given him its highest rating: ''well-qualified.'' In doing so, the ABA found him to be exemplary in the areas of ''compassion,'' ''open-mindedness,'' ''freedom from bias and commitment to equal justice under law.''

Democrats on the Judiciary Committee knew this too. Last fall all of them—every single one—looked at his record and approved him for a lifetime position to the district court. Congress adjourned before he could be confirmed, and Judge Southwick was renominated to fill a judicial emergency on the Fifth Circuit. Two things then occurred. First, the ABA increased his rating—increased his rating—from ''well-qualified'' to ''unanimously well-qualified.'' In other words, not a single person on the ABA committee found him anything other than the most qualified nominee possible. Second, in August, the committee favorably reported his nomination to the floor with bipartisan support.

Unfortunately, some of our colleagues on the other side who had supported his nomination to the Federal bench last fall seem to have changed their mind. Since there is no material change in Judge Southwick's credentials other than the ABA actually giving him an even higher rating for the circuit bench than they gave him for the district bench, the sudden change is indeed puzzling.

Critics now point to two cases out of 7,000, neither of which Judge Southwick wrote, and both of which existed when the committee unanimously approved him last fall. One of our colleagues even asserts that because these two cases create a perception among some outside groups about potential unfairness, this ''perceived fairness'' standard should determine our vote on Judge Southwick.

That is a standard I would say I would hate to have applied to nominations by a Democratic President by Republican Senators. And remember, we are setting a standard here that will apply not only to this nomination but to other nominations in the future.

The notion that mere perception, not reality, should determine whether someone is confirmed is troubling, to say the least. We expect the judges we confirm to rule based on the facts. We should not judge their fitness for office based on perception rather than the facts. In the case of Judge Southwick, the sudden ''perception'' about his fairness is driven by those who do not even know him, and it is amply disproven by his long record and by those who know him very well.

But more broadly, if we start opposing well-qualified nominees because outside groups have manufactured an unfair perception of them, then we will have established a precedent that will affect us all, as I indicated a minute ago, and for the worse—regardless of who is in the White House and which home State Senators support a nomination. Is the standard going to be around here the perception created by some outside group? I think that is a standard that would be very dangerous, no matter who is in the White House.

I urge my colleagues not to undo the good work and goodwill that brought us back from the precipice we had almost descended into a few years ago on judicial confirmations. I urge them to think hard about the ramifications of their vote for the future, and to vote for cloture on the Southwick nomination.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The majority leader is recognized.

Mr. REID. Mr. President, I ask unanimous consent that letters of opposition and concern from numerous organizations regarding the nomination now before the Senate be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

NATIONAL FAIR HOUSING ALLIANCE,
Washington, DC, June 6, 2007.

Hon. PATRICK LEAHY,
Chairman, U.S. Senate Judiciary Committee, Washington, DC.

DEAR CHAIRMAN LEAHY: The National Fair Housing Alliance (NFHA) is strongly opposed to the nomination of Leslie Southwick to the Fifth Circuit Court of Appeals.

NFHA is dedicated to ending housing discrimination and ensuring equal housing opportunity for all people. With several member organizations within the Fifth Circuit, we are deeply concerned about a nominee whose civil rights record reveals a lack of commitment to equality and justice.

We find the civil rights record of Judge Southwick on the Mississippi Court of Appeals quite troubling. His rulings on race discrimination in the areas of employment and jury selection lead us to question his ability to be a fair and impartial decision-maker in cases involving housing discrimination.

Judge Southwick participated in a shocking 5–4 decision that essentially excused an employee's use of a racial slur. The holding in Richmond v. Mississippi Department of Human Services affirmed a Mississippi Employee Appeals Board hearing officer's decision to reinstate an employee who had been fired for calling her co-worker a ''good ore nigger.'' The officer had concluded that the employer had overreacted because the term was not a racial slur but rather equivalent to calling the black employee ''teacher's pet.'' The majority, including Judge Southwick, agreed, finding that taken in context, the comment ''was not motivated out of racial hatred or racial animosity directed toward a particular co-worker or toward blacks in general.''

This decision drew a strong dissent and was unanimously reversed by the Mississippi Supreme Court. The dissenters stated that the majority's reasoning ''strains credulity'' because ''[t]he word 'nigger' is, and has always been offensive.'' They went on to argue that ''the hearing officer and the majority opinion seem to suggest that absent evidence of a near race riot, the remark is too inconsequential to serve as a basis of dismissal.''

Judge Southwick's reasoning in Richmond is indicative of a general lack of concern for rice discrimination, and it reveals a potential hostility toward equal opportunity in housing. Many cases of housing discrimination involve intimidation through racial slurs. In this context, as in all contexts, the word ''nigger'' is powerful, offensive, and threatening. The following cases are indicative of the pervasive nature of this deplorable conduct in housing cases:

In Bradley v. Carydale Enterprises, the Eastern District of Virginia ordered compensatory damages for an African-American woman whose neighbor had called her ''nigger.'' The court noted that the term ''deeply wounded'' the woman, pointing to her humiliation and embarrassment, sleepless nights, and inability to perform at her job.

