QUESTIONS AND ANSWERS

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JEROME A. HOLMES
Direct Tel: 405.234.3245
Direct Fax: 405.272.5069

holmesj@crowedunlevy.com

June 28, 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Attached are my responses to written questions from Senator Leahy, Senator Kennedy, Senator Feingold, and Senator Durbin

Sincerely,

JEROME A. HOLMES

cc: The Honorable Patrick J. Leahy
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Responses of Jerome A. Holmes
Nominee to the United States Court of Appeals for the Tenth Circuit
to the Written Questions Submitted by U.S. Senator Patrick J. Leahy

1) **You have written numerous columns and letters to publications on such topics as affirmative action, discrimination, juror racial bias and school vouchers. In one column, you described raising concerns about racial prejudice at criminal trials as "harmful" because it "bolster[s] the cynical view that jurors vote along racial lines," which "undermines public confidence in the fairness of the criminal justice system." In fact, you argued that it is the focus on the problem of racial bias in jury selection – as opposed to the racial bias itself – that harms the criminal justice system, writing that this focus "may actually give the green light to jurors to exercise arbitrary power in the jury box when their racial number allow it, as they apparently did in the O.J. Simpson case."**

   A. **Do you agree that discrimination in a criminal trial serves to undermine the fundamental fairness of the proceedings?**

Response: Racism is a negative influence in any societal context. In certain circumstances, the U.S. Supreme Court has held that racial discrimination in criminal trials violates the U.S. Constitution. If confirmed, I would faithfully adhere to Supreme Court precedent.

   B. **Do you think that a jury chosen in part through the improper use of peremptory challenges meets the Sixth Amendment's guarantee of an impartial jury?**

Response: The question of whether the racially discriminatory use of peremptory challenges (i.e., the "improper use" of such challenges) is compatible with the Sixth Amendment's guarantee of an impartial jury has been the subject of U.S. Supreme Court decisions, including *Holland v. Illinois*, 493 U.S. 474 (1990). If confirmed, I would carefully following Supreme Court precedent and other controlling legal authorities on this issue.

2) **The Supreme Court has long recognized that racial bias in jury selection undermines constitutional guarantees to a fair trial, establishing in the landmark 1986 decision *Batson v. Kentucky* that striking jurors on the basis of race is unconstitutional. In contrast to your statement that accusations of racial bias are merely "cynical," *Batson* was based on evidence showing patterns of race discrimination in jury selection and has been upheld by the Supreme Court many times.**

   A. **How does your view that it is "harmful" and "cynical" to raise concerns about racial bias in jury selections comport with the Supreme Court's well-settled law that striking jurors on the basis of race is unconstitutional?**

Response: For clarification, please allow me to note that the referenced article did not express any general belief that accusations of racial bias are cynical or harmful. I used the term "cynical" in the article, which related to race and the jury system, to describe the view that "jurors vote along racial lines, irrespective of the evidence and the law." Of course, our system of jury trials is based on the notion that jurors do nothing of the sort. Moreover, in the same piece, I deemed specific allegations of racial bias to be "harmful" to the administration of justice because, in my view, they were clearly without factual support. I have never espoused the view that claims of racial bias are generally harmful to the justice system. If confirmed, I would give very serious consideration to claims of racial bias in jury selection and faithfully apply the holdings of *Batson* and its progeny.

B. In your view, in the balance between "public confidence in the criminal , justice system" and the commands of the Constitution, what principles win out? Doesn't following the Constitution's requirements of fairness and equality bolster public confidence in the criminal justice system?

Response: If confirmed, my responsibility would be to apply the Constitution as interpreted by Supreme Court and Tenth Circuit precedent. As noted above, I would give very serious consideration to claims of racial bias in jury selection and faithfully apply the holdings of *Batson* and its progeny.

3) In a newspaper column you wrote after the Supreme Court's 2003 decision upholding the University of Michigan's Law School's limited use of race and ethnicity in admissions, *Grutter v. Bollinger*, you criticized the Supreme Court for missing an "important opportunity to drive the final nail in the coffin of affirmative action" and said, "[t]he court did not go far enough: Affirmative action is still alive." In addition, you described affirmative action scholarship programs as involving classifications that are "constitutionally dubious and morally offensive."

