Responses of Jennifer Walker Elrod
Nominee to the U.S. Court of Appeals for the Fifth Circuit
to the Written Questions of Senator Benjamin L. Cardin

1. **During your oral testimony, I asked you: "How would you look at the Constitution, and interpreting the Constitution (...) [when] judging the rights of an individual, whether it's a right to religious freedom, freedom of speech (...) how do you weigh that in your making decisions?"**

You answered that you "basically look at the facts of the case as it comes in and you look at the precedent" and that, as a trial judge for the 190th District Civil Court in Harris County, Texas that you: "look to see, what has the first Court of Appeals said? What has the 14th Court of Appeals said? What has the Texas Supreme Court said about this? Has the Supreme Court of the United States opined on this?" You concluded your answer by stating that you would "carefully consider [the holdings of those aforementioned courts], recognizing that these are important rights that need to be adjudicated based upon the facts presented in the case."

In your current position sitting as a judge for the 190th judicial district of Harris County, Texas, you signed a Temporary Restraining Order in 2005 that prohibited KTRK Television, Inc from exercising its constitutional right of free speech to broadcast a story on televangelist Benny Hinn.

In the order, you wrote: "the Court has weighed the right of free speech and the public's right to be informed of the matters contained within the Draft with the Law Firm's right to preserve its attorney client privilege and work product and the right of the Law Firm and its client to have confidential communications with the IRS, and has determined that the Law Firm's right to maintain its confidential attorney-client privilege and work product and confidential communications to the IRS outweighs the right or need of the Defendants to publish or make use of the Draft."

This order was subsequently lifted by another judge.

a. **Could you please explain the facts of the case and your decision?**

b. **What "precedental authority" or "persuasive authority" did you rely upon in making your decision?**

c. **Did you cite to that authority in your decision?**

d. **How do you reconcile your decision with:**

i. **the Supreme Court of the United States' holding in *The New York Times Co. v. United States* that "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." 403 U.S. 714, 714 (1971) quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); and**

ii. **the Texas Supreme Court's holding in *Davenport v. Garcia* that: "Under our broader guarantee [to the right of Free Speech in the Texas Constitution], it has been and remains the preference of this court to sanction a speaker after, rather than before, the speech occurs. This comports with article one, section eight of the Texas Constitution, which both grants an affirmative right to speak . . . on any subject, but also holds the speaker responsible for the abuse of that privilege. The presumption in all cases under [the Texas Constitution] is that pre-speech sanctions or prior restraints are unconstitutional." 834 S.W.2d 4, 9 (Tex. 1992) (emphasis added; internal quotations omitted)?**

e. **Do you continue to believe that your ruling issuing a prior restraint was correct?**

f. **Do you believe that a judicially created privilege, such as attorney-client privilege, should be balanced against a constitutional right?**

Response: A, B, C, D

On February 24, 2005, I was sitting as ancillary court judge in Harris County, when attorneys appeared before me for a hearing on a temporary restraining order in this case, which had just been filed. In Harris County, the civil district judges rotate the ancillary judge assignment, each of us hearing emergency matters for all of the civil courts for two weeks of the year. During the ancillary assignment, the ancillary judge wears a pager twenty-four hours a day to be available for hearings on applications for temporary restraining orders (TROs) and other emergency matters. In general, and where possible and appropriate under the law, the ancillary judge tries to preserve the status quo until the judge who has been assigned the case can hear the issues on their merits.

The Texas Rules of Civil Procedure specifically provide that TROs may be issued *ex parte* and that the party against whom the TRO is issued has an immediate right to have a hearing on a motion to dissolve a TRO once issued. TEX. R. CIV. P. 680. TROs are generally issued for fourteen days and the orders reflect a date and time certain for a hearing on a temporary injunction that is selected by the judge of the court who will hear the case after the ancillary hearing has taken place. If the parties do not appear for a hearing on

the temporary injunction, the TRO expires on its own no later than fourteen days after it is issued unless it is extended pursuant to the Rules.

In the *Brewer* case, the plaintiffs, who were an attorney and a law firm, presented an application for a TRO and attached affidavits in support of the relief sought. The plaintiffs argued that the document at issue had been stolen from the attorney's safe and concerned an ongoing criminal investigation of the attorney's client. The matter was presented as an issue of first impression for a Texas court, and it was alleged that it involved not only the First Amendment rights of the television station that sought to air the document, but also the Fifth and Sixth Amendment rights of the attorney's client. In addition, the plaintiffs invoked the attorney-client privilege.

The plaintiffs sought to prevent airing of the contents of the allegedly stolen document until such time as a hearing could be held on the merits, so that the court could weigh the rights and privileges at issue. The plaintiffs argued that if the airing of the document was not delayed until after a proper hearing, then their client's rights in the on-going criminal investigation would be violated. However, what the plaintiffs sought was a prior restraint of speech, even if it was just temporary. As a matter of law, the presumption is against any prior restraint on speech, and this presumption must be overcome in order to justify even a temporary restraint. The presumption against prior restraints is an important one, and it reflects the significance of the First Amendment and the rights of a free press in a free society.

After reviewing the evidence and the relevant authority, I signed an order on February 24, 2005, granting a TRO, in order to preserve the status quo and to permit the district court judge who had been assigned the case to conduct a full evidentiary hearing in which he would balance these important issues of first impression in Texas. Thereafter, I did not receive any calls on my pager or motions to immediately dissolve the TRO pursuant to the Rules. On March 1, 2005, the defendant news station filed a motion to vacate the TRO or to immediately convene the temporary injunction. Judge Sullivan, the judge to whose court the case had been randomly assigned, consolidated the hearing on the motion to vacate the TRO with the temporary injunction hearing. On March 3, 2005, following a full evidentiary hearing, Judge Sullivan signed an order dissolving the TRO and denying the temporary injunction.

At the hearing on the motion for the TRO, I considered authority in support of the application. In one case from the South Carolina Supreme Court, a television station sought to broadcast a privileged, attorney client communication between a criminal defendant and his attorney. *Ex Parte: The State Record Co., Inc. v. In Re: State of South Carolina v. Quattlebaum*, 332 S.C. 346 (1998). In that case the Supreme Court upheld the lower court's issuance of the prior restraint after considering the Sixth Amendment rights and the attorney-client privilege. The lower court in that case granted an *ex*

parte TRO preventing the dissemination of the communication until a hearing could take place. *Id.* at 348. Later, a hearing took place and the trial court extended the TRO until the jury could be empanelled and sequestered. *Id.*

As the Supreme Court of South Carolina observed, the Court was:

> faced with a profound dilemma: whether to uphold a prior restraint upon the media's First Amendment right of free speech, a task which carries with it an extremely heavy burden upon the party seeking to limit the speech, or whether to invalidate the prior restraint placing in jeopardy the fundamental right of a defendant to a fair trial pursuant to the Sixth Amendment. We are faced with the added quandary that the information sought to be disseminated by the media is a privileged communication between a criminal defendant and his attorney.

Id. at 350 (citations omitted).

The Supreme Court of South Carolina also observed that "a number of lower courts have held that a defendant's Sixth Amendment right to a fair trial is superior to the right of free speech and that, where the two rights collided, the latter must give way to the former." *Id.* at 351 n.12.

In another case cited at the hearing on the TRO, the Eleventh Circuit Court of Appeals affirmed a TRO issued by the United States District Court for the Southern District of Florida that had enjoined a cable news network from broadcasting tapes of privileged communications between an accused and his lawyers until they could be reviewed by a federal magistrate. *United States v. Noriega*, 917 F.2d 1543 (11th Cir. 1990). The Eleventh Circuit then remanded the case to the district court to "conduct the difficult balancing of constitutional rights required under these circumstances...." *Id.* at 1552.

Although the situation at issue at the hearing at the TRO was apparently a matter of first impression in Texas, I also consulted authority in Texas. *E.g.*, *Garth v. Staktek*, 876 S.W.2d 545 (Tex. App. –Austin, 1994, writ dism'd w.o.j.) (affirming the district court's granting of a temporary injunction in a trade secret matter). In *Garth*, Judge Bea Ann Smith, writing for the Austin Court of Appeals, observed that pursuant to *Davenport*,

> Texas law begins with the presumption that prior restraints on free speech are unconstitutional. However, prior restraints may be permitted to prevent an imminent and irreparable harm, so long as no less restrictive alternative form of protection is available. In *Davenport*, the Supreme Court held that a gag order would be permitted if imminent and irreparable harm to the judicial process will deprive litigants of a just resolution of their dispute.

Id. at 549-50.

The Texas Supreme Court standard articulated in *Davenport* and relied on in *Garth*, is entirely consistent with the Supreme Court of the United States' holding in *The New York Times Co. v. United States*, 403 U.S. 713 (1971).

E. With regard to the correctness of my ruling, I ruled on an emergency matter and relied upon evidence, argument, precedential authority, and persuasive authority in my decision to preserve the status quo to permit a full evidentiary hearing regarding important claims of competing constitutional rights and the attorney-client privilege.

F. As to the issue of balancing the privilege against the constitutional right, that was not squarely presented by this case, as this case as presented to me involved not only the privilege but also competing constitutional rights of an individual in an on-going criminal investigation. Weighing competing constitutional claims is a very important function of a court.

2. **You stated in your testimony before the committee that you would be happy to "go through your specific experiences in the Federal system." Could you please recount these specific experiences for the committee, with appropriate citations where necessary?**

Response:

Throughout my career, I have had a wide range of experience in federal court and in dealing with federal statutory and constitutional law. This experience is discussed below.

While still in law school, I enrolled in a criminal justice clinical program, which enabled me to represent indigent criminal defendants in criminal proceedings in Roxbury, Massachusetts. In representing these clients, I relied upon federal constitutional protections for the accused such as the Fourth, Fifth, and Fourteenth Amendments, as well as state criminal laws.

I also worked in the U.S. Attorney's Office in Boston, assisting in both criminal and civil matters. I relied upon federal criminal and civil statutes and constitutional law in this position.

During my two-year federal clerkship for the Honorable Sim Lake in the United States District Court for the Southern District of Texas, I worked on numerous cases both criminal and civil. This work involved federal statutes such as federal criminal statutes, Title VII, federal environmental laws, and federal habeas. This work also involved constitutional law, such as the Fourth and Fifth Amendments. I assisted Judge Lake in researching both evidentiary and procedural issues in both the criminal and civil cases that he tried. During this time period, he tried numerous criminal cases, including a federal murder

case. I also reviewed pre-sentence data sheets for every hearing on a plea and became familiar with the federal sentencing guidelines in effect at the time.

In addition, when Judge Lake sat by designation on the Fifth Circuit, I assisted him with his appellate cases in criminal and civil matters involving federal statutory and constitutional laws.

At Baker Botts, I worked on two habeas cases. In each of these, I dealt with criminal law and federal statutory and constitutional protections such as the Sixth Amendment. In one of these cases, the law firm represented a woman on death row in Texas. Her conviction was ultimately reversed by the United States District Court for the Southern District of Texas and this decision was affirmed by the Fifth Circuit. I also worked on an amicus brief to the Supreme Court on a habeas matter involving constitutional claims.

