

personal intervention to deny security clearances to investigators from the Justice Department's Office of Professional Responsibility, or as we call it, OPR, who were looking into the administration's warrantless domestic surveillance program.

This is the first time ever an OPR investigator was denied necessary clearances to conduct their investigation. Of course, the denial of security clearances had the intended effect: The investigation by OPR was shut down.

Now, as we all know, the distinguished chairman of the Senate Judiciary Committee, Senator LEAHY, has been forced to issue subpoenas to the White House, the Office of the Vice President, the Department of Justice, and the National Security Council, in order to obtain information Congress has sought for months related to the administration's legal justification for the warrantless wiretapping program.

If the White House's refusal to honor earlier congressional subpoenas and turn over information on the U.S. attorney firings is any indication of things to come, we can expect more stalling and more stonewalling by this administration as Congress seeks to learn the truth.

Again, what is going on here? What is going on, I believe, is a systematic effort on the part of the Bush administration, to twist, to partisan and political advantage, threats to our national security as justification for conducting Government in secret and in darkness, shadowed from congressional oversight and far from the light of public scrutiny.

If this requires making preposterous arguments, such as the Vice President's, in their view, that is fine. If this requires taking unprecedented action to deny clearance to Government investigators, fine by them. If this requires dispensing with many years of tradition and practice, distorting the plain language of Executive orders and abdicating the Department of Justice's watchdog role, again, fine with them. If this requires attempts to evade even a congressional subpoena, well, that is apparently fine too.

I will end where I began, with the issue of communications regarding ongoing cases and investigations between the White House and the Department of Justice. As Mr. Gonzales acknowledged yesterday, the greatest danger of infection of the Department of Justice with improper political influence comes from the White House.

Along with Chairman LEAHY, I have introduced a bill to set the Reno-Cutler policy for White House contacts as a baseline and to require the Department of Justice and the White House to report to Congress any time they authorize someone else to have these sensitive discussions.

It is my sincere hope this bill will have bipartisan support. But this bill is only one small part of a larger effort to restore checks and balances to our Government. We must and we will con-

tinue this effort, challenging the administration to work for the Democratic Congress, to stop playing politics with national security, and to end the secrecy and abuse of power that have become the hallmark of the Bush era.

I yield the floor and 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. DURBIN. I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. DURBIN. I ask unanimous consent to speak as in morning business.

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

#### NOMINATION OF JUDGE LESLIE SOUTHWICK

Mr. DURBIN. Mr. President, one of the more challenging tasks for a Senator is not to stand in judgment of a bill or even a law or a policy but to stand in judgment of a person. I served in the House of Representatives for 14 years before coming to the Senate. It is the one dramatic difference between the two bodies. Time and again we are called on in the Senate, in our capacity to advise and consent to Presidential nominations, to stand in judgment of people. It is not an easy assignment. You have to, in a matter of a short period, maybe meet a person, read about their background, and try to think ahead whether they are ready for the job they are being sent to do. For some it is only a temporary assignment. It might be for a year or two or more in a Federal agency with an important responsibility. I look at those judgments and assignments seriously, but not nearly as seriously as the task of picking Federal judges. A Federal judge, that man or woman, is appointed for a lifetime. The decision you make about a person has to be done more carefully. There has to be more reflection. If questions are raised about a person, their judgment, their values, their background, their veracity, their integrity, those questions are taken more seriously because that judge on that bench will be the face of America's law for the rest of his or her natural life.

As a member of the Judiciary Committee, I come face to face with these decisions on a regular basis and try to do my best to not only help pick good judges for my own State of Illinois but to be fair in judging those the President, whether a Democrat or Republican, sends to us for approval.

