

Judge Helene N. White
Detroit, Michigan 48202

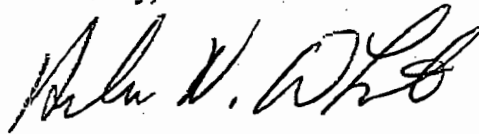
June 9, 2008

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Attached are my responses to written questions from Senator Cornyn.

Sincerely,

A handwritten signature in black ink, appearing to read "Helene N. White", with a stylized, cursive script.

Helene N. White

cc:

The Honorable Arlen Specter
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

**Responses of Helene N. White
Nominee to the U.S. Court of Appeals for the Sixth Circuit
to the Written Questions of Senator John Cornyn**

1. **In the first set of written questions, Senators Hatch and Kyl separately asked if you, as a member of the NAACP, agree with its statement that the Supreme Court's recent decision in *Crawford v. Marion County Election Board*, 128 S.Ct. 1610 (2008), is "akin to voter suppression" (See Question 3 from Senator Hatch and Question 1 from Senator Kyl). You responded that you "have not read the full text of the *Crawford* opinion." Please take this opportunity to read the opinion and comment on whether you agree with the NAACP's statement concerning the *Crawford* decision.**

Response: No, I do not agree with the NAACP's statement concerning the *Crawford* decision.

2. **In response to Senator Specter's Question 8(e)(i) concerning whether it is appropriate for federal judges to cure societal ills when the other two branches have been silent, you stated that "[f]ederal judges should be most reluctant to assume the roles of problem-solver and solution-crafter." In that response, you refrained from using definitive language that this is not the proper role for a judge, as you did when you responded to other questions (e.g., Question 8(c) from Senator Specter where you responded that "judges should not be influenced by the political dimensions of controversial cases"). When, if ever, do you think it is appropriate for a federal judge to act as a "problem-solver" or "solution-crafter"?**

Response: As stated my initial response, federal judges are granted the power and authority to decide individual cases; they are not granted the power or authority to act in place of Congress or the executive branch simply because neither has taken the action the judge may deem appropriate. Federal judges should be deciding individual cases. Federal judges should not assume the roles of problem-solver and solution-crafter simply to fill a void. To do so would usurp the power of the other branches of government.

3. **When Senator Brownback asked you, in Question 2, to name a Supreme Court Justice whose approach to judging is most similar to your own, you responded that you most closely identify with Justices O'Connor and Kennedy.**
 - a. **In a response to Senator Brownback's Question 4, you stated that "[j]udges should not view individual cases as opportunities...for imposing new duties or declaring new rights." Justice Kennedy has been heavily criticized by some for creating extra-constitutional rights. For example, in *Lawrence v. Texas*, 539 U.S. 558 (2003), Justice Kennedy struck down a state law by finding a new constitutional right to engage in intimate sexual activity that was previously rejected by the Supreme Court less than two**

decades earlier in *Bowers v. Hardwick*, 478 U.S. 186 (1986).

1. Do you think the Lawrence Court created a new constitutional right?

Response: The Supreme Court of the United States held that the petitioners' "right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."

2. You also stated that one reason you admire Justice Kennedy is that his approach places a "great importance on stare decisis." Do you believe the majority opinion in Lawrence was grounded in a commitment to stare decisis?

Response: No. The dissent, rather than the majority, was grounded in a commitment to stare decisis, among other bases. The majority determined that the principle of stare decisis did not dictate that it decide the case based on *Bowers v. Hardwick*, 478 U.S. 186 (1986), and overruled that case.

b. In response to Senator Sessions' Question 3, whether it is appropriate for federal courts to cite or rely on foreign law, you stated that "foreign law is appropriately considered in interpreting international law or treaties." Is it your position that foreign law is never properly considered when interpreting American law? As you may know, Justices O'Connor and Kennedy have suggested that international and foreign law are helpful resources for interpreting American law. Justice Kennedy mentioned foreign law in *Lawrence v. Texas*, 539 U.S. 558 (2003), when striking down a democratically enacted state law, and in *Roper v. Simmons*, 543 U.S. 551 (2005), when striking down a state criminal sentence. Are Justices Kennedy and O'Connor correct that international and foreign law are validly considered, even if non-binding, when interpreting U.S. laws, including the Constitution?

Response: The problem with referring to international law in general is that it can never be controlling, is little more than informative, and, because it will sometimes support a justice's opinion and sometimes be opposed to it, there seems to be no principled basis for deciding when and why it is relevant. In *Lawrence*, Justice Kennedy introduced his discussion of international law with the statement "To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding of *Bowers* have been rejected elsewhere." This seems an innocuous statement because the relevance of international law is premised on the *Bower's* Court having considered it. In *Roper v. Simmons*, similarly, the Court relied on the fact that it had already established an Eighth Amendment jurisprudence that referred to the views of other "nations that share our Anglo-American heritage," as instructive in its interpretation of the Eighth Amendment's prohibition of "cruel and unusual" punishments.

4. **In responding to Senator Grassley’s Question 1 on statutory construction, you stated that you “first look to the plain meaning of the statute, giving the words their plain and ordinary meaning.” You also stated in a response to Senator Brownback’s Question 4 that “expanding the scope of statutes beyond their terms” is a form of judicial activism. Do you believe the same textual commitment should apply to interpreting the Constitution?**

Response: The Constitution should be interpreted in accordance with the precedents of the Supreme Court of the United States. These precedents control without regard to the approach taken by the individual justices in interpreting the text of the document.