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February 12, 2003

The Honorable Orrin G. Hatch
Chairman, Senate Committee on the Judiciary
The United States Senate
Washington D.C.

Dear Mr. Chairman:

I hereby submit my responses to written questions posed by Senator Durbin.

Sincerely,

Deborah Cook

Cc: The Honorable Patrick J. Leahy

**Responses of Justice Deborah Cook
To the Questions from Senator Richard J. Durbin**

1. You have authored over 300 dissents, many of which were sole dissents. Several of your own colleagues on the Ohio Supreme Court have accused you of taking positions that are unreasonable and unfair. In *Bunger v. Lawson* (1998), the majority called your dissent – which would deny remedies for a convenience store employee suffering serious psychological trauma after being robbed at gunpoint – “nonsensical” and “an absurd interpretation that seems borrowed from the pages of *Catch-22*.” In *Russell v. Industrial Commission of Ohio* (1998), a workers compensation case in which you voted to deny a hearing to an injured worker, the majority stated that your dissent, “lacks statutory support for its position” and “unable to cite even the slightest dictum from any case to support its view . . . [the] dissent’s argument, which has not been raised by the commission, the bureau, the claimant’s employer, or any of their supporting amici, is entirely without merit.” To my mind, these accusations represent something more than an honest difference of opinion. They suggest that a majority of your own colleagues believe that you are a results-oriented judicial activist. In light of the strong language your colleagues have used to describe your legal reasoning, how can this Committee have confidence that you won’t be a results-oriented judicial activist on the Sixth Circuit?

In my view, an impartial analysis of the majority opinions and the corresponding dissents in *Bunger v. Lawson Co.* (1998), 82 Ohio St.3d 463, 696 N.E.2d 1029 and *State ex rel. Russell v. Indus. Comm.* (1998), 82 Ohio St.3d 516, 696 N.E.2d 1069, would support my jurisprudential position in each and confirm that my dissents were not results-oriented judicial activism.

In writing the dissent in *Bunger*, I did not choose the law that imposed the “Catch-22”. It was the Ohio General Assembly that determined by statutory definitions that an employee could suffer a “bodily condition” that is not compensable as an “injury” yet an employer would nevertheless be immune from suit by that employee for the work-related “bodily condition” suffered. The Ohio statutes at bar in the *Bunger* case explicitly provided employer immunity that was broader than the employee compensability definitions. My dissent expresses no judgment regarding the wisdom of such legislation, just an honest reading of it. Indeed, the fact that this claimant was left without compensation from his employer for his psychological injury seems a harsh result. I based my dissent in this case, however, on the fact that a legislative body has wide latitude in determining the state’s public policy. It may be a policy choice with which some may disagree and even disdain. It is nonetheless within permissible bounds and I believe that it is the role of a democratically elected body such as the General Assembly and not the court to balance all the competing interests and determine the rules that necessarily dictate a certain outcome. I therefore felt bound to uphold the legislative choice.

The same rationale applies to *Russell*. There, I wrote in dissent because I believed that my view properly applied the facts to the law. My limited function as a judge in this case

did not include deciding which payment scheme I would favor, or which payment scheme was fairer. Instead I interpreted the statute as it was passed by the General Assembly. That interpretive process led to the conclusion that I reached.

2. You testified at your nomination hearing that the general assembly in Ohio is "a conservative legislature." (Transcript page 376.) Please explain what you meant by this statement and describe specifically those ways in which you believe it is conservative.

My comment was in response to questioning over my having dissented fairly often to Ohio Supreme Court majority opinions. My characterization of the Ohio General Assembly as conservative meant nothing more than that the labor organizations, trial lawyers, and criminal defense organizations in Ohio quite often disfavored the policy choices codified by that body. My impetus to dissent from majority opinions in many of the cases that the Senators questioned me about emanated from my considered judgment to uphold laws that these organizations sought to overturn. Examples include *Bunger*, *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St.3d 134, 677 N.E.2d 308, and *Genaro v. Cent. Transport, Inc.* (1999), 84 Ohio St.3d 293, 703 N.E.2d 782. The point I had hoped to make was that any implication that I disfavored particular persons or causes is simply not true. My decisions, including dissents, reflect an honest application of the law to the facts. If the laws enacted by the General Assembly restrict relief for work-related psychological injuries (*Bunger*), causes of action for intentional torts (*Johnson v. BP Chemicals, Inc.*, 85 Ohio St.3d 298, 707 N.E.2d 1107 (1999)), or remedies for whistleblowers (*Kulch*), as Ohio law did, my role is to uphold that law in the absence of a legitimate constitutional impediment.