In Smith v. Mission Associates Ltd. Partnership, an on-site property manager called a white tenant a ''nigger-lover'' because of his live-in girlfriend's bi-racial children, and the manager's son told one of these children he didn't like ''niggers.'' Based on this and other racially hostile conduct, the District of Kansas held that the plaintiffs had established a prima facie case for a hostile housing environment under the Fair Housing Act.

In Cousins v. Bray, the Southern District of Ohio granted the plaintiffs' motion for a preliminary injunction against eviction and any attempts of harassment, intimidation, or threats. The court found that the plaintiffs' allegations that defendants had referred to their biracial sons as ''niggers'' helped to establish that race motivated their eviction, in violation of the Fair Housing Act.

And just this month, in United States v. Craft, the Seventh Circuit relied on an arsonist's use of the term ''nigger'' to determine that he targeted a black man's house because of the victim's race. It held the arsonist in violation of the portion of the Fair Housing Act that prohibits the use of coercion or intimidation to interfere with property rights.

As these cases demonstrate, our federal courts acknowledge that harmful racial slurs like ''nigger'' are powerful tools in the denial of fair housing. We are deeply concerned that based on his record, Judge Southwick does not share these ideals, and we question his ability to be a fair and impartial decision-maker in these and other civil rights cases.

Thus, we strongly oppose Judge Southwick's nomination to the Fifth Circuit Court of Appeals and believe the Senate should not confirm him.

Sincerely yours,

SHANNA SMITH,
President.

SERVICE EMPLOYEES
INTERNATIONAL UNION,
Washington, DC, June 6, 2007.

Hon. PATRICK LEAHY,
Chair, U.S. Senate Judiciary Committee
Washington, DC.

Hon. ARLEN SPECTER,
Ranking Member, U.S. Senate Judiciary Committee
Washington, DC.

DEAR CHAIRMAN LEAHY AND RANKING MEMBER SPECTER: I am writing on behalf of the 1.8 million members of the Service Employees International Union (SEIU), including the health care, public sector and property service members who live and work in the Fifth Circuit, to oppose the nomination of Judge Leslie H. Southwick to the United States Court of Appeals. SEIU joins the civil rights organizations, professional societies and editorial boards which have stated their opposition to Judge Southwick's nomination because of his consistent record of hostility to the rights of minorities and gay parents as well as his practice of going beyond the resolution of the case at issue to inject his own views on social and legislative policies into his decisions. We write separately to express our concerns regarding Judge Southwick's rulings regarding workplace issues and his ability to fairly enforce the nation's labor and employment laws.

In his dissent in *Cannon* v. *Mid-South X-Ray Co.*, 738 So. 2d 274 (Miss. App. Ct. 1999), Judge Southwick argued that the claim of Annie Cannon, a worker exposed to toxic chemicals in her work place, should be rejected because it was barred by the statute of limitations. Ms. Cannon had begun to experience health problems soon after the start of her employment as a darkroom technician. However, while the severity of the problems increased over time, Ms. Cannon's condition was not diagnosed by a doctor as work related until sometime later. Based on this diagnosis, Ms. Cannon filed suit.

Judge Southwick argued that all that is necessary for the statute of limitations to run against a plaintiffs claim is that the plaintiff know of her illness, not the cause of her illness. This rule, as the eight judges in the majority recognized, places an unreasonable burden on a worker ''who cannot reasonably be expected to diagnose a disease on which the scientific community has yet to reach an agreement.'' While Ms. Cannon knew she was sick, she did not know she had been injured by the defendants until her disease was affirmatively diagnosed by her doctor and therefore should not have been required to file a cause of action which she did not know even existed.

The use of a procedural device by Judge Southwick to deny an injured worker her day in court is chillingly similar to the rule announced by Justice Alito in *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U.S.—(2007). In that case, Lilly Ledbetter's pay disparity claim was not ''easy to identify'' because the impact of that discrimination, like Ms. Cannon's illness, grew over time and when it reached the point that it was clear that discrimination, or work place chemicals, was the cause, an action was filed. In upholding the dismissal of Ms. Ledbetter's case, Justice Alito relied upon same statute of limitations procedural device employed by Judge Southwick in denying Ms. Cannon her day in court.

