Responses of Leslie Southwick
Nominee to the United States Court of Appeals for the Fifth Circuit
to the Written Questions of Senator Edward M. Kennedy

1. **In 1998, as a member of the Mississippi Court of Appeals, you joined a 5-4 decision in Richmond v. Mississippi Department of Human Services, which upheld reinstatement of a white worker who used a racial slur in referring to a colleague. The Board's hearing officer who reviewed the case claimed that the employee's use of the "N-word" was only "somewhat derogatory" and that the employer had "overreacted." You voted to uphold the officer's decision. The opinion you joined was unanimously overturned by the Mississippi Supreme Court.**

I was troubled to see that the opinion you joined claimed that this shameful racial slur was "not motivated out of racial hatred or animosity directed at her co-worker or toward blacks in general, but was, rather, intended to be a shorthand description of her perception of the relationship existing between the [co]-worker and [a] supervisor." The opinion seemed to accept uncritically the claims of the worker who used the slur, even though she had the burden of proof. Two of your colleagues dissented, stating that the "N-word" "is, and has always been, offensive. Search high and low, you will not find any non-offensive definition for this term. There are some words, which by their nature and definition are so inherently offensive, that their use establishes the intent to offend."

a. Do you agree with the dissent that this particular racial slur is always offensive?

Response: The use of any racial slur, and particularly this one, is always offensive.

b. If so, why did you accept the employee's claim that it was not derogatory?

Response: The word *is* derogatory. My decision to join the majority in *Richmond* was not approval of the use of any racial slurs. Instead, I joined the opinion because I found that after consideration of all the evidence, under the proper standard of review, the Court should defer to the Employee Appeals Board's (EAB) determination that the employee's actions did not have such a substantially disruptive effect that "to continue the employee in the assigned position could constitute negligence in regard to the agency's duties to the public or to other state employees."

The Court of Appeals' role was not one of evaluating the relative plausibility of any factual assertion. The Mississippi Legislature has charged the EAB with conducting the *de novo* review of a state agency's decision to discipline a state employee. Here, Richmond's employer, the Department of Human Services (DHS), fired her. She was entitled to have an evidentiary hearing on the discipline at the EAB. A hearing officer took testimony and reached a decision that termination was improper. The entire record was then reviewed by the EAB and affirmed.

To understand the importance of the EAB's decision, mention needs to be made of the standard of judicial review applicable to complaints about EAB decisions brought by the employing agency. That standard is perhaps unique in Mississippi administrative law. As *Richmond* pointed out (slip. op. p. 2), the employing agency does not have a right to appeal an unfavorable EAB decision, though an employee does have appeal rights. Instead, the employer must seek a writ of certiorari. Judicial review when the writ is granted is limited to errors of law apparent on the face of the record and to arguments that there is no evidence to support the decision. I accepted that based on this record, even though Richmond had certainly used the words to belittle, there was some evidence that she had not been motivated by hatred or by animosity to an entire race. That was Richmond's testimony, and I found the EAB's conclusion to have some evidence to support it. There was also some evidence that there was not a disruption at the agency. Under the applicable review standard, that led me to believe we should affirm.

2. **The opinion you joined in <u>Richmond</u> also stated that the African American worker who was referred to in this way was not offended. But the testimony shows that she clearly was offended but did not want to make an issue of it in the workplace. She stated:**

"I guess it could have been a real big problem as far as I was concerned, but it's not how I deal with things." She went on to say, "I tend to withdraw from things of that nature and I really don't take issue with them, and I have a hard time being overtly ugly to anybody even when . . . my feelings have been hurt."

How could you have assumed that this worker, who said her feelings had been hurt by a racial slur, was not offended?

Response: I assumed that the African American employee was in fact offended by Richmond's use of the slur. The majority opinion that I joined recounted evidence presented by Richmond to the EAB as part of her efforts to demonstrate that her statement was not *motivated* by a desire to offend. Under my reading of the opinion, though, the Court of Appeals never stated that the African American employee was not actually offended. I joined the majority opinion, agreeing with it that the racial slur is offensive, but also agreeing that there was evidence in the record to support the EAB's decision that Richmond's employment did not have to be terminated.

3. When the Mississippi Supreme Court rejected your view in the <u>Richmond</u> case, it held that that the employee who used the racial slur should at least receive some form of discipline, even if she is not fired. Several of the justices would have gone further and allowed her termination. You voted to give her back her job, without imposing any discipline for using a racial slur about a colleague. Even if you did not think a worker should be fired for using a racial slur – why not at least let the employer impose some form of discipline?

