Responses of Leslie Southwick
Nominee to the United States Court of Appeals for the Fifth Circuit
to the Written Questions of Senator Patrick J. Leahy

1. As a judge on the Mississippi Court of Appeals, you joined the majority in a troubling 5-4 decision in *Richmond v. Mississippi Department of Human Services* (1998) that reinstated a white state social worker, Bonnie Richmond, who had been fired for using a heinous racial epithet in referring to an African American co-worker during a meeting with high level company officials. The epithet she used to describe her co-worker has been called by one Fifth Circuit opinion "a universally recognized opprobrium, stigmatizing African-Americans because of their race." Yet, the hearing officer at Ms. Richmond's appeal before the state Employee Appeals Board, opined that her use of the racial slur "was in effect calling the individual a 'teacher's pet.'" The opinion you joined upheld the hearing officer's conclusion, finding that the 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] DHS supervisor." Your opinion also found that there was no violation of law because the record was devoid "of any credible proof that Richmond's remark was causing widespread consternation among DHS employees."

A. In dissent, two judges criticized the opinion you joined for presenting a "sanitized version" of the facts and for suggesting that "absent evidence of a near race riot, the remark is too inconsequential to serve as a basis of dismissal." The dissent found that this racial epithet, is "inherently offensive, and [its] use establishes the intent to offend." Why did you disagree with the dissent? Do you still believe you made the right decision?

Response: I agree that the use of this word is inherently offensive. My conclusions as to the effect of the use of so offensive a word was controlled by the statutory role of a judge in this sort of appeal. Richmond had been an employee of the Department of Human Services (DHS). After her employment was terminated for using this racial slur, Richmond appealed to the Mississippi Employee Appeals Board (EAB), a state agency whose function is to review state employee discipline decisions. An EAB hearing officer, after taking testimony, determined that her employment should not have been terminated. DHS then appealed to the EAB itself. The EAB, *en banc*, reviewed the record and affirmed the outcome, although it did not adopt the hearing officer's specific comments. The almost unique procedure for an employing agency to receive judicial review of an unfavorable EAB decision on discipline is described in *Richmond* (slip. op. p. 2). The employing agency (DHS here) does not have a right to appeal. Instead, it must seek a writ of certiorari. Review is limited to errors of law apparent on the face of the record and to arguing that there is no evidence to support the decision. By contrast, an employee complaining about an EAB decision has the usual right to an appeal.

It is difficult to imagine facts in which the use of this slur was not intended to demean or belittle the target of the word. That said, the issue in the case was whether there was any record evidence supporting the EAB's conclusion that the events were not so disruptive that continuing Richmond's employment would constitute negligence. Five of us believed that the record

contained such evidence. After granting certiorari, the Mississippi Supreme Court agreed that Richmond's use of the phrase had not created a hostile work environment. The majority in the Court of Appeals did not reach the issue of what showing of disruption would have permitted reversal, contrary to the argument of the dissent. We simply upheld the EAB's exercise of judgment that more was needed than was shown here.

As to whether I still believe I made the right decision, what I can say is that I always decided a case based on my best efforts to understand the law and the facts. I would continue to do so if confirmed as a federal judge.

B. **The Mississippi Supreme Court did, in fact, find that the Employee Appeals Board had erred and unanimously reversed your decision. Do you believe the Supreme Court made the correct decision? Do you believe that epithet in was used in the workplace in a way that should not have subjected Ms. Richmond to discipline?**

Response: The Supreme Court agreed with the opinion I joined that termination of Richmond's employment was properly set aside by the EAB. The higher court also decided, though, that before it could sustain the decision not to impose any penalty at all, there would need to be further fact-finding by the EAB. It therefore remanded to that agency.

The case presented to the Court of Appeals was solely about the validity of the termination of employment, not about other discipline. The Department of Human Services as employer did not argue in the alternative for a remand to consider lesser discipline if the EAB's decision to deny termination was sustained. To me the question was whether the EAB decision could be sustained under the applicable standard of review. Having decided that it could, I also decided that a remand to have the EAB reconsider the possibility of lesser punishment was little more than a veiled ordering of a lesser penalty. Since I did not think it was appropriate to overrule the EAB and directly order lesser punishment, I also decided we should not do so indirectly. In my view, intermediate courts of appeal need to exercise caution in ordering relief that no one requested.

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 an obligation for the EAB to explain fully whenever it rejected the discipline that an employer had imposed.

As to whether I personally believe that Richmond did not deserve discipline for her use of the word, it was not my role to make that evaluation. Instead, under the applicable standard of review, the court should affirm unless there was no evidence to support the EAB's decision not to impose punishment. Based on there being some evidence in the record to support the EAB's decision, I thought that upholding that decision was the correct decision for an intermediate appellate court.