In another dissent, Judge Southwick offers a gratuitous insight into his judicial philosophy on the subject of employment at will. The employment at will doctrine, which is premised on the illusion that employers and individual workers have equal power in the employment relationship, has been consistently criticized and limited by legislative and judicial action over the last hundred years. However, in *Dubard* v. *Biloxi H.M.A.*, 1999 Miss. App. Lexis 468 (1999), *rev'd*, 778 So. 2d 113, 114 (Miss. 2000), Judge Southwick opines that ''employment at will . . . provides the best balance of the competing interests in the normal employment situation. It has often been said about democracy, that it does not provide a perfect system of government, but just a better one than everything else that has ever been suggested. An equivalent view might be seen as the justification for employment at will.'' Judge Southwick's radical statement of judicial philosophy calls into question the legitimacy of most federal employment laws enacted in the twentieth century, from the minimum wage to the Family and Medical Leave Act, implying that they are inconsistent with a democratic system of government.

Judge Southwick's record of judicial activism evidences a willingness to erect insurmountable barriers to workers seeking access to the courts and an aversion of laws which limit the employer's unrestricted right to control the employment relationship. He should not be given a lifetime appointment to a court where he will be called upon to enforce laws that he clearly disdains by injured workers who he believes have no right to ask for relief. We ask the Committee to reject the nomination of Judge Southwick to the United States Court of Appeals for the Fifth Circuit.

Sincerely,

ANNA BURGER,
International Secretary-Treasurer.

NATIONAL WOMEN'S LAW CENTER,
Washington, DC, June 6, 2007.

Re Nomination of Leslie Southwick to the U.S. Court of Appeals for the Fifth Circuit

Hon. PATRICK J. LEAHY,
Chair, U.S. Senate Judiciary Committee, Washington, DC.
Hon. ARLEN SPECTER,
Ranking Member, U.S. Senate Judiciary Committee, Washington, DC.

DEAR SENATORS LEAHY AND SPECTER: We write to express our serious concerns regarding the nomination of Leslie Southwick to the U.S. Court of Appeals for the Fifth Circuit. As an organization dedicated to advancing and protecting women's legal rights, the National Women's Law Center (NWLC) has reviewed Judge Southwick's available record, his testimony before the Committee, and his responses to Senators' written questions in order to assess his commitment to upholding essential civil rights protections. This substantive review has led the Center to conclude that there is a significant basis to doubt that commitment. Under these circumstances, it is especially troubling that hundreds of unpublished opinions that Judge Southwick joined while on the Mississippi Court of Appeals have not been produced to the Committee. As a result, the legal record that serves as the basis for determining his fitness for a lifetime position on the Fifth Circuit remains woefully incomplete. Consequently, we urge the Committee not to advance Judge Southwick's nomination until all of his record has been made available and has been reviewed, and until the substantive concerns have been satisfied.

Judge Southwick's actions in S.B. v. L.W. and Richmond v. Mississippi Department of Human Services raise significant concerns. Judge Southwick joined a separate concurrence in S.B. v. L.W. and joined the majority opinion in Richmond. Although he did not write those opinions, the result and reasoning therein is properly ascribed to him. As Judge Southwick stated in his hearing before the Committee, his decision to join an opinion as a judge on the Mississippi Court of Appeals meant that he at least agreed with the outcome espoused by that opinion. He also acknowledged at the hearing that he could have worked with the author of an opinion to change its language and at all times had the option of writing his own separate opinion.

In S.B. v. L. W., a 2001 custody case involving the parental rights of a mother in a homosexual relationship, Judge Southwick joined the majority in its holding awarding custody to the father. He also chose to join a concurrence that gratuitously took pains to elaborate the punitive ''consequences'' that may be imposed on individuals in homosexual relationships, including the loss of custody of a child. The concurrence expounded upon the state's ability, grounded in principles of ''federalism,'' to limit the rights of homosexual Americans in the area of family law and characterized participation in a homosexual relationship as a ''choice'' and ''exertion of a perceived right.'' In addition, although neither party to the case had raised constitutional questions, the concurrence undertook to discuss constitutional precedent in a highly selective manner to support its conclusion that the Mississippi legislature had permissibly taken a policy position with regard to the rights of homosexual individuals in domestic relations settings that would limit the custody rights of homosexual parents. The opinion cited the Supreme Court's decision in Bowers v. Hardwick, which upheld criminal penalties for sodomy, but ignored Romer v. Evans, which struck down a ballot initiative that ''classifie[d] homosexuals not to further a proper legislative end but to make them unequal.'' To make matters worse, when Judge Southwick was questioned about the concurrence's failure to discuss Romer, he answered that neither Romer nor Bowers was argued by the parties to the case. However, his answers do not speak to why the concurrence only cited Bowers, and, therefore, do not allay our concerns about the impartiality of the legal analysis in this case.

Furthermore, while Judge Southwick indicated in written responses that the custody decision would be evaluated differently today in light of the Supreme Court's decision in Lawrence v. Texas, he did not directly address concerns raised by the language of the concurrence either in his written answers or in his testimony, although he was asked to do so. He did not clarify whether he considers homosexuality to be a choice as suggested in the concurrence and provided no persuasive justification for his seeming endorsement of extraordinarily harsh penalties for that so-called choice.

