QUESTIONS AND ANSWERS

RESPONSES OF STEVEN M. COLLOTON TO WRITTEN QUESTIONS OF SENATOR PATRICK J. LEAHY

1. You have served as an attorney on the Whitewater investigation and in the investigation into the so-called "Filegate" - the case involving the alleged improper possession by the White House of personal FBI files on Republican political appointees in which both the President and Mrs. Clinton were both cleared by the Independent Counsel's office. Having played a role in investigations which became extremely partisan fights, what assurances can you give the committee that you will act impartially as a judge, specifically in politically-contentious cases?

I believe that a judge must carry out his or her duties to interpret and apply the law without regard to the personal policy preferences of the judge, and certainly without regard to partisan political considerations. Generally speaking, it is the responsibility of a judge to determine what the law is, based on the traditional tools of the judicial craft, such as binding precedent of the Supreme Court of the United States and the governing court of appeals, and the text, structure, and history of any constitutional, statutory, or regulatory provisions at issue. It is not the role of a judge to make policy decisions entrusted to the Legislative or Executive branches of government, or to consider the partisan political ramifications of any judicial decision. I believe that a good judge must have the self-discipline to separate the judicial inquiry from any policy or political preferences.

I respectfully suggest that my performance as a member of the Office of Independent Counsel ("OIC") should give the Committee reason to believe that I would follow the law and act impartially in any politically-contentious matters that might come before me as a judge. I am honored that opposing counsel in the principal matter on which I worked for the OIC – a tax fraud prosecution involving the former Governor of Arkansas – has written to the Committee in support of the nomination.

As noted in your question, I was also assigned to perform investigative work for the OIC in a matter relating to confidential FBI background reports that had been requested from the FBI by White House officials. This matter was assigned to the OIC after the Attorney General requested appointment of an independent counsel to investigate. I believed that the responsibility of the OIC was to follow the evidence, wherever it led, without regard to the partisan political consequences of the investigation. The Independent Counsel's final report dated March 16, 2000, explains the careful and detailed work conducted by investigators and attorneys with the OIC to reconstruct the process by which the FBI files were obtained by the White House Office of Personnel Security. The investigative work of the OIC led to the conclusion that there was no conspiracy involving senior White House officials or Mrs. Clinton to secure derogatory information from FBI background reports of former Republican political appointees for improper political use. I hope the Committee will find that this conclusion of the Independent Counsel – exonerating

subjects of the investigation after careful investigation – represents a successful discharge of the duties of the OIC, and demonstrates the dedication to impartiality of the attorneys and investigators involved in that matter.

2. You are 40 years old and nominated to a lifetime seat on a court just one step below the Supreme Court. You received an usual three-part ABA rating - Substantial Majority Qualified; Minority Well Qualified and Minority Not Qualified. What do you think contributed to such a disparate analysis of your qualifications?

I do not know what led various members of the ABA Standing Committee on the Federal Judiciary to vote as they did. I am pleased that a substantial majority of the committee concluded that I was either qualified or well qualified for the position of United States Circuit Judge. The only communication I received from the ABA committee concerning the rating was a letter that set forth the voting totals that you describe.

3. In several cases you prosecuted, including U.S. v. Jackson, U.S. v. Clark, and U.S. v. Conner, an issue was raised as to the admissibility of the evidence. Please describe your view of what happened regarding the evidentiary issues in those cases at trial and on appeal. Also, if confirmed as a circuit court judge, what will you do to ensure that the constitutional rights of the defendants who come before you are protected?

In *United States v. Jackson*, 67 F.3d 1359 (8th Cir. 1995), the principal evidentiary issue concerned the defendant's challenge to the admissibility of evidence seized pursuant to three search warrants. The warrants were issued by state court judges to local law enforcement officers, and were then subject to challenge in federal court when the case was adopted for federal prosecution. As an attorney for the government, I argued in favor of admissibility of the evidence in the district court. I had departed the United States Attorney's Office at the time of the appeal, and thus did not brief and argue the appeal.

The district court and the court of appeals concluded that two of the warrants were supported by probable cause, and that evidence seized pursuant to those warrants was admissible. The defendant challenged a third warrant on the ground that it was a so-called "indicia" warrant that sought evidence of the defendant's membership in, or affiliation with, a street gang. The Eighth Circuit previously had held that when a search warrant implicates certain associational rights under the First Amendment, the particularity requirement of the Fourth Amendment must be accorded "scrupulous exactitude," *United States v. Apker*, 705 F.2d 293, 300 (8th Cir. 1983), although the district court in *Jackson* said there was serious question about the scope of *Apker* in light of the Supreme Court's decision in *Maryland v. Macon*, 472 U.S. 463 (1985). *See Wabun-Inini v. Sessions*, 900 F.2d 1234, 1240-41 n.4 (8th Cir. 1990).