There is a controversial nomination now pending for the U.S. Court of Appeals for the Fifth Circuit, the nomination of a local State judge in Mississippi named Leslie Southwick. I came to the Southwick nomination with no advance knowledge of the man or anything he had done. I truly had an

open mind. I attended his nomination hearing and tried to give him the benefit of the doubt. Today I am sorry to report I have only doubt about his appointment to this lifetime position. There are too many questions about whether Judge Southwick would bring a measure of fairness in cases involving civil rights and the rights of ordinary people in his court. This perception as to whether he will be fair or even-handed is determinative in my mind. Whether you agree with that perception, it is there.

It is sad but accurate to report that Judge Southwick has lost the confidence of the civil rights community in the State of Mississippi and across the Nation. There is one case I wish to mention which may help explain why this has occurred. The case is called *Richmond v. Mississippi Department of Human Services*. Because of the wording in the case, it is unfortunate, I will be unable to read it into the RECORD; it would be inappropriate. But suffice it to say, in this 1998 case, the Mississippi State Court of Appeals ruled 5 to 4 to reinstate and give back pay to a White employee who had been fired for calling a Black employee the "N" word. Judge Southwick was in the five-person majority and thus was the deciding vote in that case.

Here is the background. The plaintiff, Bonnie Richmond, was a White employee who worked at the Mississippi Department of Human Services, a State agency with a 50-percent African-American workforce. After referring to an African-American colleague as a "good ole" "N" word, Bonnie Richmond, the white employee, was fired. She appealed her termination and was successful. A State hearing officer reinstated her. That decision was affirmed by the full Mississippi Employee Appeals Board, then reversed by the State court trial judge. Judge Southwick's court reversed it again, ruling for the White employee who had used the offensive racial epithet. Finally, the Mississippi Supreme Court weighed in. The Mississippi Supreme Court unanimously reversed the majority opinion which Judge Southwick had signed his name to, ordering the case to be remanded to determine an appropriate punishment short of termination for the White employee, Bonnie Richmond.

Mr. Southwick's defenders point out that he didn't write the opinion he signed on to. That is certainly true. But he didn't have to sign on to it, if he didn't agree with it. He could have filed a concurrence agreeing in the judgment but not the reasoning. He chose not to do so. The opinion Judge Southwick signed stated that the White employee who used the "N" word in this case "was not motivated out of racial hatred or animosity directed toward her co-worker or toward blacks in general."

I don't believe that is a mainstream view in America. I don't believe it is a mainstream view to say that the "N" word is "not motivated out of racial

hatred or animosity." The Southwick majority also affirmed the determination of the hearing officer who said the use of the term good old "N" word was intended to mean a "teacher's pet" and was in this context about as offensive as calling someone "a good old boy or Uncle Tom or chubby or fat or slim." Again, is that a mainstream view in America?

Recently a civil rights organization had a symbolic ceremonial burial for the "N" word, saying it is time it be removed from the American language, it is so offensive. For someone in Judge Southwick's court to be so dismissive of this term is truly to be insensitive. I don't believe the opinion which Judge Southwick signed on to reflected the type of racial sensitivity we need in a Federal judge.

The dissent in the case was eloquent and powerful. It said:

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

I certainly agree with that powerful dissent. I am sorry Judge Southwick does not.

At his May 10, 2007 hearing, Judge Southwick was asked if he still stood by his vote in that case. He said he did. I find that very troubling.

This is particularly important given the context of this nomination. This Fifth Circuit covers the States of Mississippi, Texas, and Louisiana. Those three States have the largest percentage of minority residents of any Federal circuit in America—44 percent. The State of Mississippi has the largest percentage of African Americans of any State in the Union—36 percent.

There are 19 judges on the Fifth Circuit. Of those 19, only one is African American. That would be Judge Carl Stewart of Louisiana.

Now, some have suggested that recent nominees to the Fifth Circuit reflect a deliberate design to protect this imbalance. Others say it is a conscious disregard of the obvious unfairness. The most generous view is that it is only a coincidence.

Two previous nominees to this Fifth Circuit seat—Charles Pickering and Michael Wallace—were not confirmed because of their anti-civil rights backgrounds.