My practice included complex federal antitrust matters, which in some circumstances may involve both criminal and civil penalties. For example, I worked on *United States v. Smith Int'l, Inc. and Schlumberger LTD.*, 2000-1 Trade Cas. (CCH) P72,763 (D.D.C. 2000); *Le Baud v. Pacificare Health Systems, Inc.*, 1998 U.S. Dist. LEXIS 5148 (N.D. Tex. 1998); and *Service Corp., Int'l v. The Loewen Group Inc.*, 1997-1 Trade Cas. (CCH) P71, 688 (S.D. Tex. 1996).

My practice also involved federal and state employment law, including Title VII and ERISA work. I represented an employer in an employment discrimination suit in Brazoria County, Texas, and I served as lead counsel in one ERISA case in the Eastern District of Texas where I represented the employer. In another ERISA case in the Southern District of Texas, I served *pro bono* as *guardian ad litem* for two minor children.

In addition, I served *pro bono* as General Counsel to Communities in Schools Houston, one of the largest dropout prevention groups in the nation. As part of my duties, I was called upon to analyze a variety of employment law issues, such as Title VII, and to advise the client on a variety of federal and state laws.

My experience also includes teaching appellate brief-writing and oral argument skills, both at Harvard Law School while I was a member of the Board of Student Advisors and as an Adjunct at the University of Houston Law Center.

During my five years on the Harris County bench, I have presided over cases involving both state and federal laws. My docket includes over 1400 cases and I have tried over 200 cases to a verdict. In a number of areas, I have applied federal law, such as employment laws and laws governing workers' rights. For example, in the area of workers' rights, I presided over a Jones Act

(admiralty) case tried to a jury, which involved claims that a deck coordinator on an offshore rig was injured when a crane operator, attempting to move pipe in a cargo basket, struck the deck coordinator with the pipe. The worker brought seaworthiness and negligence claims. Following a jury trial in favor of the injured worker, I signed a judgment. The judgment was affirmed by the Court of Appeals. *Diamond Offshore Mgt. Co., v. Horton* 193 S.W.3d 76 (Tex. App.-- Houston [1st] 2006). These Jones Act cases are common in the Fifth Circuit, which hears a number of admiralty disputes.

In *Banks v. Union Pacific Railroad Co.* (Case No. 2002-01778), I presided over the trial of a case brought pursuant to FELA, the federal statute that protects railroad workers. The jury found for the worker. I signed a judgment in favor of the worker. As FELA cases involve federal rights, these cases are also not uncommon in the federal courts.

I frequently preside over employment law matters, which are common to both federal and state courts. For example, I presided over a matter involving the wages paid to an employee at a club. *Duncan v. GiGi's Cabaret* (Case No. 2003-39344). Following a jury trial, the employee prevailed on her wage claim and I signed a final judgment which was not appealed.

I presided over a case where a former employee alleged that she had been discriminated against because of her religion. *Foster v. Exxon Mobil Corporation* (Case No. 2004-11981). The case was tried to a jury and the jury ruled for the defendant. I signed a final judgment to that effect which was not appealed. I have also presided over a sexual harassment trial that was resolved by the parties before a verdict was rendered. *Simagne v. Arnold* (Case No. 2005-26595).

I presided over a case where a former employee alleged that he had been terminated for being a whistleblower pursuant to health and safety laws. *Aldelstein v. Methodist Health Care System* (Case No. 2002- 51376). The jury verdict was returned for the employer and I signed a judgment to that effect. The case was not appealed.

I presided over two trials on Sabine Pilot claims, which are claims that an employee was terminated for refusal to perform an illegal act. In *Studer v. Technip Offshore, Inc.* (Case No. 2005-25696), the jury returned a verdict in favor of the defendant and I signed a judgment to that effect. In *Jordan v. York Fondren Properties, L.L.C.* (Case No. 2005-50728), the jury returned a verdict in favor of the plaintiff and I signed a judgment to that effect.

In addition, I have presided over numerous workers' compensation appeals. In these cases, the trial courts sit in appellate review over decisions made by the Workers' Compensation Commission. In one such case, I signed a judgment in favor of an injured worker who had argued her position *pro se*. In another

case, another injured worker, also appearing *pro se*, tried her case unsuccessfully to a jury.

I have also presided over expunctions of criminal convictions, cases ancillary to criminal proceedings, and cases where witnesses have invoked their Fifth Amendment rights.

3. **As you may recall, many members on the Senate Judiciary Committee are concerned about diversity on the Federal Appellate bench. The Fifth Circuit is of particular interest to the committee, as it has the largest percentage of minority residents of any regional Circuit Court of Appeals, except for the Circuit Court for the District of Columbia.**

   a. **Is diversity of the judges on the Federal courts an important issue to you?**

   b. **In your opinion as a sitting judge, does diversity of the judges on the Federal courts have any impact with respect to whether litigants have confidence in the Federal court system?**

   c. **What types of personal benefits, if any, do you find in having diversity among your judicial colleagues on the 190th District Court in Houston, Texas?**

Response: As a state trial judge, I have seen firsthand the benefits of working with other judges who have different backgrounds and experiences. This diversity assists the judges when we are considering local rules and administrative matters and when we are assisting the public in the administration of justice. In addition, when I host students from disadvantaged backgrounds at the courts, I always try to select judges who have similar backgrounds to the students to assist with the program. The students benefit from seeing how people who come from similar backgrounds have been successful in their legal careers. Diversity on the federal courts in the sense of selecting and confirming particular nominees, however, is a matter within the province of the President with advice and consent from the Senate.

4. **What significant pieces of legal writing have you composed that may assist you in your role as a federal judge, if you are confirmed?**

Response: I believe the Committee has been furnished with my legal writings, which include an ABA antitrust/tort monograph chapter and the work that I have done to help edit the Pattern Jury Charge book used in courts throughout Texas. However, my most significant work product is represented by the literally thousands of orders that I have signed in hundreds of cases. The orders may be short but they are the product of many hours of motion hearings

and trials, and they serve to resolve issues of extreme import to the parties. Moreover, having been a trial court judge would be an invaluable asset to my work on the Fifth Circuit, if I am confirmed. I have a familiarity with how trial courts apply precedent on federal and state issues and it would be my intent to craft opinions that could be used by other trial judges.

5. At the conclusion of the hearing, I asked you to provide the Committee with copies of speeches you made to groups and organizations.

Please provide the committee with speeches you made to the following groups, as indicated in question 13(d) of your questionnaire:

a. the Mexican-American Bar Association
b. the Pasadena Bar Association
c. various women's clubs and civic groups during your judicial campaign.
d. a speech to the Houston Chapter of the Federalist Society on "Practice in 190th State District Court."
e. Panel of the Houston Chapter of the Federalist Society on a "Birthright Citizenship Panel."

6. If you do not have copies of these speeches, please give the Committee an overview of the content of the speeches, and the specific public policy issues discussed in these speeches.

a. What was the nature of the discussion in these speeches?
b. Did you make any public statements in your judicial campaign on public policy issues, including but not limited to abortion, the separation of church and state, civil rights, tort reform, or standing?

Response: 5 and 6. I believe the Committee has been furnished with copies of my speeches that exist. With regard to the specific speeches referenced, I spoke to the Mexican-American Bar Association about service of process issues, and I used written materials on "Improving your Serve" and discussed relevant case law. I spoke to the Pasadena Bar Association as part of a candidate forum for election and answered questions about the proper administration of justice. I do not have any notes from that event. I have spoken to women's clubs and civic groups about my desire to be a good judge, my qualifications to serve, and about how the court system works. I have also spoken about the importance of jury duty and other matters related to the administration of justice. I do not have notes from these events.

I spoke to the Federalist Society about practice in state court and in my court specifically, such as what is the motion docket and how does a party get on the motion docket. Other than the materials on Practice in the State Court that the Committee has been provided with, I do not have notes from this event.

With regard to the Panel on Birthright Citizenship, I introduced the speakers and told a short anecdote about working on a public school project to encourage knowledge of the Constitution. I believe that I was asked to introduce the speakers at that event because a law school classmate of mine who lives in Alaska had come to Houston to speak at the event. I do not have any notes from this event.

The Judicial Conduct Code in Texas regulates the public statements and actions of judges. Among other things, judges should not make statements that could cause their impartiality to be questioned or that lend the prestige of their office to others for private gain. I did not make any public statements in my judicial campaign on public policy issues, such as abortion, the separation of church and state, civil rights, tort reform, or standing.

7. As an attorney did you handle any cases on behalf of or in affiliation with the Rutherford Institute? If so, what were the cases and what was the nature of your work?

Response: As a founding member of Baker Botts' *pro bono* committee, it was not unusual for me to be asked to work on *pro bono* matters. I worked on a wide range of *pro bono* matters referred to me by a variety of organizations and individuals. As I recall, the *Chalifoux* case was referred to my co-counsel or me by someone at the Rutherford Institute. Once the matter was referred, my co-counsel who served as lead and I made the decisions in the case and the representation was not directed by any organization. The nature of my work was to represent students *pro bono* regarding their First Amendment rights. Two students were barred from wearing rosary beads to school, allegedly based on a gang-related policy. The students were wearing their beads as part of a religious commitment they had made for their upcoming confirmations. It was undisputed that the students were not in a gang and other jewelry was permitted. The United States District Court for the Southern District of Texas ruled in favor of the students.

8. Did you have any relationship with the President, the Vice President, or the Deputy White House Chief of Staff for Strategic Planning and Senior Advisor to the President as a result of your husband's work at Enron and other Texas energy companies? If so, please describe the nature of the relationships.

Response: No.

9. To what extent was your political affiliation and beliefs discussed in your interviewing and selection process for this position? Were you asked about your ties to the Republican party?

Response: My political affiliation and beliefs were not discussed in my interviews. I was not asked about my ties to the Republican party.

10. Your questionnaire states, in response to Question 12.a., that you were a member of "various local Republican Women's clubs" from approximately 2002-2006.

a. What are the names of the clubs of which you were a member?

b. In which clubs were you most actively involved?

c. Were you an officer of these clubs, and if so, which ones?

Response: I have been a member of the Houston Professional Republican Women's Club, Magic Circle Republican Women's Club and the Texas Federation of Republican Women, which is an umbrella group for all of the Republican women's clubs in the state. The extent of my involvement consisted of attending meetings. I have never been an officer of these clubs.

11. One club you were involved in was the Texas Tea Party, formally known as the Texas Tea Party Republican Women.

a. Were you a member of this group, and during what years were you a member?

b. You attended a July 14, 2005 luncheon of this group. Please provide the subject matter of this luncheon, as well as public policy issues discussed at the luncheon.

The Texas Tea Party's April 2007 newsletter contained what it described as "answers to incorrect thoughts about abortion," excerpted from Randy Alcorn's *Pro-Life Answers to Pro-Choice Arguments*. The "pro-choice argument" listed in the April 2007 newsletter was "Every woman should have control over her own body. Reproductive freedom is a basic right." The "pro-life answer" stated, in part, "Control over the body can be exercised to prevent pregnancy in the first place. The mother's two matters of control – sex and birth control – were personal and private. The issue of abortion is not personal and private."

c. Do you agree with this statement as a legal matter? If so, how do you reconcile it with Supreme Court precedent? Does the right of privacy apply to these decisions?

