

Testimony of

The Honorable Strom Thurmond

November 14, 2002

Mr. Chairman:

Thank you very much for moving the nomination of Judge Dennis Shedd to the Fourth Circuit Court of Appeals. I am pleased that this fine man will receive a vote today. Judge Shedd is a man of impeccable character who will make an outstanding addition to the Federal appellate bench. He possesses the highest sense of integrity, a thorough knowledge of the law, and a good judicial temperament. These qualifications have earned Judge Shedd widespread respect and bipartisan support in my home state of South Carolina. In addition to Republican support, Senator Ernest Hollings and state Democratic Party Chairman Dick Harpootlian have endorsed his nomination. I am exceedingly proud of Dennis Shedd. He was a loyal employee of mine for ten years and is very deserving of this high honor. Judge Shedd has been successful at every stage of his professional life and has dedicated most of his career to public service. Upon graduation from the University of South Carolina School of Law, he joined my staff and eventually served as Administrative Assistant. Thereafter, during my tenures as Chairman and Ranking Member of the Judiciary Committee, he served as the Committee's Chief Counsel and Staff Director. As a staff member, he gained a well-deserved reputation for honesty and hard work.

Upon returning to South Carolina, Judge Shedd entered the private practice of law and also served as an Adjunct Law Professor at the University of South Carolina. In 1990, President Bush nominated Dennis Shedd to the United States District Court for the District of South Carolina, and he has served ably for more than a decade. On numerous occasions, Judge Shedd has been given the honor of sitting on the Fourth Circuit by designation.

Judge Shedd's performance on the District Court has been marked by distinction. He has been assigned more than 5,000 cases during almost twelve years on the bench. Out of all these cases, he has only been reversed 37 times, resulting in a reversal rate of less than 1%. These numbers indicate both the skilled legal mind and the thorough preparation that he will bring to the Fourth Circuit. Judge Shedd also possesses a good judicial temperament, treating all litigants in his courtroom with dignity and respect.

Unfortunately, some groups have portrayed Judge Shedd's judicial career in a negative light. I would like to take a moment to address these allegations and concerns. An examination of Judge Shedd's record indicates that he is not only fair and impartial, but personally dedicated to upholding the constitutional rights of all people.

Judge Shedd has been criticized for his handling of *Alley v. South Carolina*, a lawsuit wherein the plaintiffs sought to remove the Confederate flag from atop the Statehouse dome in Columbia, South Carolina. The South Carolina NAACP has asserted that Judge Shedd "made several derogatory comments about those opposing the flag, and minimized the deep racial symbolism of the Confederate flag by comparing it to the Palmetto tree, which appears in South Carolina's state flag."

These allegations are misleading and inaccurate. A close look at the transcript of the hearing reveals that Judge Shedd made a point of saying that his comments were not meant to be

disparaging. In fact, he said, "I'm not going to denigrate the constitutional claim about the Confederate flag." Furthermore, Judge Shedd never ruled on the merits of the case. Rather, he abstained to allow a claim to go forward in state court, arguably the forum better equipped to handle the issue.

Additionally, it is important to note that Judge Shedd's comments about the Palmetto tree were made during his examination of the lawyer's legal argument in the case. The argument hinged on the offensive nature of the Confederate flag, and Judge Shedd pointed out that many symbols could be perceived as offensive, such as the Palmetto tree on the state flag. Judge Shedd then stated, "I'm not determining now on whether or not the flag should be there at all. I'm just doing what--you lawyers have been with me before know, I'm exploring your legal theory." In this case, Judge Shedd was simply engaging in the Socratic method with the lawyers, and his words should not be twisted to insinuate any personal feelings about the propriety of flying the Confederate flag over the Statehouse dome.

I would like to point out the case of *Vanderhoff v. John Deere*, the one case involving the Confederate flag in which Judge Shedd did rule. In that case, an employee was fired because he refused to comply with company policy and remove the Confederate flag from his toolbox. The employee sued under Title VII, a statute designed to prohibit workplace discrimination based on race, sex, religion, and national origin. He argued that his national origin was a "Confederate Southern American" and that he had been the subject of discrimination. Judge Shedd rejected this argument and dismissed the plaintiff's claim. Thus, on the one Confederate flag case where he ruled on the merits, Judge Shedd's decision went against a flag proponent.

In recent weeks, Judge Shedd has been the subject of vicious attacks based on his handling of employment discrimination cases. Over and over again, we have heard the accusation that Judge Shedd shows a bias towards defendants. A review of Judge Shedd's record indicates that he has been fair to the civil rights claims of plaintiffs in his courtroom. In fact, Judge Shedd has only been reversed two times in employment discrimination cases. With such a low reversal rate, I am disappointed that some groups have insisted on attacking this fine judge.

One commonly cited case is *Roberts v. Defender Services*, in which Judge Shedd dismissed a plaintiff's sexual harassment claim. In this case, Judge Shedd merely followed the law as established by the Supreme Court, which held in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), that the work environment must be both objectively and subjectively offensive. While the plaintiff had clearly shown that the work environment was objectively offensive, Judge Shedd determined that she had not made a showing that she perceived it to be offensive. He based his determination on the fact that she had recommended the position to someone else and stated that the employer was "a nice person" who was "pretty good to work for." These comments by the plaintiff demonstrate that Judge Shedd's decision was reasonable under the circumstances of this case.

The truth is that Judge Shedd has issued rulings that have benefitted plaintiffs on numerous occasions. For example, in *Miles v. Blue Cross & Blue Shield*, C.A. No. 3:94-2108-19BD, an action was brought under Title VII of the Civil Rights Act by an African-American employee who alleged that she was fired because of her race. There was ample evidence that the plaintiff had been subjected to racial slurs before being fired. Judge Shedd appropriately denied the defendant employer's motion for summary judgment.