A. Given your legal view that affirmative action programs are "constitutionally dubious," and should be eliminated, how can you assure us that litigants appearing before you in affirmative action cases would get a fair hearing?

Response: Throughout my career, I have demonstrated the utmost respect for the rule of law and adhered to the highest standards of professionalism and legal ethics in my dealings with all participants in the legal process, particularly opposing counsel and their clients. For example, as a prosecutor, I took to heart the words of the U.S. Supreme Court in *Berger v. United States*, 295 U.S. 78, 88 (1935) (describing a prosecutor as "in a peculiar and very definite sense the servant of the law"). If confirmed as an appellate judge, I would continue my course of conduct in displaying the utmost respect for the rule of law and all litigants who would appear before me. The result would be an even-handed application of legal principles in the affirmative action context, as well as in other areas.

B. As an appeals court judge, how would you address the conflict between your own legal conclusion about what the Constitution demands and the conclusions reached by the Supreme Court in its decisions?

Response: If confirmed as an appellate judge, in litigation involving affirmative action, I would faithfully follow the governing law as expressed in U.S. Supreme Court opinions and other legal authorities. It would be my solemn duty to do so. My personal views on affirmative action would not be a factor in the decision-making process. In addition, judges must decide each case on its merits, based on the specific facts and applicable law.

4) **In an article in *The Economist*, you criticized African-American civil rights leaders for maintaining what you described as a "socially-constructed colour line..." In another publication, you dismissed a doctor's race discrimination complaint based on his colleagues' "negative reactions to his dreadlocks" as "naïve."**

Given your comments belittling concerns about the persistence of race-based barriers in this country, how will you maintain objectivity when applying constitutional and statutory remedies for race discrimination? What about when fact patterns arise similar to those you have dismissed as "naïve"?

Response: I recognize a clear line of demarcation between considering claims of race-based barriers (a) in the context of periodical opinion pieces, and (b) in a setting in which I would be called upon, if confirmed, to assess and rule upon the legal sufficiency of such race-based claims. In the latter adjudicative setting, my personal views would be irrelevant. My solemn obligation would be to give the parties a fair hearing and to follow the applicable law. The U.S. Constitution and controlling legal authorities would provide the objective standards that would guide and define the boundaries of my decision-making.

5) **You have been an outspoken critic not only of affirmative action programs and efforts to combat race discrimination, but of African-American civil rights leaders who support them, calling them "ideologically bankrupt." You have called into question the sincerity of civil rights organizations opposed to school vouchers by describing them as having "longstanding ties to school employee labor unions, which view vouchers as a dangerous threat to the educational status quo, in which teachers bear little or no accountability for their students' educational failures." In another article, you described a defense attorney's concerns about racial bias in jury selections as "philosophically offensive."**

If confirmed, is that how you will treat litigants appearing before you with whom you disagree? What about disagreements with fellow judges sitting with you on appellate panels?

Response: If confirmed as an appellate judge, I would treat litigants who would appear before me with the utmost respect and civility. During the course of my career, I have consistently treated all participants in the legal process in this manner. As a judge, my solemn obligation would be to fairly adjudicate the claims of the parties under the applicable legal standards. In this significant respect, as well as many others, the role of the judge and the role of the opinion-article writer are very different. If confirmed, I would strive to build and maintain a collegial environment with my fellow judges. I have served on the boards of numerous legal and civic organizations and have been effective at building consensus and fostering a positive work environment.

6) **For more than two years, you were a member of the Men's Dinner Club of Oklahoma City, the membership of which is restricted to men. You did not resign your membership until February 2, 2006, less than two weeks before your initial nomination to be United States District Judge for the District of Oklahoma.**

A. You asserted in your questionnaire that you did "not perceive the Club as practicing invidious discrimination." If not, what types of actions comprise discrimination with which you would not want to be associated?