Judge Pickering had unethically tried to lower the prison sentence for a convicted cross burner. Mr. Wallace defended the discriminatory policies of Bob Jones University and was so notorious for his hostility to civil rights that the American Bar Association gave him a rating of "not qualified."

The Southwick nomination has become a controversial nomination, with more focus than any other current circuit court nomination I can think of on the racial issue. Time and again, the nominees sent by the White House to the Senate Judiciary Committee fail the most basic test as to whether they

will fill this lifetime position on the Federal bench and rule fairly on issues involving race.

It is critical that members of the Fifth Circuit have an open mind when it comes to issues of race. In a letter sent to the Judiciary Committee, the Congressional Black Caucus opposed the confirmation of Judge Southwick and said:

Our Caucus is most concerned about Mr. Southwick's ability to afford equal justice under law in the Circuit where racial discrimination has always been most pronounced.

In another letter of opposition sent to the Judiciary Committee, the NAACP, the NAACP Legal Defense Fund, National Urban League, and the Rainbow/PUSH Coalition said:

This position is a lifetime appointment. If confirmed, Southwick will often provide the final word on the civil rights of millions of minority residents within the Fifth Circuit.

Historically, there have been some judicial giants in the Fifth Circuit who have served with great courage. Alabama used to be part of that Circuit. A few years ago, I went to Alabama for the first time as a guest of an organization known as the Faith and Politics Institute on Capitol Hill. It is a bipartisan group, and it tries to blend some views toward values with political decisions.

Under the leadership of JOHN LEWIS, the Congressman from Atlanta, GA, who was a pioneer in the civil rights movement, we went down to visit some of the key places where the civil rights struggle occurred.

We went to Birmingham and Montgomery and Selma, AL. I had to leave a little early, and so it appeared I would not have a chance to visit the Edmund Pettus Bridge, the notorious bridge where the march from Selma was stopped with violence. John Lewis, typical of what a fine person he is, said: I will get up extra early Sunday morning. I will drive you over there. You and I will walk across the bridge together.

Well, Senator SAM BROWNBACK joined us, and I am sure Senator BROWNBACK felt as I did, that it was an extraordinary day. That early, cool Sunday morning, JOHN LEWIS took us across that bridge and showed us the point where he had been clubbed and almost killed, as he tried to walk on that civil rights march.

I will never forget that scene. As a college student, I thought that maybe I could be there at that march. As luck would have it, I was not. I have regretted it ever since. But to be there that moment with JOHN LEWIS a few years ago really was a touching experience.

As we were driving back from the Edmund Pettus Bridge, JOHN LEWIS said to me: Do you know who the real hero was that day? It was Federal Judge Frank Johnson of Alabama. Johnson ordered the integration of Montgomery buses after Rosa Parks' protest in 1956, and he was the one who allowed that march in Selma to take place. Because of Judge Johnson's courage, he was

shunned by his community, ostracized. His mother's home was bombed. He was threatened many times because of his courage when it came to the issue of civil rights.

So when we speak of the Fifth Circuit, and its history, and Federal judges, I think of Frank Johnson and what he meant to America's history because of his courage.

At Judge Southwick's nomination hearing, I wanted to be fair with him, and I asked him a question which was maybe one of the easiest questions you could ask of a nominee. I asked him to name a single time in his career or in his life when he took an unpopular point of view on behalf of the voiceless or powerless. He could not name a single instance.

I thought, perhaps that was not fair. The judge should be allowed to reflect on that question. I will send it to him in writing and ask him: Was there a time in your life when you sided, for example, with a civil rights plaintiff when your court was split? He could not name a single case in his judicial career.

There has been a heavy focus placed on Judge Southwick's votes in the so-called "N" word case—which I have discussed—and a custody case in which he voted to take an 8-year-old girl away from her lesbian mother.

I disagree with Judge Southwick's position in these cases. I think, sadly, they show an inclination toward intolerance and insensitivity. But I am sympathetic to the argument that these are only two cases out of thousands in which he has taken part. However, it is not the end of the story.

