

Statement of

The Honorable Russ Feingold

United States Senator
Wisconsin
August 2, 2007

Statement on the Nomination of Leslie Southwick
Senator Russell D. Feingold
Senate Judiciary Committee
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Mr. Chairman, 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 six 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's 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 six years of the Clinton Administration. And the numbers tell a very clear tale - three judges confirmed for this Circuit during the first six years of this Administration, versus none in the last six 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, of course, 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, who 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 D.C. 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 one 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% of the residents are African Americans, we need a judge on the 5th Circuit who recognizes that such a decision had to be overturned.

I am even more disturbed by Judge Southwick's decision in the child custody case, *S.B. v. L.W.*, and particularly by his joining a stridently anti-gay concurring opinion. In light of how he voted in that case, I am simply not convinced by his assurances that he will give all litigants who come before him a fair hearing. To hear him defend that decision to take a woman's child away from her and give custody to the unmarried father of the child because the mother was involved in a homosexual relationship as somehow being compelled by Mississippi's public policy against homosexual behavior was very disappointing.

I have heard Judge Southwick's defenders say it is unfair to judge him by one case. But to a person whose ties to her own child are threatened, there is only one case that matters. I am deeply troubled by this decision. I found Judge Southwick's explanation of his reasoning in joining it and his assurances that he harbors no bias against gay Americans, unconvincing.

Mr. Chairman, 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 earned my support. Thank you, Mr. Chairman.