The Club's "Vision" is to promote "Judeo-Christian values in government through political and charitable activities".

d. What does this statement mean to you?

Response: A. and B. To my knowledge, I was not a member of the Texas Tea Party. I have no specific recollection of attending a July 14, 2005, luncheon of the organization, and I do not know what was discussed at the meeting. In 2005, the election cycle was commencing for 2006, and judicial candidates and

judges may have been invited to the meeting as an opportunity for the club members to meet them.

As I have noted previously, I am very active in the community and attend lunches and events almost every week for organizations as diverse as Girls Inc., the Hispanic Bar Association of Houston, Leadership Houston, Aspiring Youth, the Houston Bar Association, the Association of Women Attorneys, the Mexican-American Bar Association, the Asian-American Bar Association of Houston, the South-Asian Bar Association, Communities in Schools of Houston Inc., the Girl Scouts of America, the Barbara Jordan Project, and the State Bar of Texas.

C. To my knowledge, I did not receive the Texas Tea Party's April 2007 Newsletter, and I am not familiar with Randy Alcorn. The right to privacy has been reaffirmed repeatedly by the Supreme Court. In *Griswold v. Connecticut*, 381 U. S. 479 (1965), the Supreme Court held that a married woman had a constitutionally protected liberty interest in the right to contraception. In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Supreme Court, relying on the Equal Protection Clause of the Fourteenth Amendment, extended this right to unmarried women. In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court held that the right to privacy applies to a woman's right to choose whether to terminate her pregnancy. In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Supreme Court upheld *Roe* and applied an "undue burden" standard to uphold certain restrictions on abortion rights and to strike down other restrictions. These are just some of the cases upholding a right to privacy. In addition, the right to privacy also applies in other contexts, such as the Fourth Amendment's rights preventing unreasonable searches and seizures. If confirmed, I would faithfully apply Supreme Court precedent in regard to the right of privacy.

D. I am unfamiliar with the club's vision except to support women and Republican candidates. The Judicial Conduct Code in Texas prevents judges from conduct or statements that might call into question their impartiality or which lend the prestige of their office to others. As a sitting judge, I did not and would not promote any club's vision but would fairly and impartially rule on the matters that come before me.

12. Did you participate in any way in working on the contested Florida election and the *Bush v. Gore* Supreme Court case in 2000? If so, what was your level of involvement, and in what capacity did you work on this case?

Response: In November 2000, I had just come back from maternity leave after the birth of my second daughter. I was asked to complete one short research project one afternoon and I did so. I believe I spent in total less than three hours working on the project.

13. Last week the President nominated Catharina Haynes to the other vacant Texas seat on the U.S. Court of Appeals for the Fifth Circuit.

The Fifth Circuit consists of the three million citizens of Mississippi, the four million citizens of Louisiana, and the twenty-three millions citizens of Texas. Circuit Courts of Appeal are the final interpretation of the law of the law for many issues governing these 30 million citizens.

Ms. Haynes bears some similarities to you. She is an associate at Baker Botts. She was a judge of the 191st District Court in Dallas, while you were a judge of the 190th District Court in Houston.

a. Did you work with Mr. Haynes either at Baker Botts or as a judge?
b. Did you discuss or coordinate your campaign strategy or issues for judicial election with Ms. Haynes?
c. Did you have any campaign staff in common to both campaigns? If so, who?
d. Did either of you discuss your potential nomination to this position with each other, or with members of Baker Botts? If so, what was the nature of those discussions?

Response: To the best of my recollection, I never worked with Judge Haynes while at Baker Botts. I have met her, but I do not know her well. Baker Botts is a large multi-office law firm. I was always in the Houston office, and I believe she was always in the Dallas office. I do not believe that we had any cases that overlapped with one another.

I have never worked with her as a judge. I have always sat in Houston and, to my knowledge, she has always sat in Dallas. I did not discuss or coordinate my campaign strategy or issues for judicial election with Judge Haynes. I have no idea who worked on Judge Haynes' campaign. I did not even have a campaign as such in 2006 as I ran unopposed. I did not discuss my nomination with her, and she did not discuss her nomination with me. I did mention to a few very close friends who are still at Baker Botts that I had interviewed for a position on the Fifth Circuit.

14. Do you believe that classifications based on sex should be subject to "intermediate" or "heightened" scrutiny?

Response: The Supreme Court has held that sex-based classifications are subject to "intermediate scrutiny." *E.g.*, *United States v. Virginia*, 518 U.S. 515, 533 (1996) (striking down VMI's policy of not admitting women). This intermediate scrutiny may be contrasted with "rational basis" and "strict scrutiny," which apply to other types of Equal Protection challenges. I would faithfully apply precedent in this area if confirmed.

15. Do you believe that the Constitution protects a general right of privacy? If so, as a judge how do you define the contours of that right?

Response: As discussed in more detail in the answer to Question 11C, the Supreme Court has held that the Constitution protects a right to privacy. This right is guaranteed by the Fourth, Fifth, and Fourteenth Amendments. As a judge, I would look to the text of the Constitution, Supreme Court precedent and other precedent to construe this right on the specific facts of each case.

16. To what extent does a judge play a role in acting as a check and balance on the other branches of government?

17. What is your view on the proper balance of power and separation of powers in our federal system under the Constitution?

Response: The framers were very wise in setting up a system in which each branch of government has separate powers and functions. The judicial branch's function is to interpret the laws, the executive branch executes the laws, and the legislative branch makes the laws. All three branches are equal, and the judicial branch should be modest and should not undertake to legislate or execute the laws. This is true both as a constitutional matter and as a practical matter. For example, courts lack institutional competence to engage in the legislative function. The legislature can bring in all of the best public policy experts and hear from the people in order to craft legislation. Courts cannot do this and should not sit to impose their public policy beliefs under the guise of interpreting the law.

However, the judicial branch does have an important function. Since *Marbury v. Madison,* 5 U.S. 137 (1803), the judicial branch has served as a check and balance to the other two branches of government, just as those branches serve as check and balance to the judicial branch. For example, in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), Justice Jackson articulated a framework for the courts to use in evaluating conflicts between the executive and legislative branches. Under the framework, the President's power is at its highest where the President is acting with the expressed or implied assent of Congress, and its lowest when the President is defying Congress. The middle position, where Congress is silent, is also addressed in the framework. Likewise, in *United States v. Nixon*, 418 U.S. 683 (1974), the Supreme Court held that the executive privilege does not provide a blanket exemption in criminal cases.

Responses of Jennifer Walker Elrod
Nominee to the U.S. Court of Appeals for the Fifth Circuit
to the Written Questions of Senator Dick Durbin

1. You have served as a state district court judge in Harris County, Texas for five years. In your Senate questionnaire, you stated that you sign orders but do not write opinions.

Please list all cases that have come before you involving civil rights (e.g. discrimination), workers' rights, or consumers' rights claims and provide a brief explanation of the case and the nature of your order. Please also provide any letters or other documents you authored in which you explained your reasoning in cases involving civil rights, workers' rights, or consumers' rights claims.

Response: During my five years on the Harris County bench, I have handled numerous cases involving civil rights (e.g., discrimination), workers' rights, and consumers' rights.

In the area of workers' rights, I presided over a Jones Act (admiralty) case tried to a jury, which involved claims that a deck coordinator on an offshore rig was injured when a crane operator, attempting to move pipe in a cargo basket, struck the deck coordinator with the pipe. The worker brought seaworthiness and negligence claims. Following a jury trial in favor of the injured worker, I signed a judgment. The judgment was affirmed by the Court of Appeals. *Diamond Offshore Mgt. Co. v. Horton*, 193 S.W.3d 76 (Tex. App.-- Houston [1st] 2006). These Jones Act cases are common in the Fifth Circuit, which hears a number of admiralty disputes.

In *Banks v. Union Pacific Railroad Co.* (Case No. 2002-01778), I presided over the trial of a case brought pursuant to FELA, the federal statute that protects railroad workers. The jury found for the worker. I signed a judgment in favor of the worker. As FELA cases involve federal rights, these cases are also not uncommon in the federal courts.

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I presided over a case where a former employee alleged that she had been discriminated against because of her religion. *Foster v. Exxon Mobil*

Corporation (Case No. 2004-11981). The case was tried to a jury and the jury ruled alleged for the defendant. I signed a final judgment to that effect, which was not appealed. I have also presided over a sexual harassment trial that was resolved by the parties before a verdict was rendered. *Simagne v. Arnold* (Case No. 2005-26595).

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I presided over two trials on Sabine Pilot claims, which are claims that an employee was terminated for refusal to perform an illegal act. In *Studer v. Technip Offshore, Inc.* (Case No. 2005-25696), the jury returned a verdict in favor of the defendant, and I signed a judgment to that effect. In *Jordan v. York Fondren Properties, L.L.C.* (Case No. 2005-50728), the jury returned a verdict in favor of the plaintiff, and I signed a judgment to that effect.

In addition, I have presided over numerous workers' compensation appeals. In these cases, the trial courts sit in appellate review over decisions made by the Workers' Compensation Commission. In one such case, I signed a judgment in favor of an injured worker who had argued her position *pro se.* In another case, another injured worker, also appearing *pro se*, tried her case unsuccessfully to a jury. She made a point to tell me that she had been treated fairly by the court regardless of the outcome.

In the area of consumer rights, I conducted a bench trial in 2002, involving numerous consumers who had taken their cars to two car repair establishments. Many of those consumers had their vehicles damaged in Tropical Storm Allison and sought repairs. Among the claims raised were that consumers did not get their cars repaired, were charged exorbitant fees for no work, or that their cars were illegally confiscated pursuant to unlawful mechanic's liens. The establishments' owner denied the claims. Following the trial, I signed a judgment ordering the owner to pay damages and awarding statutory penalties for victims of consumer fraud, and the judgment was affirmed on appeal. *Miller v. State of Texas,* 2003 WL 22707135 (Tex. App.—[14th] 2003).

Other consumer cases that I have presided over, include, but are not limited to claims brought pursuant to the Texas Deceptive Trade Protection Act. *See e.g., Lazenby v. Lexus of Clear Lake*, 2005 WL 462134 (Tex. App.—[14th] 2006) (affirming 190th Court summary judgment in case involving allegations that car repair establishment falsely

claimed that car could hold 14 quarts of transmission fluid and improperly reclaimed a loaner car).

I believe that the Committee has already been provided copies of dispositive orders in the cases in which I presided.

2. At your nomination hearing, you testified that as a judge, "we call the balls and the strikes, and I would be faithful to that role on the Fifth Circuit Court of Appeals." At his own nomination hearing to be Chief Justice of the United States, John Roberts made a similar pledge. But as my colleague Senator Kennedy wrote in a June 2007 op-ed in the *Washington Post*: "[John Roberts] memorably claimed during the confirmation process that he wanted only to be a diligent umpire, calling balls and strikes without regard to what team was at bat. But it turns out that our new umpires have a keen interest in who wins and who loses."