A business group in Mississippi looked at 638 cases during an 8-year period of time and rated Judge Southwick as the judge on the Mississippi Court of Appeals most likely to rule against common, ordinary people, employees suing their employers. Another study showed he voted with companies and employers, businesses and powerful interests, in 160 out of 180 cases in which there was a split decision.

Many groups that do not normally take a position on a Federal judge have spoken out against Judge Southwick. There are many positive things about this judge's life. He has served his country. He has served in the military. And I am sure he has done many good things. But when a Senator has to make a decision about a lifetime appointment to a critical circuit court position, in a controversial area, where we have had a string of controversial nominees, you have to take that very seriously.

There is just too much doubt about whether Judge Southwick will have an open mind when it comes to civil rights and the rights of ordinary people in his court, and that is why I will oppose him if he comes before the Judiciary Committee.

A final word. Senator PATRICK LEAHY, the chairman of the Senate Judiciary Committee, has said he will

call Judge Southwick for a vote whenever Senator SPECTER and the Republican minority want his name to be called. I do not know how my colleagues on the Democratic side will vote. I know many of them share my misgivings.

Judge Southwick has had a hearing, which is more than can be said for many nominees from the Clinton administration—over 60 judicial nominees were bottled up in the Senate Judiciary Committee during those years, never even given the dignity or courtesy of a hearing and vote. Judge Southwick had his hearing. He had his opportunity to speak and answer questions, unlike dozens of Clinton nominees who never had that chance.

Now his record is there for everyone to view, and his name is there if the Republicans decide they wish to call him for a vote. This is not obstructionism. This is the process as it should work. I urge my colleagues, particularly from the State of Mississippi, if Judge Southwick does not prevail, I hope they will be able to find in that great State someone who can be brought to this nomination who will not incur the wrath and doubt that Judge Southwick has over his decisions and over his testimony before the Senate Judiciary Committee.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from South Carolina.

#### HOMELAND SECURITY

Mr. GRAHAM. Mr. President, a bit later I will be calling up an amendment to the Homeland Security appropriations bill pending before the Senate. I would like a moment, if I could—

The PRESIDING OFFICER. If the Senator will suspend.

Mr. GRAHAM. Yes, I certainly will. I believe Senator BYRD wants to make a statement first.

#### CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Morning business is closed.

#### DEPARTMENT OF HOMELAND SECURITY APPROPRIATIONS ACT, 2008

The PRESIDING OFFICER. Under the previous order, the Senate will resume consideration of H.R. 2638, which the clerk will report.

The legislative clerk read as follows:

A bill (H.R. 2638) making appropriations for the Department of Homeland Security for the fiscal year ending September 30, 2008, and for other purposes.

Pending:

Byrd/Cochran amendment No. 2383, in the nature of a substitute.

Bingaman amendment No. 2388 (to amend No. 2383), to provide financial aid to local law enforcement officials along the Nation's borders.

The PRESIDING OFFICER. The Senator from West Virginia.

Mr. BYRD. Mr. President, I thank my friend and colleague, the very able and distinguished Senator from South Carolina, for his characteristic courtesy.

Mr. President, this morning, we return to the consideration of the fiscal year 2008 Homeland Security appropriations bill. The Appropriations Committee, by a vote of 29 to 0, produced a balanced and responsible bill.

The bill includes significant resources for border security, for enforcing our immigration laws, and for improving security at our airports. We include—we include, may I say—significant new resources for implementing the SAFE Port Act. We also restore cuts in the first responder grants program.

Last week, the administration released its latest National Intelligence Estimate concerning the terrorist threat to the U.S. homeland. Hear me now. I will say that again. Last week, the administration released its latest National Intelligence Estimate concerning the terrorist threat to the U.S. homeland. That is right here, the U.S. homeland. I will quote from the report. This is not just ROBERT BYRD talking.