Judge Southwick's decision to join the majority opinion in Richmond v. Mississippi Department of Human Services, affirming a state review board's decision to overturn a state agency's termination of an employee for referring to an African-American employee as a ''good ole n*****,'' also raises serious concerns. The majority in Richmond concluded that the terminated employee ''was not motivated out of racial hatred or racial animosity directed toward a particular co-worker or toward blacks in particular,'' and that there was no ''credible proof'' that the use of this highly inflammatory racial epithet caused substantial problems within the agency workplace. This majority opinion failed to adequately consider the discrimination inherent in the use of that particular racial epithet and required an unnecessarily stringent showing of disruption from the employing agency. The Mississippi Supreme Court unanimously reversed the Court of Appeals' decision, remanding to the review board to make findings as to whether the agency acted properly under state personnel rules, and as to whether a lesser penalty than termination should be imposed.

Judge Southwick's testimony before the Senate Judiciary Committee and his responses to written questions did not alleviate NWLC's concerns. It is disturbing that Judge Southwick continues to consider the majority opinion in Richmond well-reasoned and declined to criticize the opinion he joined in part so as not to ''change horses mid-stream.'' In addition, Judge Southwick's characterization of the standard of review in his written questions as whether no evidence sported the review board's decision (rather than whether substantial evidence support it) is incorrect. Whether the mischaracterization represents his original understanding of the standard of review or a post-hoc attempt to justify joining the majority, his position is equally troubling. Further, although the Mississippi Supreme Court concluded that the employee should not have been terminated, two strong dissents raised grounds for Judge Southwick to consider whether his decision to join the majority opinion was correct: first, that the Court of Appeals improperly placed the burden of proof upon the agency with regard to the issue of the disruptive effect of the epithet; second, that failing to terminate the employee could have subjected the agency to a federal discrimination action and thus would have constituted negligence; and third, that the majority of the Mississippi Supreme Court substituted its judgment for the review board's. As a result, Judge Southwick's reliance on the Mississippi Supreme Court opinion in answer to questions about whether he believed his decision to join the majority in Richmond was correct does not eliminate our concerns.

Although our concerns are primarily grounded in only two of the reported cases that came before Judge Southwick on the Mississippi Court of Appeals, these cases are significant because they are among the few in his available record that raise constitutional and civil rights issues that Judge Southwick would face if confirmed to the Fifth Circuit. Moreover, hundreds of unpublished opinions that Judge Southwick joined during his first two years on the Mississippi Court of Appeals have not been tamed over to the Committee. These opinions could implicate an even broader range of legal issues and could shed light on Judge Southwick's approach to the constitutional and federal legal issues that come before the Fifth Circuit. It is critical for Senators and the public to be able to review a nominee's complete record when a lifetime appointment to the

federal bench is at stake. To allow this already-questionable nomination to move forward while substantial gaps in the record exist would be highly unfortunate and unwarranted.

No judicial nominee enjoys a presumption in favor of confirmation; rather, it is the nominee who carries the burden of convincing the Senate that he or she should be confirmed. NWLC respectfully urges the Committee not to vote Judge Southwick out of committee while his record remains incomplete, and while substantive concerns raised by his available record have not been allayed. If you have questions or if we can be of assistance, please contact us at (202) 588–5180.

Sincerely,

NANCY DUFF CAMPBELL,
Co-President.
MARCIA D. GREENBERGER,
Co-President.

PARENTS, FAMILIES AND FRIENDS OF LESBIANS AND GAYS,
Washington, DC, June 7, 2007.

Senator PATRICK LEAHY,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.
Hon. ARLEN SPECTER,
Ranking Member, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR SENATOR LEAHY AND SENATOR SPECTER: On behalf of more than 200,000 members and supporters of Parents, Families and Friends of Lesbians and Gays (PFLAG), I am writing to urge the Judiciary Committee to reject the nomination of Judge Leslie H. Southwick to the 5th Circuit Court of Appeals. There is absolutely nothing in Judge Southwick's troubling record, written responses, or testimony to the committee to indicate that he can fairly judge cases involving gay, lesbian, bisexual or transgender families or any other minority parties.

As a member of the Mississippi Court of Appeal, Judge Southwick joined a majority opinion which took custody of an eight-year-old child away from her mother, citing in part the mother's ''lesbian home'' and ''homosexual lifestyle'' as justification for the decision. Additionally, Judge Southwick was the only other judge to join a concurring opinion by Judge Payne that unnecessarily referenced the state's probation on gay and lesbian adoption, despite the fact that this was not an adoption case, using the phrase ''the practice of homosexuality'' throughout. Most disturbingly, the concurrence states that even if the mother's sexual acts are her choice she must accept the fact that losing her child is a possible consequence of that choice.

We hope that you will agree that all American families, including those living in Mississippi, Louisiana, and Texas, deserve a federal court system free from bias, regardless of their sexual orientation or gender identity. We are in no way confident that Judge Leslie H. Southwick can provide that basic right. Because of this, we strongly urge you to oppose the nomination of Leslie H. Southwick to a lifetime seat on the 5th Circuit Court of Appeals.

