Responses of Judge John G. Roberts, Jr.
to the Written Questions of Senator Dianne Feinstein
Submitted on behalf of Senator Barbara Mikulski

The Griswold decision and it progeny established the implied right of privacy in the Constitution. How would you use the provisions of the Constitution and its Amendments to the Constitution to support the right of privacy in other instances?

RESPONSE: As I stated in my testimony before the Committee, there are several provisions of the Constitution that protect privacy. For example, the Fourth Amendment protects the right of the people to be secure in their "persons, houses, papers, and effects, against unreasonable searches and seizures." The First Amendment protections of speech and religious freedom safeguard privacy of conscience. Further, as I also stated before the Committee, privacy interests are protected as an aspect of the "liberty" safeguarded under the Due Process Clauses of the Fifth and Fourteenth Amendments. The question of whether particular asserted interests are within the scope of protected liberty is one that the Court has held turns on careful consideration of our Nation's history, traditions, and practices, assessed in light of the Court's precedents under principles of stare decisis, with an appreciation of the limited nature of the judicial role.

Can you tell this Committee specifically what would be protected under the liberty clause in light of current Supreme Court precedent and do you find any constitutional weakness in those arguments?

RESPONSE: The Supreme Court's jurisprudence makes clear that "[f]reedom from imprisonment — from government custody, detention, or other forms of physical restraint — lies at the heart of the liberty that [Due Process] Clause protects." Zadvydas v. Davis, 533 U.S. 678 (2001) (citing Foucha v. Louisiana, 504 U.S. 71 (1992)).

The Court's jurisprudence has also recognized that the Due Process Clause protects substantive liberties that extend beyond freedom from physical constraint. In Washington v. Glucksberg, 521 U.S. 702, 720 (1997), the Court listed various rights protected under current Supreme Court precedent under this aspect of the Due Process Clause. I do not think it appropriate for me to comment on any "constitutional weakness" concerning such precedent.

What kinds of facts and circumstances would you need in order to decide that there was a constitutionally protected right to privacy in the reproductive rights context?

RESPONSE: The Court explained how it goes about assessing particular claims that an interest is a privacy right protected as part of the liberty safeguarded under the Due Process Clause in Washington v. Glucksberg, 521 U.S. 702, 719-21 (1997). In that case, the Court stated that "[o]ur Nation's history, legal traditions, and practices . . . provide the crucial 'guideposts for responsible decisionmaking,' that direct and restrain our exposition of the Due Process Clause." Id. at 721 (citation omitted). In the specific context of reproductive rights, the applicable precedents include Casey and Roe. I would consider questions of the sort you pose in light of these and other precedents of the Court, under principles of stare decisis.

Do you think there's a "level playing field" in the United States? Specifically with regards to access and implementation of hiring, pay and employment rights, access to education and schools, imposition of the death penalty, sentences and prisons, and other civil rights issues?

RESPONSE: While our society has made significant progress toward racial and gender equality, I have no doubt that we still have a long way to go. Congress has the authority to act within its power to, as you say, level the playing field and provide all Americans with an equal opportunity to succeed.

If not, in your view, may a government affirmative action program be justified to level the playing field or promote diversity?

What about to remedy discrimination? Why or why not?

RESPONSE: The Supreme Court held in Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995), and Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), that classifications based on race are subject to strict scrutiny. These cases also held that affirmative action programs are permissible if they are meant to remedy specific instances of past discrimination. More recently, the Court held in Grutter v. Bollinger, 539 U.S. 306 (2003), that promoting diversity in higher education can serve as a "compelling state interest" to satisfy the strict scrutiny standard to which racial classifications are subject. Since these issues are continuously being raised before the Court, I believe it would be inappropriate for me to comment at greater length. If confirmed, I would consider these issues in the context of the factual circumstances of the particular case, in light of the arguments presented by the parties, and decide them according to the rule of law.

Do you believe that private employers can create voluntary affirmative action plans that comport with Title VII? Why or why not?

RESPONSE: In United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979), the Supreme Court held that certain voluntary race-conscious affirmative action plans do not violate Title VII. If confirmed, I would treat that precedent with the same respect as any other precedent, consistent with principles of stare decisis.

Do you think that international law and norms, specifically the treaties and other international laws that the United States has signed, have any role to play in interpreting our own constitutional standards, for example in connection with exempting minors from the death penalty or prohibiting torture?

RESPONSE: As a general matter — and without commenting on any particular Supreme Court decision or specific issue — relying on foreign law as precedent for interpreting our Constitution presents two concerns. The first has to do with democratic theory. Even though judges are not directly accountable to the people, their role is consistent with democratic theory because they are appointed through a process that allows for participation of the electorate through the Senators whom they elect. If a court relies on a decision of a foreign judge, however, no President accountable to the people appointed that judge, no Senate accountable to the people

confirmed that judge, and yet that judge is playing a role in shaping a law that binds the people in this country.

The second concern is that reliance on foreign law fails to limit judicial discretion in the way that reliance on domestic precedent does. As Alexander Hamilton explained in Federalist 78: "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents." But foreign law vastly increases the scope of that discretion, because it offers "something for everyone" and can be used or not used depending on the result a court would like to reach.