Indeed in every decision during the 2006-07 Supreme Court term in which there was a 5-4 ideological split, Chief Justice Roberts ruled in favor of the conservative position.

You testified that you will "call the balls and the strikes," but what evidence can you point to that would indicate you would not have a bigger strike zone for conservative positions in cases involving ideological splits?

Response: I have presided over a very busy trial court, in a large, metropolitan area. I have ruled on motions in hundreds of case and presided over the trials of over 200 cases to verdict. During that time, I have received honors for my professionalism and attention to the administration of justice. I have also been ranked well-qualified by the members of the Houston Bar Association, a diverse group of lawyers, in each of its polls. In 2006, I ran unopposed for re-election. In addition, the American Bar Association has determined that I meet its high standards for service on the Fifth Circuit.

As set forth in the answer to Question 1, and as demonstrated by the orders provided to the Committee, all parties have been treated fairly and equally in the court that I have presided over. Moreover, in addition to my track record as a judge, I have devoted my time to efforts to improve justice and opportunities for all, including work on behalf of the Texas Access to Justice Commission, the Barbara Jordan Project, Communities in Schools Houston, Lone Star Legal Aid, the Houston Volunteer Lawyers Program, the Mexican-American Bar Association, the Houston Hispanic Forum, and many others.

Since taking the bench, I have taught trial advocacy skills to legal aid lawyers and I have been given a commendation from the Texas Access to Justice Commission for this work. I frequently meet with community

groups in order to help people in ways that are consistent with my duties as a judge. The first group that I spoke to when I became a judge was the South-Asian Bar Association. I have also participated in events with the Asian-American Bar Association, the Mexican-American Bar Association of Texas, the Hispanic Bar Association of Houston, the Mexican-American Bar Association of Houston, the Association of Women Attorneys, as well as others.

I was also privileged to co-chair the Barbara Jordan Project on behalf of the Houston Young Lawyers Association. The Barbara Jordan Project is a tribute to the great civil rights leader and Congresswoman, Barbara Jordan. As part of this project, middle school students study the speeches and life of Barbara Jordan and then compose their own speeches and present them at a downtown theatre. The Houston Young Lawyers Association awarded me its Woodrow Seals Award, named for the now-deceased judge who presided over the United District Court for the Southern District of Texas, for my community service and professionalism.

Moreover, each year that I have been on the bench, I have also sponsored a legal internship program designed for students from inner city schools to come to the courthouse to learn about their legal rights and careers in the law.

Before taking the bench, I had a long history of *pro bono* work that demonstrated my commitment to fairness and justice for all. I was recognized for this work by my peers and presented with the Thomas Gibbs Gee Award, named for the now-deceased Fifth Circuit Judge.

As part of my *pro bono* efforts, I chaired the board of Lone Star Legal Aid (formerly the Gulf Coast Legal Foundation), one of the largest legal aid providers in Southeast Texas. I heard first-hand the struggles that the legal aid lawyers faced. As I mentioned in my hearing, I helped a high school student's parents come from Mexico to see her graduate with honors. I also represented *pro bono* an African-American man and his partially-disabled son, in a case brought on a contract for deed. They came very close to losing their home, but we were able to get a temporary injunction to prevent their eviction.

In another matter, I represented a historic African-American church that provided services to the poor in the Fourth Ward, in a lawsuit involving property tax issues. I represented an organization that restores homes in a historically African-American neighborhood and provides services to the community as well. In addition, I served *pro bono* as the first General Counsel of Communities in Schools Houston, one of the largest dropout

prevention groups in the nation, which serves children from disadvantaged backgrounds.

In summary, I believe my record overwhelmingly demonstrates that I am committed to fairness and justice for all.

3. In your Senate questionnaire, you indicated that you were a member of "various local Republican Women's clubs."

Please identify the names of these clubs, length of your membership, and the mission of each club.

Response: I have been a member of the Houston Professional Republican Women's Club (approx. 2000-2002) and Magic Circle Republican Women (approx. 2004-2005). As a member of these organizations, I was automatically a member of the Texas Federation of Republican Women, which is an umbrella organization of all Republican women's clubs. I do not know the mission of these clubs except that they support women and Republicans. The extent of my involvement consisted of attending meetings.

As I have noted previously, I am very active in the community and I have been involved with organizations as diverse as Girls Inc., the Hispanic Bar Association of Houston, Leadership Houston, Aspiring Youth, the Houston Bar Association, the Association of Women Attorneys, the Mexican-American Bar Association, the Asian-American Bar Association of Houston, the South-Asian Bar Association, the North Harris County Bar, Communities in Schools Houston, Girl Scout of America, and the State Bar of Texas.

The Code of Judicial Conduct governs the conduct of judges in Texas. Consistent with the Code, as part of my involvement in the various clubs and groups discussed above, I did not take positions on or further political missions of the groups.

4. On page 8 of your July 15, 2005 Campaign Finance Report, you indicated that you gave a financial contribution to the "Texas Tea Party." Presumably, this refers to an organization known as Texas Tea Party Republican Women, whose stated mission is "to promote Judeo-Christian values in government through political and charitable activities." The March 2007 newsletter of this organization states: "TTPRW is a Republican club which promotes pro-life, Judeo-Christian values and our goals represent Biblical values – with no apologies." That newsletter also urges its members to support state legislation that would require public schools to offer courses in which the Bible is taught as history, and to support state legislation that

would trigger a ban on abortion rights if *Roe v. Wade* were reversed by the Supreme Court.

A. Are you a member of Texas Tea Party Republican Women? If not, what affiliation have you had with this organization?

Response: I am not a member of the Texas Tea Party Republican Women. I believe I may have attended a few events hosted by this organization. To my knowledge, there are over forty Republican women's clubs in our area, and I do not have a clear recollection of this club's events. I am not familiar with the mission statement that you describe and, to my knowledge, did not receive the club's March 2007 newsletter.

B. Do you believe Biblical values should be promoted in government? If so, which ones?

C. Do you believe public schools should be required to offer courses in which the Bible is taught as history?

D. Do you believe that abortion rights should be banned in Texas if *Roe v. Wade* were reversed by the Supreme Court?

Response: B., C., and D. As a sitting judge, I do not make public policy pronouncements. The Code of Judicial Conduct governs the speech and conduct of judges. Pursuant to the Code, judges should refrain from speech or other conduct that might give them the appearance of impartiality. Moreover, judges are to avoid pre-judging matters that might come before them.

As demonstrated by my record, when I do rule on a case, I do not seek to impose my will or public policy preferences.

E. Do you believe the right to privacy is a type of "liberty" protected by the Due Process Clause of the 14th Amendment?

Response: The right to privacy has been repeatedly reaffirmed by the Supreme Court. In *Griswold v. Connecticut*, 381 U. S. 479 (1965), the Supreme Court held that a married woman had a constitutionally protected liberty interest in the right to contraception. In *Eisenstadt v. Baird,* 405 U.S. 438 (1972), the Supreme Court, relying on the Equal Protection Clause of the Fourteenth Amendment, extended this right to unmarried women. In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court held that the right to privacy applies to a woman's right to choose whether to terminate her pregnancy. In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Supreme Court upheld *Roe* and applied an "undue burden" standard to uphold certain restrictions on abortion rights and to strike down other restrictions. These

are just some of the cases upholding a right to privacy. In addition, the right to privacy also applies in other contexts, such as the Fourth Amendment's rights preventing unreasonable searches and seizures. If confirmed, I would faithfully apply Supreme Court precedent regarding the right of privacy.

F. In the Supreme Court case *Planned Parenthood v. Casey*, Justice Scalia authored a dissent in which he maintained that the Supreme Court's decision in *Roe v. Wade* was as much of a mistake as its decision in *Dred Scott*, which affirmed the existence of slavery in America. Do you agree with that analysis? Do you believe there are parallels between *Roe v. Wade* and *Dred Scott*? Please explain your answer.

Response: *Dred Scott* was superseded by constitutional amendment in 1865. Prior to its being superseded it was not reaffirmed. In contrast, *Roe v. Wade* is the law of the land. Moreover, it has been reaffirmed several times, including in *Casey*. I will faithfully follow precedent if confirmed.

5. You have been a member of the Federalist Society for 13 years and have given speeches to the Houston chapter of the Federalist Society.

A. Please explain why you joined this organization and what you think it represents.

Response: I joined the Federalist Society back in law school. As I recall, the *Harvard Journal of Law and Public Policy*, which traditionally has published pieces from the student symposiums sponsored by the Federalist Society, allowed first-year law students to help subcite the journal's issues. I was interested in working on a journal and I was impressed with the diverse speakers who appeared in the symposiums that were included in the journal. For example, in 1992, the journal included a symposium on the Bill of Rights after 200 Years and included pieces by, among others, Nadine Strossen and Richard Epstein. In my experience, the Federalist Society encourages rigorous discussion and debate of the leading legal issues and sponsors speeches by leading scholars of all viewpoints.

B. The Federalist Society mission statement says: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society." Do you agree with that statement? Please explain.

Response: I am not familiar with the mission statement that is mentioned in the question. However, my law school experience was intellectually diverse. I took classes with Professors Tribe, Sullivan, and Duncan Kennedy and also with Professors Areeda and Fried. The law students with whom I

speak today also reference a diverse experience. Likewise, the law students from Texas law schools that I meet do not reference an "orthodox liberal ideology which advocates a centralized and uniform society." My experience in the legal profession for over 14 years as both a lawyer and judge in Texas has been the same as that of the students.

C. Former Judge Robert Bork has said: "The Federalist Society has done more for the health of the law than any organization I have witnessed in my career." Do you agree with that statement? Please explain.

Response: I am not familiar with the comments by Judge Bork. In my own experience, the Federalist Society is just one of a number of organizations that play a role in improving the legal profession. Others that I am personally familiar with include the Texas Access to Justice Commission, the State Bar of Texas, the Houston Bar Association, the Texas Young Lawyers Association, the Houston Young Lawyers Association, the Mexican-American Bar Association of Texas, the Houston Lawyers Association, the Hispanic Bar Association of Houston, the Asian-American Bar Association, the Association of Women Attorneys, Texas Lawyers Care, and many others.

6. When he ran for president, President Bush pledged he would appoint "strict constructionists" to the federal judiciary, in the mold of Supreme Court Justices Clarence Thomas and Antonin Scalia.

A. How would you describe your own judicial philosophy, and how do you believe it is different from or similar to Justices Scalia and Thomas?

B. Do you consider yourself to be a strict constructionist? Why or why not?

Response: A. and B. My judicial philosophy is one of modesty, respect for the other branches of government, respect for the litigants and their counsel, and respect for the other judges. Central to good judging is the idea that a judge should never substitute her will for her judgment. Moreover, a good judge must remember that she does not sit as a public policy-maker or to execute the laws, those are the provinces of the other branches of government.