Response: The Mississippi Supreme Court determined as a procedural matter that it could not yet uphold the EAB's decision that no punishment short of termination should be imposed on Richmond. Instead, the high court made this holding: "We therefore remand the present case to the EAB in order for the board to impose an appropriate penalty less than dismissal, or to make detailed findings as to why no penalty should be imposed." *Richmond v. MDHS*, 745 So. 2d 254, 258 (Miss. 1999).

I considered the possibility of a remand to have the EAB consider lesser discipline than termination. A number of reasons kept me from agreeing with the approach. Neither party requested that any punishment other than termination be considered. DHS sought only to have termination reinstated; Richmond wanted the EAB decision to be sustained. For the Court of Appeals to grant a remand to consider relief no one requested, raised questions to me of the proper role of judges. I also believed that the EAB reasonably would interpret that remand to be nothing more than an implied ordering of lesser punishment. Instead of ordering reconsideration by the EAB, the appellate court should decide whether lesser punishment was required under the applicable standard of review. Since I concluded that the EAB had made a decision that could be sustained on the record under our deferential review obligation, it was not for the Court to rule indirectly in a manner that I did not find we should do directly.

On the other hand, I do not disagree with the Mississippi Supreme Court's decision to order the EAB to explain its ruling. An argument to remand for better findings was not made at the Court of Appeals. None of the three precedents cited by the Supreme Court to support the requirement of specific findings by the EAB had, in my reading of them, actually created such a duty. *Richmond*, 745 So. 2d 254, 258 (¶16) (Miss. 1999). In *Richmond*, the Supreme Court did not just order reconsideration but was usefully creating or at least clarifying an obligation for the EAB to explain fully whenever it rejected the discipline that an employer had imposed.

4. In the 2001 case <u>S.B. v. L.W.</u>, you joined a decision upholding a chancellor's removal of an eight-year-old girl from the custody of her biological mother, who was her primary care-giver. The majority opinion you joined made clear that the mother's parental rights were denied in large part because of her sexual orientation. You also joined a concurring opinion noting that the Mississippi legislature had "made clear its public policy position relating to particular rights of homosexuals in domestic relations settings."

> **a. You testified that you joined the concurrence because it "added something about policy from the legislature." You also stated that on the issues involved in the case, "the policy. . . really needs to be set by the legislative branch . . . ." A parent's ability to maintain custody of her child obviously involves fundamental rights. Did you mean to suggest that legislative policy should always trump those rights?**

Response: Legislative policy may not override an individual's fundamental constitutional rights. At the time that *S.B. v. L.W.* was decided, a state legislature's ability to enact policies governing the activities of homosexual individuals was supported by precedent from the United States Supreme Court. *Bowers v. Hardwick*, 478 U.S. 186 (1986). The

legislative policy referenced in Judge Payne's opinion would not control over a fundamental right. Any argument that a state legislature has an ability to govern the private activities of an individual based solely on sexual orientation will in the future have to be assessed in light of the overruling of *Bowers* by *Lawrence v. Texas*, 539 U.S. 558 (2003).

b. Since other factors were involved in the decision, why did you believe it was necessary to focus on the mother's sexual orientation?

Response: Controlling Mississippi Supreme Court precedent required the trial judge in ruling on a child custody matter to consider, among other factors, the "moral fitness" of the parents. See *Albright v. Albright*, 437 So. 2d 1003 (1983). This factor had been interpreted to include the sexual relations and activity of unmarried parents, regardless of the parent's sexual orientation. Thus, under Mississippi law, consideration of an extra-marital relationship was appropriate under the moral fitness factor, whether that relationship was homosexual or heterosexual in nature. Since the mother specifically challenged the custody decision on the basis that her sexual orientation had overridden every other factor, the writers of all the court's opinions determined that an analysis was required in order to do justice to her appeal.

The trial judge, as he was required by law to do, considered among numerous other factors the extra-marital sexual relations of both parents when reaching his decision. *S.B. v. L.W.*, 793 So. 2d at 658 ("The chancellor noted that the mother had two live-in lovers since the child was born."). The mother's sexual orientation was not the controlling factor for the Court of Appeals. As one of the opinions I joined noted, "[e]ven barring the whole sexual preference discussion, I would agree with the majority that ample evidence existed to support the chancellor's decision." *S.B. v. L.W.*, 793 So. 2d at 664 (Payne, J., concurring).