In any event, under Eighth Circuit precedent, a court presented with such a challenge could properly analyze whether the evidence was admissible pursuant to the "good-faith exception" to the exclusionary rule announced in *United States v. Leon*, 468 U.S. 897 (1984), with or without reviewing whether the warrant was issued in compliance with the Fourth Amendment. *See United States v. Chambers*, 987 F.2d 1331, 1334 (8th Cir. 1993). The district court found that the state search warrant violated the Fourth Amendment under the standards of the Eighth Circuit's decision in *Apker*, but that the evidence seized was admissible under the "good faith exception." The court of appeals concluded that the officers' reliance on the warrant was not objectively unreasonable, and that the evidence seized pursuant to the warrant was thus admissible under the "good faith exception."

In *United States v. Clark*, 22 F.3d 799 (8th Cir. 1994), the principal issue was whether the defendant had a reasonable expectation of privacy while seated voluntarily in the back seat of a marked patrol car, such that a surreptitious tape recording of his conversations constituted a "search" under the Fourth Amendment. The defendant urged the district court to suppress statements he made while in the patrol car and physical evidence (*i.e.*, illegal narcotics) seized by law enforcement officers as a result of the recorded statements.

A magistrate judge and the district judge concluded that the defendant had a reasonable expectation of privacy in the patrol car, that the tape recording constituted a "search," and that the evidence should be suppressed. The district court concluded that the back seat of the patrol car was "more like a taxi cab, where presumably there would be an expectation of privacy." *United States v. Clark*, No. CR 92-3002, Order (June 1, 1993), at 14.

As an attorney for the government, I believed that an appeal was warranted, and the Solicitor General authorized an appeal of the district court's ruling. A unanimous panel of the court of appeals reversed. Consistent with a decision of the Eleventh Circuit in *United States v. McKinnon*, 985 F.2d 525 (11th Cir. 1993), the Eighth Circuit held that "a person does not have a reasonable or legitimate expectation of privacy in statements made to a companion while seated in a police car." 22 F.3d at 801. This decision appears to be consistent with a long line of decisions issued both before and after *Clark*. *E.g.*, *People v. Todd*, 26 Cal.App.3d 15, 17, 102 Cal. Rptr. 539 (1972); *State v. Ramirez*, 535 N.W.2d 847, 850 (S.D. 1995) (collecting cases); *State v. Timley*, 975 P.2d 264, 267 (Kan. App. 1999) (collecting cases); *United States v. Turner*, 209 F.3d 1198, 1200-01 (10th Cir. 2000).

In *United States v. Conner*, 127 F.3d 663 (8th Cir. 1997), the principal evidentiary issue was whether police officers violated the Fourth Amendment during their encounter with two burglary suspects at the door of a motel room, such that evidence seized pursuant to search warrants obtained after the encounter should be suppressed. The defendants filed motions to suppress evidence, and the litigation in the district court was conducted by one of my colleagues in the United States Attorney's Office. The district court held that the police officers violated the

Fourth Amendment when they demanded, without a warrant, that the suspects open the door of a motel room in which they were located. Because the officers used information gleaned from observations of the motel room to obtain search warrants, the district court held that evidence seized pursuant to the warrants should be suppressed.

The United States Attorney asked me to pursue an appeal of the district court's ruling, and the Solicitor General authorized appeal. The principal issues on appeal were whether the officers were permitted to command the occupants of the motel room to open the door for brief, investigatory questioning, *see United States v. Winsor*, 816 F.2d 1394, 1397-1400 (9th Cir. 1987) (command permissible based on reasonable suspicion), *vacated, United States v. Winsor*, 846 F.2d 1569 (9th Cir. 1988) (en banc) (command to open door requires probable cause), and if not, whether the warrantless command by the officers was justified in the *Conner* case by probable cause and exigent circumstances. A majority of the Eighth Circuit panel concluded that the command of the officers to open the motel room door constituted an "entry" to the room that required probable cause and a search warrant. *Conner*, 127 F.3d at 666. The panel further concluded that exigent circumstances did not justify a warrantless entry. *Id.* at 667. A dissenting opinion by Judge Diana Murphy concluded that the officers had probable cause to believe the burglars and stolen property were inside the motel room, and that the risk of flight or of danger to others in the vicinity constituted exigent circumstances that justified immediate police action without a warrant. *Id.* at 668-69 (Murphy, J., dissenting).

If confirmed as a circuit court judge, it would be my duty to protect the constitutional rights of defendants who come before the court of appeals. Although I have represented the United States in criminal cases as an attorney in the Department of Justice, the litigating positions I have taken as an advocate do not necessarily reflect the views that I would reach on issues that might come before me as a judge. To the contrary, with respect to any issue on which I may have taken a litigating position that was later rejected by the court of appeals or the Supreme Court, I would be obligated to follow any applicable binding precedent.

In the course of my duties as a federal prosecutor, I have recognized the constitutional rights of criminal defendants. My office and I have declined to pursue cases presented for prosecution when it appeared that evidence was obtained illegally or when there was insufficient evidence to overcome the presumption of innocence. I have declined to pursue appeals in cases where it appeared that the district court's determination that evidence was obtained illegally would be sustained on appeal. My staff and I have participated in periodic training designed to educate law enforcement officers on developments in the law and to achieve compliance with constitutional rules in the investigation of criminal cases. If confirmed as a circuit court judge, I believe this experience would assist me in discharging the duties of a judge to protect the constitutional rights of the accused.