Response: I condemn in the strongest terms any form of invidious discrimination. I would not knowingly be a member of any organization that harbored or expressed any bias against women, or any other groups on the basis of immutable characteristics. In particular, I would not be a member of any organization that limited in any material way the professional opportunities in the community (including networking opportunities) of women, or racial and ethnic minorities, by virtue of the impact of its membership restrictions. When I joined the Men's Dinner Club, I did not perceive it to be such an organization. Its membership consisted of widely respected business, community, and government leaders, including at least two judges of Oklahoma's courts of last resort. I recognized in February 2006 that some might perceive the Men's Dinner Club as being an improper organization of the kind discussed above. That was unacceptable to me. I would not allow my association with any group to even raise a suggestion that my condemnation of invidious discrimination is anything less than unequivocal. Accordingly, I resigned.

B. Given your membership in a gender exclusive club, how can you assure us that, if confirmed, you will fairly approach claims of gender discrimination and inequality?

Response: My personal experience should provide some assurance. I have suffered racial prejudice in my life. I also have endured the negative feelings that come from being treated as an outsider because of an immutable characteristic – in my case, race. This experience has caused me to abhor invidious discrimination, including discrimination on gender grounds. Further, it has contributed to my interest in assuming a leadership role in the diversity initiatives of my law firm, Crowe &

Dunlevy. I am Chair of its Diversity Committee. One element of the Committee's charge is the consideration of initiatives that will ensure that the firm continues to be a leader in Oklahoma in the retention and promotion of women. Lastly, I believe that my professional record including my time as a federal prosecutor clearly demonstrates that I am firmly committed to the rule of law and the fair treatment of all participants in the legal process. If confirmed, I would faithfully follow the governing law with regard to gender discrimination claims.

Responses of Jerome A. Holmes
Nominee to the United States Court of Appeals for the Tenth Circuit
to the Written Questions Submitted by U.S. Senator Edward M. Kennedy

You've been quoted as saying that the statement society sends by executing a convicted murderer "is not materially diminished by the fact that in the implementation of the death penalty mistakes are made."

Q: How do you think the court system should address the possibility of mistakes in the imposition of the death penalty?

Response: At the trial and appellate levels, federal judges should strive to ensure that the death penalty is imposed only in the context of proceedings that are completely fair and that afford the defendant the full panoply of rights the defendant is entitled to under the U.S. Constitution and other laws.

Q: Do you think the current system has sufficient safeguards against mistakes in imposing capital punishment? How do you respond to the increasing number of death row inmates exonerated by DNA evidence? What safeguards are necessary to protect innocent people from execution?

Response: Respected commentators have voiced serious concerns about the adequacy of safeguards against mistakes in the death penalty system and have pointed in particular to cases where state court defendants on death row have been exonerated by DNA evidence. This is a matter for policymakers to consider. However, if confirmed, I may be called upon to rule on the legal adequacy of death penalty safeguards. In doing so, I would be obliged to carefully follow U.S. Supreme Court precedent and other controlling legal authorities. Judicial review is itself a safeguard to protect the rights of all defendants. If confirmed, I would work tirelessly to ensure that the constitutional rights of the defendants in cases before me were protected.

Q: How do you feel about racial disparities in the criminal justice system, such as differences in the length of sentences and in the imposition of the death penalty? Is racism a negative influence in the system?

Response: Racism is evil. Insofar as it exists in any societal system, it would be a negative influence. Legal scholars and practitioners have discussed and debated the implications of racial disparities in the criminal justice system. Such disparities have been, and will likely continue to be, the basis for litigation. If confirmed, I may be called upon to rule on claims based upon racial disparities. Therefore, as a judicial nominee, I respectfully submit that it would be inappropriate for me to offer my personal feelings about racial disparities.

At your hearing, you testified that you would be able to set aside your personal views and ideology in order to follow legal precedent. You said, "I recognize very clearly the distinction between the role of a writer on society policy issues in their personal capacity and the role of a judge in adjudicating rights and liberties of individual litigants, and in that latter role it is inappropriate for me to import my personal views on policy issues into the decision-making process."

Q: In your columns entitled, "The Court Misses An Opportunity," Daily Oklahoman, July 2, 2003 and "A Step Closer to King's Dream," The Daily Oklahoman, Jan. 19, 2004, please identify any statements which express your personal views that were inconsistent with the law on affirmative action at the time these columns were published. Describe how your personal views were inconsistent with the law.

