

May 9, 2007

VIA FACSIMILE

The Honorable Patrick J. Leahy  
Chairman, U.S. Senate Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

Dear Chairman Leahy:

As you and your colleagues prepare for the upcoming judicial nominations hearing tomorrow, Lambda Legal urges the members of the Senate Judiciary Committee to pay close attention to the past record of former Mississippi Court of Appeals Judge Leslie Southwick, a nominee for a seat on the United States Court of Appeals of the Fifth Circuit. As the nation's oldest and largest national impact litigation organization committed to achieving the full recognition of the civil rights of lesbians, gay men, bisexuals and transgender people and those with HIV, we respectfully offer our legal expertise to the members of the Committee on Judge Southwick's record in deciding civil rights cases.

When Judge Southwick served on the Mississippi appellate bench, he joined two opinions that warrant particularly close scrutiny by the Senate Judiciary Committee. In *S.B. v. L.W.*, 793 So.2d 656 (Miss. Ct. App. 2001), Judge Southwick joined a concurring opinion that described the mother's sexual orientation as a "choice" that he felt carried with it "significant consequences" for her custody rights. Notwithstanding that the case involved a biological mother who had been the child's parent since birth, Judge Southwick 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.

We recognize, though, that there have been many legal shifts since Judge Southwick joined this opinion in 2001. These include the U.S. Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), the decision our organization secured that overturned all remaining state laws that had criminalized private sexual activity between consenting adults, and *Hollon v. Hollon*, 784 So.2d 943 (Miss. 2001), a Mississippi Supreme Court ruling barring excessive emphasis on a parent's sexual orientation in custody determinations.

Given such changes, we ask that the Senate Judiciary Committee pose the following questions to Judge Southwick to determine his ability to be a fair and impartial jurist – one who will follow legal precedent when hearing cases involving lesbian, gay, bisexual and transgender people, and treat them with the same evenhanded treatment to which all litigants are entitled:

- Are you able to rule fairly and impartially in cases involving gay, lesbian, bisexual and transgender litigants?
- Are you able to follow legal precedent established in *Lawrence v. Texas*, that, under our Constitution, religious beliefs about homosexuality and the "traditional family" cannot be the sole basis for the enactment and enforcement of criminal laws (539 U.S. at 571)?
- Are you able to follow legal precedent established in *Lawrence v. Texas*, that those in same-sex relationships are entitled under the U.S. Constitution's protections of liberty and equality to the

same autonomy as heterosexuals in making personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education (539 U.S. at 574)?

- The concurrence you joined in *S.B. v. L.W.* asserts that “[u]nder principles of federalism, each state is permitted to set forth its own policy guidelines through legislative enactments and through judicial renderings.” (793 So.2d at 664.) Under your judicial philosophy, do those principles of federalism require that a state’s policy guidelines be consistent with, and not violate, the guarantees of liberty, due process and equality under the U.S. Constitution?
- Are you able to follow legal precedent established in *Romer v. Evans*, 517 U.S. 620, 632, 635 (1996), that a law that can be explained only by anti-gay animus violates the equal protection clause?

The second opinion joined by Judge Southwick that merits the Senate Judiciary Committee’s close examination is *Richmond v. Mississippi Dept. of Human Servs.*, 1998 Miss. App. LEXIS 637 (Miss. Ct. App. 1998), *reversed*, *Richmond v. Mississippi Dept. of Human Servs.*, 745 So.2d 254 (Miss. 1999). Judge Southwick joined a 5-4 majority ruling in that case that upheld the reinstatement of a white state employee who had been fired for referring to an African American co-worker as “a good ole nigger.” The opinion joined by Judge Southwick found the use of that epithet too inconsequential to serve as a basis for the white employee’s dismissal, relying in part for this conclusion on the assertion that the epithet allegedly was not motivated out of racial hatred or animosity, but was “intended to be a shorthand description of her perception of the relationship existing between the worker and a ... supervisor” equivalent to calling her a “teacher’s pet” and on the African American co-employee’s lack of outrage at the remark. In response, the justices who dissented at the Court of Appeal expressed that the view that use of the epithet was inherently offensive and to find it inconsequential “requires a level of myopia inconsistent with the facts or reason.” (1998 Miss. App. LEXIS at \*28) (King, J., dissenting).

In light of this opinion, we ask that the Senate Judiciary Committee also pose the following additional question to Judge Southwick to determine his ability to be a fair and impartial jurist:

- Are you able to rule fairly and impartially in cases involving the rights of employees under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act of 1967 to a workplace free from discrimination based on race, religion, national origin, sex, disability or age?

As the nation’s oldest and largest national impact litigation organization committed to achieving the full recognition of the civil rights of LGBT people and those with HIV, we are ever aware of the importance of access to justice for all people, with judges who will decide the cases that come before them based on evidence and precedent. We urge you to scrutinize Judge Southwick’s record closely and to ask and require answers from him to pertinent questions about his ability to be a fair and impartial jurist.

Very truly yours,



Kevin M. Cathcart  
Executive Director

CC: Senator Sheldon Whitehouse (via facsimile)