The Voting Rights Act of 1965 is one of the most important pieces of legislation in American history. What is the proper role of the Federal courts and the Executive branch in insuring that all Americans are provided with the right and the incentive to participate in our electoral system?

RESPONSE: The right to vote is preservative of all other rights. Thus, I agree that the Voting Rights Act is one of the most important pieces of civil rights legislation in American history.

As a general matter, the duty of the Executive Branch with respect to the Voting Rights Act — as with any other statute — is to "take care that the laws be faithfully executed." U.S. Const., Art. II, § 3. Section Five of the Voting Rights Act further imposes pre-clearance and other responsibilities upon the Department of Justice. I also know that the Department of Justice actively participates in litigating other voting rights matters around the country, either on its own or assisting in private litigation. The duty of the courts is to decide cases that arise under any federal statute according to the rule of law.

Following 9/11, there are serious issues of national security but how do we balance these with every citizen's right to be protected from unwarranted government scrutiny and intrusion, rampant and possibly unnecessary data collection, and potential misuse of this data? Where do you draw the line between First Amendment rights and National Security?

RESPONSE: As a general matter, public safety and the right of every person to be free from unwanted governmental intrusions are both prominent concerns that animate the Supreme Court's interpretation of the Fourth Amendment. As the Supreme Court has explained, the constitutional "touchstone" of a search or seizure is reasonableness. See, e.g., Ohio v. Robinette, 519 U.S. 33, 39 (1996). This approach generally requires a fact-specific inquiry into the totality of the circumstances, id., in which a reviewing court "balanc[es] the need to search against the invasion which the search entails." New Jersey v. T.L.O., 469 U.S. 325, 337 (1985).

The First Amendment preserves some of our most treasured and basic rights — preserving the freedoms of speech, religion, press, and association. Yet it is elementary that national security and foreign relations may at times require confidentiality. See, e.g., Snepp v. United States, 444 U.S. 507, 509 n.3 1980) ("The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.") The Supreme Court has

struggled to draw a line between these competing concerns; if confirmed, I would look to the Court's precedents under principles of stare decisis, with an eye to an appropriate balance between civil liberties and national security, in accord with the Framers' vision in the Constitution.

Your testimony regarding a past memorandum about gender discrimination is unclear about the level of scrutiny you would give these types of cases. At the time that you wrote the memo, the Supreme Court had already concluded that gender was a suspect classification entitled to intermediate scrutiny. Yet your memo on this issue implies that even intermediate scrutiny should not be given to gender discrimination issues even though it was the law of the land at that time. Please describe specifically what your memo was advocating and why?

RESPONSE: As I stated before the Committee, I was using the term "heightened scrutiny" in the memorandum you cite to refer to "strict scrutiny." For the proposition that gender classifications do not warrant "heightened judicial review," I cited Rostker v. Goldberg, 453 U.S. 57 (1981). In that case, then-Justice Rehnquist's opinion for the Court employed the "intermediate scrutiny" standard announced in Craig v. Boren, 429 U.S. 190 (1976), and decided that an all-male draft does not violate the Fifth Amendment's equal protection component because "the Government's interest in raising and supporting armies is an 'important governmental interest'" under the intermediate scrutiny standard. Rostker, 453 U.S. at 70. As this citation to Rostker makes clear, my memorandum indicated that gender classifications are not subject to "strict scrutiny" but are subject to "intermediate scrutiny."

And please advise the Committee what your view is on intermediate scrutiny and whether you believe it is a constitutionally sound precedent of the Court.

RESPONSE: The Supreme Court's precedents have recognized that intermediate scrutiny applies to gender classifications, see, e.g., United States v. Virginia, 518 U.S. 515 (1996); J.E.B. v. Alabama ex. rel. T.B., 511 U.S. 127 (1986); Mississippi University for Women v. Hogan, 458 U.S. 718 (1982); Craig v. Boren, 429 U.S. 190 (1976), as well as to classifications on the basis of illegitimacy, see, e.g., Clark v. Jeter, 486 U.S. 456 (1988). If confirmed, I will treat these cases with the same respect as any other precedent, consistent with principles of stare decisis.

Judge Roberts, during your hearings you testified that the in the documents that the Committee has from your time in the Reagan and Bush Administrations you were acting to advance the policies of the Administration that you worked for and that the opinions expressed were not necessarily your own. Can you tell the Committee why you went to work for the Reagan Administration and later the Bush Administration?

RESPONSE: I worked for the Reagan and first Bush Administrations because doing so afforded me the opportunity to serve my country and two Presidents whom I greatly admired and respected. I feel very fortunate to have had those opportunities.

Did the policies of the Administration ever factor into your decision to take any of these positions?

RESPONSE: Yes. I was generally sympathetic with the policies of both administrations.

Can you tell us which policies you disagreed with?

RESPONSE: I am sure there were policies both within the areas I worked, and outside those areas, with which I disagreed. Throughout the confirmation process I have followed the lead of all the sitting Justices and have not discussed my personal views on policy matters. I have done so because my personal policy preferences do not play a role in my decisions as a judge on the D.C. Circuit and would not play a role in my decisions as a Justice if I am confirmed.