For more information please contact our Assistant Director of Programs, Elizabeth Hampton Brown, at (202) 467–8180 ext. 211 or e-mail ebrown@pflag.org.

Sincerely,

JODY M. HUCKABY,
Executive Director.

ALLIANCE FOR JUSTICE,
Washington, DC, May 31, 2007.

Hon. PATRICK J. LEAHY,
Chair, Committee on the Judiciary,
U.S. Senate, Washington, DC.
Hon. ARLEN SPECTER,
Ranking Member, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR CHAIRMAN LEAHY AND SENATOR SPECTER: No nominee to a lifetime seat on our federal courts is entitled to a presumption of confirmation. As Senator LEAHY has stated, the Senate's constitutional ''advice and consent'' role is a serious responsibility, by which ''those 100 of us privileged to serve in the Senate are entrusted with protecting the rights of 280 million of our fellow citizens.'' Were the Senate to confirm Judge Leslie Southwick to a lifetime appointment on the Fifth Circuit, it will in fact have placed in jeopardy the rights of many of the most vulnerable of our fellow citizens. As a judge on the Mississippi Court of Appeals, Judge Southwick assembled a deeply troubling record in cases involving the interests of vulnerable parties, consistently favoring corporations, insurance companies, and other powerful interests over vulnerable workers and consumers. His record also calls into question his commitment to equal dignity and equal justice for minorities.

Judge Southwick's published opinions reveal that he voted 89 percent of the time against injured workers and consumers in divided employment and torts decisions. In a number of these cases, Judge Southwick harshly interpreted laws and precedents to favor corporate defendants. In Goode v. Synergy Corporation, Judge Southwick voted to deny a family, who sued the propane company after their grandchild was killed in a fire, a new trial even though there was new evidence previously undisclosed by the company, showing that the company's conduct may have caused the fire.

Although there are few cases that shed light on Judge Southwick's views on civil rights, those that do are profoundly troubling. Astonishingly, in one of his exceedingly rare decisions in favor of an employee, he joined the court's 5–4 opinion in Richmond v. Mississippi Dep't of Human Services, which upheld an Employee Appeals Board decision to reinstate, with full back pay, a woman who used a racial slur in reference to a coworker, calling her a ''good ole n*****.'' In neither the opinion he joined, nor in his answers to questions at his confirmation hearing, did he express doubts about the decision he joined in Richmond. He and his colleagues on the majority also declined to remand the case to the Board for assessment of a lesser penalty—as one dissenting opinion urged and the Mississippi Supreme Court later ordered in reversing the Court of Appeals. Judge Southwick and the majority would have allowed the employee full reinstatement with back pay in spite of the epithet.

In S.B. v. L.W., Judge Southwick joined a homophobic concurrence arguing that sexual orientation was a perfectly legitimate basis on which to deny a parent custody of one's child. At his hearing, he attempted to explain this opinion as a reflection of the intent of the legislature as to the rights of gay parents. However, a dissenting opinion in S.B., along with a subsequent Mississippi Supreme Court decision stating that sexual orientation was not a basis on which to deny child custody, demonstrate that Judge Southwick's attempt to deflect criticism to the state legislature is questionable indeed.

The Senate must be especially wary of Judge Southwick's nomination because the president, in his six years in office thus far, has engineered a transformation of the federal courts to reflect an ideology that is hostile to the rights of minorities and our society's most vulnerable members. Moreover, the president has shown little willingness to promote diversity on the bench. Astonishingly, there has never been an African-American Fifth Circuit judge from Mississippi, a state with a population that is 37% African-American. Thus, it is particularly troubling that the President has now nominated someone to this Mississippi seat whose record raises such grave doubts about his racial sensitivity and his commitment to equal justice for all Americans.

President Bush and his Senate allies have exploited every opportunity to confirm the nominees of the hard right, steamrolling venerable Senate rules and traditions to achieve this goal. The current Senate now faces a choice: stand up to nominees who will make our courts even less friendly to our most vulnerable citizens; or inherit a share of President Bush's disturbing legacy of remaking the courts in the partisan image of his right wing base. Judge Leslie Southwick represents a crossroads, and the Senate should choose to reject his nomination and insist that the President submit a nominee with a demonstrated commitment to equal rights and fairness to all Americans, regardless of their race, sexual orientation or economic status.

Sincerely,

NAN ARON,
President.

Mr. REID. Mr. President, first of all, let me say I have the greatest respect for my senior colleague, the Senator from Mississippi, Mr. COCHRAN, who is always a gentleman in everything he does. I have worked on the floor with Senator LOTT during the time I was assistant leader, and I have the greatest respect for him. I appreciate the way they have handled this and not making it personal in nature simply because I oppose something they want.