C. Mississippi, where you have been a judge and where you would sit if confirmed to the Fifth Circuit, has the highest percentage of African-Americans in the country. Yet, the state has had only one African-American

judge on the federal bench in its history, and has never had an African-American federal appellate court judge. What assurances can you give that litigants coming into your courtroom will be treated fairly regardless of their race?

Response: I took an oath upon becoming an appeals court judge in 1995 to "administer justice without respect to persons, and to do equal right to the poor and to the rich . . . ." I embraced that duty and would have done so even without the oath. Impartiality is at the core of my sense of what it means to be a judge. Regardless of who a litigant might be, no matter how sympathetic or unsympathetic the individual or the claim appears to be, I would evaluate the facts and law fairly, "without respect to persons," and regardless of race.

I tried to be faithful to that oath on the Court of Appeals. I would renew my commitment to administer justice fairly if fortunate enough to return to the bench. All litigants, regardless of race or background, whether involved in a criminal or civil case, can be assured of that.

2. **You joined an opinion in a 2001 Mississippi Court of Appeals case, *S.B. v. L.W.*, upholding a chancellor's decision taking an 8 year old child away from her bisexual mother and awarding custody of the child to the father, primarily due to her mother's sexual orientation and the fact that she was living with her female partner. Over a dissenting opinion holding that sexual orientation has no bearing on child custody decisions, the opinion you joined found that sexual orientation could be *a factor* among many weighing in favor of giving custody to the father. You also joined Judge Payne's concurring opinion that suggested that a trial judge should not only consider the sexual orientation of a parent as a factor in determining suitability for custody, but also, in doing so, should consider Mississippi's "public policy position relating to particular rights of homosexuals in domestic relations settings." The concurrence you joined opined that sexual orientation is an individual "choice," and an individual must accept that losing the right of custody over their own child as one of the "consequences flowing from the free exercise of such choice."**

   A. What assurances can you give that you would rule fairly and impartially in cases involving the civil rights of gays and lesbians?

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.

   B. The concurrence you joined relied on "the principles of federalism" to justify reliance on Mississippi's public policy determinations "regarding rights of homosexuals in domestic situations." Do you believe that "principles of

federalism" allow for a state to subject people to different legal tests or penalties or levels of protection based on their sexual orientation?

Response: Principles of federalism that were referenced in the concurring opinion cannot override rights such as those recognized in *Lawrence v. Texas*. One state could not choose a less-protected interpretation of liberty interests than that announced by the Supreme Court.

C. How is the position taken in the concurrence you joined that individuals can be treated differently for legal purposes on the basis of their sexual orientation consistent with the Equal Protection Clause of the 14th Amendment, which states: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws"?

Response: Equal protection arguments involving sexual orientation likely would have been analyzed in 2001 under the rational basis test. At least two precedents cited in the majority opinion found it valid to consider sexual orientation as one factor in deciding the custody of a child. Any equal protection analysis undertaken today, however, would have to be conducted in light of *Lawrence*.

D. The Senate this year is considering the Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007. The House has already passed a version of this bill, which makes it easier for federal authorities to investigate and prosecute crimes based on sexual orientation and gender identity, among other factors. Given your joining of Judge Payne's concurrence and your reaffirming at your hearing of the appropriateness of looking to sexual orientation in the context of evaluating "morality" in certain legal contexts, how can you assure us that as a judge you would uphold and apply a hate crimes law, if passed, that would protect people from crimes committed based upon their sexual orientation?

Response: I do not consider the majority and concurring opinions in *S.B. v. L.W.* to be valid analyses of the law as it exists today. I can assure all who would come before me if I am confirmed, that I will consider everyone's claim "without respect to persons," and use my best efforts to understand then-applicable law.

E. Congress this year is also considering the Employment Non-Discrimination Act of 2007, which would prohibit discrimination against employees based on sexual orientation or gender identity. Given your joining of Judge Payne's concurrence and your statements at your hearing, how can you assure us that as a judge you would uphold this bill protecting people from employment discrimination based on sexual orientation, if it is passed into law?

Response: I would apply this bill if enacted just as I would apply any other Congressional enactment. In doing so, I would give full weight to the words of the statute, with a presumption

of constitutionality. Congress has broad rights to legislate change to law. Absent constitutional infirmity in the statute, a judge's responsibility is to apply the new law.

The fact that I voted a certain way in a 2001 state case when controlling precedents seemed to me to require one result, would in no way inhibit me from giving full effect to this statute if it were applicable in a case that came before me. My appellate function would always be to apply current law, no matter what the law might earlier have been when I decided a case in a related context.

F. Congress this year is also consider the Uniting American Families Act of 2007, which would allow permanent partners of United States citizens and permanent residents to obtain lawful permanent resident status in the same manner as spouses of U.S. citizens and permanent residents. Given your joining of Judge Payne's concurrence and your statements at your hearing, how can you assure us that as a judge you would uphold and apply this bill giving immigration rights to gay couples if it is passed into law?