5. In the concurring opinion, you tried to justify your decision by pointing to Mississippi laws that discriminate against same-sex couples in adoption and criminalize same-sex relationships. The concurrence concluded that "[u]nder the principles of Federalism, each state is permitted to set forth its own public policy guidelines through legislative enactments and through judicial renderings. Our State has spoken on its position regarding rights of homosexuals in domestic situations." The dissent disagreed, noting that there was no indication that remaining with her mother would harm the child.

a. The right to raise your own children is one of the most fundamental rights of any individual. It's troubling that you would rely on "states' rights" to deny a mother the custody of her eight-year-old child. The states' rights argument was long used to justify discrimination against African Americans and other groups. No one should be denied basic constitutional rights simply because of who they are. How do you answer those who – after reading this case – are concerned that you will not be able to rule impartially in cases involving issues of sexual orientation?

Response: I offer my assurance that, if fortunate enough to be confirmed as a judge for the United States Court of Appeals for the Fifth Circuit, I will faithfully defend the rights provided to all citizens by the United States Constitution. I will decide all matters impartially and will discharge my judicial duties without bias or prejudice on any basis, including sexual orientation.

b. As you noted in your testimony, in 2003, the Supreme Court decided Lawrence v. Texas, striking down the kinds of laws against same-sex relationships mentioned in your concurrence. In discussing the Fourteenth Amendment's guarantee of Equal Protection, the Court stated that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." Now that the Supreme Court has ruled in Lawrence v. Texas, would you decide the case of S.B. v. L.W. differently today?

Response: It is evident that the analysis would have to be different in light of *Lawrence v. Texas*, though that analysis might not have changed the final result since this issue was only one of several that the trial court used to decide the case.

6. At your nomination hearing before the Senate Judiciary Committee on May 10, you said that you review moral issues when determining whether a bisexual parent should be granted child custody. You insisted that of the factors you applied in this custody case, "The moral issue was one of them, which was the rule in Mississippi at that time, and remains, that morality of each party should be considered." Do you believe that as a matter of law, sexual orientation is in and of itself, a moral factor?

Response: At the hearing, my answer that referred to "moral issues" was using the terminology that was used in Mississippi caselaw at the time of the 2001 decision. Today, any issue of whether sexual orientation could be considered in weighing these factors would be guided by the Supreme Court's opinion in *Lawrence v. Texas*.

7. In Goode v. Synergy Corporation, you dissented from a decision granting a new trial to the parents and grandparents of a girl killed in a fire. The fire had been caused by a defective repair to a water heater that allowed propane gas to escape. The family tried to hold accountable the propane gas company that maintained the water heater, but during pre-trial discovery, the company failed to disclose that its worker had been responsible for the defective repair. That fact was only discovered after trial, when an employee of the company admitted working on the family's water heater. Seven members of the Supreme Court held that the family should have a new trial.

You argued that the victim's family wasn't entitled to a new trial, despite the gas company's failure to provide this critical piece of evidence. You said the family had not been diligent in trying to discover the missing information before trial. But the

family deposed everyone they could identify who might know about the leak. They even directly asked the company whether it had performed any maintenance on the water heater before the fire. Under oath, the company responded that it had not.

a. If the company itself didn't even know about the repair, how can you claim the family should have found this evidence before trial?

Response: Under Mississippi law, the granting of a new trial is extraordinary relief. The Court of Appeals was required to review the trial judge's decision not to grant a new trial under the highly deferential "abuse of discretion" standard. At the time, I was persuaded by the dissent that the trial judge was in the best position to evaluate the issue when he determined that the plaintiffs could have done more than submitting interrogatories to discover who had made repairs to the water heater. A party's need to go beyond submitting discovery to the adversary was a point made in a federal court precedent cited in the dissent. Whether sufficient efforts had been undertaken to discover evidence before trial is a fact issue largely for the trial judge. I was convinced that no abuse of discretion in evaluating the evidence had occurred.

b. In private practice, a large portion of your work was defending oil and gas companies like the one sued in the Goode case. Can you assure us that you no longer see yourself as an advocate for those companies, and, if confirmed, you would rule fairly in cases seeking to hold such companies accountable for breaking the law?

Response: I say unequivocally that I have not been and would not be an advocate for any litigant. I had the honor to be a judge for twelve years. I did my best to treat all litigants with impartiality and respect. If confirmed to the United States Court of Appeals for the Fifth Circuit, I would discharge my duties without bias, prejudice, or partiality.

8. In the chapter on statutory interpretation that you wrote for the Encyclopedia of Mississippi Law, you stated that "advocates of rigorous analysis such as New Textualism frequently have crossed swords with those who basically find that any available source of information is usable such as legislative history or background considerations." In light of this statement about what you termed "the battle over theories . . . at the federal level," please explain how you view the significance of legislative history in statutory interpretation, and whether you believe that legislative history and other background considerations should be considered when interpreting federal statutes.