Response: If confirmed, in litigation involving affirmative action, I would faithfully follow the governing law as expressed in U.S. Supreme Court opinions and other legal authorities. My personal views on affirmative action would not be a factor in the decision-making process. Accordingly, as a judicial nominee, I respectfully submit that it would not be appropriate for me to detail my views on affirmative action and compare and contrast them with existing

law on the subject. If confirmed, I would be obligated to follow the law in the affirmative action area (and in other areas as well), and I would do so.

At your hearing, it was mentioned that you chair your law firm's diversity committee. When did you become chair of that committee? What are the objectives of that committee? On its website, Crowe & Dunlevy states that the firm is a leader in "hiring and promoting the best and brightest lawyers that are women, racial and ethnic minorities or physically disabled."

Response: Approximately a little more than a month after I joined Crowe & Dunlevy in August 2005, the Diversity Committee was born out of discussions between me and several Directors of the firm, including the immediate past President of the firm. When it was established, in approximately late September 2005, the Diversity Committee was an informal initiative of the then-President. I was asked to Chair the Diversity Committee at that time and I agreed to do so. In April 2006, in large part to underscore the importance of diversity to the firm, the Diversity Committee became a formal standing committee of the firm. I was a key participant in the discussions that led to this positive change. The new firm President asked me to assume the Chair position of the Diversity Committee and I agreed to do so. From its conception through the present, the Diversity Committee primarily has focused on coordinating and participating in the firm's efforts (a) to recruit and retain top-notch lawyers who are racial and ethnic minorities; and (b) to be a leader in promoting diversity in the Oklahoma legal profession, including supporting certain initiatives to increase the number of racial and ethnic minority lawyers in Oklahoma.

Q: **As chair of the diversity committee, do you work to accomplish those goals?**

Response: I have worked hard to accomplish the goals of the Diversity Committee. I have had numerous discussions with the leadership of the Recruitment Committee concerning strategies for recruiting racial and ethnic minority lawyers and have personally been involved in certain recruitment initiatives related to such lawyers. I have participated in the implementation of the Crowe & Dunlevy Minority Scholars Program under which two talented minority law students at the University of Oklahoma College of Law each receive

a $4,000 scholarship during each of their three years of legal study. I also have devoted numerous hours to coaching a mock trial team at a predominately African-American high school in Oklahoma City. This coaching endeavor reflects the firm's interest in increasing the size of the pool of racial and ethnic minority students who will be situated by virtue of education and interest to apply to law school and thereby enter the ranks of the legal profession.

Q: Are these actions consistent with your public condemnation of race-conscious practices?

Response: I would respectfully submit that my writings referenced in the question are consistent with the work I have done as Chairman of the Diversity Committee and as the mock trial coach at a predominantly African-American high school.

In your Questionnaire, you indicated that you were a member of a club whose membership was restricted to men. You indicated that you resigned, effective February 2, 2006.

Q: Did you communicate your resignation in writing? If so, please attach a copy of that letter. If you communicated your resignation orally, please indicate how you communicated your resignation and what was said.

Response: I communicated my resignation in writing and a copy of the letter is attached.

In response to your Questionnaire, you provide dates which indicate that President Bush forwarded your nomination less than two weeks after you submitted your resignation from the club.

Q: When did you first express in writing to the Oklahoma Senators your interest in a judicial nomination, as you stated you did in response to Question III.3 of your Questionnaire?

Response: I first expressed in writing to the Oklahoma Senators my interest in a judicial nomination on approximately January 22, 2005.

Q: On which date were you notified that you would be nominated to the district court position?

Response: I was notified that I actually would be President Bush's nominee for the district court position on approximately the same day my name was submitted to the U.S. Senate, February 14, 2006.

Q: What is your reason for failing to resign from the club any earlier than February 2, 2006?