Let me say that again. Last week, the administration released its latest—I am talking about the administration, the Bush administration, the administration in control of the executive branch—the administration released its latest National Intelligence Estimate concerning the terrorist threat to the U.S. homeland. I will quote from the report:

We judge the U.S. Homeland will face a persistent and evolving terrorist threat over the next three years.

That ought to make us sit up and take notice. I am going to say it again. Hear me.

Last week, the administration released its latest National Intelligence Estimate concerning the terrorist threat to the U.S. homeland. I will quote from the report:

We judge the U.S. Homeland will face a persistent and evolving terrorist threat over the next three years. The main threat comes from Islamic terrorist groups and cells, especially al-Qa'ida, driven by their undiminished intent to attack the Homeland and a continued effort by these terrorist groups to adapt and improve their capabilities. . . .

[W]e judge that al-Qa'ida will intensify its efforts to put operatives here.

Let me repeat that word—here, H-E-R-E.

Yesterday, in light of this latest threat assessment from the Government's most senior intelligence analyst—I better read that again. Yesterday, in light of this latest threat assessment from the Government's most senior intelligence analyst, I urged the President to reconsider his veto threat of this bill. This morning, we received the White House's response. The President has said he will veto this bill because he, the President—President Bush—regards the additional spending for border security, port security, avia-

tion security, and for first responder grants as excessive.

The President has every right to make this threat, but, in my view, the view of this West Virginia mountaineer, the threat is irresponsible. Let me say that again. In my view—and I am a U.S. Senator—the threat is irresponsible.

If the President is going to scare the Nation by issuing intelligence estimates that say the threat of a terrorist attack is persistent and evolving, he, the President—President Bush—has a responsibility to back it up with resources to deter that threat. The Appropriations Committee recognizes the threat, and the Appropriations Committee of the Senate has responded responsibly.

I ask unanimous consent to have printed in the RECORD the Statement of Administration Policy dated July 25, 2007.

Mr. President, I yield the floor.

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

STATEMENT OF ADMINISTRATION POLICY, S. 1644—DEPARTMENT OF HOMELAND SECURITY APPROPRIATIONS ACT, 2008

(Sponsor: Senator Byrd (D), West Virginia.)

The Administration strongly opposes S. 1644 because, in combination with the other FY 2008 appropriations bills, it includes an irresponsible and excessive level of spending and includes other objectionable provisions.

The President has proposed a responsible plan for a balanced budget by 2012 through spending restraint and without raising taxes. To achieve this important goal, the Administration supports a responsible discretionary spending total of not more than \$933 billion in FY 2008, which is a \$60 billion increase over the FY 2007 enacted level. The Democratic Budget Resolution and subsequent spending allocations adopted by the Senate Appropriations Committee exceed the President's discretionary spending topline by \$22 billion causing a 9 percent increase in FY 2008 discretionary spending. In addition, the Administration opposes the Senate Appropriations Committee's plan to shift \$3.5 billion from the Defense appropriations bill to non-defense spending, which is inconsistent with the Democrats' Budget Resolution and risks diminishing America's war fighting capacity.

S. 1644 exceeds the President's request for programs funded in this bill by \$2.2 billion, part of the \$22 billion increase above the President's request for FY 2008 appropriations. The Administration has asked that Congress demonstrate a path to live within the President's topline and cover the excess spending in this bill through reductions elsewhere. Because Congress has failed to demonstrate such a path, if S. 1644 were presented to the President, he would veto the bill.

The President has called on Congress to reform the earmarking process that has led to wasteful and unnecessary spending. Specifically, he called on Congress to provide greater transparency and full disclosure of earmarks, to put them in the language of the bill itself, eliminate wasteful earmarks, and to cut the cost and number by at least half. The Administration opposes any efforts to shield earmarks from public scrutiny and urges Congress to bring full transparency to the earmarking process and to cut the cost and number of earmarks by at least half.