3. As you know, your nomination is opposed by several organizations in Ohio that are very familiar with your record. A coalition of women's groups and employment lawyers organizations wrote to this Committee and said the following:

"Justice Cook's anti-worker voting record is becoming legendary in Ohio. Her opinions, with rare exceptions, espouse positions which would undermine the enforcement of state and federal civil rights laws. What is most striking about Justice Cook's career on the bench, particularly her tenure on our state Supreme Court, is her heartlessness. She repeatedly displays a cold indifference to the most tragic situations confronted by the individuals who appear before her. Worse, she routinely adopts strained or extreme legal propositions to deny meaningful relief to those most in need of justice from our courts."

(a) What is your response to these statements?

I simply do not believe that a fair and neutral review of my record would lead one to these conclusions. These statements address

themselves to results of cases and attribute such results to the personal feelings and choices of the jurist. The statements appear to ignore the role of the law in judicial decision-making.

- (b) **Why do you think so many organizations have opposed your nomination?**

The nomination process can be turned into an ideological battle in which the records of the nominees involved are mischaracterized. I believe that my record reflects balanced decision-making and a steadfast commitment to following the law. Critics of any judge regularly employ a results-oriented view of cases that ignores the requirement that judges follow the law that governs that particular case.

4. During the 2000 presidential campaign, President Bush pledged that he would appoint "strict constructionists" to the federal judiciary, in the mold of Supreme Court Justices Clarence Thomas and Antonin Scalia. These Justices have voted to limit Congress's power to provide redress for victims of rape and domestic abuse, combat discrimination against individuals with disabilities and against individuals who are 40 and over, and protect our water sources from pollution.

- (a) **How would you describe the judicial philosophy of Justices Scalia and Thomas?**

I would hesitate to describe the judicial philosophy of any sitting Supreme Court justice. I understand that both Justices Scalia and Thomas describe themselves as textualists.

- (b) **How would you describe your own judicial philosophy, and how do you believe it is different from or similar to Justices Scalia and Thomas?**

As stated above, I hesitate to describe the philosophy of sitting justices. My judicial philosophy is to follow the law without regard for my personal beliefs or inclinations, while respecting precedent, separation of powers, and my limited role as a judge as distinguished from that of a policy maker.

- (c) **As a judge, would you interpret the Constitution strictly according to its original understanding in 1789?**

When presented with a case involving constitutional interpretation, I would evaluate the issues according to the appropriate precedent set forth by the United States Supreme Court.

- (d) **Do you think that the Supreme Court's most important decisions in the last century – *Brown v. Board of Education*, *Miranda v. Arizona*, *Roe v. Wade* – are consistent with strict constructionism? Why or why not?**

If strict constructionism means that rights do not exist unless explicitly mentioned in the Constitution, then the cases you mention likely would not be consistent with that label.

5. In your 2000 campaign for re-election to the Ohio Supreme Court, you were endorsed by an organization called Ohio Right to Life.

- (a) **What if anything did you do to secure that endorsement?**

I do not believe that I ever met anyone from this organization in my prior judicial campaigns. I did not seek the endorsement of this group and indeed did not even know at the time that I had received it.

- (b) **What if any communications did you have with Ohio Right to Life?**

I do not believe that I had any.

- (c) **Did you publicize this endorsement in any of your campaign literature?**

No, I did not.

- (d) **Please list the published and unpublished cases you have ruled on involving abortion rights, and provide copies of the unpublished decisions.**

Cleveland Bar Assn. v. Cleary, 93 Ohio St.3d 191, 2001-Ohio-1326, 754 N.E.2d 235.