I say in response to my friend, the distinguished Republican leader, there is a different standard, as well there should be, for someone who is going to be placed on the trial court than somebody placed on the appellate court. So the reasoning that Senators approved in the committee a judge for a district court—clearly, the tradition in the Senate is, with rare exception, they are approved—so the argument that we have approved somebody for a trial court so they should automatically be approved for an appellate court simply is not valid.

Our Constitution outlines the shared responsibility between the Senate and the President of the United States to ensure that the judiciary is staffed with men and women who possess outstanding legal skills, suitable temperament, and high ethical standing.

As a leader, I have worked hard to ensure that the Senate carries out its work with respect to judicial nominees fairly and promptly, and with a lot of transparency.

The judicial confirmation process today is working well, and all Senators should be pleased to know that the judicial vacancy rate is currently at an all-time low. For people who yell and shout and complain about the Democrats not allowing Republicans to assume the bench, the judicial vacancy rate today is at an all-time low. We

have a Judiciary Committee that has helped this significantly. Senator Pat Leahy, Senator Arlen Specter—the chairman and ranking member of that committee—have as much collegiality as I have ever seen in a committee since I have been in the Senate. They have been fair, and they have been fast.

This year alone, the Senate has confirmed 32 judicial nominees, including four court of appeals nominees—in addition to the more than 250 others who have been approved during the past 6 years of the Bush administration.

In contrast, my Republican colleagues and my Democratic colleagues will clearly recall that during the Clinton administration, the Republican-controlled Senate refused to confirm 70 nominees. Think about that: 70 nominees. Many of them did not even have the courtesy of a hearing. Some of them waited almost 4 years for a hearing.

I remember how we were treated. But we have chosen to live by the Golden Rule. We have chosen this is not ''get even time;'' this is a time to be fair and to be open. The Golden Rule: Treat people as you would want them to treat you. I am happy to say that is how we have done this.

Judges with impeccable records, such as Ronnie White and Richard Paez, were maligned by Republicans merely for partisan political gain. That is wrong. We do not intend to initiate any of that while we are in charge of the Senate.

But today we face a judicial nomination that has attracted strong opposition. I turned in what is part of this RECORD a stack of organizations and individuals who simply oppose this nomination for lots of different reasons.

Opposition to the nomination of Judge Leslie Southwick for the Fifth Circuit Court is neither partisan nor political. It is factual. These facts are present deep within the fundamental American commitment to civil justice and equal rights, which is something we must stand by.

In the past few weeks, our Nation has seen the recurrence of racial issues that we had assumed and hoped were behind us. Yet, the recent events in Jena, LA, and at the U.S. Coast Guard academy—where nooses were hung to intimidate, demean, and belittle people of color—demonstrate that issues of race and intolerance are sorrowfully still present in our society.

For many Americans, for many African Americans, and for the Congressional Black Caucus—of which this body only has one member. When I first came to the House of Representatives, there were about 20 members of the Congressional Black Caucus. Now there are 78. I believe that is the number. That is good. That is good for our country. But those individuals concerned know the Federal courts have historically represented the first, last, and often the only form of redress against racism and civil injustice. For that reason, I believe this body has little choice but to consider the nomination of Judge Southwick to the Fifth Circuit Court in the context of race and civil rights.

I heard Senator SCHUMER here this morning talk about the demography of the State of Mississippi. That has to be something we take into consideration.

President Bush is asking us to confirm Southwick for one of the highest judicial positions in the United States: the United States Circuit Court of Appeals. It is a lifetime appointment. But for a court as important as the Fifth Circuit, Judge Southwick is the wrong choice. His record on the Mississippi State court does not justify a promotion. That is why I rise, once again, as I have many times regarding Judge Southwick, to express my strong opposition to this nomination. I urge my colleagues to join me in voting ''no.''

As a member of the Mississippi State appellate court, Judge Southwick joined decisions that demonstrate insensitivity to, and disinterest in, the cause of civil rights.

Mr. President, I ask unanimous consent that the hour of 11 o'clock time for the vote be extended. I should be finished shortly.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. REID. Mr. President, I do believe that as a member of the Mississippi State appellate court, Judge Southwick joined decisions that demonstrate insensitivity to, and disinterest in, the cause of civil rights.

For example, in the Richmond case, he voted to uphold the reinstatement with back pay of a White State employee who had used a racial epithet about an African-American coworker.

Judge Southwick says the decision was about technical legal issues, but the dissent in the case by his colleague, Judge King, explains what was at stake. It was not a technical legal issue. As I said when I began, it was based on the facts. Judge King wrote, regarding the ''N'' word—and I quote him:

> There are some words, which by their nature and definition are so inherently offensive, that their use establishes the intent to offend.

It was clear in this decision that Judge Southwick should have joined what would have been the majority. The majority would have been with Judge King. He decided not to go with what would have been the majority and created his own majority to, in effect, agree that using this ''N'' word was nothing more than an offhand remark that meant nothing. It took the courageous action of judges on the Fifth Circuit to carry out the Supreme Court's desegregation decisions and destroy the vestiges of the Jim Crow era.