The term "strict constructionist" means different things to different people. To some, it means a judge who interprets the law as it is, without adding to or subtracting things in order to serve some private agenda of the judge. To others, it means a judge who narrowly construes statutes or

constitutional provisions that are meant to be interpreted broadly. The first approach is consistent with my view of judicial modesty.

C. **Do you believe that *Roe v. Wade, Brown v. Board of Education,* and *Miranda v. Arizona* are consistent with strict constructionism? Why or why not?**

Response: *Brown v. Board of Education* reversed *Plessy v. Ferguson*, which the Court held was inconsistent with the framers' intent in the Fourteenth Amendment to address discrimination through broad protections such as equal protection and due process. As such, it was not inconsistent with the principles of judicial modesty discussed above.

As the Supreme Court observed in *Dickerson v. United States*, 530 U.S. 428 (2000), which reaffirmed *Miranda*, the Supreme Court has authority to prescribe rules of evidence and procedure that are binding on federal tribunals. The Supreme Court has held that it also has authority to impose judicially-created guidelines to prevent violations of constitutional rights.

With regard to *Roe v. Wade*, the Supreme Court has recognized that certain liberty interests are entitled to constitutional protection. The right to privacy has been repeatedly reaffirmed by the Supreme Court. In *Griswold v. Connecticut*, 381 U. S. 479 (1965), the Supreme Court held that a married woman had a constitutionally protected liberty interest in the right to contraception. In *Eisenstadt v. Baird,* 405 U.S. 438 (1972), the Supreme Court, relying on the Equal Protection Clause of the Fourteenth Amendment, extended this right to unmarried women. In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court held that the right to privacy applies to a woman's right to choose whether to terminate her pregnancy. In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Supreme Court reaffirmed *Roe* and applied an "undue burden" standard to uphold certain restrictions on abortion rights and to strike down other restrictions.

Responses of Jennifer Walker Elrod
Nominee to the U.S. Court of Appeals for the Fifth Circuit
to the Written Questions of Senator Dianne Feinstein

1. In your response to the Committee questionnaire you state that 100 percent of your practice has been in civil proceedings, and that only 20 percent of your practice has been in federal courts. You also have never served as an appellate judge and appear to have limited experience in appellate courts (for example, the listing of ten most significant cases in your response to the Committee questionnaire does not include any appellate litigation).

- ***Please explain in detail whether and to what extent you have handled cases during your legal career involving each of the following issues:***
    - ***Interpretation of the Equal Protection Clause of the Fourteenth Amendment;***
    - ***Interpretation of the Due Process Clauses of the Fifth and Fourteenth Amendments;***
    - ***Interpretation of the Fourth Amendment protection against unreasonable searches and seizures;***
    - ***Interpretation of the Eighth Amendment prohibition of cruel and unusual punishment;***
    - ***Interpretation of federal criminal statutes;***
    - ***Interpretation of federal civil rights or antidiscrimination statutes, including Title VI, Title VII, and Title IX; and***
    - ***Interpretation of federal environmental laws such as the Clean Water Act and the Comprehensive Environmental Response, Compensation, and Liability Act.***

Response:

Throughout my career, I have had a wide range of experience in federal court and in dealing with federal statutory and constitutional law. This experience is discussed below.

While still in law school, I enrolled in a criminal justice clinical program, which enabled me to represent indigent criminal defendants in criminal proceedings in Roxbury, Massachusetts. In representing these clients, I relied

upon federal constitutional protections for the accused such as the Fourth, Fifth, and Fourteenth Amendments, as well as state criminal laws.

I also worked in the U.S. Attorney's Office in Boston, assisting in both criminal and civil matters. I relied upon federal criminal and civil statutes and constitutional law in this position.

During my two-year federal clerkship for the Honorable Sim Lake in the United States District Court for the Southern District of Texas, I worked on numerous cases, both criminal and civil. This work involved federal statutes such as federal criminal statutes, Title VII, federal environmental laws, and federal habeas. This work also involved constitutional law, such as the Fourth and Fifth Amendments, and the Equal Protection Clause. I assisted Judge Lake in researching both evidentiary and procedural issues in both the criminal and civil cases that he tried. During this time period, he tried numerous criminal cases, including a federal murder case. I also reviewed pre-sentence data sheets for every hearing on a plea in cases on which I worked and became familiar with the federal sentencing guidelines in effect at the time.

In addition, when Judge Lake sat by designation on the Fifth Circuit, I assisted him with his appellate cases in criminal and civil matters involving federal statutory and constitutional laws.

At Baker Botts, I worked on two habeas cases. In each of these cases, I dealt with criminal law and federal statutory and constitutional protections such as the Sixth Amendment. In one of these cases, the law firm represented a woman on death row in Texas. Her conviction was ultimately reversed by the United States District Court for the Southern District of Texas and this decision was affirmed by the Fifth Circuit. In the second case, I worked on an amicus brief to the Supreme Court on a habeas matter involving constitutional claims.

My practice included complex federal antitrust matters, which in some circumstances may involve both criminal and civil penalties. For example, I worked on *United States v. Smith Int'l, Inc. and Schlumberger LTD.*, 2000-1 Trade Cas. (CCH) P72,763 (D.D.C. 2000); *Le Baud v. Pacificare Health Systems, Inc.*, 1998 U.S. Dist. LEXIS 5148 (N.D. Tex. 1998); and *Service Corp., Int'l v. The Loewen Group Inc.*, 1997-1 Trade Cas. (CCH) P71, 688 (S.D. Tex. 1996).

My practice also involved federal and state employment law, including Title VII and ERISA work. I represented an employer in an employment discrimination suit in Brazoria County, Texas, and I served as lead counsel in one ERISA case in the Eastern District of Texas where I represented the

employer. In another ERISA case in the Southern District of Texas, I served *pro bono* as *guardian ad litem* for two minor children.

In addition, I served *pro bono* as general counsel to Communities in Schools Houston, one of the largest dropout prevention groups in the nation. As part of my duties, I was called upon to analyze a variety of employment law issues, such as Title VII, and to advise the client on a variety of federal and state laws.

My experience also includes teaching appellate brief-writing and oral argument skills, both at Harvard Law School as a member of the Board of Student Advisors and as an Adjunct at the University of Houston Law Center.

During my five years on the Harris County bench, I have presided over cases involving both state and federal laws. My docket includes over 1400 active cases and I have tried over 200 cases to a verdict. In a number of areas, I have applied federal law, such as employment laws and laws governing workers' rights. For example, in the area of workers' rights, I presided over a Jones Act (admiralty) case tried to a jury, which involved claims that a deck coordinator on an offshore rig was injured when a crane operator, attempting to move pipe in a cargo basket, struck the deck coordinator with the pipe. The worker brought seaworthiness and negligence claims. Following a jury trial in favor of the injured worker, I signed a judgment. The judgment was affirmed by the Court of Appeals. *Diamond Offshore Mgt. Co., v. Horton*, 193 S.W.3d 76 (Tex. App.-- Houston [1st] 2006). These Jones Act cases are common in the Fifth Circuit, which hears a number of admiralty disputes.

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by the parties before a verdict was rendered. *Simagne v. Arnold* (Case No. 2005-26595).

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In addition, I have presided over numerous workers' compensation appeals. In these cases, the trial courts sit in appellate review over decisions made by the Workers' Compensation Commission. In one such case, I signed a judgment in favor of an injured worker who had argued her position *pro se.* In another case, another injured worker, also appearing *pro se*, tried her case unsuccessfully to a jury.

I have also presided over expunctions of criminal convictions, cases ancillary to criminal proceedings, and cases where witnesses have invoked their Fifth Amendment rights.

2. When you were asked at your confirmation hearing to describe how you would approach judging the rights of an individual, you said that you would look at the facts and at relevant precedent. If confirmed as a circuit judge, however, you are likely to hear some cases in which the available precedents are not squarely on point.

- ***What philosophical approach would you bring to bear on a case of first impression – in which there are no relevant precedents?***

- ***If two different lines of precedent appear equally applicable to the case before you, but would lead to different results, how would you choose which line of precedent to follow?***

Response: In a case of first impression, I would look to the briefs and arguments of the parties and work with other members of the court, considering precedent in other related areas, the text of the statute at issue, and rules of statutory construction in light of the applicable standard of review. If two different lines of precedent appeared equally applicable, I would try to determine if they

could be harmonized. If that was not possible, I would follow the one that was most closely analogous to the facts and to the law at issue, using all of the proper tools of analysis.

3. Please name the current Supreme Court Justice whose approach to judging you believe is most similar to your own, and explain in detail the reasons for your answer.

Response: I admire all of the Supreme Court Justices. The Supreme Court Justice with whom I have spent the most time is Justice Breyer. He was my professor in law school. I found him to be brilliant, tough, fair, very personable, and possessing an amazing grasp of Administrative Law. In law school, I also had the opportunity to spend a day with Justice Brennan, assisting him on a visit to the campus. I was most impressed by his kind and patient manner with everyone who approached him. He even took the time to personally encourage me in my legal career that day. In addition, I admire Justice O'Connor, who was born in Texas, both for her work as the first female Supreme Court Justice and for her work to educate the public about the proper role of judges in our society that continues to this day.

My judicial philosophy is one of modesty, respect for the other branches of government, respect for the litigants and their counsel, and respect for the other judges. Central to good judging is the idea that a judge should never substitute her will for her judgment. Moreover, a good judge must remember that she does not sit as a public policy-maker or to execute the laws, those are the provinces of the other branches of government. It is my hope that my approach to judging follows this philosophy.

4. Judges in both federal and state courts have come under increasing criticism in recent years, and the term "judicial activism" is frequently used by those who disagree with a judge's decision.

- ***How would you define "judicial activism"?***

- ***What assurances can you give the Committee that, if confirmed, you will not engage in improper "activist" judging?***

Response: "Judicial activism" means different things to different people. It can mean substituting one's will or public policy preferences to strike down legislation. I spoke against that type of judicial activism during my Investiture in 2002, and my record over the past five years in hundreds of cases demonstrates that I will not engage in improper "activist" judging if confirmed to the Fifth Circuit.

5. In your response to the Committee questionnaire you state that you have been a member of "various local Republican Women's clubs."

- ***Please identify specifically each of the clubs of which you have been a member or with which you have been affiliated; describe in detail the nature of your membership or affiliation with the club; and identify any area(s) in which your views differ from the views of the club.***

Response:

I have been a member of the Houston Professional Republican Women's Club and the Magic Circle Republican Women's Club. As a member of these clubs, I was automatically a member of the Texas Federation of Republican Women, which is an umbrella organization of all Republican women's clubs in Texas. Other than their support of women and Republicans, I do not know the clubs' specific views. The extent of my involvement consisted of attending meetings.

Some of the other clubs and organizations that I have been involved with include, but are not limited to Girls Inc., the Hispanic Bar Association of Houston, Leadership Houston, Aspiring Youth, the Houston Bar Association, the Association of Women Attorneys, the Mexican-American Bar Association of Houston, the Asian-American Bar Association of Houston, the South-Asian Bar Association, the Barbara Jordan Project, Communities in Schools Houston Inc., the Girl Scouts of America, the North Harris County Bar, and the State Bar of Texas.