Medical Planning Services v. Tri-County Christian Community of Greater Akron, 1992 WL 112583.

6. I know that you will "apply the law" in the area of abortion rights but I would like to know your personal views of the issue.

- (a) **Do you believe in and support a constitutional right to privacy, and that such a right encompasses a woman's right to have an abortion?**

The Supreme Court has decided that there exists a constitutional right to privacy. Further, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992), affirmed the court's decision in *Roe v. Wade* and upheld a woman's right to an abortion. These decisions are settled law and I will follow *Casey* and other Supreme Court cases protecting the reproductive rights of women.

- (b) **Do you believe that *Roe v. Wade* was correctly decided?**

Because my role as a judge is to apply the law without allowing my personal preferences to affect my judgment, it follows that my personal opinion on the legal analysis of United States Supreme Court decisions bears no importance to my duties to uphold the Constitution and the laws of the United States.

- 7. Some people believe that mandatory minimum sentencing is costly and unjust, and that it has failed to deter crime or target drug kingpins. They believe that mandatory sentences have exacerbated racial and gender inequalities, and sent record numbers of women and people of color to prison. Do you agree with this assessment? If so, how do you recommend addressing it?**

Certainly, everyone would agree that our nation's laws must apply to all individuals equally, without targeting individuals based on race, gender, sexual orientation, or other characteristics. The statistics Senator Durbin cited on this subject at the hearing suggest that the matter ought to have a high priority with legislative policy-makers.

In my role as a jurist, I must follow the minimum sentencing laws properly enacted by the legislature. I do not believe that I have a sufficiently thorough knowledge of the various arguments being presented to legislative bodies regarding this problem to offer any reasoned policy recommendations.

- 8. The legal profession puts a strong emphasis on service to our communities and to those in our society who are disadvantaged.**

- (a) **Can you cite examples in your career as a lawyer and judge that show you have a demonstrated commitment to equal rights and that you are devoted to continuing the progress made on civil rights, women's rights, and individual liberties?**

In my decade as a practicing lawyer, I regularly accepted referral of clients who were without resources. These clients often needed legal assistance with protecting rights to pension benefits, continued employment, personal property and protection from discrimination.

One such referral produced a judgment of the Ohio Supreme Court construing a newly enacted age discrimination statute. *Barker v. Scovill, Inc.* (1983), 6 Ohio St.3d 146, 6 OBR 202, 451 N.E.2d 807. My client was Jean Barker who claimed age discrimination in her discharge from employment.

As a judge I have worked to faithfully uphold laws protecting these rights. In, *In re Bicknell*, 96 Ohio St.3d 76, 2002-Ohio-3615, 771 N.E.2d 846, for example, I concluded that Ohio's name change statute does not preclude same-sex partners from changing their name; the statute required only that applicants for a name change set forth a reasonable and proper cause in the application. Similarly, in *State v. Thompson, State v. Thompson*, 95 Ohio St.3d 264, 2002-Ohio-2124, 767 N.E.2d 251, I wrote the lead opinion declaring unconstitutional an Ohio statute that criminalized homosexual solicitation, as a restraint on speech that by implication violated equal protection.

In my personal endeavors, I work to promote equal rights and individual liberties with the youngsters in our Collegescholars program and members of their families.

- (b) **In your experience as a lawyer and state court judge, how would you assess the quality of legal representation provided to indigent criminal defendants? As a federal judge, what steps would you take to assure that all defendants received competent counsel?**

My law practice was exclusively civil and I lacked any experience during that part of my career on the subject of the quality of representation of indigent criminals. As a judge, I saw mostly acceptable levels of representation by appellate counsel appointed to represent indigent defendants. In fact, the work of the Ohio Public Defenders office ranks very high in evaluations of criminal defense efforts.

If confirmed, my efforts at the circuit court would be to faithfully consider all claims of ineffective assistance of counsel whether the cases involve public defenders or private attorneys. It would be my duty to ensure that all defendants receive competent counsel by applying the test the United States Supreme Court set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

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Moreover, if competent representation is lacking, it would be appropriate to review the standards for appointment of appellate counsel for representation of indigent defendants at the Sixth Circuit.