Judge Southwick, from what I have learned about him, is not capable of being part of that. Yet Judge Southwick's record gives us absolutely no reason to hope that he will continue this tradition of delivering justice to the aggrieved.

That is why there is no shortage of opposition to this nomination, first and foremost, as I have said, from our colleagues, Members of Congress, the Black Caucus. They cite opposition by the Magnolia Bar, the Mississippi NAACP, and countless other organizations that stand for justice. They have asked us to remember that their constituents are our constituents—some 45 million of them—and they deserve representation on this issue.

His decision in the Richmond case is his most serious problem, but Judge Southwick has failed in many other areas. He sides continually with plaintiffs in bad cases. He always, with rare exception, joins with corporations and not the workers. He appears to favor defendants.

There is no reason why the President can't find a nominee with a record fairly representing all people. If we reject Judge Southwick, the President will still have an opportunity to nominate another candidate. Judge Southwick's record has been fully documented by my colleagues who have spoken before me. His most grievous failure—I repeat—a failure to give full weight to the vile meaning and history of the ''N'' word—is deeply disturbing. I cannot overlook it.

I urge all my colleagues to join me in voting ''no,'' so we can find a candidate truly befitting this important lifetime appointment—a candidate who will give the people of the Fifth Circuit the confidence they deserve that their claim to justice will be heard with the respect and equality every American citizen deserves.

The PRESIDING OFFICER. All time for debate has expired.

Mr. LEVIN. Mr. President, parliamentary inquiry.

The PRESIDING OFFICER. The Senator from Michigan will state his inquiry.

Mr. LEVIN. How many votes are required to invoke cloture and end the debate on the pending nomination under the rules and precedents of the Senate?

The PRESIDING OFFICER. It will be three-fifths of the Members duly chosen and sworn, that being 60.

Mr. LEVIN. I thank the Chair.

CLOTURE MOTION

The PRESIDING OFFICER. Under the previous order, the clerk will report the motion to invoke cloture.

The assistant legislative clerk read as follows:

CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on Executive Calendar No. 291, the nomination of Leslie Southwick, of Mississippi, to be United States Circuit Judge for the Fifth Circuit.

Mitch McConnell, Arlen Specter, Wayne Allard, Johnny Isakson, Richard Burr, Norm Coleman, David Vitter, Kay Bailey Hutchison, George V. Voinovich, John Thune, Jim DeMint, Tom Coburn, Michael B. Enzi, Elizabeth Dole, Jeff Sessions, Jim Bunning, John Barrasso, Trent Lott, and Thad Cochran.

The PRESIDING OFFICER. By unanimous consent, the mandatory quorum call has been waived.

The question is, Is it the sense of the Senate that debate on the nomination of Leslie Southwick to be United States Circuit Judge for the Fifth Circuit shall be brought to a close?

The yeas and nays are mandatory under the rule.

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from California (Mrs. BOXER), the Senator from Connecticut (Mr. DODD), and the Senator from Massachusetts (Mr. KENNEDY) are necessarily absent.

I further announce that if present and voting, the Senator from Massachusetts (Mr. KENNEDY) would vote ''nay.''

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 62, nays 35, as follows:

[Rollcall Vote No. 392 Ex.]

YEAS—62

Akaka	DeMint	Lugar
Alexander	Dole	Martinez
Allard	Domenici	McCain
Barrasso	Dorgan	McConnell
Bennett	Ensign	Murkowski
Bond	Enzi	Nelson (NE)
Brownback	Feinstein	Pryor
Bunning	Graham	Roberts
Burr	Grassley	Salazar
Byrd	Gregg	Sessions
Carper	Hagel	Shelby
Chambliss	Hatch	Smith
Coburn	Hutchison	Snowe
Cochran	Inhofe	Specter
Coleman	Inouye	Stevens
Collins	Isakson	Sununu
Conrad	Johnson	Thune
Corker	Kyl	Vitter
Cornyn	Lieberman	Voinovich
Craig	Lincoln	Warner
Crapo	Lott	

NAYS—35

Baucus	Kerry	Obama
Bayh	Klobuchar	Reed
Biden	Kohl	Reid
Bingaman	Landrieu	Rockefeller
Brown	Lautenberg	Sanders
Cantwell	Leahy	Schumer
Cardin	Levin	Stabenow
Casey	McCaskill	Tester
Clinton	Menendez	Webb
Durbin	Mikulski	Whitehouse
Feingold	Murray	Wyden
Harkin	Nelson (FL)	

NOT VOTING—3

Boxer	Dodd	Kennedy

The PRESIDING OFFICER. On this vote, the yeas are 62, the nays are 35. Three-fifths of the Senators duly chosen and sworn having voted in the affirmative, the motion is agreed to.