The Code of Judicial Conduct governs the conduct of judges in Texas. Consistent with the Code, as part of my involvement in the various clubs and groups discussed above, I did not discuss personal views or positions on issues that might come before me.

Responses of Jennifer Walker Elrod
Nominee to the U.S. Court of Appeals for the Fifth Circuit
to the Written Questions of Senator Patrick Leahy

1. **Your only appellate experience was before the U.S. Supreme Court where, in *Texas v. Cobb*, 532 U.S. 162 (2001), a case involving a criminal defendant's Sixth Amendment right to counsel, you filed an amicus brief on behalf of the Texas Association of District and County Attorneys. You argued that the criminal defendant's confession was properly admissible at trial. The Texas Court of Criminal Appeals upheld the defendant's Sixth Amendment right to counsel during custodial interrogations. Your Supreme Court amicus brief argued that the ruling of the Texas Court of Criminal Appeals "frustrates effective law enforcement."**

In a divided 5-4 opinion, the U.S. Supreme Court reversed the lower court ruling and ruled in favor of the state. The majority held that the Sixth Amendment right to counsel attaches only to charged offenses. Accordingly, the Sixth Amendment did not bar police from interrogating the defendant about a subsequent offense, and his confession was therefore admissible. Writing for four Justices in dissent, Justice Breyer noted that as a result of the Court's ruling in *Cobb*, "the importance of counsel [would be] severely diminished" and the Court's precedent establishing that police are barred from initiating contact with the accused after the invocation of counsel would be "drastically eroded." Justice Breyer's dissent also expressed concern that the *Cobb* ruling might increase the risk of circumvention of the right to counsel by prosecutors "charging several offenses, all stemming from the same criminal incident."

   A. **As an advocate, you took positions in *Cobb* that would weaken the fundamental Sixth Amendment right to counsel. How can we be assured that as a judge you will decide cases fairly and in manner that respects the rights of criminal defendants?**

   B. **Given that you advocated for a restrictive view of the Sixth Amendment in the only criminal case in which you have participated, what assurances can you give that as a judge you will vigorously guard and protect the fundamental right to counsel?**

   C. **As a judge on the Fifth Circuit, you will have ample opportunities to decide death penalty cases in which an individual's most precious right – his or her life – will hang in the balance. Yet, in the only capital case you have worked on, you took a restrictive view of the Sixth Amendment that four Justices on the Supreme Court labeled as ripe for prosecutorial abuse. What assurances can you give us that as a judge you will ensure that no individual is executed based on a conviction obtained through a**

violation of a defendant's constitutional rights, particularly the right to counsel?

Response: During my years in private practice, I vigorously advocated for the rights of my clients, whether plaintiffs and defendants; however, the role of an advocate is fundamentally different from that of a judge. Importantly, the *Cobb* case is not the only case involving the rights of a criminal defendant in which I have participated as an advocate. As a third-year law student, I volunteered to represent indigent criminal defendants in their proceedings in Roxbury, Massachusetts. I handled all aspects of their cases, and I vigorously protected my clients' constitutional rights.

At Baker Botts, I volunteered to work on a habeas matter involving a woman on death row in Texas. Her conviction was ultimately reversed by the United States District Court for the Southern District of Texas, and that decision was affirmed by the Fifth Circuit. *Perillo v. Johnson,* 205 F.3d 775 (5th Cir. 2000). That case also dealt specifically with Sixth Amendment rights. The Fifth Circuit upheld the reversal of the conviction, holding that the woman's right to counsel had been compromised due to her counsel's relationship with a co-defendant. *Id.* at 808. I also worked on complex federal antitrust matters, which may present both civil and criminal issues.

In addition, as a law clerk to the Honorable Sim Lake in the United States District Court for the Southern District of Texas, I had the opportunity to work on habeas cases, criminal cases, and other cases involving the rights of incarcerated persons, such as Section 1983 cases. During my clerkship, I traveled with Judge Lake to the state prisons for *Spears* hearings, which are designed to enable inmates to have an oral hearing to state their claims. I also assisted Judge Lake in a federal murder trial and on numerous other criminal matters, providing research on evidentiary and procedural issues. In every case that I worked on where a guilty plea was being considered, I reviewed the sentencing data information and the applicable guidelines in effect at the time. When Judge Lake sat by designation with the Fifth Circuit, I assisted him on appellate matters as his law clerk.

As a judge for the past five years, my function has been to decide cases fairly in a manner that respects the rights of all litigants and preserves the integrity of the judicial process. As Bar-sponsored polls of counsel who have appeared before me have consistently shown since I became a judge, I have a track record of treating litigants fairly and respectfully. As a trial judge, I fully understand how trials proceed and the important role that counsel plays. As Texas law provides, criminal defendants need to have trained counsel, resources for experts and investigators, and a fair trial from the judge and jury.

Moreover, I sometimes hear cases that involve incarcerated persons, many of them who are appearing *pro se*. I strive, within the confines of my role as a

judge, to make sure that they have an opportunity to bé heard. For example, I schedule conference call oral hearings in which they can participate so that I can make sure that I understand the points they are trying to raise in their motions. My record of community service in the areas of access to justice and administration of justice also has benefited those in the criminal justice system.

Appellate judges have an obligation to be careful and diligent in reviewing claims of those who allege that their rights of life and liberty have been abridged. My legal career demonstrates that I respect the rights of criminal defendants. If confirmed, I would be committed to the rule of law and the rights that the law provides to criminal defendants and all other litigants.

2. **Given your lack of criminal and appellate experience aside from one matter, what experiences will you draw upon and what steps will you take to prepare yourself to handle the complex criminal appeals that will come before you as a federal appellate court judge?**

Response: As noted above in answer to Question 1, I have had significant criminal experience in my legal career. In addition, as a judge, I have dealt with matters that relate to criminal issues. I regularly hear expunctions of criminal convictions, and I have dealt with Fifth Amendment rights in the context of testimony. I have also tried civil matters ancillary to criminal proceedings.

As to appellate advocacy experience, I have taught appellate brief-writing and oral advocacy both through the Board of Student Advisors at Harvard Law School and through my service as an Adjunct faculty member at the University of Houston Law Center.

With regard to the complexity of the criminal cases heard by the Fifth Circuit, I believe my experience working on complex antitrust matters as a lawyer and trying complex civil cases as a judge has equipped me to handle the complex criminal appeals that would come before me if I am confirmed.

3. **In *Gideon v. Wainwright*, 372 U.S. 335 (1963), a unanimous U.S. Supreme Court held that a state court's failure to appoint counsel for an indigent criminal defendant violated his Sixth Amendment right to counsel and the Due Process Clause of the Fourteenth Amendment. In an opinion by Justice Hugo Black, the Court held that the Sixth Amendment's right to counsel in a criminal case was a fundamental right essential to a fair trial.**

Unfortunately, those who cannot afford competent counsel too often find their liberty and lives placed in the hands of underpaid and inadequate court-appointed lawyers.

A. Do you believe that *Gideon* stands for the principle that such a fundamental right as the right to counsel must be applied in a way that it can be meaningfully exercised?

Response: *Gideon v. Wainwright,* 372 U.S. 335 (1963), is a seminal case in American jurisprudence. The Supreme Court held that a defendant had the right to appointed counsel and that failure to have an appointed counsel deprived Clarence Earl Gideon of a fair trial under both the Sixth and the Fourteenth Amendments. *Id.* at 342. *Gideon* and its progeny lay out the parameters for the exercise of this right.

B. In 1984, the U.S. Supreme Court held in *Strickland v. Washington*, 466 U.S. 668 (1984), that a criminal defendant's Sixth Amendment right to counsel is the right to the effective assistance of counsel. Do you believe our Constitution allows even truly guilty defendants to have access to an ineffective assistance of counsel claim, or only those for whom the outcome of a trial was truly prejudiced?

C. In your personal view, does *Strickland* allow courts to defer to strategic judgments of counsels who were aware of mitigating evidence? What about cases where a defendant's counsel failed to investigate mitigating evidence?

Response: B. and C. The Supreme Court has held that every criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). How *Strickland* should be applied in cases involving counsel's knowledge or use of mitigating evidence is a matter that might come before me as a judge, and it would be inappropriate for me to opine on it except to state that I would faithfully apply precedent in this area. Rights guaranteed to the accused under the Constitution do not vary depending on the person's guilt or innocence.

3. Last term, the U.S. Supreme Court heard two cases involving the use of race as a factor in student assignments to public schools. In the consolidated opinion of *Parents Involved in Community Schools v. Seattle School District No 1, et al.*, 127 S. Ct. 2738 (2007), a 5-4 decision, the Court struck down school assignment plans from school districts in Seattle, Washington and Louisville, Kentucky that used race to achieve diversity in public education.

A. Although Justice Kennedy provided the crucial fifth vote to strike down the school plans at issue, he wrote a concurring opinion accepting that achieving diversity and overcoming racial isolation in public schools are compelling interests. Do you consider Justice Kennedy's concurring opinion in the school race cases the controlling opinion in that case?

Response: In *Marks v. United States.*, 430 U.S. 188, 193 (1977), the Supreme Court held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as the position taken by those Members who concurred in the judgment on the narrowest grounds.'" (citations omitted). I would apply this analysis to Justice Kennedy's concurring opinion in *Parents Involved in Community Schools v. Seattle School District No. 1,* 127 S.Ct. 2738, 2788-97 (2007).

B. In the school integration cases, Chief Justice Roberts stated that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race." Do you agree? Why or Why not?

C. Justices have long debated whether our Constitution is color-blind or color-conscious. In *Brown v. Board of Education*, 347 U.S. 483 (1954), the landmark ruling that "separate-but-equal" schools are unconstitutional, a unanimous Supreme Court announced that the U.S. Constitution "prevents states from according differential treatment to American children on the basis of their color or race." Yet, in the recent school integration cases, a ruling that struck down schools plans designed to integrate students, Chief Justice Roberts suggested that *Brown* stands for the principle that "no State has any authority under the equal protection clause . . . to use race as a factor in affording educational opportunities among its citizens." Where do you stand on this issue? In your view, does *Brown* stand for the principle of an affirmative duty to integrate public schools or the principle that race cannot be a factor under the Equal Protection Clause?

Response: B. and C. Racial discrimination has a long history in this country and continues to be a serious issue. School boards, principals, legislators, and others grapple daily with the challenges posed by schools in many areas that are becoming increasingly racially imbalanced some fifty years after *Brown v. Board of Education*, 347 U.S. 483 (1954). Having served *pro bono* as General Counsel of Communities in Schools Houston, a dropout prevention organization with a large presence in inner city schools, I know firsthand some of the challenges faced. Moreover, I have been personally involved in the Houston Bar Association's efforts to commemorate the Fiftieth Anniversary of *Brown*. I went to elementary schools in different parts of the county and read the stories of Linda Brown and Ruby Bridges to students so that they could understand the impact that the decision had and the struggles that these children faced.