Response: In the chapter of the Encyclopedia of Mississippi Law entitled "Theories of Statutory Interpretation," I sought to collect cases on significant theories. I did not take a position as to whether any given theory was superior to another. I believe that when interpreting a statute, a judge should consider all materials that are helpful to explain the statute's meaning. There are some generally recognized and accepted steps in interpreting statutes and I have used these steps as a guide when called upon to interpret a statute. First, I believe a judge should look at the language of the statute in context.

Canons of construction should be used as an aid where they would be helpful. If a statute's language is ambiguous, a judge should then turn to a variety of sources to aid in its interpretation. Legislative history can certainly be relevant to the proper interpretation of a statute. Though there is not much legislative history for Mississippi statutes, I have looked at what is available to explain ambiguity. The one recurring place in which the legislature indicates its intent is in the caption that is part of the bill, but which is not codified. I may have been the only recent judge on either Mississippi appellate court to go to the legislative records and seek the language of the caption. *See Tolbert v. Southgate Timber Co.*, 943 So. 2d 90 (¶22) (Miss. Ct. App. 2006).

9. Legislative history had a key role in the Supreme Court's 2005 ruling in Jackson v. Birmingham Board of Education, recognizing that Title IX allows suits by persons who suffer retaliation for opposing sex discrimination made unlawful by the statute. The Supreme Court in Jackson recognized that Title IX was passed three years after the Court's decision in Sullivan v. Little Hunting Park, Inc., which held that the general prohibition against race discrimination in Section 1982 provides a right of action for those who suffer retaliation because they stood up against discrimination. Writing for the Court, Justice O'Connor used language from the Court's decision in Cannon v. University of Chicago: "It is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [Sullivan] and that it expected its enactment [of Title IX] to be interpreted in conformity with [it]."

a. Do you think that the Court appropriately considered the fact that Sullivan was decided prior to the passage of Title IX in concluding in Jackson that there is a cause of action for retaliation under Title IX?

Response: Congress certainly has the authority and sometimes does enact legislation in response to specific decisions by the United States Supreme Court. Congress also, as a general proposition, may be presumed to be aware of recent high court opinions when it adopts related legislation. As I read Justice O'Connor's opinion in *Jackson v. Birmingham Board of Education*, the sequence and temporal proximity of the *Sullivan* decision and the enactment of Title IX was one factor in the Court's decision. Other considerations were the previous interpretations of the term "discrimination" and the remedial purpose of Title IX. Five justices agreed with the opinion in *Jackson*, and that makes it law. I note that one of my opinions earlier mentioned also used as part of the analysis of a statutory amendment, that it may have been adopted to overrule a Mississippi Supreme Court opinion from a few years earlier. *See Tolbert v. Southgate Timber Co.*, 943 So. 2d 90 (¶20) (Miss. Ct. App. 2006). Such background considerations are quite relevant in statutory analysis.

b. If not, do you agree with Justice Thomas' dissent, which states that the holding is "contrary to the plain terms of Title IX," which does not explicitly state that retaliation is discrimination on the basis of sex?

Response: As I stated above, the Court's decision in *Jackson* is binding precedent as to the interpretation and application of Title IX.

10. You also wrote in your chapter in the Encyclopedia of Mississippi Law that "There are significant concerns often expressed in federal jurisprudence about the reliability of statements in congressional records, as perhaps such statements are a conscious effort to pass legislation by other means when the constitutional process of agreement by both houses and presentment to the executive have failed." On this point, you cited a concurring opinion in Hirschey v. F.E.R.C, 777 F.2d 1 (D.C. Cir. 1985) in which then-D.C. Circuit Judge Scalia said, "I frankly doubt that it is ever reasonable to assume that the details, as opposed to the broad outlines of purpose, set forth in a committee report come to the attention of, much less are approved by, the house which enacts the committee's bill."

a. Do you agree with this statement by then Judge Scalia? Please explain the basis for your response.

Response: Legislative history can be of great utility. However, when considering any evidence of the meaning of a statute, just as considering evidence of any other matter, a judge should give to it the weight and credibility that the circumstances suggest it deserves. For example, the context for some statements about the intent of a bill will demonstrate those views were not broadly shared or even known. If Justice Scalia is suggesting that such evidence should not be considered no matter how reliably it appears to reflect the Congressional purpose, then I do not agree with him.

b. Please describe in detail the approach you would take in determining what elements of legislative history are reliable indications of Congressional intent, and the reasons for your approach.

Response: I would answer this by reference to my response to Question #8. The most reliable indicator of Congressional intent is the language of the statute itself. If that language proves to be ambiguous, legislative history may well be an important factor in interpreting the statute. However, as discussed in my answer to Question #10(a), the usefulness of individual forms of legislative history can only be determined on a case-by-case basis.