Response: Should Congress enact this statute, its effect may be to displace a contrary former statute, to overrule caselaw, or otherwise to create new rules of law. Each time the legislative branch performs its constitutional function by enacting legislation, it is for the judicial branch to perform its constitutional function by applying that law to the facts before the court. I assure this Committee that I would diligently uphold that duty.

3. Notwithstanding that *S.B. v. L.W* involved a biological mother who had been the child's parent since birth, the concurrence you joined relied in part on the state's statutory restrictions blocking gay men and lesbians from becoming adoptive parents, as well as the state's restrictions on marriage of same-sex couples, as justifications for why the state should consider a parent's sexual orientation as a negative factor in a custody dispute. However, five years before your concurrence in *S.B.*, the Supreme Court in *Romer v. Evans*, 517 U.S. 620 (1996), found that a state law that can be explained by antigay animus violates the Equal Protection Clause.

A. How is the position taken in the concurrence you joined in *S.B. v. L.W*. consistent with the Supreme Court's decision in *Romer*?

Response: The Colorado citizens' initiative that was set aside in *Romer* was a blanket prohibition against any laws that would prohibit discrimination on the basis of sexual orientation. At the time we decided the 2001 case, however, *Bowers v. Hardwick* was also the law. The 2001 decision reflected what the majority in good faith thought to be the law. Regardless of whether *Romer* is seen as being clarified by *Lawrence v. Texas*, or instead that *Lawrence* extended *Romer*, any analysis of these issues in the future must reflect *Lawrence* and potentially still more judicial and legislative developments.

B. The principle Supreme Court case cited in the concurrence you joined, *Bowers v. Hardwick*, 478 U.S. 186 (1986), since overturned, held that state sodomy laws criminalizing same sex conduct were constitutional. But *Romer*,

which upheld civil laws protecting the rights of gay Americans had also already been decided. In light of *Romer,* why did the concurrence you joined not exclude antigay civil laws from the universe of factors a trial judge should consider in determining the public policy of the state on same sex custody matters?

Response: *Romer* was not discussed in any of the opinions, not even the dissent. Moreover, a review of the briefs submitted to the Court of Appeals reveals that only Mississippi authorities were cited, not *Romer* (or *Bowers*). No one argued that *Romer* affected the state caselaw on child custody.

C. The concurrence you joined in *S.B. v. L.W.*, which involves the rights of a mother with a bisexual sexual orientation to have custody over her own biological child, does not even mention *Romer*. Do you agree with *Romer* that the state's ability to prohibit the choice of particular sexual practices does not implicitly sanction "exclusion from . . . ordinary civic life in a free society" for those people who might be presumed to prefer those practices?

Response: Yes, I agree with that statement.

D. If confirmed, how can you assure us that you would follow the precedent established in *Romer* that a law that can be explained only by anti-gay animus violates the equal protection clause?

Response: If confirmed, I will always strive to understand the current law and apply it to the facts presented in the case. I can also assure the Senate that I would always faithfully apply the precedents of the Supreme Court. *Romer, Lawrence,* new statutes that may be passed, and any other developments in the law must be applied by a judge in cases in which they are relevant.

4. As Deputy Assistant Attorney General in the Civil Division of the Department of Justice, you worked on the Iran-Contra case of former National Security Adviser John Poindexter, who was later pardoned by the first President Bush. At a Justice Department briefing on February 5, 1990, you were questioned about the case and the scope of executive privilege. In response to a question about whether a president can invoke executive privilege to conceal or cover up a criminal act, you said, "you must balance the interest of the presidency against whatever the other interests are."

Were you suggesting that there are circumstances under which a president could invoke executive privilege to conceal, cover up, or disguise the fact that he or she broke the law? Do you still believe that to be the case?

Response: If confirmed, I would apply controlling precedents in this area. The Supreme Court has indicated that evidence clearly relevant for criminal proceedings is in a category that is the least protected by executive privilege. In *United States v. Nixon*, 418 U.S. 683 (1974), the Court recognized the privilege as an inherent attribute of executive authority, but there is not immunity

under all circumstances. The Court stated that a need for evidence "demonstrably relevant in a criminal trial" would "outweigh the privilege." Where exactly that balance is to be struck will depend, as it did in *Nixon*, on the facts of each case.