In *Parents Involved in Community Schools v. Seattle School District No. 1,* 127 S.Ct. 2738 (2007), the Supreme Court held that race cannot be used as the sole factor to determine admission to public schools. *Id.* at 2753-53. Justice

Kennedy's concurrence does leave open other means to achieve diversity in public schools under certain circumstances. *Id.* at 2797.

Chief Justice Roberts' observation in dicta that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race" is part of his plurality opinion, not the majority opinion, and as such is not binding precedent. *Id.* at 2768.

If confirmed to the Fifth Circuit, I would faithfully apply precedent in this area.

D. Do you believe a racial classification is always and intrinsically bad, or is a racial classification only harmful when used to subordinate or stigmatize a group?

Response: As a judge, my duty is to faithfully follow precedent, not to shape the law to fit my own public policy preferences. I will follow Supreme Court precedent in this area as in all others.

4. You issued a prior restraint enjoining Houston news stations KTRK from broadcasting a story on a local television evangelist Benny Hinn. According to a March 2, 2005 story in the *Houston Chronicle*, in granting the TRO request, you ruled that the attorney-client privilege outweighs KTRK's right to broadcast information. The next day, State District Judge Kent Sullivan overturned your order and allowed KTRK to air the information contained in the law firm's document.

A. In *Nebraska Press Assn v. Stuart*, 427 U.S. 539 (1976), the Supreme Court made it clear that "prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights." Yet, in the Hinn case you found that an evidentiary privilege outweighed the fundamental right to free speech and free press. Given that the Supreme Court has ruled for over 75 years, since *Near v. Minnesota*, 283 U.S. 697 (1931), that attempts to censure the media carry a presumption of unconstitutionality, how do you explain your ruling granting the TRO?

Response: On February 24, 2005, I was sitting as ancillary court judge in Harris County, when attorneys appeared before me for a hearing on a temporary restraining order. This case had just been filed. In Harris County, the civil district judges rotate the ancillary judge assignment, each of us hearing emergency matters for all of the civil courts for two weeks of the year. During the ancillary assignment, the ancillary judge wears a pager twenty-four hours a day to be available for hearings on applications for temporary restraining orders (TROs) and other emergency matters. In general and where possible and legally

appropriate, the ancillary judge tries to preserve the status quo until the judge who has been assigned the case can hear the issues on their merits.

The Texas Rules of Civil Procedure specifically provide that TROs may be issued *ex parte* and that the party against whom the TRO is issued has an immediate right to have a hearing on a motion to dissolve a TRO once issued. TEX. R. CIV. P. 680. TROs are generally issued for fourteen days and the orders reflect a date and time certain for a hearing on a temporary injunction that is selected by the judge of the court who will hear the case after the ancillary hearing has taken place. If the parties do not appear for a hearing on the temporary injunction, the TRO expires on its own no later than fourteen days after it is issued unless it is extended pursuant to the Rules.

In the *Brewer* case, the plaintiffs presented an application for a TRO and attached affidavits in support of the relief sought. The plaintiffs were an attorney and a law firm, who represented a client. The plaintiffs argued that the document had been stolen from the attorney's safe and concerned an on-going criminal investigation of the attorney's client. The matter was presented as an issue of first impression for a Texas court, and was alleged to involve not only the First Amendment rights of the television station that sought to air the document, but also the Fifth and Sixth Amendment rights of the client. In addition, the plaintiffs invoked the attorney-client privilege.

The plaintiffs sought to prevent airing of the contents of the allegedly stolen document until such time as a hearing could be held on the merits, so that the court could weigh the rights and privileges at issue. The plaintiffs argued that if the airing of the document was not delayed until after a proper hearing, then the client's rights in the on-going criminal investigation would be violated. However, what the plaintiffs sought was a prior restraint of speech, even if it was just temporary. As a matter of law, the presumption is against any prior restraint on speech, and this presumption must be overcome in order to justify even a temporary restraint. The presumption against prior restraints is an important one, and it reflects the significance of the First Amendment and the rights of a free press in a free society.

After reviewing the evidence and the relevant authority, I signed an order on February 24, 2005, granting a TRO, in order to preserve the status quo and to permit the district court judge who had been assigned the case to conduct a full evidentiary hearing in which he would balance these important issues of first impression in Texas. Thereafter, I did not receive any calls on my pager or motions to immediately dissolve the TRO pursuant to the Rules. On March 1, 2005, approximately five days later, the defendant news station filed a motion to vacate the TRO or to immediately convene the temporary injunction. Judge Sullivan, the judge to whose court the case had been randomly assigned, consolidated the hearing on the motion to vacate the TRO with the temporary injunction hearing. On March 3, 2005, following a full

evidentiary hearing, Judge Sullivan signed an order dissolving the TRO and denying the temporary injunction.

At the February 24, 2005 hearing on the motion for the TRO, I considered authority in support of the application. In one case from the South Carolina Supreme Court, a television station sought to broadcast a privileged, attorney client communication between a criminal defendant and his attorney. *Ex Parte: The State Record Co., Inc. v. In Re: State of South Carolina v. Quattlebaum*, 332 S.C. 346 (1998). In that case, the South Carolina Supreme Court upheld the lower court's issuance of the prior restraint. The lower court in that case had granted an *ex parte* TRO preventing the dissemination of the communication until a hearing could take place. *Id.* at 348. Later, a hearing took place and the lower court extended the TRO until the jury could be empanelled and sequestered. *Id.*

As the Supreme Court of South Carolina observed, the Court was

> faced with a profound dilemma: whether to uphold a prior restraint upon the media's First Amendment right of free speech, a task which carries with it an extremely heavy burden upon the party seeking to limit the speech, or whether to invalidate the prior restraint placing in jeopardy the fundamental right of a defendant to a fair trial pursuant to the Sixth Amendment. We are faced with the added quandary that the information sought to be disseminated by the media is a privileged communication between a criminal defendant and his attorney.

Id. at 350 (citations omitted).

The Supreme Court of South Carolina also observed that "a number of lower courts have held that a defendant's Sixth Amendment right to a fair trial is superior to the right of free speech and that, where the two rights collided, the latter must give way to the former." *Id.* at 351 n.12.

In another case cited at the hearing on the TRO, the Eleventh Circuit Court of Appeals affirmed a TRO issued by the United States District Court for the Southern District of Florida that had enjoined a cable news network from broadcasting tapes of privileged communications between an accused and his lawyers until they could be reviewed by a federal magistrate. *United States v. Noriega*, 917 F.2d 1543 (11th Cir. 1990). The Eleventh Circuit then remanded the case to the district court to "conduct the difficult balancing of constitutional rights required under these circumstances...." *Id.* at 1552.

Although the situation at issue at the hearing at the TRO was apparently a matter of first impression in Texas, I also consulted authority in Texas. *E.g.*, *Garth v. Staktek*, 876 S.W.2d 545 (Tex. App. --Austin, 1994 writ dism'd w.o.j.) (affirming the district court's granting of a temporary injunction in a

trade secret matter). In *Garth*, Judge Bea Ann Smith, writing for the Austin Court of Appeals observed that

> Texas law begins with the presumption that prior restraints on free speech are unconstitutional. However, prior restraints may be permitted to prevent an imminent and irreparable harm, so long as no less restrictive alternative form of protection is available. In *Davenport*, the Supreme Court held that a gag order would be permitted if imminent and irreparable harm to the judicial process will deprive litigants of a just resolution of their dispute.

Id. at 549-50. (citations omitted).

B. Why did you not include Judge Sullivan's reversal of your TRO ruling in your Senate questionnaire, as the questionnaire specifically asks that you list "orders where your decisions were reversed"?

Response: As noted above, Judge Sullivan, who presided over the 80th District Court, did not reverse my decision. He held an evidentiary hearing after consolidating the motion to vacate the TRO with the motion to deny the temporary injunction. This is exactly what my ruling preserving the status quo was designed to permit. Following that hearing, he dissolved the TRO and denied the temporary injunction. Moreover, as a judge of a sister court, Judge Sullivan could not reverse my decision as an appellate court could. As I understood it, the questionnaire sought out information about appellate reversals, which I have provided.

5. At your hearing, you compared the role of a federal judge to an umpire, saying umpires don't make the rules; they simply call "balls and strikes." However, unlike trial judges, federal appellate judges don't just decide the cases that come before them. Appellate judges also create binding precedent and ensure that the body of law for a circuit is clear and consistent. Since the Supreme Court only hears around 80 cases a year, the precedents created by appellate courts are most often the binding authority trial judges follow.

As in baseball where different umpires may see different strike zones, a panel of judges may have a multitude of views on the meaning of constitutional provisions and federal statutes. Given your limited appellate experience, how will you approach working on an appellate panel where different judges view precedent and law differently?

Response: As a law clerk assisting a judge assigned to hear cases on the Fifth Circuit, I have seen firsthand how judges on the Fifth Circuit work together on appellate panels. Importantly, judges have to read the briefs and the records carefully, research the case law, and listen to their colleagues. I have worked with other judges on numerous administrative procedures matters and in other contexts,

such as serving on Texas' Pattern Jury Committee, which edits and revises jury instructions for use throughout the state. My colleagues on the civil bench in Harris County have shown confidence in my abilities to work with others and my diligence by asking me to chair their Judicial Education Conference for the past two years. Therefore, I believe that I would bring the proper level of respect for the views of others to the Fifth Circuit if confirmed.

6. **The Fifth Circuit Court of Appeals has historically been on the vanguard in protecting the civil rights of Americans. In the wake of the *Brown* decision, Fifth Circuit judges took a prime role in tearing down the fabric of a Jim Crow society and extended *Brown*'s promise of equality from education to other areas like voting rights, transportation, and other accommodations.**

   A. **You are a member of the Federalist Society, a conservative organization that has traditionally believed that judges should be strict constructionists who "interpret the law, not make the law." Judge John Minor Wisdom, a legal giant of the Fifth Circuit, believed an appellate judge should also have a social consciousness. In a February 2002 speech to Loyola Law School, entitled *Four Louisiana Giants of the Law*, Justice Ruth Bader Ginsburg remarked that "Judge Wisdom never disregarded legal rules he found unaccommodating or tried to chisel his own view of right and wrong into an unyielding body of law. Instead, he used his unrivaled mastery of traditional legal analysis to achieve just, yet law-bound, results." In your personal view, are notions of basic fairness and justice incompatible with achieving law-bound results?**

Response: Notions of basic fairness and justice are compatible with achieving law-bound results. In my background, I have had a number of opportunities to represent minorities and to advocate for the poor and powerless. For example, I have chaired the board of Lone Star Legal Aid (formerly the Gulf Coast Legal Foundation), one of the largest legal aid providers in Southeast Texas. I heard firsthand the struggles that the legal aid lawyers faced. Since taking the bench, I have taught trial advocacy skills to legal aid lawyers and have been given a commendation from the Texas Access to Justice Commission for this work.

As I mentioned in my hearing, I helped a high school student's parents come from Mexico to see her graduate with honors. I also represented *pro bono* an African-American man and his partially-disabled son, in a case brought on a contract for deed. They came very close to losing their home, but we were able to get a temporary injunction to prevent their eviction.