Response: I condemn in the strongest terms any form of invidious discrimination. I have suffered racial prejudice in my life. I also have experienced the negative feelings that come from being treated as an outsider because of an immutable characteristic – in my case, race. I would not knowingly be a member of any organization that harbored or expressed any bias against women, or any other groups on the basis of immutable characteristics, or that otherwise engaged in invidious discrimination. In particular, I would not be a member of any organization that limited in any material way the professional opportunities in the community (including networking opportunities) of women, or racial and ethnic minorities, by virtue of the impact of its membership restrictions. When I joined the Men's Dinner Club, I did not perceive it to be such an organization. Its membership consisted of widely respected business, community, and government leaders, including at least two judges of Oklahoma's courts of last resort. I recognized in February 2006 that some might perceive the Men's Dinner Club as being an improper organization of the kind discussed above. That was unacceptable to me. I would not allow my association with any group to even raise a suggestion that my condemnation of invidious discrimination is anything less than unequivocal. Accordingly, I resigned.

Responses of Jerome A. Holmes
Nominee to the United States Court of Appeals for the Tenth Circuit
to the Written Questions Submitted by U.S. Senator Russell D. Feingold

1. **In a 2004 presentation to the Leadership Oklahoma Class XVIII, you stated that "the death penalty system nationwide ... is far from perfect," but that the mistakes made in its implementation do not materially diminish the statement society is sending through its enforcement – "that certain conduct and the perpetrators of it deserve to die." Further, you stated that "society has a strong interest in reinforcing the social contract with its members by making a clear statement that the conduct of the perpetrators is outside the conceivable bounds of anything the community can tolerate – that perpetrators have forfeited their right to live in our community."**

   (a) Given your statement to the Leadership Oklahoma class, are you concerned about the high rate of constitutional errors in capital punishment trials and sentencing proceedings? What about the demonstrated problem of innocent people being sentenced to death?

   Response: I am very concerned whenever the criminal justice system does not function with utmost fairness and in a manner that is designed to produce – to the extent that it is humanly possible – accurate outcomes. That concern is heightened in the death penalty area because of the finality of the sanction. If confirmed, I would seek to ensure that the due process rights of every defendant are protected.

   (b) You seemed to suggest that mistakes in a system of capital punishment are acceptable in order to "mak[e] a clear statement." Is executing an innocent person an acceptable mistake? What other kinds of mistakes are tolerable?

   Response: The criminal justice system should be administered in a manner that eliminates mistakes - to the extent that it is humanly possible - and yields accurate outcomes. If confirmed, I would work tirelessly to help ensure that the system functions in such a manner.

   (c) Do you believe that capital punishment is a deterrent to crime?

   Response: If confirmed, I would strive to ensure that the death penalty is imposed only in the context of proceedings that are fair and that afford the defendant the full panoply of rights the defendant is entitled to under the U.S. Constitution and other laws. The deterrent effect of the death penalty is a matter of significant debate in social science circles and is a factor for policymakers to consider. If confirmed, I would carefully follow the binding

precedent of the U.S. Supreme Court and other governing legal standards as to the death penalty.

(d) At the hearing, you stated that your job, as a judge, would be "to follow the law, to follow the precedent [that you are] bound by, the Supreme Court precedent," and that you "plan to do that, if confirmed." Other than your personal assurances, what in your record demonstrates that as a federal judge you will fairly and even-handedly consider cases where the death penalty is sought?

Response: Throughout my career, I have demonstrated the utmost respect for the rule of law and adhered to the highest standards of professionalism and legal ethics in my dealings with all participants in the legal process, especially opposing counsel and their clients. As a prosecutor, I took to heart the words of the U.S. Supreme Court in *Berger v. United States*, 295 U.S. 78, 88 (1935) (describing a prosecutor as "in a peculiar and very definite sense the servant of the law"). As I conceived of it, my job was not to obtain convictions but to ensure that the law was fairly and properly enforced as to particular defendants. To be sure, while a prosecutor, I was an advocate and argued on behalf of my client, the United States. If confirmed, however, I would no longer be an advocate and all elements of partiality would be removed from my decision-making process. Yet, as a judge, I would continue my course of conduct in displaying the utmost respect for the rule of law and all litigants who would appear before me. The result would be an even-handed application of legal principles in the death penalty context and in others as well.

2. In a 2002 *Daily Oklahoman* opinion piece, you acknowledge "that racial prejudice still exists in the jury box," but state that existing legal procedures, such as the *voir dire* process of judicial selection, sufficiently "excise the malignancy of racial bias" from jury deliberations.