5. In recent years, legislative history has played an important role in courts' interpretation of federal anti-discrimination statutes, including Title IX and the Family and Medical Leave Act. In the chapter on statutory interpretation that you wrote for the Encyclopedia of Mississippi Law, you wrote 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." You then cited a concurring opinion by then-D.C. Circuit Judge Scalia, who wrote, "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. **What role do you believe legislative history should play in the courts' interpretation of federal statutes, such as the Family and Medical Leave Act, where court decisions have focused on Congressional intent to address gender discrimination by state employers?**

Response: My review of different methods of statutory interpretation for the *Encyclopedia* chapter was meant to include all approaches found in Mississippi caselaw. My own judicial opinions sought to follow the principle that if the words of the statute were clear, as illuminated by standard canons of construction, then there was no need to go further. When there was ambiguity, I looked to such matters as the history of amendments to the statute through the years, in order to understand what part of a current statute was language added to a prior statute, and what language had been deleted. *Lattimore v. Sparkman*, 858 So. 2d 936 (Miss. Ct. App. 2003). There is no meaningful history in Mississippi legislative records, no committee reports or the like, but I have looked at the process of enactment, from the language of an initial bill, to the amendments, to the final act. *Dawson v. Townsend & Sons*, 735 So. 2d 1131 (Miss. Ct. App. 1999). The one recurring place in which the state 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).

Legislative history is an important factor to consider in determining the meaning of an ambiguous statute and to help determine the intent of Congress in enacting that statute.

B. One of this Committee's principle accomplishments last Congress was the reauthorization of the expiring provisions of the Voting Rights Act. As we heard in nine hearings in our Committee and in thousands of pages of testimony and reports, the VRA remains a cornerstone of our inclusive Democracy, protecting the rights of all Americans to vote free from discrimination and to have their votes counted. The almost 500 members of

Congress who voted to reauthorize the VRA and the President who signed it realized the continued importance of this landmark civil rights law.

If you are confirmed to the Fifth Circuit, you may well be called upon to consider provisions of the newly reauthorized voting rights act, as applied to specific situations and perhaps even for their constitutionality. What assurances can you provide that as a circuit court judge you would interpret and apply the Voting Rights Act in accordance with its plain language and Congressional intent? What weight would you give to the extensive record established by Congress before reauthorizing?

Response: Should I be confirmed as a United States Circuit judge and subsequently be in a position to interpret the Voting Rights Act, I would conscientiously apply my understanding of the Act to the facts before the court. My starting point in interpreting statutes has been to seek meaning in the words themselves, and to interpret an unambiguous statute based on its language. As shown in the cases cited in my response to the preceding part of the question, if there is ambiguity, I examined other relevant evidence of meaning. If there is legislative history, that would be examined as well. The referenced Congressional record could well be a useful factor in determining the intent and meaning of the Act.

6. The central question for me with any judicial nominee is whether he or she will act as a check and balance on the other branches of government. We are at a pivotal moment in American history, faced with a President making sweeping claims to nearly unchecked executive power. You have written a number of articles calling for a new constitution for the State of Mississippi that would strengthen the office of the governor.

Do your arguments for the need for a strong executive in Mississippi apply to the federal government as well? What is your view on the proper balance of power in the federal system?

Response: The Mississippi Constitution has by almost all commentators been considered to have created one of the weakest executive offices of any state. In promoting a new state constitution in the 1980s, I saw a reordering of the balance between the branches as one of the advantages of a new state charter.

The federal Constitution does not have these flaws that I thought were in my state's constitution. My sense is that the United States Constitution has the balance right, with three truly coequal, independent branches, interacting through appropriate checks and balances. The judiciary's role in enforcing checks and balances includes an equal obligation to check excesses of the executive branch as of the legislative one – as well as to restrain itself.

7. One of the central questions I have for any judicial nominee is whether he or she understanding the role of the courts and their responsibility to protect the constitutional rights of individuals, especially the less powerful and especially where the political system has not. The Supreme Court defined the special role for the courts in stepping in where the political process fails to police itself in the

famous footnote 4 in United States v. Carolene Products (1938). In that footnote, the Supreme Court held that : "[L]egislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."

Can you discuss the importance of the Supreme Court's responsibility under the *Carolene Products* footnote to intervene to ensure that all citizens have fair and effective representation and the consequences that would result if it failed to do so?

Response: Footnote four in *Carolene Products* is surely one of the most important and influential texts ever buried at the bottom of any page of a Supreme Court opinion. It was the herald of developments in Supreme Court jurisprudence that led to different standards of judicial scrutiny that are to be applied depending on the nature of the rights or the categories of people that were affected by governmental action. The footnote suggested that "discrete and insular minorities" needed greater protection from discriminatory legislation because those minorities are less able to protect their own interests through the political process. Identifying a level of scrutiny is often outcome-determinative. The difference between the justifications that can uphold actions that are subject only to the rational basis test, for example, and those that must withstand strict scrutiny, is enormous.

The *Carolene Products* approach has had a momentous effect on providing constitutional protection to groups who are less influential politically than other groups. The consequences of not finding protection in the courts for these "insular minorities," is that they often would not find protection anywhere.