I represented a historic African-American church that provided services to the poor in the Fourth Ward, in a lawsuit involving property tax issues. I also represented an organization that restores homes in a historically African-American neighborhood and provides services to the community. In addition, I served *pro bono* as the General Counsel of Communities in Schools

Houston, one of the largest dropout prevention groups in the nation, a group servicing children from disadvantaged backgrounds. In recognition of my *pro bono* work, I was honored to receive the Thomas Gibbs Gee Award, named for the deceased Fifth Circuit Judge.

As a judge, I have presided over numerous cases involving issues important to a diverse, large community. I have received excellent ratings for my legal rulings and for my judicial temperament. In addition, I continue to meet with a variety of community groups in order to help people in a way that is consistent with my duties as a judge. The first group that I spoke to when I became a judge was the South-Asian Bar Association. I have also participated in events with the Asian-American Bar Association of Houston, the Mexican-American Bar Association of Texas, the Hispanic Bar Association of Houston, the Mexican-American Bar Association of Houston, the Association of Women Attorneys and others.

I was also privileged to co-chair the Barbara Jordan Project on behalf of the Houston Young Lawyers Association. The Barbara Jordan Project is a tribute to the great civil rights leader and Congresswoman, Barbara Jordan. As part of this project, middle school students study the speeches and life of Barbara Jordan and then compose their own speeches and present them at a downtown theatre. For my work in the community and professionalism, the Houston Young Lawyers presented me with the Woodrow Seals Award, named for the deceased judge who served on the Southern District of Texas.

Moreover, each year that I have been on the bench, I have sponsored a legal internship program designed for students from inner city schools to come to the courthouse to learn about their legal rights and careers in the law. I believe my record overwhelmingly demonstrates that I have a social consciousness committed to fairness and justice for all.

B. In the post-*Brown* era, a time when the Fifth Circuit was the principle judicial protector of civil rights, some Americans criticized that court for judicial activism. Similarly, when the Supreme Court issued the *Brown* decision in 1954, some Americans protested with "impeach Earl Warren" signs on their front lawns. Even in recent times, conservative scholars like Thomas Sowell have commented that the *Brown* decision had "flimsy and cavalier reasoning . . . that would hardly sustain a conviction for jay-walking, set a pattern of judicial activism that has put American law in disarray on all sorts of issues that extend far beyond racial cases." Do you agree that the Supreme Court's decision in *Brown*, which overturned almost fifty years of the "separate-but-equal" precedent, was an act of judicial activism?

Response: *Brown v. Board of Education* is one of the most important decisions of the Twentieth Century. The term "judicial activism" means different things to

different people. To some people, it means overturning legislation for any reason at all. Others understand it to mean that reversing a law because it conflicts with a constitutional protection is the duty of a judge. When *Brown* overruled *Plessy, Plessy* had already been undermined in part by the *Sweatt* decision. The Court in *Brown* ruled that *Plessy* did not reflect the framers' intent in crafting the Fourteenth Amendment, which granted broad protections based upon race. Thus, under the Court's analysis, *Brown* was not a departure from the law, but a return to the faithful application of the Fourteenth Amendment.

C. Judge J. Skelly Wright, the former Chief Judge of the D.C. Circuit and a district court judge in the Eastern District of Louisiana, displayed heroism in the 1950s by signing orders desegregating public schools in New Orleans – a feat which he accomplished at great risk to his own personal safety. Judge Wright was often labeled as a "judicial activist." In *Hobson v. Hansen*, 269 F.Supp. 401 (D.D.C. 1967), Judge Wright noted that courts should not be called upon to resolve "great social and political problems" that ideally should be resolved "in the political arena by other branches of government." Yet he also stated that "[i]f the legislature simply cannot or does not act to correct an unconstitutional status quo, the Court, despite all its incapacities, must finally act to do so." Do you agree? In your personal view, is it proper for courts to apply a higher level of scrutiny for legislation that discriminates against minorities or others who lack the power to seek redress through the political process?

Response: The Supreme Court has the power to decide cases and controversies. If a case presents an issue of unconstitutional conduct, even if it is tolerated by the status quo of society, the Court has a duty to rule against the unconstitutional conduct. The Supreme Court has specifically held that strict scrutiny is the appropriate analytical tool to use in cases involving discrimination based upon race.

D. Today, civil rights continue to be important in the Fifth Circuit. Although the Fifth Circuit currently has 19 judicial seats, it currently has only 1 African American judge and 3 Latino judges. Yet, the Fifth Circuit contains the states with the two largest percentages of African Americans (Mississippi and Louisiana, respectively) and a state with one of our nation's largest Latino populations (Texas). How can you assure us that as a circuit judge you will have an open mind in cases involving the rights of African Americans, Latinos, and other racial minorities?

Response: As explained in detail in response to Question 6A, I have had a number of opportunities to represent minorities and to advocate for the poor and powerless.

7. **Please describe any times when, as an advocate, you have taken an unpopular viewpoint on behalf of a client. Please describe any *pro bono* case in which you defended the rights of poor individuals or members of racial minorities.**

Response: As described in answer to Question 6A, I have had a number of opportunities to defend the rights of poor individuals and members of racial minorities. As noted above, I also served as the Chair of the Board of the largest legal aid provider in Southeast Texas and helped shepherd the organization through a complex merger that was required by changes in the law.

In addition, my representation of high school students in a First Amendment case was one that was unpopular in some circles. The school wanted to be able to ban the students wearing of the rosary beads. Moreover, some religious persons did not believe that people should wear rosary beads at all. Thus, the students and their counsel were criticized.

8. **You have given at least one speech on "The Importance of Each Branch of Government," but the text of that speech was not furnished to this Committee. What is your view on the proper balance of power in the federal system?**

Response: I have provided the Committee with my notes regarding the importance of each branch of government. The speech was given to students as part of an ABA/HBA educational project, and I also used materials provided by the ABA and the HBA.

The framers were very wise in setting up a system in which each branch of government has separate powers and functions. The judicial branch's function is to interpret the laws, the executive branch executes the laws, and the legislative branch makes the laws. All three branches are equal, and the judicial branch should be modest and should not undertake to legislate or execute the laws.

However, the judicial branch does have an important function. Since *Marbury v. Madison*, 5 U.S. 137 (1803), the judicial branch has served as a check and balance to the other two branches of government, just as the other branches serve as a check and balance to the judicial branch. For example, in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), Justice Jackson articulated a framework for the courts to use in evaluating conflicts between the executive and legislative branches. Under the framework, the President's power is at its highest where the President is acting with the express or implied assent of Congress, and its lowest when the President is defying Congress. The middle position, where Congress is silent is also addressed in the framework. Likewise, in *United States v. Nixon*, 418 U.S. 683

(1974), the Supreme Court held that the executive privilege does not provide a blanket exemption in criminal cases.

9. **This Administration has repeatedly expressed its view that the "unitary executive" doctrine licenses the White House to overrule and bypass Congress and the courts based on the President's interpretation of the Constitution – even where that interpretation violates the law. For example, Congress passed a law containing Senator McCain's amendment restricting the use of torture when interrogating detainees, which the President signed. Later, the President issued a signing statement asserting that his power as Commander-in-Chief allows him the authority to bypass the very law that he signed. Also, from 2002 to January 31, 2007, the President unilaterally authorized the National Security Agency to conduct warrantless surveillance without following the law requiring court approval for these wiretaps.**

   A. **What are your views on the unitary executive theory? Do you believe our Government can embrace the unitary executive theory while remaining true to our system of checks and balances?**

Response: The Supreme Court has articulated the scope of presidential power over the executive branch and its limitations in a series of cases including *Myers v. United States*, 272 U.S. 52 (1926), *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and *Morrison v. Olson*, 487 U.S. 654 (1988). If presented with a case involving presidential power within the executive branch, I would faithfully follow precedent in this area just as in any other area.

   B. **In *Marbury v. Madison*, 5 U.S. 137 (1803), then-Chief Justice John Marshall announced that the U.S. Supreme Court is the final arbiter of our laws. In that case, Chief Justice Marshall announced that "It is emphatically the province and duty of the judicial department to say what the law is." Yet, in Congress's recent inquiry into who made the decision to fire eight U.S. Attorneys, the White House asserted that its blanket claim of executive privilege is the final word that neither Congress nor a court may review, arguing that a U.S. Attorney may not present a certified contempt claim to a grand jury where the President has asserted executive privilege. Do you share the White House's view that a claim of privilege is un-reviewable by a federal court? What role, if any, do judges have in preventing abuses of power by other branches of government?**

Response: Since *Marbury v. Madison*, 5 U.S. 137 (1803), the federal courts have played a very important role in articulating the constitutional limits of executive and legislative powers. In considering these types of issues, I would look to Supreme Court precedent such as *United States v. Nixon*, 418 U.S. 683 (1974)

(holding that the executive privilege does not provide a blanket exemption in criminal cases and that the privilege was reviewable by the court).

10. The U.S. Court of Appeals for the Fifth Circuit rules frequently on death penalty cases and has often been reversed on such cases by the U.S. Supreme Court. In 2005, in *Miller-El v. Dretke*, 545 U.S. 231 (2005), a case in which prosecutors used peremptory challenges to strike 10 of 11 African-American jurors in a capital case, the Court stated in a 6-3 reversal that the Fifth Circuit's decision to uphold the death sentence "blinks reality." One year earlier, in *Tennard v. Dretke* 542 U.S. 274 (2004), which involved the execution of a man with an I.Q. of 67, the Court stated that "[t]he Fifth Circuit's test has no foundation in the decisions of this Court." Earlier in 2004, in *Banks v. Dretke*, 540 U.S. 668 (2004), which involved a prosecutor's failure to turn over exculpatory evidence, the Court reversed the Fifth Circuit 7-2, stating that "one can hardly be confident that Banks received a fair trial."

This past term, the Fifth Circuit was overruled by the Supreme Court in four capital punishment cases. Most recently, in *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007), the Court criticized the Fifth Circuit's use of a narrow standard for determining incompetence in a case involving a schizophrenic criminal defendant. In that case, the Court found that "[i]n our view the Court of Appeals' standard is too restrictive to afford a prisoner the protections granted by the Eighth Amendment."

In light of so many instances of the Supreme Court overruling the Fifth Circuit's death penalty jurisprudence, what assurances can you give this committee that as a Fifth Circuit judge you would not seek to narrow the rights of capital defendants?

Response: If confirmed, it would be my duty to carefully apply the Supreme Court precedent in the area of the death penalty such as that in *Miller-El*,*Tennar d*, *Banks*, and *Panetti*. It would also be my duty to carefully study the briefs and the trial court record in the death penalty cases that I would hear and to listen to the arguments and the discussions with my colleagues.

As noted above, I had the opportunity to work on a death penalty case in which the conviction was reversed by the Southern District of Texas, and that decision was affirmed by the Fifth Circuit. I understand the importance of a careful review of these cases. Also, as a trial judge, I understand how important it is to pay attention to the details of what goes on at trial. *Miller-El*, for example, involved a *Batson*–type situation that trial judges confront even on the civil side.

I believe that my record demonstrates that I would faithfully apply precedent in this area as in every other area.