(a) Is that still your belief?

Response: In 2002, I wrote articles and expressed opinions on legal issues as a private citizen. If confirmed, some of those issues - including questions relating to the constitutional sufficiency of the *voir dire* process - may come before me in the factual context of a particular case. Accordingly, I respectfully maintain that it would be inappropriate as a judicial nominee for me to offer personal opinions about the sufficiency of the *voir dire* process to address racial prejudice in the jury box. As a judge, I would be required to consider each case on its own merits, without prejudging any issues. I would carefully follow the binding precedent of the U.S. Supreme Court and other governing legal standards in assessing the sufficiency of the *voir dire* process in any particular case.

(b) What proof, in your view, would be adequate to demonstrate racial bias by a jury or juror, or in jury selection?

Response: If confirmed, I would scrupulously follow U.S. Supreme Court precedent and other controlling legal standards, in determining the appropriate quantum of proof to warrant a finding of racial bias by a jury or juror, or in jury selection.

(c) The use of peremptory challenges by both prosecutors and defense attorneys remains controversial because of the possibility of allowing racial bias to infect the jury selection process. Do you think that peremptory challenges present a problem in our criminal justice system?

Response: Whether the use of preemptory challenges is a problem in that it arguably contributes to the level of racial bias in the jury selection process is indeed a controversial topic that is debated by practitioners and legal scholars. If confirmed, however, this debate would play no role in my decision-making process. I would carefully follow the binding precedent of the U.S. Supreme Court and other governing legal standards as to preemptory challenges.

Responses of Jerome A. Holmes
Nominee to the United States Court of Appeals for the Tenth Circuit
to the Written Questions Submitted by Senator Richard Durbin

1. Mr. Holmes, you are an outspoken critic of affirmative action. You have written numerous articles and letters to the editor complaining about affirmative action. In the last four years, you have made the following statements:

- **"[Affirmative action] programs sow seeds of racial disharmony and seriously undermine efforts to unite Americans as one people."**
- **"[Affirmative action] policies necessarily divide us along racial lines, and establish a spoils system based upon skin color."**
- **"the [Supreme] court upheld the affirmative action policy of the university's law school. And in so doing, it missed an important opportunity to drive the final nail in the coffin of affirmative action."**
- **"shelving race-based scholarship programs . . . takes us one step closer to a time when constitutionally dubious and morally offensive racial classifications will no longer impede the progress of any citizen toward full achievement of the American dream."**

Section 455 of Title 28 of the United States Code states: "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

Based on the statements you have made expressing hostility to affirmative action, I question whether you would have an open mind on this issue and I believe your impartiality might reasonably be questioned in all cases and proceedings relating to affirmative action.

Others share this belief. In a June 14, 2006 letter written to the Senate Judiciary Committee expressing "grave concern" about your nomination, a broad coalition of civil rights organizations – including the NAACP, the NAACP Legal Defense & Educational Fund, the Mexican American Legal Defense and Educational Fund, the Leadership Conference on Civil Rights, the National Urban League, and many others – stated: "His criticism of affirmative action raises serious questions about whether litigants could expect him to rule impartially and fairly on claims that turn on legal principles of affirmative action, and about Mr. Holmes' approach to antidiscrimination laws more broadly, if he is confirmed."

Although you testified at your nomination hearing that "I would follow the law and I would follow the binding precedents and adhere to stare decisis" when it comes to affirmative action, many challenges to affirmative action are cases of first impression

without any precedents that are directly on point. In such instances, a judge's personal views on affirmative action inevitably come into play.

Question: If you are confirmed, will you agree to disqualify yourself in all cases and proceedings involving affirmative action and race-conscious programs?

