MAGNOLIA BAR ASSOCIATION, INC.
Post Office Box 648, Jackson, Mississippi 39205-0648
Office: (601) 353-2540 Fax: (601) 352-0208
magnoliabar@bellsouth.net

REPLY TO:
Carlton W. Reeves
Post Office Box 22725
Jackson, MS 39225
(601) 354-2121
FAX: (601) 354-7854
Creeves@prjlawyers.com

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VIA E-MAIL AND FEDERAL EXPRESS

Honorable Patrick Leahy
Chairman
United States Senate Committee on the Judiciary
433 Russell Office Bldg
United States Senate
Washington, DC 20510

Re: Nomination of Leslie Southwick

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 an 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-American 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 o f 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.