The PRESIDING OFFICER. Under the previous order, the question is, Shall the Senate advise and consent to the nomination of Leslie Southwick to be United States Circuit Judge for the Fifth Circuit.

Mr. REID. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The clerk will call the roll.

The legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from California (Mrs. BOXER), the Senator from Connecticut (Mr. DODD), and the Senator from Massachusetts (Mr. KENNEDY) are necessarily absent.

I further announce that, if present and voting, the Senator from Massachusetts (Mr. KENNEDY) would vote ''nay.''

The PRESIDING OFFICER (Mr. WEBB). Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 59, nays 38, as follows:

[Rollcall Vote No. 393 Ex.]

YEAS—59

Akaka	DeMint	Lugar
Alexander	Dole	Martinez
Allard	Domenici	McCain
Barrasso	Dorgan	McConnell
Bennett	Ensign	Murkowski
Bond	Enzi	Nelson (NE)
Brownback	Feinstein	Pryor
Bunning	Graham	Roberts
Burr	Grassley	Sessions
Byrd	Gregg	Shelby
Chambliss	Hagel	Smith
Coburn	Hatch	Snowe
Cochran	Hutchison	Specter
Coleman	Inhofe	Stevens
Collins	Isakson	Sununu
Conrad	Johnson	Thune
Corker	Kyl	Vitter
Cornyn	Lieberman	Voinovich
Craig	Lincoln	Warner
Crapo	Lott	

NAYS—38

Baucus	Inouye	Obama
Bayh	Kerry	Reed
Biden	Klobuchar	Reid
Bingaman	Kohl	Rockefeller
Brown	Landrieu	Salazar
Cantwell	Lautenberg	Sanders
Cardin	Leahy	Schumer
Carper	Levin	Stabenow
Casey	McCaskill	Tester
Clinton	Menendez	Webb
Durbin	Mikulski	Whitehouse
Feingold	Murray	Wyden
Harkin	Nelson (FL)	

NOT VOTING—3

Boxer	Dodd	Kennedy

The nomination was confirmed.

The PRESIDING OFFICER. Under the previous order, the motion to reconsider is laid upon the table, and the President is notified of the Senate's action.

Mrs. CLINTON. Mr. President, I opposed the nomination of Leslie Southwick to serve a lifetime appointment on the U.S. Court of Appeals for the Fifth Circuit. His tenure as a judge on the Mississippi Court of Appeals reveals a record that fails to honor the principles of equality and justice and demonstrates a disregard for civil rights.

The American people deserve Federal judges—regardless of who nominates them—who are dedicated to an even-handed and just application of our laws. In case after case, Judge Southwick has demonstrated a lack of respect and understanding for the civil rights of all Americans, and particular indifference towards the real and enduring evils of discrimination against African Americans and gay and lesbian Americans.

After reviewing his judicial opinions and examining his qualifications, I have concluded that Judge Southwick's regressive civil rights record should disqualify him from serving a lifetime appointment on the Court of Appeals for the Fifth Circuit. I urge the President to select judicial nominees who embrace the principle that all are equal under the law.

LEGISLATIVE SESSION

The PRESIDING OFFICER. Under the previous order, the Senate will now return to legislative session.

DEVELOPMENT, RELIEF, AND EDUCATION FOR ALIEN MINORS ACT OF 2007—MOTION TO PROCEED

The PRESIDING OFFICER. There will now be 20 minutes of debate equally divided before a cloture vote on a motion to proceed to S. 2205.

The majority leader.

Mr. REID. Mr. President, I am going to use my leader time so it does not interfere with the 20 minutes allocated.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. REID. Mr. President, earlier this year, we had a chance at comprehensive immigration reform. I agree with the President of the United States that we should do comprehensive immigration reform. President Bush and I, I repeat, were in agreement. That effort brought people together from both sides of the aisle, from all parts of the political spectrum. We agreed our current immigration system works well for no one. That effort brought Democrats and Republicans together in pursuit of a common good.

Many of us then were profoundly disappointed when this issue was stopped, not because of the President, but by Republicans in the Senate and a few Democrats. It was a real disappointment to me. We had spent so much time on the floor trying to move forward on comprehensive immigration reform.

I continue to believe that tough, fair, practical and comprehensive reform is the only way to get control of our broken immigration system and restore the rule of law. I remain committed to enacting comprehensive legislation as soon as we can. But until we can once again look forward to comprehensive immigration reform, we should, at the very least, enact the DREAM Act. We tried to offer this crucial legislation as an amendment to the Defense authorization bill, but we were blocked from doing so by a small number of Republicans.

At that time, I committed to moving the DREAM Act for a vote before November 16. Today, that is where we are. We now turn to the DREAM Act as stand-alone legislation, and I once again rise to offer my strong support for this legislation. Anyone who believes as I do that education unlocks doors to limitless opportunity should join me in voting for this legislation.

We should vote for this legislation because the DREAM Act recognizes