Response: If confirmed, in litigation involving affirmative action and race-conscious programs, I would faithfully follow the governing law as expressed in U.S. Supreme Court opinions and other legal authorities. My personal views on policies relating to affirmative action and race-conscious programs would not be a factor in the decision-making process. Even if there were no governing law - that is, precedent directly on point - it would be inappropriate for a judge to rely upon personal views and I would not do so. I would employ well-settled principles of adjudication in seeking to arrive at the correct legal result: Among other things, I would focus on the language of the operative constitutional, statutory, or regulatory provision and look for guidance in the rulings of the Supreme Court and other courts on analogous issues. Accordingly, if confirmed, I do not believe that it would be appropriate for me to disqualify myself in all cases and proceedings involving affirmative action and race-conscious programs. Of course, I would always be careful if confirmed to assess whether any factors in a particular case involving affirmative action (or any other subject) required me to disqualify myself under the controlling statutory provisions and the Code of Conduct for United States Judges.

2. In its 2003 decision upholding the University of Michigan Law School's affirmative action program, the Supreme Court discussed the benefits of affirmative action in many different facets of U.S. society. Quoting from a brief filed by high-ranking retired officers of the U.S. military, the Court wrote: "a 'highly qualified, racially diverse officer corps ... is essential to the military's ability to fulfill its principle mission to provide national security.... At present, 'the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies.'"

Question: Do you agree or disagree with the position taken in the University of Michigan case by these high-ranking retired officers of the U.S. military? Please explain.

Response: If confirmed, it would be my solemn obligation to follow the governing law on affirmative action, including the U.S. Supreme Court's ruling in the University of Michigan case. Accordingly, I would respectfully submit that it would be inappropriate for me to express my personal views concerning elements of the Supreme Court's legal analysis in that decision.

3. In a 2002 article entitled "Victimization message misguided," you wrote that "Al Sharpton, Jesse Jackson and their ilk have little to offer me or other African-Americans in the 21st century. They continue to peddle a misguided and dangerous message of victimization.... As long as Jackson and company can successfully portray African-Americans as victims to the public at large, they'll be able to wring concessions out of educational institutions like Harvard University and corporate America."

Section 455 of Title 28 of the United States Code states: "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

Based on the statements you have made expressing hostility to Jesse Jackson and Al Sharpton, I believe your impartiality might reasonably be questioned in cases and proceedings in which they or their organizations are a party.

A. Question: If you are confirmed, will you agree to disqualify yourself in all cases and proceedings in which Jesse Jackson, Al Sharpton, or their organizations are a party?

Response: My personal opinions as expressed in editorial writings would play no role in the judicial decision-making process. If confirmed, in litigation involving the referenced individuals, or their organizations, I would carefully follow the governing law as expressed in U.S. Supreme Court opinions and other legal authorities. I would always be careful to assess whether any factors in a particular case involving these men or their organizations (or any other individuals or organizations) required me to disqualify myself under the controlling statutory provisions and the Code of Conduct for United States Judges.

B. Question: What concessions do you believe Rev. Jesse Jackson has wrung out of Harvard University, other universities, and corporate America? Please describe these concessions and explain why you disapprove of them.

Response: The referenced editorial was commenting upon Mr. Jackson's interactions with Harvard University's then President over the President's counseling of an African-American professor for claimed deficient academic performance. The purpose of the editorial was to discuss the inappropriate assertion of racial bias charges. If confirmed, my solemn obligation would be to fairly adjudicate the claims of litigants under applicable legal standards. Whether I personally approved or disapproved of their claims would be

irrelevant. In this significant respect, as well as many others, the role of the judge and the role of the opinion-article writer are very different. My prior writings on legal and social policy issues would have no bearing on my decision-making process, if I am confirmed as an appellate judge.

4. According to your Senate questionnaire, you were a member of an all-male organization called the Men's Dinner Club of Oklahoma City from 2003 until February 2006, when you resigned, in your words, "to avoid any possible suggestion of impropriety."

A. Question: Why does this club exclude women?

Response: I am not aware of the Club's reasons for excluding women.

B. Question: What efforts did you make, if any, to advocate for the inclusion of women in this club? If you made no such efforts, why do you believe that the club's exclusion of women was an acceptable policy?