In another case, *Davis v. South Carolina Department of Health and Environmental Control*, C.A. No. 3:96-1698-19BD, an action was brought under Title VII by an African-American employee who alleged that she was denied a promotion because of her race. There was evidence that an

unqualified white employee had been promoted and that racially disparaging remarks had been made. Judge Shedd followed the law and denied the defendant employer's motion for summary judgment. Again in *Ruff v. Whiting Metals*, C.A. No. 3:98-2627-19BD and *Williams v. South Carolina Department of Public Safety*, C.A. No. 3:99-976-19BC, Judge Shedd denied a defendant's motion for summary judgment on race discrimination claims.

In the case of *Treacy v. Loftis*, C.A. No. 3:92-3001-19BD, Judge Shedd, overruling a magistrate judge's recommendation, declined to grant summary judgment on a fired employee's claim of intentional infliction of emotional distress. In that case, the plaintiff claimed that her job was terminated due to her involvement in an interracial relationship. Judge Shedd, in refusing to grant summary judgment, allowed the case to go forward.

There are many other cases like these. Judge Shedd's record reveals that he has upheld important rights protected by the Constitution. If elevated to the Fourth Circuit, Judge Shedd will continue to protect civil liberties.

In addition to Judge Shedd's proven record of protecting civil rights, he has personally dedicated himself to providing equal opportunities for women and minorities. As an example, Judge Shedd served as Chairman of the South Carolina Advisory Committee to the United States Commission on Civil Rights. He also played an instrumental role in the selection of Margaret Seymour as the first female African-American U.S. Magistrate Judge in the District of South Carolina. When Judge Seymour was nominated by President Clinton to the district court, Judge Shedd fully supported her nomination. Furthermore, Judge Shedd has hired both African-American and female law clerks.

I would like to turn to another accusation that has been leveled against Judge Shedd. He has been accused of espousing an unreasonably narrow interpretation of Congressional power based on his decision in *Condon v. Reno*, 972 F.Supp. 977 (1997), in which he struck down the Driver's Privacy Protection Act. The Act regulated the dissemination of state motor vehicle record information, and the state of South Carolina challenged its constitutionality. Judge Shedd ruled that under Supreme Court precedent, the Act violated the Tenth Amendment by impermissibly commandeering state governments, forcing them to regulate in a specific fashion. The Fourth Circuit upheld this decision, *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998), but the Supreme Court ultimately reversed. *Reno v. Condon*, 120 S.Ct. 666 (2000).

I want to stress that this case was one of first impression. Given the United States Supreme Court opinions in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997), Judge Shedd's ruling was entirely reasonable. In a very persuasive opinion, he compared the Drivers Privacy Protection Act with those Acts invalidated in *New York* and *Printz* and found it to have similar constitutional defects.

Judge Shedd was not alone in his analysis. At least one liberal commentator, Erwin Chemerinsky, concluded that the Supreme Court's distinction of the Drivers Privacy Protection Act from the statutes struck down in *New York* and *Printz* was unconvincing. While Chemerinsky agreed with the final outcome of the case, he has argued that the Supreme Court should have overruled both *New York* and *Printz* in order to reach its decision in *Reno*. Professor Chemerinsky's argument lends support to the proposition that Judge Shedd, in striking down the statute, was correct in his interpretation of the law at that time.

In addition, of the 16 lower Federal court judges who considered the constitutionality of DPPA, 8 determined that the statute was unconstitutional. In short, there is nothing to indicate that Judge Shedd's decision in this case was out of the mainstream.

Another case that has been cited is *Crosby v. U.S.*, in which Judge Shedd held that the plaintiff's

claim under the Family and Medical Leave Act was barred by the Eleventh Amendment to the Constitution. Judge Shedd's detractors have argued that this case is another example of his narrow view of Congressional power. However, this accusation is unfair and unwarranted. In this case, Judge Shedd sought to follow the law as established by the Supreme Court. He was not attempting to make new law, but was instead seeking to apply the law correctly. Furthermore, Judge Shedd was not alone in his decision. Out of nine circuit courts that have considered this same question, eight have agreed with Judge Shedd. It is worth noting that Judge Roger Gregory, originally appointed by President Clinton, joined the Fourth Circuit's opinion that agreed with Judge Shedd's ruling.

Judge Shedd has also been criticized as being anti-plaintiff for disposing of matters sua sponte, or on his own motion. This charge is without merit for a number of reasons. First, Federal judges face enormous caseloads. If an area of the law is clear, it is completely proper for the judge to act on his own motion, helping to move litigation along and clear the dockets. Second, the law clearly allows for district court judges to consider matters without prompting from lawyers. The Supreme Court has acknowledged this, stating in *Celotex Corp. v. Catrett*, 830 F.2d 1308 477 U.S. 317, 326 (1986), that district courts may grant summary judgment sua sponte to a party that has not moved for summary judgment. As long as a judge is acting properly, which Judge Shedd has always done, sua sponte decisions are entirely appropriate.

I have known Judge Shedd for over 24 years and can personally vouch for his integrity and high moral character. He is truly a man of knowledge, ability, and superior ethical standards. Judge Shedd will bring a wealth of trial experience to the Fourth Circuit, having handled more than 4,000 civil cases and over 900 criminal matters as well as possessing unmatched legislative experience. It is no surprise that Judge Shedd received a majority rating of "Well Qualified" from the American Bar Association. I am proud to support my friend, Dennis Shedd, to the Fourth Circuit Court of Appeals.