Responses of Leslie Southwick
Nominee to the United States Court of Appeals for the Fifth Circuit
to the Written Questions of Senator Russ Feingold

1. The majority opinion in the Richmond case, which we discussed at your hearing, made much of the fact that the African-American employee who heard the racial slur when it was uttered by Ms. Richmond had indicated that she was not shocked by the use of that phrase in that context and explained her lack of negative reaction as follows: "Because I felt as if she was describing the actions of a person, I at that time didn't allow myself to feel anything other than what I felt she was doing and I allowed her that leeway to describe her." Do you think it was reasonable for the court to draw the conclusion it did from that testimony?

Response: The majority opinion fairly characterized the testimony of the witness. At the hearing, the witness was reminded what Richmond had said in front of her, and then was asked, "that didn't shock you?" The witness answered "no." The quotation that is in your question was in response to the second question following the one about being shocked, and it explained why she was not.

2. Do you believe that the use in the workplace of the racial slur at issue in the *Richmond* case can ever be just "somewhat derogatory"?

Response: The use of this word is inherently and highly derogatory. The use of any racial slur, particularly this one, is offensive.

3. In the *S.B. v. L.W.* custody case, the majority of the court decided to give custody of a child to the father, who had never married the mother. The opinion makes it clear that the fact that the mother was bisexual and at the time was living with another woman was a significant factor in the court's decision. You joined the majority opinion and also joined a concurrence by Judge Payne that argued that by prohibiting gay couples from adopting children and from marrying, and by criminalizing sodomy, which at the time was still constitutionally permissible, "the legislature has clearly set forth the public policy of our State with regard to the practice of homosexuality."

a. How was the state's policy on adoption relevant to the question of whether a court should take away custody from a child's natural mother?

Response: The statutes cited in the concurring opinion reflected the legislature's policy judgments in a number of subject areas, judgments that were consistent in approach to the caselaw that was cited in the majority opinion and therefore relevant as analogies.

b. Do you believe that the "public policy of our State with regard to the practice of homosexuality" justifies finding against a gay American in any case in which the morality of that individual is at issue? If not, what distinguished the custody case from other cases where such a conclusion would not be warranted?

Response: I find no Mississippi caselaw that explicitly permitted a finding against a gay American, based on nothing more than the fact the person is gay, in cases in which morality was an issue. As the *S.B. v. L.W.* opinions stated, even in 2001 the controlling Mississippi precedents indicated that sexual orientation or extra-marital relations (whether heterosexual or homosexual), would not by themselves usually be sufficient to affect the custody decision. What suggestions there were in two precedents cited in *S.B. v. L.W.* were not explicit holdings to that effect. The public policy that was reflected in those precedents and the cited statutes will now have to be judged in light of such developments in the law as *Lawrence v. Texas*.

4. What was the public policy in your state at the time this case was decided on whether individuals who were in homosexual relationships should be able to retain custody of their own naturally born children?

Response: I am not aware of any expression of public policy on that question beyond the caselaw that was cited in the majority opinion. In some of the child custody opinions cited by the Court of Appeals majority, the Mississippi Supreme Court had approved consideration of whether a parent was involved in extra-marital relations, whether of a homosexual or a heterosexual nature. As the majority stated, evidence of such relations could not be the sole basis on which to deny custody without a showing that the relations caused harm to the child. *S.B. v. L.W.*, 793 So. 2d 656 (¶ 18) (Miss. Ct. App. 2001).

5. As we discussed at the hearing, the concurrence that you joined states:

> **"I do recognize that any adult may choose any activity in which to engage; however, I also am aware that such person is not thereby relieved of the consequences of his or her choice. It is a basic tenet that an individual's exercise of freedom will not also provide an escape of the consequences flowing from the free exercise of such a choice. As with the present situation, the mother may view her decision to participate in a homosexual relationship as an exertion of her perceived right to do so. However, her choice is of significant consequence, as described before in the discussion of our State's policies, in that her rights to custody of her child may be significantly impacted."**

a. Do you believe today that one of the consequences of having a same-sex relationship should be to risk losing custody of your own child?

Response: Under controlling precedent, a trial judge was to consider ten factors in making a decision on child custody. The appellate function was to review the decisions on each factor through an abuse of discretion lens. The precedents that were binding on our court accepted that sexual orientation could be a factor, along with others, in deciding custody. As the majority stated in *S.B. v. L.W.*, evidence of such relations could not be the sole basis on which to deny custody without a showing that the relations caused harm to the child. The prior caselaw that made extra-marital relations of any kind an issue in custody decisions, and in some cases also approved consideration of sexual orientation, will have to be re-analyzed in light of *Lawrence*.

b. If the answer to question (a) is no, what about the *S.B. v. L.W.* case led you to conclude that custody should be denied to this particular mother?

Response: The appellate court was to search for an abuse of discretion in the decisions of a trial judge on each factor that was relevant to custody. The majority and the concurring opinions both addressed each of the relevant factors (some of the ten were not contested), and both opinions found that other factors were sufficient to sustain the custody decision. However, given that the mother argued that consideration of her sexual orientation had skewed the decision by the trial judge, the court also addressed that argument.

c. Why did you join an opinion that suggests that the decision to participate in a same-sex relationship may have a significant impact on an individual's rights to custody of his or her own child?

Response: I joined these opinions because of my analysis that both opinions were applying controlling law in Mississippi at the time of the decision.

6. Do you understand why some gay Americans, based on the *S.R. v. L.W* case, may have doubts about your ability to treat them fairly as a judge on a federal appellate court?

Response: I regret that some may react that way to the decision. I have always tried to be fair, to apply my understanding of the facts to my best interpretation of the law, and not let other considerations alter the result. I believe my opinions reflect that approach.

7. At your hearing, you stated in answer to questions from Sen. Coburn that you would treat gay Americans who come before you the same as everyone else. What in your record can you point to that you think ought to reassure gay Americans and those of us who are deeply concerned about discrimination against them that concerns about your ability to do that are misplaced?

Response: Each judge can do no more than assure any litigant that he or she will strive to follow the law after a diligent effort to understand the facts of a case, regardless of the parties before the court. I offer that assurance, should I one day serve as a federal judge. The recognition of legal rights of gays and lesbians has been evolving, as much since the 2001 decision as at any other period in American history. The 2001 decision relied on now-overruled United States Supreme Court precedent. If confirmed as a federal judge, my future decisions would reflect that evolution as well as my commitment to equal justice for all under the law.