Response: I came to the conclusion that the Club's policy of remaining all male was problematic. I would not knowingly be a member of any organization that harbored or expressed any bias against women, or any other groups on the basis of immutable characteristics. In particular, I would not be a member of any organization that limited in any material way the professional opportunities in the community (including networking opportunities) of women, or racial and ethnic minorities, by virtue of the impact of its membership restrictions. When I joined the Men's Dinner Club, I did not perceive it to be such an organization. Its membership consisted of widely respected business, community, and government leaders, including at least two judges of Oklahoma's courts of last resort

C. Question: Why do you believe that the exclusion of women from this club does not constitute invidious discrimination?

Response: I did not believe that the Club harbored or expressed any bias against women, or any other groups on the basis of immutable characteristics. Its membership consisted of widely respected business, community, and government leaders, including at least two judges of Oklahoma's courts of last resort. I never witnessed anything even remotely anti-female in the rhetoric or conduct of the Club's membership. Like me, many of the Club's members were members of other Oklahoma civic, business, and leadership organizations in which women constitute a significant portion of the membership and occupy leadership roles. I recognized in February 2006 that some might perceive the

Men's Dinner Club as being an improper organization of the kind discussed above. That was unacceptable to me. Accordingly, I resigned.

5. In your Senate questionnaire, you wrote: "The judiciary should not, however, attempt to usurp the role of the political branches through, for example, conceiving and implementing public policies from the bench, or issuing rulings that go beyond the resolution of the dispute before the court to impose wide-ranging obligations on societal groups."

A. Question: Please identify with specificity the "wide-ranging obligations on societal groups" you believe the judiciary has imposed.

Response: I was responding to the question in a general manner and was not referring to any particular circumstance.

B. Question: Please identify three cases from the past 50 years in which you believe the Supreme Court has "attempt[ed] to usurp the role of the political branches through . . . conceiving and implementing public policies from the bench." Please explain the basis for your belief.

Response: In my Senate Questionnaire response, I was not referring to the Supreme Court or any specific opinions. I was responding to the question in a general manner. If confirmed, I would be obliged to faithfully follow Supreme Court precedent. Accordingly, I respectfully maintain that as a judicial nominee it would be inappropriate for me to criticize that precedent.

C. Question: Do you believe that *Roe v. Wade, Brown v. Board of Education*, and *Miranda v. Arizona* are examples in which the Supreme Court "attempt[ed] to usurp the role of the political branches through . . . conceiving and implementing public policies from the bench"? Please provide a separate answer and explanation for each of these three cases.

Response: Each of the decisions cited in the question is an established precedent of the Supreme Court that has been subsequently reaffirmed. If confirmed, I would be obliged to faithfully follow Supreme Court precedent, including the three cited decisions. Accordingly, as a judicial nominee, I respectfully submit that it would be inappropriate for me to offer my personal views concerning the adjudicatory propriety of these decisions.

D. Question: Do you believe that *Roe v. Wade, Brown v. Board of Education,* and *Miranda v. Arizona* are consistent with "strict constructionism"? Please explain.

Response: If confirmed, I would be obliged to faithfully follow Supreme Court precedent, including the three cited decisions. Accordingly, as a judicial nominee, I respectfully submit that it would be inappropriate for me to offer my personal views as to whether these decisions are consistent with a particular school of judicial decision-making

6. In an article entitled "Why Oklahomans from A to Z Should Embrace School Choice," you set forth a zealous defense of school voucher programs. You criticized civil rights groups who oppose such programs and argued that because of their ties to school employee labor unions, "these African-American leaders may not be capable of impartially evaluating the merits of voucher programs."

In light of your own strong views about school voucher programs, if you are confirmed, litigants who came before you might also question your capability of impartially evaluating their merits.

Section 455 of Title 28 of the United States Code states: "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

Question: If you are confirmed, will you agree to disqualify yourself in all cases and proceedings involving school voucher programs?

Response: If confirmed, in litigation involving school voucher programs, I would faithfully follow the governing law as expressed in U.S. Supreme Court opinions and other legal authorities. My personal views concerning school voucher programs would not be a factor in the decision-making process. Accordingly, if confirmed, I do not believe that it would be appropriate for me to disqualify myself in all cases and proceedings involving school voucher programs. Of course, I would always be careful if confirmed to assess whether any factors in a particular case involving school vouchers (or any other subject) required me to disqualify myself under the controlling statutory provisions and the Code of Conduct for United States Judges.